

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 25-851

WEST VIRGINIA PROFESSIONAL CHARTER SCHOOL BOARD, RANDY SMITH, President, West Virginia Senate, ROGER HANSHAW, Speaker, West Virginia House of Delegates, and PATRICK MORRISEY, Governor, West Virginia,

Petitioners-Defendants

and

WEST VIRGINIA ACADEMY; EASTERN PANHANDLE PREPARATORY ACADEMY; WORKFORCE INITIATIVE FOR NURSES ACADEMY; and CLARKSBURG CLASSICAL ACADEMY,

Petitioners-Intervenors

v.

SAM BRUNETT, ROBERT MCCLOUD, and JACLYN SANCHEZ,

Respondents-Plaintiffs.

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ASSIGNMENT OF ERROR

The Court lacks jurisdiction to consider the first assignment of error, contending that the circuit court erred in denying the motion to dismiss. Petitioners President Smith, Speaker Hanshaw, and Governor Morrissey (State Officers) styled their motion to dismiss for lack of standing as one made “pursuant to Rule 12(b)(1) and 12(b)(6).” (JA 313.) As the Court reiterated in this very action the last time these State Officers sought appeal on this basis, a denial of a motion to dismiss “is interlocutory and not subject to appellate review at this time.” *Blair v. Brunett*, 248 W. Va. 495, 498 n.4, 889 S.E.2d 68, 71 n.4 (2023).

The permanent injunction order, over which this Court properly has appellate jurisdiction, was issued *only* against Petitioner West Virginia Professional Charter School Board (PCSB). Therefore, President Smith and Speaker Hanshaw are entitled to pursue just their second assignment of error in which they assert legislative immunity, a collateral order.

As to Petitioners’ third and fourth assignments of error, State Officers lack standing since the permanent injunction order, again, does not enjoin them. Regarding these State Officers, the order only contemplates a potential “Scheduling Order” for future circuit court proceedings based on contingencies that may never need to happen. (JA 983.)

Petitioners-Intervenors likewise lack standing as to all four assignments of error as, again, the denial of their 12(b)(6) motion to dismiss is interlocutory and the permanent injunction order in no way enjoins the intervening charter schools that are currently in operation. Nor does the permanent injunction order immediately (or even necessarily in the future) affect the purported rights or interests of these intervening charter schools—whose existence and operations are not jeopardized by the permanent injunction order, which again, enjoins *only PCSB* and pertains only to future PCSB authorizations of *new* (not already existing) charter schools.

INTRODUCTION

Petitioners are right: this is about “school choice.” But Petitioners are wrong about who has the first-order priority to exercise that choice under the West Virginia Constitution. It is not would-be charter school parents. Any second-order *statutory* right those parents might have to that choice must first yield to the affirmative, *constitutional* right of the People to vote on the creation of those independent public schools. This action seeks to effectuate that constitutional right to direct democracy so that the People may exercise school choice unfettered by their representatives’ choice of school.

Suspiciously refusing to let the People vote, their representatives here defend a law that subverts the People’s will by enabling independent charter schools with unelected boards, managed by private, for-profit entities, to take taxpayer funds without any direct accountability to the taxpayers. It is for this reason that the People ratified article 12, section 10—they had the foresight to take the decision on the creation of independent schools out of the hands of their representatives and give it directly to the People.¹

The Court has said as much: “The framers of [article 12, section 10] ... thought it best to curb the Legislature in the creation of [independent public schools], unless the people immediately concerned should give their consent thereto.” *Leonhart v. Bd. of Educ. of Charleston Indep. Sch. Dist.*, 114 W. Va. 9, 170 S.E. 418, 420 (1933). Voting on the creation of independent schools is the People’s *one and only opportunity* to have any say on existence and operation of these schools.

Constitution trumps statute—a proposition every first-year law student knows—a rule of law that even a high school student should know, if this Court’s goals for civics education were

¹ “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.

realized. And because the Constitution so plainly trumps the statute in question here, Petitioners must resort to asking this Court to rewrite the Constitution by *adding* to section 10 the words “carve out” (or “annex”) plus the word “territory” while *striking* the word “organization” from section 10. What that equals is a thinly disguised tale of revisionist history that misapprehends the precedent and defies settled rules of constitutional interpretation, namely, to start (and preferably end) with the *actual words* of the Constitution.

Because they cannot change the Constitution, Petitioners must try to change the narrative. By their telling, this is an anti-school choice suit designed to close charter schools and deprive thousands of educational opportunities. But if that were so, then Respondents would have initiated this action soon after the first charter school law in 2019. Respondents did not because that law did not offend section 10. It was only after national lobbying groups clamored that charter school authorizations were moving too slowly that the Legislature passed H.B. 2012 to divest county school boards of the power to authorize and supervise charter schools. In other words, H.B. 2012 made charter schools independent public schools, triggering section 10—and only then—prompting this suit to enforce compliance with its voter-consent requirement.

All that Respondents ask is that we follow the Constitution, “the organic and fundamental law of the land.” Syl. Pt. 2, *Simms v. Sawyers*, 85 W. Va. 245, 250, 101 S.E. 467, 467 (1919). If a majority of voters consent to the creation of charter schools, so be it. Far from respecting the will of the People, Petitioners want to block their votes entirely. For charter school advocates especially, it represents the height of hypocrisy to demand more school choice yet fight so hard to deny all voters that choice over the composition of their local schools. These voting opponents win only by an opinion executing rhetorical twists and somersaults to write off section 10, whereas that resulting headline effortlessly writes itself. The choice is unmistakably clear for this Court.

STATEMENT OF THE CASE

With noted exceptions, this statement reproduces the circuit court’s underlying factual findings, which this Court reviews under a deferential, “clearly erroneous standard.” Syl. Pt. 1, *Bansbach v. Harbin*, 229 W. Va. 287, 290, 728 S.E.2d 533, 536 (2012). Paragraph citations are to the circuit court’s order, (*see* JA 947), omitting excessive quotations to improve readability.

While preserving their objections to the circuit court’s rulings, Petitioners did not below, nor here in their opening brief, challenge the court’s specific factual findings as clearly erroneous and have thus waived any such argument on appeal. *See State v. Asbury*, 187 W.Va. 87, 91, 415 S.E.2d 891, 895 (1992) (“Generally the failure to object constitutes a waiver of the right to raise the matter on appeal.”).

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

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. (¶ 1.) Those township districts would later evolve into so-called “magisterial school districts.” (*Id.*) Both types of districts, independent and magisterial, were considered part of the general system of public education. (*Id.*)

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. (¶ 2.) 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.” (*Id.*)

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*. (¶ 3.)

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. (¶ 4.) 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. (*Id.*)

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.” (¶ 5.) 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. (*Id.*) 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. (*Id.*)

B. The 2019 Charter School Law

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.” (¶ 6.) S.B. 451 would have also approved the creation of a mostly independent “West Virginia Public Charter School Commission” as a charter school authorizer.

(Id.)

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. (§ 7.)

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. (§ 8.) Governor Justice thereafter called a special legislative session on education matters. (§ 9.)

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. (§ 10.)

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

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.² (¶ 13.)

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

C. H.B. 2012

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. (¶15.) 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.” (*Id.*) ““They don’t think it’s going to work,’ [Paine] said.” (*Id.*) ““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.’” (*Id.*)

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. (¶ 16.) The Monongalia County Board of Education unanimously voted to deny that application on November 30, 2020. (*Id.*)

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.” (¶ 17.) “Rucker noted she planned to push changes before the local boards’ decisions,” contending that “local education leaders will reject

² 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.

charter schools, as they perceive the institutions as competition to public institutions.” (*Id.*)

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. (¶ 18.)

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. (¶ 19.)

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

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. (§ 20.)

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. (§ 21.)

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. (§ 22.) Nitro Preparatory Academy no longer appears on the PCSB website list of “Authorized Charter Schools.” (*Id.*)

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.” (§ 23.) West Virginia Academy provides a detailed description on its website of its primary recruitment area which includes parts of Monongalia and Preston Counties. (*Id.*)

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

Also in November 2022, PCSB authorized the Workforce Initiative for Nurses (WIN) Academy for high school students. (§ 25.) 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).” (*Id.*)

In 2024, PCSB authorized the Clarksburg Classical Academy which began operation in fall 2024. Its charter lists Harrison County as the primary recruitment area. (¶ 26.) In late 2024, PCSB authorized the Wisdom Academy to begin operation in fall 2025. (¶27.) Its charter lists as its primary recruitment counties, “Monongalia, Preston, Marion, Harrison, Taylor, Wetzel, and Doddridge Counties.” (*Id.*)

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. (¶ 28.)

E. Legislature Enacts Supportive Charter School Laws

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.* 18-5G-5a. (¶ 29.)

F. Procedural History

Plaintiffs commenced this action on September 29, 2021. (¶ 30.) Prior to PCSB’s authorization of its first five charter schools, Plaintiffs moved for a preliminary injunction on November 2, 2021. (*Id.*) Defendants moved to dismiss. (*Id.*) A hearing on the respective motions was held on December 14, 2021. (*Id.*)

On January 20, 2022, the Court granted the preliminary injunction motion and denied the motion to dismiss. (¶ 31.) 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. (*Id.*)

Defendants noticed their appeal and moved to stay the preliminary injunction. (¶ 32.) The Supreme Court of Appeals of West Virginia Court granted the stay on February 23, 2022. (*Id.*) A week later, Plaintiffs-Respondents 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. (*Id.*) The Court denied the motion to expedite the appeal and subsequently set argument for May 2023. (*Id.*)

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.” (¶ 33.) 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. (*Id.*)

The circuit 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. (¶ 34.)

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. (¶ 35.) 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. (*Id.*)

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. (¶ 36.)

Following the hearing and prior to the entry of the permanent injunction 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. (¶ 37.) Accordingly, Governor Morrisey and Senate President Smith now replace their predecessors as named defendants in their official capacities. (*Id.*)

Also following the permanent injunction hearing while the parties’ respective motions were still under submission, PCSB voted in November 2025 to authorize a new charter school, the Phalen Leadership Academy – West Virginia, Inc., to operate in Charleston beginning in July 2026 with a primary recruitment area in Kanawha County.³

On December 3, 2025, the circuit court entered its order granting Plaintiffs’ permanent injunction, denying the motions to dismiss of Defendants and Intervenor, and granting a motion to stay for 60 days to permit Defendants time to seek appellate review. Petitioners subsequently

³ PCSB Board Meeting (Nov. 2025), <https://wvcharters.org/meetings/nsbbf8kkeg8jpf-jm4xb-xjrfk-x6sm9-dl7fy-ftda7-ynam3-lnc4t-pddjy-w4ljn-gnbxl>; See also Phalen “Charter Agreement” (Feb. 2026), available at <https://wvcharters.org/s/PLA-PCSB-Charter-signed.pdf>.

sought and were granted a further stay by this Court in January 2026.

SUMMARY OF ARGUMENT

This Court should affirm the injunction because H.B. 2012 violates article 12, section 10 by authorizing the creation of independent public school organizations without the consent of the affected county voters. So straightforward is this application of section 10 that Petitioners prevail only by convincing this Court to rewrite the plain language. Their effort to transform section 10 into a narrow prohibition on “carving out” geographic territory can be accomplished only by impermissibly adding and subtracting words from the text itself.

Moreover, Petitioners’ reliance on *Kuhn*, *Herold*, and *Casto*, which arose in very different nineteenth- and early twentieth- century school systems, are of no avail. As the circuit court concluded, those cases reinforce Respondents’ position on the merits and do not establish that section 10 applies only when territory is physically carved out of a school district. Nor do those cases bear any relevance to section 10’s application to independent school “organizations” considering our twenty-first century school system. The countywide school-district structure means that any newly created independent school organization will necessarily operate within one or more county school districts. The creation of PCSB charter schools today, therefore, triggers section 10’s voter-consent requirement each time, especially considering those schools draw (or you could say, carve out) students, funding, and jurisdiction from traditional public schools.

PCSB charter schools are also “independent” in every constitutionally relevant sense. Unlike the prior law, H.B. 2012 stripped county school boards of their supervisory role, made charter schools their own local educational agencies for all purposes, and vested authorizing, renewal, and oversight powers solely in the unelected PCSB and unelected charter school boards. Although charter schools remain part of the public education system, section 10 does not require

complete separation from all state law to qualify as independent. Most salient to independence is that these charter schools are free from the supervision and control of the publicly elected county boards that otherwise govern local public schools. That independence is the very feature H.B. 2012 was designed to create, and it is why the statute cannot stand without voter consent.

The circuit court's remedy for H.B. 2012's constitutional violation was proper and reasonable. The permanent injunction does not close existing charter schools or dictate a single legislative response; it simply enjoins PCSB from authorizing new charter schools unless and until section 10 is satisfied. That prospective relief falls squarely within the court's equitable authority and reflects respect for the coordinate branches while preventing future constitutional violations.

Petitioners' additional grievances do not alter the result. Their legislative immunity arguments are either new (and thus waived) or old and jeopardize time-honored notions of judicial review, due process, and separation of powers. And Petitioners cannot obtain interlocutory review of the denial of their motions to dismiss, as this Court decided in the first appeal.

Accordingly, the Court should affirm the permanent injunction and reject Petitioners' effort to evade the People's constitutional right to vote on the creation of independent public schools.

STATEMENT REGARDING ORAL ARGUMENT

Respondents request oral argument under Rule 20 because this case involves "issues of fundamental public importance," implicating "constitutional questions regarding the validity of a statute." W. Va. R. App. P. 20.

ARGUMENT

This Court reviews a circuit court's grant of a permanent injunction under "a three-pronged deferential standard of review," applying (1) "an abuse of discretion standard" to the injunction, (2) "a clearly erroneous standard" to the "circuit court's underlying factual findings," and (3) "*de*

novo” review to “questions of law.” *T & C Constr. Servs., LLC v. City of St. Albans*, 249 W. Va. 695, 699, 901 S.E.2d 59, 63 (2024).

Applying the abuse of discretion standard, the “power to grant . . . a permanent injunction, . . . ordinarily rests in the sound discretion of the trial court, according to the facts and the circumstances of the particular case; and its action in the exercise of its discretion will not be disturbed on appeal in the absence of a clear showing of an abuse of such discretion.” Syl. Pt. 1, *Blair v. Brunett*, 248 W. Va. 495, 889 S.E.2d 68, 69 (2023). That is, the Court “will not disturb a circuit court’s decision unless the circuit court makes a clear error of judgment or exceeds the bound of permissible choices in the circumstances.” *Gribben v. Kirk*, 195 W. Va. 488, 500, 466 S.E.2d 147, 159 (1995).

Even if this Court “may not necessarily have obtained the same result” as the circuit court below, a “mere disagreement with such a ruling does not automatically lead to the conclusion that the lower court abused its discretion.” *State v. Allen*, 208 W. Va. 144, 155, 539 S.E.2d 87, 98 (1999). Rather, the circuit court’s “decision should not be overruled unless the reviewing court is actuated, not by a desire to reach a different result, but by a firm conviction that an abuse of discretion has been committed.” *Id.*

It cannot be said with “firm conviction” that the circuit court’s decision “exceeds the bounds of permissible choices.” And Petitioners have waived any argument—much less carried the burden of showing—that the circuit court’s factual findings underlying its legal conclusions were erroneous, let alone *clearly* erroneous. Concerning any unsettled questions of law that this Court reviews *de novo*, the West Virginia Constitution plainly settles the matter.

A. The Court Should Affirm Because H.B. 2012 Is Unconstitutional

Respondents succeed on the merits because H.B. 2012 violates section 10 by establishing

PCSB charter schools as independent public school organizations, created in school districts, without the consent of affected county voters. For Petitioners to prevail instead, they must convince the Court not to obey, but to *rewrite*, the Constitution. Otherwise, they are left in the unenviable position of having to argue that independent charter schools are not independent. The circuit court found both arguments unconvincing, as should this Court.

1. PCSB Charter Schools Require Voter Consent to Comply with Section 10

To be convinced of Petitioners' position, the Court would have to accept a construction that, (a) from a textual perspective, is linguistically incorrect, and a misreading of the case law that, (b) from an originalist perspective, makes revisionist history but no sense.

a. The Plain Language and Meaning of Section 10 Controls

All agree we should start with the plain text:

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.

Now, then, here is Petitioners' construction: section 10 "prevent[s] the Legislature from carving territory out of existing school districts and imposing new tax burdens without voter consent." (Pet'rs Opening Br. 3.) Nowhere in section 10 are the words "carve," "existing," or "territory," much less any mention of "tax burdens." Elsewhere, Petitioners use the words "reshape," "change," or "annex," as presumably synonymous with "carve out." (*See, e.g., id.* at 4, 8, 27, 30.) Those words do not appear in section 10 either. Instead, Petitioners pull (out of context) the words carve and annex from early section 10 decisions.

But that is the first flagrant foul of constitutional interpretation: "Where 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). The circuit court applied (and did not construe) section 10, tracking the language as plainly written, to prohibit an “independent free school” from being “created” without the “consent” of “a majority of voters.” (JA 956, ¶ 42.)

The court further explained that the prepositional “phrase ‘out of which’” in that sentence is not operating as a separation prohibition on carving out territory, as Petitioners contend, but rather “modifies ‘school district or districts’ to indicate which voters must consent to the creation of the independent public school.” (*Id.* 957, ¶ 46.) “This application of the phrase,” the court noted, “is linguistically correct in that it gives effect to the ‘entirety’ of section 10, that is, “*every word or phrase* within the provision.” (*Id.* citing *Comm. to Reform Hampshire Cnty. Gov. v. Thompson*, 223 W. Va. 346, 353, 674 S.E.2d 207, 214 (2008) (emphasis added) (citation omitted)).

The circuit court observed that Petitioners’ “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.*”

(*Id.* ¶ 47.)

“Such a tortured construction,” the circuit court concluded, “is indefensible,” for it runs afoul of yet another rule of constitutional interpretation: the Court “may not *add to, distort or ignore* the plain mandates” of a constitutional provision “clear in its terms.” (*Id.* ¶ 48, citing *Fields v. Mellinger*, 244 W. Va. 126, 129, 851 SE.2d 789, 792 (2020) (emphasis added) (citations omitted)). And again, where, as here, “a constitutional provision is clear in its terms, and the intention of the electorate is clearly embraced in the language of the provision itself, this Court

must *apply* and *not interpret* the provision.” See *State ex rel. Justice v. King*, 244 W. Va. 225, 232, 852 S.E.2d 292, 299 (2020) (emphasis added) (citations omitted).

Yet Petitioners insist that this Court previously interpreted “out of which” to mean “carved out” in each and every application, for all time. It did not. But even assuming otherwise, Petitioners still cannot prevail unless they convince this Court to *add* the word “territory” to section 10 and *strike* the word “organization” from section 10.

Adding “territory,” as Petitioners demand, renders section 10 a nullity, since post-1933, each school district’s territory spans the entire county; there are not competing territories within a single county from which to “carve out” an independent public school. So, if what must be “carved out,” according to Petitioners, is geographic “territory,” then the implication is that the Legislature amended section 10, effectively nullifying it by statute, when it switched to single-county school districts.

Petitioner-Intervenors were not shy about this implication, they patently asserted below that 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.” (JA 526.)

But this Court cannot throw away a constitutional provision so haphazardly because neither the Legislature in 1933 nor a judicial decision in 2026 can amend (much less nullify) section 10, only the People may do so through ratification. See *Fields*, 244 W. Va. at 129, 851 SE.2d at 792. Yet adding geographic “territory” to section 10 does just that, so Petitioners cannot pass it off as a *mere interpretation* of section 10.

Significantly, that is true even if geographic “territory” is somehow said to be an interpretation of the words “school district” in section 10. For if so, that construction would effectively nullify the word “organization” in section 10 since school districts have geographic

territory but organizations do not. Yet the framers included the word “organization” in section 10—disjunctive with “district”—understanding that an independent school organization could be created within the geographic or jurisdictional territory of a school district.

Count them, that is three fouls of constitutional interpretation Petitioners entreat this Court to commit: (1) to construe, rather than apply, the plain language, (2) to add and strike words that distort the plain meaning, and (3) to nullify the plain import by judicial or legislative fiat.

Worse, Petitioners hope to bait this Court into committing these constitutional offenses based on out-of-context language, even arguably dicta, from three decisions—*Kuhn*, *Herold*, and *Casto*—that apply section 10 to long-replaced school systems of the nineteenth- or early twenty-century, which at best, help Respondents on the merits and, at worst, bear no application of section 10 to our twenty-first century system of public schools.

b. *Kuhn*, *Herold*, and *Casto* Do Not Control

Rejecting Petitioners’ “out of which” equals “carved out” territory distortion of section 10, the circuit court’s careful summary and synthesis of these three decisions merits full consideration:

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).

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.

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).

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.

(JA 958–59, ¶¶ 50-53.)

The circuit court’s reading of these cases aligns, as it must, with the plain language and meaning of section 10, and thus, reinforces the merits of Respondents’ claim.

But even if this Court were not so persuaded—indeed even if this Court were somehow convinced to give more significance to the “carved out” language—*Kuhn*, *Herold*, and *Casto* simply cannot control this Court’s application of section 10 *today* for one unavoidable reason: Because even if “carved out” of “territory” were the constitutional trigger point in 1912 and 1923, it has not been (and cannot be) the predicate offense since 1933, when “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.” (JA 959 ¶ 54.)

Accordingly, as the circuit court concluded, the creation of any independent public school organization today, “triggers section 10’s ‘out of which’ phrase *each and every time*.” (JA 960 ¶55.) “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.’” (*Id.*)

Petitioners have *no answer* to this except to confess that they want this Court effectively to mark 1933 as the death date of section 10, “because the category of entities it regulates no longer exist[s].” (Pet’rs Opening Br. 31.) To accept Petitioners’ invitation would not only offend bedrock canons of interpretation (impermissibly amending a constitution by statute and judicial decision) but would also supply a weakly fabricated justification for *eliminating* the People’s constitutional right to school choice.

Especially weak because how exactly would this Court write off “organization”? If the framers meant for section 10 to apply only when territory is carved out for an independent school, then the framers expressing section 10’s application to both “school district, *or organization*” makes no sense because “school districts have territory, organizations do not.” (JA 960 ¶ 56.)

There is no avoiding this logic and that is why Petitioners had *no answer* to it in the court below or even now in their opening brief—and thus, in fairness should not be permitted to manufacture one, for the first time, in their reply brief. *See Gabbert v. Coyne*, 248 W. Va. 378, 386 n.15, 888 S.E.2d 878, 886 n.15 (2023) (finding “petitioner waived the argument [having] failed to raise the issue before the circuit court in the first instance”); *cf. Argus Energy, LLC v. Marenko*,

248 W.Va. 98, 103–04, 887 S.E.2d 223, 228–29 (2023) (“[A]ppellate courts generally do not consider issues or arguments raised for the first time in oral argument because such issues or arguments are waived by failure to include them in the appellate brief.”)

Instead, Petitioners strangely deny that charter schools are organizations (Pet’rs Opening Br. 34), but that is precisely how H.B. 2012 defines charter schools, as the circuit court concluded (JA 957 ¶ 43 (citing W. Va. Code §18-5G-1(c), § 18-5G-6(a)(2)(A).)

The section 10 framers understood better than Petitioners that “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.” (JA 960, ¶ 56.) Far from disregarding or discarding “the word ‘organization,’ as used in [] section [10],” this Court has given it effect, noting “that it is modified by the words, ‘independent free school,’ just as ‘district’ is so modified by them.” *Leonhart v. Bd. of Educ. of Charleston Indep. Sch. Dist.*, 114 W. Va. 9, 170 S.E. 418, 420 (1933). Notably, *Leonhart* gave effect to these words, it did not nullify section 10 even as it considered the Legislature’s sweeping 1933 system changes. “Had section 10 been rendered dead letter by that 1933 statute,” the circuit court noted, *Leonhart* “would have easily said so, in a relatively short opinion. Instead, the Court conducted a full analysis, taking section 10 to be good law.” (JA 963 ¶ 65.)⁴

⁴ Amicus Curiae Mountain State Learning Solutions Inc. (MSLS) floats an argument that the statutory canon, *noscitur a sociis*, applies to “define the scope of the term ‘organization.’” (MSLS Br. 13.) Petitioners never made that argument, which cannot fairly be considered for the first time on appeal, made by a nonparty. See *Matter of NorthMet Project Permit to Mine Application Dated Dec. 2017*, 959 N.W.2d 731, 755 (Minn. 2021) (“Under the principle of party presentation, we generally do ‘not consider arguments raised for the first time on appeal’ nor do we ‘decide issues raised solely by an amicus.’”); accord: *Select Portfolio Servicing, Inc. v. Dunmire*, 456 P.3d 255 n.4 (Nev. 2020); *State v. J.R.*, 152 A.3d 180, 197 (N.J. 2017).

Even if it could be considered, MSLS’s application of the canon is baffling, contending that “organization” is somehow a “subset of ‘District,’” whatever that means, and misconstruing *Leonhart* entirely, suggesting that the Court there meant for “organization” to “inherit[] the narrower meaning of its neighboring terms.” (MSLS Br. 13.) Significantly, a disjunctive “or” separates “district” and “organization” in section 10; in such instances, “[c]anons of construction indicate that terms connected in the disjunctive in this manner be given separate meanings. *Garcia v. United States*, 469 U.S. 70, 73 (1984); *Iverson v. United States*, 973 F.3d 843, 852 (8th Cir. 2020) (observing when words “are listed

But even assuming this Court were to accept the “carved out” language as controlling as well as accept a now-procedurally waived explanation from Petitioners about the “organization” language, there is one final canon of interpretation that should still favor Respondents on the merits. It comes from a decision all parties cite, so there is no dispute as to its force. If there is any lingering doubt as to the “meaning of the words used” in section 10, this Court is supposed to effectuate the Constitution through a “contemporaneous and practical construction.” *Chesapeake & O.R. Co. v. Miller*, 19 W. Va. 408, 420 (1882). “It is axiomatic that our *Constitution* is a living document that must be viewed in light of modern realities.” *State ex rel. McGraw v. Burton*, 212 W. Va. 23, 36, 569 S.E.2d 99, 112 (2002) (emphasis in original).

In contemplating a “contemporaneous and practical construction” that properly gives effect to section 10 “in light of modern realities,” PCSB charter schools do “carve out a *jurisdiction* for an independent public school organization without altering the geographic territory of an existing school district(s).” (JA 960 ¶ 57.) As the circuit court explained, “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.” (*Id.*)

So, even giving the Petitioners the benefit of every possible doubt concerning “carved out” (not in section 10 itself!), and setting aside all the other interpretation offenses surveyed above, Respondents *still prevail* on the merits because H.B. 2012 practically carves out jurisdiction,

in the disjunctive...the [*noscitur a sociis*] canon often is of little help.”); accord: *Matter of Proposed Constr. of Compressor Station (CS327)*, 318 A.3d 658, 668 (N.J. 2024); *McDonald v. Bowen*, 468 S.W.2d 765, 771 (Ark. 1971). More fatal to the argument, this Court has explained that the canon “is only a guide” and “does not apply absent ambiguity, or to thwart [drafters] intent, or to make general words meaningless.” *West Virginia Consol. Pub. Ret. Bd. v. Clark*, 245 W. Va. 510, 520, 859 S.E.2d 453, 463 (2021). That is what MSLS’s improper application of the canon does, thwarts the intent of section 10, despite its plain, unambiguous language, to render “organization” in that disjunctive clause “meaningless.”

students, and resources in the creation of PCSB charter schools, without the consent of the voters, in violation of section 10. And the only way then to avoid that conclusion would be for this Court to effectively rewrite the Constitution to add “territory” and strike “organization” from section 10.

2. PCSB-Charter Schools Are Independent for Section 10 Purposes

Petitioners’ contortions of section 10 are matched in degree only by the length that they will go to avoid another undeniable point: PCSB charter schools are independent. And once again, the only way for Petitioners to convince otherwise entails this Court flouting time-honored rules of constitutional interpretation to render section 10 dead letter.

a. Independence Is The Whole Point of PCSB Charter Schools

Independence is the *sine qua non* of charter schools under state laws. *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). Here, too, under West Virginia law. The circuit court provided a thorough explanation:

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.

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.”

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 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.

(JA 961–62 ¶¶ 58-61.)

Despite unmistakable independence, Petitioners argue that *Casto* implies that, to be independent for section 10 purposes, PCSB charter schools must be completely and entirely independent of the “general system” of public education “across multiple dimensions.” (Pet’rs Opening Br. 32.) This, once again, misapprehends the case law.

Even the *Kuhn* decision the Petitioners belabor explains that, although “independent school districts” at the time bore “the designation of ‘independent,’ they nevertheless constitute a *part of the general system*, sanctioned by the legislature as the most efficient for a particular locality.” 4 W. Va. at 510 (emphasis added). That perfectly describes PCSB charter schools as explicitly stated in state law: they are “*part of the state’s education system*” W. Va. Code § 18-5G-2(12) (emphasis added), sanctioned by the Legislature to “provide more options for students to attain a thorough and *efficient* education,” *id.* § 18-5G-15(a) (emphasis added).

Citing *Herold* just a few years ago, this Court recognized that the Legislature is *not prohibited from augmenting*, and making more *efficient*, the general system of free schools.” *State v. Beaver*, 248 W. Va. 177, 193, 887 S.E.2d 610, 626 (2022) (quoting 71 W. Va. 43, 75 S.E. at 315–16) (emphasis added in *Beaver*). Again, that was the purported purpose of H.B 2012, to “augment” the general system with “more efficient” charter schools. That augmentation does not divest independent charter schools of their independence.

Casto acknowledged as much: an “independent district” was considered a “recognized part

of the general school system,” *i.e.*, not entirely independent. 94 W. Va. 513, 119 S.E. at 471. Yet the Court did not deem the new Upshur County high school at issue there “independent” for two reasons.

First because its board was composed of existing “presidents of the boards of education” of other school districts within Upshur County (again multiple school districts within a county were common), “together with the county superintendent of free schools, as the Upshur county board of education for said school.” *Id.* In other words, in creating this county high school supervised by a county board, the Legislature was gesturing towards the countywide districting that it would eventually adopt ten years later in 1933. And notably *Herold* had laid that groundwork, recognizing that the Legislature could make “the county, instead of the district, the unit...for the general or common free schools, and establishing the county as the unit for graded or high schools” without offending section 10. 71 W. Va. 43, 75 S.E. at 316. And that was indeed the conclusion of this Court in *Leonhart* after the 1933 changes.

Second because this new Upshur County board was to “run the school in accordance with the general school law” including the “the buildings” to “be maintained and governed by the general school laws, not in conflict with the act.” *Casto*, 94 W. Va. 513, 119 S.E. at 471. This contrasts sharply with PCSB charter schools which are largely *exempt* from the general laws applicable to traditional public schools, as the circuit court observed.

Also, unlike the Upshur County high school in *Casto*, PCSB charter schools are not supervised by county school boards—they are completely independent in that respect, their own local education agency “for all purposes.” That freedom from county supervision, as explained next, is most dispositive for purposes of section 10 independence.

b. PCSB Charter School Independence from County Board Supervision Is Key

Petitioners not only misapprehend *Casto*, they exaggerate its significance as setting “the standard” for section 10 “independence.” (Pet’rs Opening Br. 32.) *Casto* did no such thing; it simply observed what had been the forms and functions of an “independent district” in nineteenth and then early-twenty century school systems—e.g., “*usually* composed ... of a district or districts where there are many pupils ... who cannot receive instruction to the degree desired under the ordinary district system...*usually* subjected to a special rate of taxation for school purpose.” 94 W. Va. 513, 119 S.E. at 471.

In so describing “independent *districts*” at the time, the Court was not laying down a standard or rule for section 10 independence for all time. Nor can *Casto* be credibly read that way because the Court never mentioned, much less elaborated on, the forms or functions of an “independent school *organization*”—the other entity section 10 prohibits the Legislature from creating without the consent of affected voters. And it cannot be fairly assumed that independent organizations just happen to share all the same forms and functions of independent districts because, again, the latter had territory, the former do not.

It is no secret why Petitioners hope to convince the Court that *Casto* set the independence standard—because then it would be an impossible standard to meet today since the Legislature abolished independent *districts* in 1933. So again, the implication is that, unless PCSB charter schools exactly mirror the forms and functions of their nineteenth century predecessors, then section 10 has no application in the twenty-first century.

The Court should not follow that implication to its offensive end because, again, the Constitution cannot be amended by the Legislature nor by judicial decision, but only as ratified by the People. *Fields*, 244 W. Va. at 129, 851 S.E.2d a 792 (“[The Constitution] can be altered or

rewritten only in the manner provided for therein.”). And unless and until then, it is this Court’s duty to effectuate every word of the Constitution. *Id.* The Court did so in *Leonhart* just a year after the 1933 statutory change that Petitioners imply makes section 10 inapplicable. Again, had nullification or override been the effect of that statutory change, *Leonhart* would have said so, and not conduct an analysis “taking section 10 to be good law.” (JA 963 ¶ 65.)

It would be “arbitrary,” as the circuit court emphasized, to affix the meaning of section 10 independence to “the now-abolished, pre-1933 independent school *districts*.” (*Id.* ¶ 66.) And Petitioners prove just how arbitrary, contending that 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. (Pet’rs Opening Br. 33–35.) Such functions are not dispositive of section 10 independence.

First, PCSB charter schools do not need to levy taxes to operate because, as Petitioners admit, the State guarantees their funding through the State aid formula. W. Va. Code § 18-5G-5(a). That *ensures their independence*, even more so than their nineteenth century predecessors, who had to rely on their own tax bases. That bears repeating: The nineteenth century independent school districts were more dependent on their own locally raised tax revenue. PCSB charter schools have no such local tax dependency because the State statutorily assures their funding. But that does not mean, as Petitioners suggest, that PCSB charter schools have no effect on “county property taxes.” (Pet’rs Opening Br. 34.)

PCSB charter schools now receive “99 percent of the per pupil total basic foundation allowance” to each county. W. Va. Code § 18-5G-5a. Before that 2023 change, the charter schools received 90% and the remaining 10% went to the county school district to cover costs. Now the

county school district must cover all the costs. And because the funding formula is largely enrollment driven, the 99% of State aid that “follow[s] [each] student,” *id.*, to the PCSB charter school, results in a concomitant loss of funding to the county’s traditional public schools whose fixed and transitional costs prevent them from offsetting the loss, and thus, are forced to raise taxes through local excess levies or else take more drastic measures like close schools, fire teachers and staff, or end educational programs.⁵

Whether these potential costs to traditional public schools are outweighed by the potential benefits of charter schools is a choice for the county voters—a *school choice* that section 10 entitles them but which they can exercise only once in the creation of charter schools. Thereafter, once created, the voters have no choice over PCSB charter school funding or operations which are supervised by the appointed, unelected PCSB and the unelected charter school boards.

Second, Petitioners make much of the fact 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,” as the circuit court concluded. (JA 963 ¶ 66.) More to the point, “independent” in section 10 cannot mean “no laws apply,” as Petitioners seem to suggest. The nineteenth century independent school districts were again part of the general education system, they were not lawless, they simply enjoyed more

⁵ Studies confirm the fiscal effects of charter schools on traditional public school. See David S. Knight & David DeMatthews, *The Fiscal Impacts of Expanded Voucher Programs and Charter-School Growth on Public Schools: Recommendations For Sustaining Adequate and Equitable School Finance Systems*, NATIONAL EDUCATION POLICY CENTER (2024) (“[S]tudies show that as enrollment declines, districts are not able to reduce spending at the same rate as they lose funding”); Gordon Lafer, *In the Pub. Int., Breaking Point: The Cost of Charter Schools for Public School Districts*, IN THE PUBLIC INTEREST 11 (2018), (“When districts retain these responsibilities but are left with insufficient funding to carry them out, they [are] forced to choose between eliminating essential programs or laying off essential personnel.”).

autonomy over their affairs, as do PCSB charter schools.⁶

To be sure, Petitioners oversell the relatively few state laws that regulate PCSB charter schools, but the most determinative fact is that, even among those applicable regulations, PCSB charter schools are absolutely 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). The supervisor who regulates state law matters—PCSB charter schools have no publicly elected supervisors. This makes PCSB charter schools *more independent* than the nineteenth century independent school districts, which were at least supervised by elected boards.

For these reasons, the circuit court concluded that “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.” (JA 964 ¶ 67.)⁷ And it is that independence from county school board oversight and supervisory powers which provoked this very action to H.B. 2012 in 2021 but did not provoke a similar challenge to the 2019 charter school law because, under the 2019 version, county school boards were the primary charter school authorizers with supervisory authority over charter schools. Petitioners did not, and cannot now, challenge the circuit court’s factual findings regarding this most relevant legislative history.

Independence from publicly elected and accountable county school boards makes PCSB

⁶ More than autonomy, Amicus Curiae MSLS argues that, to be independent, public charter schools must be effectively their own fiefdoms with the power of “geographic and financial coercion” to compel students to attend in the exercise of “governmental sovereignty over a captive population.” (MSLS Br. 9.) Bizarre. That does not even describe the *Kuhn* era independent school districts, who were again dependent on local taxes and whose students were not compelled to attend (West Virginia’s compulsory school law was first enacted decades later in 1897). And again, charter schools do not need taxing power, their funding is secured by the State, with few strings attached, which permits them to operate with far more independence.

⁷ As West Virginia Constitutional Law expert Professor Bastress explained in his prior testimony, that autonomy from county school boards makes them “independent” for purposes of section 10. (JA 166–68) (“They each have their own governing board and that governing board exists separate from the county board of education, which has no responsibility or control or authority over the charter schools. So that would be my definition of an independent school district, is one which has its own governing board.”)

charter schools, overseen by their own unelected boards, “independent” for section 10 purposes. And because H.B. 2012 approves the creation of independent PCSB charter schools without the consent of the affected voters, the circuit court’s conclusion that it is unconstitutional and its permanent injunction against future section 10 violations should be affirmed.

B. The Court Should Affirm Because The Injunction Is Proper And Reasonable

Petitioners shadow box phantom procedural errors the circuit court *never made*. The circuit court did not (1) base any of its factual findings or conclusions of law on law of the case doctrine; (2) blend injunctive and mandamus relief; (3) dictate a legislative remedy; or (4) exceed its territorial jurisdiction. The last argument is the only worth reiterating because the first three just *did not happen* as evidence by the circuit court’s order itself.

First, the circuit court was explicit that, although its order “reproduces many of the factual findings and legal conclusions” it had made in its *preliminary* injunction order, the “operative portions [of which] represent the law of the case” on the section 10 claim, the circuit court left no doubt that its *permanent* injunction order was “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.” (JA 946-47 n.1 (emphasis added).) For all the fuss that Petitioners make about this, they cannot show that the circuit court prejudiced them in any way just by entering new findings and conclusions, some of which it had previously made yet had every reason based on the entire record to renew. Again, Petitioners waive any object to the factual findings, and the legal conclusions are subject to this Court’s review anyway, so no error and absolutely no prejudice.

Second, the permanent injunction does not order any “affirmative mandamus commands.” (Pet’rs Opening Br. 38.) It only enjoins PCSB from authorizing new charter schools absent consent

of affected voters, as section 10 requires. It “stops or prevents performance of an act,” *i.e.*, authorizing new charter schools, as injunctive relief typically does, it does not “direct that an act be performed” as entailed by mandamus relief. *See State ex rel. Adkins v. Bailey*, 251 W. Va. 586, 593 n.10, 915 S.E.2d 364, 371 n.10 (2025) (citing *Blair*, 248 W. Va. at 503, 889 S.E.2d at 76). Petitioners are well aware that Respondents have long emphasized throughout the course of the action that PCSB lacks power to call a special election required by section 10. That is the reason the Governor and Legislature, who are empowered to call such a special election, are named. But no mandamus relief is sought (let alone ordered) through PCSB.

Third, the circuit court’s order does not enjoin the Legislature, much less dictate a remedy to it. Quite the reverse, circuit court granted the very deference and respect that Petitioners say the Legislature is owed—*i.e.*, “leave the Legislature free to decide how to respond.” (Pet’rs Opening Br. 39.) That was indeed the whole reason the court staged the relief, to permit “a reasonable time for compliance,” *i.e.*, “corrective legislative compliance,” in the first stage, hopefully avoiding a second stage altogether. (JA 983.) The court did so explicitly “out of deference to the other coordinate branches.” (JA 980 ¶ 115.) To be sure, one of the ways that the Legislature could respond is to call for special elections as required by section 10. But the circuit court never ruled that was the *only way* for the Legislature to respond, especially since the court heard directly from counsel that there were alternative responses.

Fourth, the circuit court *did* make a ruling on its jurisdiction, rejecting Petitioners’ arguments that by enjoining PCSB, a state agency, it was exceeding its territorial jurisdiction. The court’s cited ample authority for its jurisdiction to enjoin PCSB. (JA 969–70, ¶¶ 80–83.) Petitioners do not bother to rebut any of that specific constitutional, statutory, and case law authority, so Respondents need not repeat, but do rely on, that authority here. Instead, Petitioners recite empty

refrains (*e.g.*, “injunction’s statewide reach is jurisdictionally void”) and grossly mischaracterize the injunction itself—it does *not* “close schools statewide” or “close [schools] located outside Kanawha County [who] are not parties to this action.” (Pet’rs Opening Brief 40.)

But the irony of Petitioners’ argument that PCSB cannot be enjoined from violating section 10 should not be lost on this Court, which decided on the last appeal, that there was indeed jurisdiction over PCSB. *See Blair*, 248 W. Va. at 502, 889 S.E.2d at 75 (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 Petitioners “have, throughout the course of this action, insisted that PCSB is a proper defendant.” (JA 968, ¶ 80.)

So, for Petitioners to say, on the one hand, that PCSB is not just *a* but *the* proper defendant for section 10 purposes (as they maintain in this appeal), yet say, on the other hand, any injunctive relief against PCSB to effectuate section 10 is limited to Kanawha County is to say effectively, “heads we win, tails you lose.” That cannot be the rule of law.

In addition to being procedurally proper, the circuit court’s permanent injunction order was most reasonable and measured. The court addressed at length how the balance of hardships and equities favored enjoining only PCSB in the first stage of relief. (*See* JA 964–67.) Petitioners reward the circuit court’s restrained, equitable approach, considering the interests of current charter school parents and students, by shamelessly mischaracterizing the injunction as threatening to close their schools. Again, the permanent injunction at issue on this appeal only prevents PCSB from authorizing new charter schools, it does not affect existing charter schools.

Petitioners also conveniently fail to mention that their own witness, PCSB’s executive director, testified that, should section 10 special elections eventually be required, charter schools could benefit from both pro-charter school campaigns and the local support obtained through a

majority vote approving their creation, as the circuit court found. (JA 967 ¶ 77.) And even if that vote failed, PCSB’s executive director further testified that the charter school could “reconstitute itself as a private school and obtain eligible funds through the Hope Scholarship.” (*Id.* ¶ 76.)⁸

So, no matter Petitioners’ framing, the permanent injunction is procedurally proper and a reasonable exercise of the circuit court’s discretion. This Court should affirm.

C. The Court Should Deny Immunity to the House Speaker And Senate President

Petitioners assert—for the first time on appeal—that the Speech and Debate Clause in article 6, section 17 confers legislative immunity on the House Speaker and Senate President. They did *not* assert that argument in their briefing or hearing argument below, hence, the circuit court’s order does not address it. Petitioners are therefore foreclosed from asserting it here. Syl. Pt. 1, *Mowery v. Hitt*, 155 W.Va. 103, 181 S.E.2d 334 (1971) (“In the exercise of its appellate jurisdiction, this Court will not decide nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken.”).⁹

Despite not asserting it below, Petitioners now claim such immunity is all-encompassing and absolute. But if that were true, if the Speech and Debate immunity were so unequivocal, then there would have been no need for the Legislature to enact 55-17-3a(b) after the “commencement

⁸ For all these reasons, the Amicus Brief of Mountaineer Charter School Alliance (MCSA), purporting to extol the benefits of charter schools, is inapposite. The Legislature’s policy choice to establish charter schools may prove wise or foolish, but it cannot override the People’s right to school choice in section 10 to decide whether those schools should be created in their counties. And even if the People decide against their creation, it will not be as devastating to those schools, as Amici claim, nor as detrimental to their would-be students who, as the circuit court observed, “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.” (JA 966 ¶ 74.)

⁹ “It is well-settled that legislative immunity is not a jurisdictional bar but is rather a personal defense that may be asserted to challenge the sufficiency of a complaint under Rule 12(b)(6).” *State Emps. Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 77 (2d Cir. 2007); *accord Ex parte Scott*, 422 So. 3d 80, 85 n.2 (Ala. 2025) (concluding that claim of “legislative immunity” was waived for purposes of the appeal and rejecting contention that it “is a jurisdictional issue”). Even if this Court were to disagree with other courts and consider assertions of legislative immunity comparable to those of sovereign immunity, it would still have to return to the question, previously left undecided, of whether such immunity is “waivable” in this context. *See Shoemaker v. Tazewell Cnty. Pub. Schs.*, 249 W. Va. 451, 454, 895 S.E.2d 854, 857 (W. Va. Ct. App. 2023).

of this action—possibly in direct response to this action.” (JA 980 ¶ 116.) Petitioners say the statute just “reinforces” the “protection” of the Speech and Debate immunity. (Pet’rs Opening Br. 22.) But constitutional protections are paramount; they need no “reinforcing” help from statutes.

Before addressing this new (untimely) constitutional argument as well as the old statutory one, we should start with the obvious: the House Speaker and Senate President are named only in the official capacities. They are not being “hauled into court for the act of passing legislation,” as Petitioners contend. (Pet’rs Opening Br. 22.) They face no personal civil or criminal liability, they are not being asked to testify about their motivations or deliberative process, much less divulge legislative privileges, about their vote on H.B 2012, there are no intrusive demands on their time (one doubts the extent to which they can be said to have participated at all in this suit, after handing it off to the Attorney General’s office). In other words, none of the concerns that animate Speech and Debate or personal legislator immunity are present here.

For these very reasons, the Supreme Court of Indiana recently *rejected* an assertion of Speech and Debate Clause immunity by the Indiana House Speaker and Senate President in which the court noted that such immunity was “intended to protect individual **legislators**, not the Legislature”—protecting individual legislators “from personal liability for things said in resolutions, reports, and open sessions and for the act of voting”—but emphasizing that such immunity is “not meant to prevent a court from declaring a law unconstitutional.” *Holcomb v. Bray*, 187 N.E.3d 1268, 1290 (Ind. 2022) (emphasis in original).¹⁰

Here, too, the House Speaker and Senate President are named here only on behalf of the Legislature—and most significantly under West Virginia law—are named in this suit based on *this*

¹⁰ As the Indiana Supreme Court emphasized there, as here, “though individual legislators are named in this suit, it does not seek to hold them personally liable for anything they said or did in session. The suit does not question the legislators’ motives or reasons for passing the statute. It does not reference what was said in passing the law. It does not mention who voted for it. Rather, it challenges only the constitutionality of an enacted law.” *Id.*

Court's directive: “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). The circuit court sufficiently explained why this case is one “involving the legislature,” making the presiding officers “essential” parties. (JA 972 ¶ 92 (citing *Pauley v. Kelly*, 162 W. Va. 672, 718, 255 S.E.2d 859, 883 (1979)).)

But even if this Court were inclined to reconsider its prior directive, prompted by Petitioners’ newfound assertions of legislature immunity, the Court should consider that in a future case—perhaps even in future proceedings in this very case—that could leave plaintiffs without any party to sue for an unconstitutional statute. The circuit court took this possibility seriously: Suppose the Legislature decides to create an independent charter school on its own power, through a special act (not through PCSB or any other school board), without the consent of affected voters. This is not a farfetched hypothetical, this is how the Legislature used to create independent school districts in the nineteenth and early twentieth centuries, *i.e.*, on its own legislative initiative. In that case, who would a plaintiff sue to challenge the special act? Petitioners say, “the officer who implements the law.” (Pet’rs Opening Br. 24.) But what officer?

In this scenario, the independent school is created, in violation of section 10, solely by legislative action. Petitioners insist here again that the Governor cannot be sued, and there would be no PCSB in this scenario. How about sue the legislatively created school itself? But the Petitioners would then tell those plaintiffs they lack standing due to causation and redressability problems—because the school is not the cause of its own creation, and the school has no power to take any corrective action a court might wish to order, like order a special election consistent with section 10. *Khun*, *Herold*, and *Casto* are not instructive because modern standing doctrine had not then been developed much less asserted in those cases.

And this is just a possible scenario in section 10 cases, we could think of other constitutional violations committed solely by the legislature with no ensuing “officer who implements the law.” There are, after all, other constitutional provisions that limit the Legislature itself, *e.g.*, article 3, section 4 (“No bill of attainder, ex post facto law, or law impairing the obligation of a contract, *shall be passed.*”); article 3, section 19 (“No hereditary emoluments, honors or privileges shall ever be *granted* or *conferred* in this state.”).

For this reason, the U.S. Supreme Court was unwilling to rule out the maintenance of a suit against members of Congress, despite more robust federal Special and Debate Clause precedent, “where no agents participated in the challenged action and no other remedy was available.” *Powell v. McCormack*, 395 U.S. 486, 506 n.26 (1969).

So, before this Court accepts Petitioners’ sweeping assertions of legislative immunity that will be binding in future cases, it should consider the ramifications for access to the courts and this Court’s own separate powers of judicial review, particularly where, as here, the challenge is to the constitutionality of a statute on a matter that involves the Legislature.

As for the constitutionality of section 55-17-3a(b), the circuit court did not declare it “facially unconstitutional,” as Petitioners contend. (Pet’rs Opening Br. at 24.) Rather, the circuit court merely “conclude[d] that the Legislature’s immunity statute provides *no lawful basis for dismissal.*” (JA 982 ¶ 125, emphasis added.) The circuit court’s decision in that regard was well-reasoned, (JA 980–82 ¶¶ 118–25), relying on this Court’s reasoning in *Workman v. Carmichael*. Petitioners’ attempts to distinguish *Workman* fall flat.

That *Workman* “involved an imminent impeachment proceeding” (Pet’rs Opening Br 23) could have easily counseled the Court to find it straightaway nonjusticiable. Instead, the Court contemplated, and reserved the power to issue, an extraordinary writ against the Legislature. If the

Court could do so in that context, then surely it is not beyond the realm of reason that it could do so in the appropriate section 10 case (possibly this one), since section 10 was ratified to ensure the People’s constitutional right *against the Legislature*.

Allowing the Legislature to immunize itself retroactively *ex post facto* style—by statute!—from constitutional challenges smacks of foul play. It raises serious questions of basic due process under the West Virginia Constitution (article 3, section 17) as well as the U.S. Constitution (*see Bartlett v. Bowen*, 816 F.2d 695, 707 (D.C. Cir. 1987)). Respondents do not accept Petitioners’ assurances that there will always be a forum for judicial review. As the circuit court concluded, Respondents have every “vested” right “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.” (JA 982 ¶ 124.)

The most judicious course here is to affirm the circuit court’s conclusion that this purported “immunity statute provides no lawful basis for dismissal the declaratory and mandamus relief claims against the Presiding Officers”—*in this case*. (*Id.* ¶ 125.) Leave for another day whether and to what extent section 55-17-3a(b) immunizes Presiding Officers in a different case.

D. The Denial of Petitioners’ Motions to Dismiss Is Not Yet Reviewable

“Ignoring this Court’s decision in *Blair v. Brunett*,” Petitioners say, “does not make it go away.” (Pet’rs Opening Br. 12.) Respondents could not agree more. Petitioners lay claim to *Blair* concerning their first assignment error (denial of their motions to dismiss for lack of standing)—an issue that *Blair* decidedly did not decide because it was interlocutory: “Because we find that the motion to dismiss is not subject to appellate review at this time, the sole issue we consider herein is the circuit court’s ruling granting the preliminary injunction against Governor Justice.”

Blair, 248 W. Va. at 498 n.4, 889 S.E.2d at 71 n.4.

On that “sole issue”— “whether Respondents have standing for the *injunctive* relief at issue against Governor,” *id.* at 248 W. Va. at 503, 889 S.E.2d at 76 (emphasis in original)—this Court did indeed find causation and redressability problems, precluding that type of preliminary injunctive relief as against the Governor (but not as against PCSB, enjoined by the permanent injunction). Contrary to the Petitioners assertions, however, this Court *did not rule* on the Governor’s other standing arguments with respect to declaratory and mandamus relief, nor did this Court rule on the House Speaker or Senate Presidents standing arguments regarding those forms of relief. Again, that is because those motion to dismiss standing arguments were rejected by the circuit court in an interlocutory order—and “this Court generally does not review interlocutory orders,” excepting those “relating to preliminary and temporary injunctive relief.” *Id.* 248 W. Va. at 498 n.4, 889 S.E.2d at 71 n.4.

Despite this law of the case, Petitioners are once again here seeking interlocutory review, on the very same basis as before, *i.e.*, denial of their motions to dismiss. They are trying to exploit a “concern” this Court registered in a footnote in *Blair* “that the circuit court [previously] did not identify the specific conduct that the Senate President and House Speaker could be ordered to adjust prospectively” nor “identify a specific basis for keeping [them] in this case, based on a speculative and unarticulated possibility . . . for mandamus relief against them.” *Id.* 248 W. Va. at 500 n.9, 889 S.E.2d at 73 n.9. But the circuit court has now thoroughly addressed those very concerns at considerable length, articulating and specifying a basis for nonspeculative declaratory and mandamus relief, grounded in this Court’s own precedents. (*See* JA 970–80 ¶¶ 98–117.)¹¹

¹¹ Should this Court somehow find a jurisdictional basis for reviewing the denial of the motions to dismiss, Respondents maintain, pursuant to Rule 10(d), that the Governor and the Legislature’s Presiding Officers are proper defendants for all the reasons articulated by the circuit court.

Even if the Court remains unsatisfied with that explanation, it should still find, as it did before, that those “issues relating to Respondents’ requested mandamus relief, as well as the circuit court’s interlocutory order denying the motion to dismiss filed by the Senate President and House Speaker . . . not before [it] in the instant appeal.” *Id.* Jurisdiction cannot be conferred, “even in the interest of justice . . . where none exists.” *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988); *Lambert v. Interurban Motor Co.*, 99 W. Va. 135, 128 S.E. 81, 81 (1925) (“none exists except where [jurisdiction] is distinctly and expressly conferred”). And no injustice will meanwhile befall the State Officers by being named in this suit; they face no imminent court order, much less any harm or even inconvenience by this nearly five-year suit, to the extent they can even be said to be participating at all.

The same is true of the intervening charter schools who also try to appeal the denial of their 12(b)(6) motion, also interlocutory. They too face no imminent court order or harm, the permanent injunction does not enjoin the currently operating charter schools and sets only an expectation in the near future that the Legislature or Governor will take corrective action. If no such action is taken, all that the circuit court’s order contemplates are “further proceedings” to “consider” whether further relief shall be granted. (JA 983.)

CONCLUSION

Because Respondents succeed on the merits, the Court should affirm the permanent injunction against PCSB’s authorization of new charter schools absent the voters’ consent.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 25-851

WEST VIRGINIA PROFESSIONAL CHARTER SCHOOL BOARD, RANDY SMITH, President, West Virginia Senate, ROGER HANSHAW, Speaker, West Virginia House of Delegates, and PATRICK MORRISEY, Governor, West Virginia,

Petitioners-Defendants

and

WEST VIRGINIA ACADEMY; EASTERN PANHANDLE PREPARATORY ACADEMY; WORKFORCE INITIATIVE FOR NURSES ACADEMY; and CLARKSBURG CLASSICAL ACADEMY,

Petitioners-Intervenors

v.

SAM BRUNETT, ROBERT MCCLOUD, and JACLYN SANCHEZ,

Respondents-Plaintiffs.

CERTIFICATE OF SERVICE

I, Bren J. Pomponio, hereby certify that I filed the foregoing *Respondents' Brief* with the Court's File & ServeXpress filing system, which will generate electronic service to all counsel of record, on this day, May 18, 2026.

/s/ Bren J. Pomponio
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