No. 22-616

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Petitioner

AND

KATIE SWITZER AND
JENNIFER COMPTON,

Petitioners

v.

TRAVIS BEAVER, WENDY PETERS,
DAVID L. ROACH, STATE SUPERINTENDENT
OF SCHOOLS, AND L. PAUL HARDESTY, PRESIDENT
OF THE WEST VIRGINIA BOARD OF EDUCATION,

Respondents.

BRIEF OF AMICI CURIAE CONSTITUTION AND EDUCATION LAW SCHOLARS IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE

As *Amici Curiae*, the Constitution and Education Law Scholars, submit this brief in support of Respondents.[1] The Scholars have devoted a significant portion of their research, teaching, and scholarship to the proper role of courts in enforcing constitutional rights, including the claims, privileges, and immunities concerning education. They are well-versed in state court jurisprudence of such education rights, including in West Virginia. The Scholars have been immersed in the study of judicial review and enforcement of such rights subject to important limitations that protect constitutional separation of powers. They strongly believe that, while courts should not improperly intrude on other branches' choices, judicial review and enforcement is appropriate to protect and vindicate constitutional rights, especially where majoritarian democratic processes have violated the rights of disfavored minorities. The Scholars seek to assist this Court by explaining, in a historical and legal context, how all these principles apply to the issues presented by this appeal.

ARGUMENT

If there is one line of "just and well-settled doctrine" most applicable to the constitutional infirmities of H.B. 2013 raised by this appeal, it is "that a state cannot do that indirectly which [it] is forbidden by the constitution to do directly." *Smith v. Turner*, 48 U.S. 283, 458 (1849); *State ex rel. Webb v. Wilson*, 182 W. Va. 538, 544, 390 S.E.2d 9, 15 (1990) (granting writ of prohibition where "contrary ruling would allow the state 'to do indirectly what it cannot do directly'") (quoting *State v. Crawford*, 83 W. Va. 556, 560, 98 S.E. 615, 617 (1919)).

Here, if the State under strict scrutiny cannot *directly* reduce public school funding and enrollment in ways that risk educational deprivations and disparities, it cannot do so *indirectly*

[1] Counsel has provided timely notice of this filing and certifies that no party to this action or its counsel authored this brief, in whole or in part, nor has any party or its counsel made monetary contribution to fund the preparation or submission of this brief.

through an expansive education savings account (ESA) voucher program that is designed and scaled to compete statewide for students (and therefore funding) with the public education system. Likewise, if the State cannot *directly* by general law discriminate against students, it cannot do so *indirectly* by a special law that permits publicly subsidized private school ESA voucher recipients to discriminate.

A. The West Virginia Constitution Forbids Directly or Indirectly Preferencing Private School Alternatives That Frustrate the Fundamental Right to A Thorough and Efficient System of Free Schools

Many state constitutions regard public education as holding "a priori status," meaning constitutional duties respecting education are, in the words of courts that have construed them, "fundamental," "paramount," "primary," "essential," such that they are among a state government's "first obligation[s]." *See* Derek W. Black, *Preferencing Educational Choice*: *The Constitutional Limits*, 103 CORNELL L. REV. 1359, 1417 (2018) (citing authorities) ("*Preferencing Choice*").

So too under the West Virginia Constitution: Public education is "a fundamental, constitutional right," and "a Prime function of our State government," the funding of which is "ahead of every other State function," and "second in priority only to payment of the State debt." Syl. Pt. 3, *Pauley v. Kelly*, 162 W. Va. 672, 719, 255 S.E. 2d 859, 884 (1979). The Court has "made it abundantly clear [that priority] gives a *constitutionally preferred status* to public education." *Pauley v. Bailey*, 174 W. Va. 167, 174, 324 S.E.2d 128, 134 (1984) (citing Syl. Pt. 1, *State ex rel. Bd. of Educ. v. Rockefeller*, 167 W. Va. 72, 78–79, 281 S.E.2d 131, 135 (1981) (emphasis added)).

The State admits as much, except it describes the priority to public education as "strong." (Pet'r Opening Br. at 19.) That description does not quite do it justice; concerning the financing of public education, "among mandated public services," it is "the *first constitutional priority*." *W.*

Va. Educ. Ass'n v. Legislature of State of W. Va., 179 W. Va. 381, 382, 369 S.E.2d 454, 455 (1988) (emphasis added); *see Cooper v. Gwinn*, 171 W. Va. 245, 256, 298 S.E.2d 781, 792 (1981) ("The basic amenities of civilization to which the government is required to give *first priority* include the education of youth.") (emphasis added). So foremost is the duty of "thoroughness and efficiency of the system of free schools in West Virginia" that the Court has said it cannot even be diminished by "an assertion that the State lacks ample means to provide education." *Cathe A. v. Doddridge Co. Bd. of Educ.*, 200 W. Va. 521, 531, 490 S.E.2d 340, 350 n.7 (1997).

The State also admits that "discretionary forays into the non-public education sphere," like H.B. 2013, "cannot come at the expense of its duty to provide thorough and efficient public schools." (Pet'r Opening Br. at 19.) But, relying mostly on federal court doctrine, the State insists that standing and ripeness preclude any court from considering that expense until it has been exacted to render public education financing constitutionally inadequate and inequitable. (*See id.* at 16, 17, 23.)

Prudential considerations of standing and ripeness have not so precluded state courts from considering challenges to state education expenditures, owing to the "distinct features of state constitutionalism," the enforcement of positive rights, like the right to education, and *state* justiciability doctrines, including "permissive taxpayer standing doctrines." *See* Joshua G. Urquhart, *Disfavored Constitution, Passive Virtues? Linking State Constitutional Fiscal Limitations and Permissive Taxpayer Standing Doctrines*, 81 FORDHAM L. REV. 1263, 1267–68 (2012) (citing Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001)).

The very decisions that the State relies on concerning similar voucher programs (*see* Pet'r Opening Br. at 11), in fact, concluded either that taxpayers had pre-implementation standing under

a public standing doctrine similar to this Court's own doctrine, *see Meredith v. Pence*, 984 N.E.2d 1213, 1217 n.4 (Ind. 2013), or would have had such standing if plaintiffs, as here, belonged to the class prejudiced by the challenged statute, *see Hart v. State*, 774 S.E.2d 281, 294 (N.C. 2015), or otherwise parents of public school students had standing given the "public importance" of the constitutional challenge, *see Schwartz v. Lopez*, 382 P.3d 886, 895 (Nev. 2016).[2]

On the latter point, "[state] courts have 'broadened standing and evidentiary parameters'" in education rights cases because they frequently raise "issues 'of significant, if not, paramount public interests (school-aged children's rights concerning public education).'" *See* Joshua E. Weishart, *Rethinking Constitutionality in Education Rights Cases*, 72 ARK. L. REV. 491, 517 (2019) (quoting *Hoke Cnty. Bd. of Educ. v. State*, 599 S.E.2d 365, 376-77 (N.C. 2004) and citing, *inter alia*, *Idaho Sch. For Equal Educ. Opportunity v. State*, 129 P.3d 1199, 2103 (Idaho 2005); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 202 (Ky. 1989)).

For its part, this Court has not discounted or disregarded a statute's projected impact on public school children. On the contrary, because of the first constitutional priority given to public education financing, the Court has said that, "in all cases dealing with our public schools, our first concern must be the impact our decision *will have* on the education that the State's children *will receive*." *Hancock Cnty. Bd. of Educ. v. Hawken*, 209 W. Va. 259, 262, 546 S.E.2d 258, 261 (1999) (emphasis added). Future tense. The public importance of the potential impact of H.B. 2013 was surely a factor in this Court's decision to assume jurisdiction of this appeal.

In overlooking all this authority and asking this Court instead to "wait and see" the full

[2] The State did not cite other state court decisions that permitted pre-implementation challenges to voucher programs which found them unconstitutional. *See Adams v. McMaster*, 851 S.E.2d 703 (S.C. 2020); *Louisiana Fed. of Teachers v. State*, 118 So.3d 1033 (La. 2013); *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009); *Bush v. Holmes*, 919 So.2d 392 (Fla. 2006); *Owens v. Colo. Congress of Parents, Teachers and Students*, 92 P.3d 933 (Colo. 2004).

extent of the detrimental impact on public school children, the State also misapprehends the nature of the claimed constitutional violation. The constitutional defect, giving rise to Respondents' injuries, is in the design of H.B. 2013 itself, even before the statute's full implementation. The ESA voucher program here is scaled to compete with the public school system for students and resources. Whatever the wisdom of this policy, it undercuts the constitutional obligation to public education.

Voucher programs have traditionally limited eligibility to certain disadvantaged students on the basis of income, prior attendance at a low-performing school, or other measure of educational disadvantage. *See* Black, *Preferencing Choice*, *supra*, at 1388; *see also* EDUCATION COMMISSION OF THE STATES, *Vouchers, Student Eligibility Requirements: Primary Requirements* (2021), https://reports.ecs.org/comparisons/vouchers-03. Because H.B. 2013 uniquely lacks such targeted or means-tested eligibility, even students from middle- and high-income homes attending high-performing public schools, i.e., advantaged students, can take advantage of the program.

The State suggests that open eligibility promotes equity. But not all equity is created equal. Experience suggests that "the use of school vouchers risks skimming the most engaged families [away] from public schools, while leaving the rest of the students in inadequate schools without political clout and active monitoring of engaged parents." *See* Martha Minow, *Confronting the Seduction of Choice: Law, Education, and American Pluralism*, 120 YALE L. J. 814, 832 (2011). H.B. 2013 financially incentivizes such skimming of advantaged public school students and their parents to *opt out* of public schooling. By opening eligibility to any and all West Virginia students (in the inevitable event that fewer than 5% of initially eligible students enroll), H.B. 2013 also financially disincentives current private school students and their parents to *opt in*, that is, enroll in public schools.

Whether these incentives will work as designed, private school voucher recipients likely will be the ones exercising "school choice," more so than parents and students. Again, private schools can select their students, and so, to justify receiving publicly funded vouchers, they have every incentive to skim the highest-achieving, low-cost students from public schools and push out of private schools the lowest-achieving, high-cost students in ways that the laws governing public schools forbid. That H.B. 2013 does not target eligibility to disadvantaged students and lacks antidiscrimination protections virtually assures that selection bias will be most pronounced here. And that selection bias will perpetuate, if not exacerbate, existing socioeconomic stratifications.

Even if the unfairness of the competition and the illusion of choice could be overlooked, its unconstitutionality cannot. Fueling a market-driven competition on a statewide scale with publicly subsidized ESA vouchers, open eligibility, and virtually no antidiscrimination protections preferences private school alternatives over public schooling in the state's legislative framework, which is inconsistent with the constitutionally preferred, first-order status given to public education. *See* Black, *Preferencing Choice*, *supra*, at 1418.

The rejoinder that the State can both prioritize public schools while it, at the same time, subsidizes and levels up their competitors misunderstands the zero-sum nature of this competition. The State cannot be said to be prioritizing public education by increasing the likelihood that public schools will eventually lose out in (an unbalanced) competition to private schools. The rejoinder that the State is merely "passing statues that make it easier for parents to choose non-public options" (Pet'r Opening Br. at 28), misunderstands the State's role, supposing it can be a neutral party, an indiscriminate sponsor of any and all forms of schooling. But the State is mandated by the West Virginia Constitution to have a favorite in this competition: public education. *See State ex rel. Brotherton v. Blankenship*, 157 W. Va. 100, 125, 207 S.E.2d 421, 436 (1973) (reaffirming

that "maintenance of *free schools* is an *absolute and mandatory* duty" and "is of *paramount importance* in a free society [such] that neither the Legislature nor the executive branch of government may perform *any act* which would result in the elimination of this safeguard") (emphasis added).

"Providing *public schools* ranks at the very apex of the function of [this] State," *State v. Riddle*, 168 W. Va. 429, 434, 285 S.E.2d 359, 362 n.2 (1981) (emphasis added), because "an educated electorate is vital to the proper operation of a democracy," *Randolph Cnty. Bd. of Educ. v. Adams*, 196 W. Va. 9, 14, 467 S.E.2d 150, 155 (1995). Just any education will not do; the State's "central mandate" is to provide a public, democratic education. *See id.* at 14–15, 467 S.E.2d at 155–56 ("The framers of our Constitution lived among the ruins of a system that virtually ignored public education and its significance to a free people."). For this reason, virtually every state constitution imposes a duty to educate democratically to meet the demands of citizenship, essential to the survival of a democratic republic. *See* Joshua E. Weishart, *Democratizing Education Rights*, 29 WM. & MARY BILL RTS. J. 1, 39–41, 43–52 (2020) (citing state constitution text, history, precedent entailing duty). For this reason as well, Congress has even gone so far as to require the provision of education as a condition of statehood in this Union. *See* Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1088 (2019).

That the stakes are so high for the State and for public school children only compounds the constitutional injury. The circuit court properly credited evidence of projected decreases in public school funding as a result of this State-manufactured competition and loss of student enrollment, which when this expansive ESA voucher program is at full scale, will leave many counties unable to meet fixed costs, much less invest more in their schools. Some will have to turn to excess levies, not for excesses, but for the basics—assuming voters approve the additional taxes. The State

replies that "not every drop in public school funding is unconstitutional" and that "Respondents had to show that the Act will reduce public school funding . . . by an amount large enough to cross the constitutional line." (Pet'r Opening Br. at 24.)

The Court, on the contrary, has placed the "*affirmative burden* on the State to factually demonstrate the financial necessity of cutting back on the expenditures for public education which has been accorded a constitutional preference" and given its status as a fundamental right afforded equal protection. Syl. Pt. 3, *State ex rel. Bd. of Educ., Kanawha Cnty. v. Rockefeller*, 167 W. Va. 72, 79, 281 S.E.2d 131, 135 (1981) (emphasis added). Discharging that burden requires a "compelling factual record" of "a compelling State interest" for reducing "expenditures for public education." *Id.* at 79–80, 281 S.E.2d at 135–36.

The Legislature did not build such a compelling factual record before passing H.B. 2013. And rather than say how it could meet its affirmative burden here, the State undercuts it by admitting that "[s]ome districts will lose money if students leave their public schools and the Legislature does not change the current funding structure." (Pet'r Opening Br. at 26.) But faced with this foreseeable risk, the Legislature had the obligation to adjust the public school funding formula before or while it was contemplating H.B. 2013, not at some unknown point in the future. Instead, the Legislature passed H.B. 2013, knowing it could injure public education, without a single safeguard. Enacting an expansive ESA voucher program first, before it shored up public school funding against the detrimental financial impact of that program, further demonstrates the State's misplaced priorities. *See Simmons-Harris v. Goff*, 711 N.E.2d 203, 212 n.2 (Ohio 1999) (suggesting "that a greatly expanded School Voucher Program," not targeted to disadvantaged students nor limited in scope, "could damage public education").

Moreover, the State's acknowledgement that at least some districts could eventually lose

public school funding because of the ESA voucher program portends "[a] statute that creates a lack of uniformity in the State's educational financing system" unless it can be shown "necessary to further a compelling state interest." Syl. Pt. 4, *Bd. of Educ. of Cnty. of Kanawha v. W. Va. Bd. of Educ.*, 219 W. Va. 801, 807, 639 S.E.2d 893, 899 (2006). Again, the State fails to make such a compelling or narrowly tailored showing and instead falls back on H.B. 2013's stated purpose: "to provide the option for a parent to *better* meet the individual education needs of his or her eligible child." W. Va. Code § 18-31-5(a) (emphasis added). Better than what? Public schools?

If, as H.B. 2013 implies, public schools are not currently meeting the education needs of children, then the State's first constitutional priority is to improve the public schools. Instead, the State has signaled explicitly with "better" its statutory preference to incentivize all children to leave the public schools—a circumvention inimical to the constitutionally preferred status of public education. Far from improving public education, this expansive ESA voucher program risks exacerbating educational deprivations and further stratifying educational opportunities in and among public schools. *See* Black, *Preferencing Choice*, *supra*, at 1427–28.

These are not "collateral consequences," as the State puts it. (Pet'r Opening Br. at 30.) But that phrasing gives up the game, suggesting that the State views the loss of public school funding from declining public school enrollment as an indirect, incidental risk of its ESA voucher program. Such "circumvention or indirection," however, "is not constitutionally permissible" because it allows such acts to occur "in the shadow of the State, to do indirectly what the State cannot do directly." *See W. Va. Trust Fund, Inc. v. Bailey*, 199 W. Va. 463, 477, 485 S.E.2d 407, 421 (1997).

B. H.B. 2013 Is an Impermissible Special Law That Indirectly Permits What the General Law Respecting Education Directly Forbids—Discrimination

Most state constitutions, either through express language, judicial applications of substantive due process guarantees, or both, mandate general laws and prohibit special laws. *See*

Joshua E. Weishart, *Separate But Free*, 73 FLA. L. REV. 1139, 1177–79 (2021). The purpose of this general law mandate is to prohibit arbitrary deprivation of rights and so-called "class legislation" that confers benefits or imposes burdens on certain classes not others without a reasonable relation to a legitimate, public purpose. *Id.* at 1178–80.

So too under the West Virginia Constitution, which provides that "in no case shall a special act be passed, where a general law would be proper." W. Va. Const. art. 6, § 39. As the Court has explained, that provision "serves to prevent the arbitrary creation of special classes, and the unequal conferring of statutory benefits" and, as such, mandates that a statute "must operate alike on all persons and properly similarly situated" and "applies uniformly upon a class." *State ex rel. City of Charleston v. Bosley*, 165 W. Va. 332, 339–40, 268 S.E.2d 590, 595 (1980).

The State contends that H.B. 2013 is a general law because all families who qualify for the ESA voucher are "subject to the same eligibility criteria, . . . same spending restrictions, and . . . same scholarship amounts." (Pet'r Opening Br. at 37.) But who qualifies for the voucher is the starting, not the end, point of the analysis because those who qualify might yet be benefitted or burdened arbitrarily or dissimilarly. The focal point, in all cases, is how the law actually "applies" and "operates." *See Bosley*, 165 W. Va. at 339–40, 268 S.E.2d at 595.

Regarding its foreseeable application and operation, H.B. 2013's "inherent limitation . . . that arbitrarily separates" some students from others, *see State ex. rel. Dieringer v. Bachman*, 131 W. Va. 562, 568, 48 S.E.2d 420, 425 (1948), is its exclusion of state antidiscrimination protections otherwise provided under the general law respecting education, including those afforded under the West Virginia Human Rights Act, W. Va. Code § 5–11–9. [3]

[3] Public schools may not discriminate on the basis of "race, religion, color, national origin, ancestry, sex, age, blindness or disability, either directly or indirectly, any of the accommodations, advantages, facilities, privileges, or services of the place of public accommodations." W.Va. Code § 5-11-9(6)(A); *see Bd. of*

Throwing up its hands, the State dismissively replies that private school antidiscrimination exemptions "pre-date" H.B. 2013 and that H.B. 2013 itself does not further exempt private schools from state antidiscrimination laws. (Pet'r Opening Br. at 38.) But this action is not about whether private school voucher recipients are subject to existing state antidiscrimination laws, it is about the fact that H.B. 2013 does *not* subject private school voucher recipients to state antidiscrimination laws going forward. As a result, H.B. 2013 arbitrarily creates classes, some who will benefit from the exclusion of antidiscrimination protections because of their privileges and favored characteristics, others who will be burdened by that exclusion because they are already marginalized by their disfavored characteristics.

That makes H.B. 2013 an impermissible special law.

The implication in the State's response that it is powerless to subject private school voucher recipients to state antidiscrimination laws is belied by the fact that, in other school choice legislation, i.e., H.B. 2012, enacted the same time as H.B. 2013, the State expressly prohibits charter school recipients of public funding from engaging in discrimination "against any person on any basis" that would be unlawful in public schools. W. Va. Code § 18-5G-11(a)(6).

Yet by excluding those antidiscrimination protections in H.B. 2013, the State fails to put private school voucher recipients on notice that certain forms of discrimination are unlawful, as provided under general law. The extent to which private schools maintain discriminatory policies or practices is beside the point because the exclusion of antidiscrimination protections in H.B. 2013 suggests that such policies and practices are permitted. "A State may not grant the type of tangible financial aid here involved if that aid has a significant tendency to facilitate, reinforce, and support private discrimination." *Norwood v. Harrison*, 413 U.S. 455, 465 (1973).

Educ. Cnty. of Lewis v. W. Va. Hum. Rights. Comm'n, 182 W. Va. 41, 45, 385 S.E.2d 637, 641 (W.Va. 1989).

The injury is the differential treatment implicit in the exclusion of antidiscrimination protections and the tacit permission to discriminate but also in the uncertainty about whether certain disfavored students will be subjected to discriminatory policies and practices. That uncertainty will suffice to deter certain students from even taking advantage of the ESA voucher program. Courts have given significance to such deterrent effects before. *See, e.g.*, *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 365–66 (1977) (explaining that person deterred from applying for job by employer's discriminatory hiring practices "is as much a victim of discrimination as is he who goes through the motions of submitting an application"); *Save Our Sch.-Se. & Ne. v. D.C. Bd. of Educ*., 564 F. Supp. 2d 1, 7 (D.D.C. 2008) (suggesting plaintiffs could have had standing from being deterred to apply to charter school due to alleged discriminatory admissions practices); *Leskovisek v. Ill. Dep't of Transp.*, 305 F.Suppp.3d 925 (C.D. Ill. 2018) (concluding that adult students with disabilities had standing because "they were deterred from applying for a position due to the consistently enforced discriminatory policy"); *Walsh v. City & Cty. of Honolulu*, 423 F. Supp. 2d 1094, 1100 (D. Haw. 2006) (concluding plaintiffs had standing to challenge constitutionality of statute that required applicants to be current or former state residents because it deterred plaintiffs from applying).

Stated discriminatory policies of private schools currently in effect will deter applications or will expose undeterred applicants to discrimination. But, again, whether private school voucher recipients will discriminate is not ultimately determinative because the exclusion of antidiscrimination protections arbitrarily separates even as it serves no legitimate, public or governmental purpose. This is especially evident given the Legislature's duty under Article 12, section 1 to provide "by general law" for the education of children and such general laws respecting education regard antidiscrimination protections as proper, serving the interests of justice.

Aiming to improve "the quality of education in both public and private schools" does not justify the State's tolerance for discrimination, that is, it "does not mean that the State must grant aid to private schools without regard to constitutionally mandated standards forbidding state-supported discrimination." *See Norwood*, 413 U.S. at 463. Moreover, the proffer of a "legitimate education function" served by ESA vouchers "cannot be isolated from discriminatory practices" because "discriminatory treatment exerts a pervasive influence on the entire educational process." *Id.* at 469.

Prohibited forms of discrimination that are countenanced or condoned by H.B. 2013's exclusion of antidiscrimination protections can have an especially pernicious effect on educational opportunity. *Cf. State ex rel. Bd. of Educ. v. Bailey*, 192 W.Va. 534, 372, 453 S.E.2d 368, 372 (1994) (noting discrimination created by lack of uniformity in public education funding "will be upheld only if *necessary* to further a 'compelling state interest'"). And that discrimination need not be limited to minorities or students with disabilities to be germane or actionable under the general law—"distinctions and disparities based on wealth or residence may lead to finding a violation of the constitutional right to education." *See Pendleton Citizens for Cmty. Schs. v. Marockie*, 203 W. Va. 310, 317, 507 S.E.2d 673, 680 (1998). Low-income students in sparsely populated counties are entitled to educational opportunities free from discrimination at the hands of the State or its publicly funded private school benefactors.

If discrimination against poor, rural children seems unlikely, consider again the selection bias that permits private school voucher recipients to skim low-cost, high achieving students and push out high-cost, low achieving students. Consider as well the pressure to engage in that selection bias to demonstrate high performance in order to justify the voucher program. Finally, consider that such forms of discrimination are not as visible as other explicit admission policies or

overt practices.

No doubt improving educational opportunities is a legitimate public purpose but the discrimination permitted by H.B. 2013 cannot possibly be reasonably or rationally related to that purpose because it deprives students of their educational freedoms and is profoundly antidemocratic. *See* Weishart, *Separate But Free*, *supra*, at 1189–91 (explaining same for segregative school choice practices). "[I]t matters how public purposes are achieved, the means as well as the ends." *Id.* at 1191.

The "means" also matter for purposes of the substantive due process guarantee "to receive the benefit of law as enacted by their Legislature," *Cooper*, 171 W. Va. at 298 S.E.2d at 786, and to be free "from arbitrary treatment by the state," *Major v. DeFrench*, 169 W. Va. 241, 251, 286 S.E.2d 688, 694–95 (W. Va. 1982). Substantive due process indeed originally grounded the general law principles that are explicitly favored in state constitutional provisions, like Article 6, Section 39. *See* Weishart, *Separate But Free*, *supra*, at 1176–78. "[U]nder the substantive due process standard, it must appear that the *means* chosen by the Legislature to achieve a proper legislative purpose bears a rational relationship to that purpose and are not arbitrary or discriminatory." *Bailey v. Truby*, 174 W. Va. 8, 21, 321 S.E.2d 302, 316 (1984) (emphasis added) (quotations omitted). Because H.B. 2013's exclusion of antidiscrimination protections casts an expansive shadow of uncertainty and trepidation concerning the risks of discrimination in private school admissions and operations, it deprives unprotected children of the benefit of the law while subjecting them to arbitrary or discriminatory treatment—a substantive due process violation.

At bottom, H.B. 2013's exclusion of antidiscrimination protections places the State's imprimatur on arbitrary, discriminatory, and unreasonable treatment inconsistent with the general law respecting education and, thus, denies certain schoolchildren due process afforded under that

general law. That the State allows such wrongs to be done indirectly through ESA vouchers to private schools cannot salvage this impermissible special law because "it is axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Norwood*, 413 U.S. at 465.

CONCLUSION

For the foregoing reasons, the Court should affirm the circuit court's decision.

Respectfully submitted,
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No. 22-616

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Petitioner

v.

TRAVIS BEAVER, WENDY PETERS, DAVID L. ROACH, STATE SUPERINTENDENT OF SCHOOLS, AND L. PAUL HARDESTY, PRESIDENT OF THE WEST VIRGINIA BOARD OF EDUCATION,

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Amici Curiae Constitution and Education Law Scholars is being served on all counsel of record by File & Serve Xpress E-Service and, separately via File & Serve Xpress U.S. Mail to counsel listed below, this 23rd day of September, 2022.

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