**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**Appeal No. 22-616**

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**STATE OF WEST VIRGINIA, et al.,**

**Petitioners,**

**v.**

**TRAVIS BEAVER and WENDY PETERS, et al.,**

**Respondents.**

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# PETITIONER STATE OF WEST VIRGINIA'S REPLY BRIEF

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## INTRODUCTION

Respondents' attacks on the Hope Scholarship Act threaten substantial damage to our Constitution. Their theory of construction calls on the Court to add new words to key constitutional provisions and statutes. They also lean on tenuous implications to redefine the words in the text—as when they insist that requirements that the Legislature "shall" do one thing mean that it "shall not" do anything else. And they try to shift the powers that our various branches hold, looking for clear authorization for the Legislature to act in the non-public educational zone instead of a clear command against it as the Constitution's near-plenary power model actually requires.

None of that works. The Court looks to the words written into our Constitution, not those that parties might infer or otherwise wish were there. And the Court is especially reluctant to imagine new restrictions on legislative power when, since the State's infancy, our laws have insisted that limiting the Legislature's reach must come through express or necessary implication. Even when—perhaps particularly when—the Legislature directs state funds, the Constitution gives it a wide berth.

The right result here should have flowed easily from these fundamentals. The Legislature is meeting its duty to provide a thorough and efficient system of free schools for West Virginia's children, and it has discretion to supplement that system through the Hope Scholarship Act. Nothing hiding in provisions speaking to the Board of Education's powers, or the Legislature's taxing authority, or our system's distaste for special laws calls the Act into question, either. The circuit court was mistaken in holding otherwise. The Court should dissolve the injunction and end the wait for the thousands of families counting on the Act.

## ARGUMENT

### I. The Circuit Court Lacked Subject-Matter Jurisdiction.

At its core, the Parent Respondents' claimed injury is too attenuated to support this suit. Despite the many theories they invoke to show otherwise, Respondents still have not established the essential elements of subject-matter jurisdiction. The Court should dissolve the permanent injunction and remand with direction to dismiss on both standing and ripeness grounds.

#### A. Respondents Have Not Established Standing.

**1.** Respondents cannot meet their burden to show traditional standing. "Concrete," "particularized," "actual," and "imminent" harms are hard to square with the injuries that Respondents offer up here—which rely on a series of inferences or guesswork. *Men & Women Against Discrimination v. Family Prot. Servs. Bd.*, 229 W. Va. 55, 61, 725 S.E.2d 756, 762 (2011). Nothing in the out-of-state cases Respondents start with found standing on the theory of harm they allege. Several did not address standing at all. *Davis v. Grover*, 480 N.W.2d 460 (Wis. 1992); *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998); *Bush v. Holmes*, 919 So.2d 392 (Fla. 2007). And the "exercise of jurisdiction in a case is not precedent for the existence of jurisdiction." *Kanawha Cty. Pub. Libr. Bd. v. Bd. of Educ. of Cty. of Kanawha*, 231 W. Va. 386, 396, 745 S.E.2d 424, 434 (2013). The cases that do address standing applied state-specific doctrines not relevant here (more on that below), narrow "exceptions" to the demanding "personal injury" requirement. *Schwartz v. Lopez*, 382 P.3d 886, 894 (Nev. 2016) ("public-importance exception"); *see also Meredith v. Pence*, 984 N.E.2d 1213, 1217 n.4 (Ind. 2013) ("Indiana's public standing doctrine").

Things go no better for Respondents under West Virginia law.

*First*, Respondents maintain (for the first time on appeal) that they "cannot" receive Hope Scholarship funds "even if they wanted to." Parent Resp. Br. 52. This is an odd claim: Respondents' children are enrolled in public schools and are eligible to apply for Hope

Scholarships. *See* W. VA. CODE §§ 18-31-2(5), 5, 6. So rather than show legal ineligibility, Respondents list personal reasons why they believe it does not make sense for their families to capitalize on the program. Parent Resp. Br. 52. In other words, Respondents could receive funds on their children's behalf, but they do not want to. This voluntary opt-out does not show any harm from the law itself. Parties cannot manufacture legal injury through choice and personal priorities.

Other problems lurk with this newly asserted injury, too. Respondents have said from the beginning that they do not intend to use the program because they prefer public schools. *See* JA Vol. 4, at 411-14, 417-19. They thus cannot claim any "legal right" to Hope Scholarship funds that has been or likely will be "denied." *State ex rel. Perdue v. McCuskey*, 242 W. Va. 474, 480, 836 S.E.2d 441, 447 (2019). Basing injury on a "hypothetical" denial is not enough for standing. *Id.* What's more, "[s]tanding is gauged by the specific common-law, statutory or constitutional claims that a party presents." *Jefferson Cty. Found., Inc. v. W. Va. Econ. Dev. Auth.*, 875 S.E.2d 162, 170 (W. Va. 2022) (cleaned up). Even if Respondents change their mind about entering the program, their claims do not pertain to the conditions for participating in it. They challenge the Act's entire existence. A jurisdictionally sized disconnect separates the argument that the program should pay no one and a claim that it injures Respondents because it did not pay them.

*Second*, Ms. Peters's new worries about her public-school teacher job do not establish standing. Parent Resp. Br. 52 n.41. Nothing in the record shows that Ms. Peters is likely to lose her job because of the Act. She has never made that claim—in her affidavit, she alleged only that "teachers and other staff, technology, building maintenance, summer school, and more will be cut" if funds go down after decreased enrollment. JA Vol. 4, at 415. This broad assertion is not a "particularized" claim that her *own* job is at risk. *Men & Women*, 229 W. Va. at 61, 725 S.E.2d at 762. Respondents must show that the Act will injure them "in a personal and individual way."

*State ex rel. Dodrill Heating & Cooling, LLC v. Akers*, 874 S.E.2d 265, 272 (W. Va. 2022). Ms. Peters's belief that the Act could affect enrollment in her district which could in turn affect funding in her district in a way that could "impact her job" in an unspecified manner is the type of "speculative chain of possibilities" that defeats standing. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013). Only "unsubstantiated fears of what the future may have in store" support this theory of injury, and Respondents cannot build standing on unfounded "conjecture." *Justice v. W. Va. AFL-CIO*, 246 W. Va. 205, 866 S.E.2d 613, 628 (2021).

*Third*, Respondents say that the Act "will result in fewer students attending public schools," which then means "money will be taken from public schools." Parent Resp. Br. 52 (emphasis omitted). But the Act does not affect public-school funding on its face, and Respondents do not do the legwork of showing that a funding decline will flow from it. Respondents need not show—at least for standing purposes—a shortfall of significant size. But they must walk the Court through how a "concrete" loss will occur. *Tabata v. Charleston Area Med. Ctr., Inc.*, 233 W. Va. 512, 517, 759 S.E.2d 459, 464 (2014).

And—as with Ms. Peters's new claim—the alleged pass-through funding problem is not sufficiently particularized. To pass that bar, an injury "must affect [Respondents] in a personal and individual way." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 n.1 (1992). Respondents would have to establish that the Act will harm *their* schools and *their* students. They need to make plain how funding loss will affect the educational services to which the students are constitutionally entitled. They do not. Instead, Respondents only allege that the Act might harm "public school funding" in general. Parent Resp. Br. 53. That claim is neither "personal" nor "individual."

Still another issue defeats this claimed injury: It is not "imminent." *Men & Women*, 229 W. Va. at 61, 725 S.E.2d at 762. Respondents concede that the Act will not reduce school funding

until "next year" at the earliest. Parent Resp. Br. 53. Yet imminent harms are those "threatening to occur immediately." *Imminent*, BLACK'S LAW DICTIONARY (11th ed. 2019). (Now, because the "enrollment figures … used in the [funding] calculation for the following year" are certified "as of October 1st," JA Vol. 4, at 557-58, "next year" has become two years.) And even then, any potential harm turns on future legislative sessions. Respondents urge the Court to let them act now because the Act will affect one factor in a funding formula that Respondents presume is the only measure the Legislature will use to set funding. So any potential funding decrease is "dependent upon contingent events" that are at least a year away. *Zaleski v. W. Va. Mut. Ins. Co.*, 224 W. Va. 544, 552, 687 S.E.2d 123, 131 (2009). This distant threat is not enough to show an "imminent and not conjectural or hypothetical" harm. Syl. pt. 5, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 576 S.E.2d 807 (2002).

*Fourth*, Respondents fleetingly suggest (again, for the first time on appeal) that they "have representational standing to vindicate the rights of their children." Parent Resp. Br. 43 (citation omitted). Representative standing doctrine allows an "association … to invoke a court's remedial powers on behalf of its members." *Affiliated Constr. Trades Found. v. W. Va. Dep't of Transp.*, 227 W. Va. 653, 658, 713 S.E.2d 809, 814 (2011). Looking past the hurdle that Respondents are natural people, the doctrine does not excuse them from showing how the Act presents a "concrete and particularized," "actual or imminent" harm to their children. *Men & Women*, 229 W. Va. at 61, 725 S.E.2d at 762. It is no shortcut for them to traditional standing.

**2.** Neither exception to traditional standing Respondents invoke affords jurisdiction, either.

*First*, this case does not fit West Virginia's narrow taxpayer-standing mold. Respondents' expansive view of the doctrine gets federal and state law wrong. It would also give anyone "who

pay[s] state and local taxes" standing to challenge any program that expends state funds—personal stake in the matter or not. Parent Resp. Br. 54. The Court should hold to its more demanding line.

Respondents begin by describing a federal taxpayer-standing test, and an outdated and overbroad one at that. Parent Resp. Br. 54. *Flast v. Cohen*, 392 U.S. 83 (1968), is an outlier; Respondents have nothing to say about the more recent cases that explain its extremely limited role in modern federal practice. State Br. 13. Spot Respondents that *Flast*'s language may appear to allow standing based on no more than a connection "between the plaintiffs' taxpayer status" and the alleged constitutional infringement. Parent Resp. Br. 54. Yet "in the [now more than] four decades since its creation, the *Flast* exception has largely been confined to its facts"—including limiting it to "suits alleging violations of … the Establishment Clause." *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 609-10 (2007).

More importantly, this Court has never applied or even referred to *Flast*'s taxpayer-standing formulation. In the rare cases when taxpayer standing applied, our courts used a two-part analysis: The challenged statute must "affect[] the administration of justice" and "require[] the payment of public funds." Syl. pt. 1, *State ex rel. Goodwin v. Cook*, 162 W. Va. 161, 248 S.E.2d 602 (1978); *contra* Parent Resp. Br. 55 ("No case cited by State-Petitioners" explains that "administration of justice" is the doctrine's "linchpin."). Yet even though the doctrine began from the idea that taxpayers have "inherent interest in the proper administration of justice," syl. pt. 1, *Howard v. Ferguson*, 116 W. Va. 362, 180 S.E. 529 (1935), Respondents urge the Court to toss that first half of the analysis. Parent Resp. Br. 55. It should not.

The only cases Respondents find that do not involve the "administration of justice" limit are three mandamus actions nearing a half-century old. None provides much analysis to go on; they declare that the "citizen and taxpayer" had standing to sue. Syl. pt. 1, *State ex rel. Brotherton*

*v. Moore*, 159 W. Va. 934, 230 S.E.2d 638 (1976). All three, though, are clear that the taxpayer had standing to sue *in mandamus*. *Id.* (describing the "right to maintain a mandamus proceeding"); *Delardas v. Cty. Court of Monongalia Cty.*, 155 W. Va. 776, 779, 186 S.E.2d 847, 850 (1972) (same); *Campbell v. Kelly*, 157 W. Va. 453, 455, 202 S.E.2d 369, 371-72 (1974) (proceeding "in mandamus"). Respondents recognize the gap between mandamus cases and their challenge, but they claim "no distinction" exists and move on. Parent Resp. Br. 55. Yet mandamus actions are not typical appeals. They seek "to enforce an established right" and compel a defendant to fulfill his or her "corresponding imperative duty created or imposed by law." *State ex rel. Potter v. Off. of Disciplinary Counsel of State*, 226 W. Va. 1, 4, 697 S.E.2d 37, 40 (2010) (cleaned up). Withholding legally required action often creates direct and tangible harm. And cases involving "a clear legal right" and a corresponding "legal duty" closely connect to the proper administration of justice. *State ex rel. Ball v. Cummings*, 208 W. Va. 393, 398, 540 S.E.2d 917, 922 (1999). So the writ's distinctiveness explains why the Court may have applied a less demanding standing test before. Even assuming the Court would apply the same analysis to a mandamus action today, Respondents give no cases or other analysis explaining why it should do the same outside that context.

And if Respondents were right that taxpayer status is already sufficient, the doctrine would be a popular exception to traditional standing law. But in the past twenty years the Court has done no more than note its existence a couple times. State Br. 13. Respondents dig up another example, but it is even more attenuated: The Court mentioned *federal* courts' refusal under Article III to afford *state* taxpayers standing "by virtue of their status as taxpayers." Parent Resp. Br. 55 n.44 (quoting *Jefferson Cty. Found., Inc.*, 875 S.E.2d at 171 n.18). The fact that "taxpayer standing is rarely applied" does not mean it can never be, Parent Resp. Br. 54, but it does challenge

Respondents' view. After all, the scarcity of taxpayer standing cases makes little sense if the doctrine is as versatile as Respondents make it out. And Respondents cannot answer the concern that if this Court *did* loosen the reins going forward, any taxpayer in the State could challenge any program that uses public dollars. State Br. 13. The Court should not endorse an exception that would swallow the concrete and particularized injury rule.

*Second*, public-interest standing is unavailable. The Court has never endorsed this exception to the ordinary standing rules and should not start now. With only one page of discussion on an issue that Respondents raise for the first time on appeal and treat as already-settled law, this case is a poor one for rewriting jurisdictional rules on the fly.

Respondents' Trojan Horse strategy would slip public interest standing into the Court's precedents because two cases "recognize[d] public interest standing for litigants challenging legislative expenditures or appropriations of significant public importance." Parent Resp. Br. 56. Those two cases (the same recent cases noting taxpayer standing) are the only times the Court has mentioned it, and in both it did no more than that. *Affiliated Constr.*, 227 W. Va. at 657 n.8, 713 S.E.2d at 813 n.8 ("not[ing] that there are other concepts of standing, *e.g.*, public interest standing"); *Kanawha Cty. Pub. Libr. Bd.*, 231 W. Va. at 397, 745 S.E.2d at 435 (quoting same language). To even state the content of the doctrine's test, Respondents must resort to Nevada law. Parent Resp. Br. 56 (citing *Schwartz*, 382 P.3d at 894-95).

In passingly referring to the doctrine, the Court did not authorize it wholesale. *Affiliated Construction* also noted *jus tertii* standing in the same footnote, but it was another two years before the Court adopted that doctrine. Syl. pt. 5, *Kanawha Cty. Pub. Libr. Bd.*, *supra*. And when it did, the Court evaluated how it operated in other jurisdictions and considered whether the case for it was weighty enough to justify relaxing standing's demanding requirements. *Id.* at 397-98, 745

S.E.2d at 435-36. Respondents provide no tools for that analysis here. Even the out-of-state cases they invoke that do recognize the doctrine "stress" that it is a "narrow" "exception to the general standing requirements." *Schwartz*, 382 P.3d at 894. Respondents do not explain why West Virginia should adopt a similar "exception to the general requirement that a plaintiff must have an interest … different from that of the general public." *Meredith*, 984 N.E.2d at 1217 n.4. Given that West Virginia already recognizes a *Pauley* cause of action—a comfortable fit for traditional standing—the Court has even less need to make new law.

**B. Respondents' Claims Are Not Ripe.**

Like the circuit court, Respondents think a claim is ripe as soon as the law it challenges goes into effect. *See* Parent Resp. Br. 57. But lower courts should not "adjudicate rights which are merely contingent or dependent upon contingent events." *State Farm Mut. Auto. Ins. Co. v. Schatken*, 230 W. Va. 201, 210, 737 S.E.2d 229, 238 (2012). And they must be especially careful not to "prematurely reach ultimate constitutional issues." *Wampler Foods, Inc. v. Workers' Comp. Div.*, 216 W. Va. 129, 146, 602 S.E.2d 805, 822 (2004). So it cannot be that any suit filed after a law's effective date automatically qualifies as ripe.

Respondents' argument to the contrary confuses the law they challenge with the facts that gives rise to their claims. A law's *consequence* is important for ripeness. *See*, *e.g.*, *Harris v. Quinn*, 573 U.S. 616, 657 n.30 (2014) (holding claims premised on compulsory union dues were not ripe, even though law requiring them was in effect, when the plaintiffs were not yet union members and thus not yet facing the prospect of payment); *Hodel v. Indiana*, 452 U.S. 314, 335-36 (1981) (holding miners' challenge to civil penalty provisions was not ripe where miners had "made no showing that they were ever assessed civil penalties under the Act, much less that the [challenged] requirement was ever applied to them or caused them any injury"). The harms Respondents allege—student withdrawals from public schools and assumedly concomitant

funding declines—did not happen on the Act's passage, have not happened yet, and are unlikely to happen for another two years, if at all.

For this second reason then, too, the circuit court should have dismissed for lack of subject-matter jurisdiction.

## II. The Act Aligns With Our Constitution's Education Provisions.

Beyond failing to show how the Court can hear this case, Respondents also cannot explain why the Constitution requires a facial injunction. Start again with first principles. Unlike the federal Constitution, ours gives the Legislature "unlimited power" unless specifically restricted. *Gissy v. Bd. of Educ. of Freeman's Creek Dist.*, 105 W. Va. 429, 143 S.E. 111, 113 (1928). And for "separation of powers" reasons, the Court does not presume unconstitutionality. Syl. pt. 1, *Lewis v. Canaan Valley Resorts, Inc.*, 185 W. Va. 684, 408 S.E.2d 634 (1991). Quite the opposite: "[N]egation of legislative power must appear beyond reasonable doubt." *State ex rel. Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 747, 143 S.E.2d 351, 357 (1965). Yet Respondents raise policy concerns and turn an express mandate to do one thing—the critical duty to provide thorough and efficient public schools—into a command not to do anything else in the educational sphere. The Court should not join this attempt to line edit Article XII.

### A. The Constitution Does Not Ban All Non-Public Education Programs.

Respondents insist that the Act "is unconstitutional regardless of [public-school] funding levels." Parent Resp. Br. 8. In other words, something in the nature of the Act, and not simply its effect on public schools, offends the Constitution. But the words written in the constitutional text make it hard to see what that might be. Respondents strain after negative inferences, but they fall too short of "beyond reasonable doubt" to shrink the Legislature's plenary powers.

**1.** Respondents view Article XII, Section 1 as a narrow grant of education-related authority, confining the Legislature to the sole task of supporting public schools. The text is not

so restrictive. By saying the Legislature "shall" act, Section 1 makes the duty mandatory. It does not say that the Legislature may fund "only" public schools, nor that it shall provide for "all" the State's educational needs through the free schools alone. Courts "construe, interpret and apply" the Constitution, but they "may not add to, distort or ignore the plain mandates thereof." *Fields v. Mellinger*, 244 W. Va. 126, 129, 851 S.E.2d 789, 792 (2020) (cleaned up). Here, that means holding the Legislature to its duty but without distending the text to say that it can't do more.

The State's construction is not novel. When "the Constitution commanded the Legislature to establish a system of free schools," it imposed "no directions or restrictions whatever … in that mandate." *Rogers v. Jones*, 115 W. Va. 320, 175 S.E. 781, 782 (1934). Traditional district-based public schools are of course a key part of our system, W. VA. CONST. art. XII, § 6, but "[t]hey formed merely a basis upon which to start," *Leonhart v. Bd. of Educ. of Charleston Indep. Sch. Dist.*, 114 W. Va. 9, 170 S.E. 418, 420 (1933). The Legislature "is not prohibited from augmenting … the general system of free schools." *Herold v. McQueen*, 71 W. Va. 43, 75 S.E. 313, 315-16 (1912). In fact, the Constitution obliges it to "foster and encourage, moral, intellectual, scientific and agricultural improvement" *apart* from the "system of free schools." W. VA. CONST. art. XII, § 12. Respondents do not know what to make of that constitutional provision. The answer is that it "confers a sweeping power on the legislature to promote knowledge"—though the Legislature would have the same "power even without section 12's express delegation." ROBERT M. BASTRESS, JR., THE WEST VIRGINIA STATE CONSTITUTION 335 (2d ed. 2016).

Left without a textual hook, Respondents try other angles. For one, they appeal to the State's founding with misleadingly ellipsed statements from the constitutional convention. *Compare* Parent Resp. Br. 18 ("[a]ll money … shall") *with* source cited *id.* at 18 n.13 ("[a]ll money being proceeds of forfeited waste and unappropriated lands deposited in the treasury and not

reclaimed by the former owner as aforesaid, shall"). For another, they stretch modest principles into far-reaching holdings. *See*, *e.g.*, *id.* at 18 (insisting that the Legislature can "allocate" public funds "for [public] educational purpose[s] *only*" just because the Court saw Article XII, Section 1 as an effort "broadly to overcome all hostility to quality public education" (cleaned up)).

Respondents also dress up policy arguments as constitutional truth, objecting that the Act siphons off $120 million in "public dollars that could be used for public education." Parent Resp. Br. 26. The number's validity aside, Respondents concede that one could levy this criticism against any spending program—we could always spend more on public schools. *Id.* And no one here disputes that public education is "the first constitutional priority." *Id.* at 26-27 (quoting *W. Va. Educ. Ass'n v. Legislature of State of W. Va.*, 179 W. Va. 381, 382, 369 S.E.2d 454, 455 (1988)); BOE Br. 2-4. That principle just does not mean the Legislature cannot fund second and third priorities, too. *See Cooper v. Gwinn*, 171 W. Va. 245, 256, 298 S.E.2d 781, 792 (1981) ("luxuries of life may be addressed" after constitutional essentials). Respondents may believe that "extra" money is best spent on public education, but that is not the Constitution's demand. So long as the Legislature maintains constitutionally adequate free schools, it has leeway to supplement other educational interests. The Legislature's "policy decisions, under our constitutional framework, are its own." *State ex rel. Beirne v. Smith*, 214 W. Va. 771, 778-79, 591 S.E.2d 329, 336-37 (2003).

Finally, Respondents try to analogize a couple out-of-state decisions and distinguish the rest. Parent Resp. Br. 34-36; BOE Br. 17-18. But as others have noted, *Bush v. Holmes*, *supra*, construed a state constitution *without* the dual duties in our Article XII, Sections 1 and 12; anyway, the same court has since limited *Bush* to its facts, and others have found its analysis lacking. *See Amici Curiae* Br. of Ams. for Prosperity Found. 13-14; Parent Pet'rs' Br. 19-20. For its part,

*Schwartz v. Lopez* enjoined a similar law only because it did not come with a separate appropriation—it upheld educational savings accounts under the Nevada Constitution's dual-duty education provisions. 382 P.3d at 896. No *Schwartz* problem arises here because the Legislature gave the Act its own appropriation. And as to the decisions against them, Respondents emphasize immaterial facts like the programs' size. Parent Resp. Br. 35. Yet the analysis in most of these rulings turns on the same commonsense notion Respondents ask this Court to ignore: A legislature's duty to public schools does not strip its discretion to fund other educational programs as well. *Amici Curiae* Br. of Ams. for Prosperity Found. 9-11 (collecting cases).

In the end, the Constitution's text prevails. The courts' duty "is merely to carry out the provisions of the plain language stated in the constitution." *Stepp v. Cottrell on behalf of Est. of Cottrell*, 874 S.E.2d 700, 704 (W. Va. 2022). Article XII's plain language says that the Legislature must provide the "legally recognized elements" of a thorough and efficient system of public schools. *Randolph Cty. Bd. of Educ. v. Adams*, 196 W. Va. 9, 17, 467 S.E.2d 150, 158 (1995). It does not also say the Legislature can do nothing more to advance the State's educational needs.

**2.** With the words not cooperating, Respondents continue to push the negative implication *expressio unius* canon as a way to presume constitutional limits the drafters failed to write down. This further campaign to find meaning without text is wanting, too.

To their credit, Respondents leave no doubt about their view of the canon: "Where the Constitution *addresses* a topic," it "limits the Legislature that otherwise would have unlimited power to act." Parent Resp. Br. 19 (emphasis added). That broad understanding does not bespeak the "great caution" the canon's use demands. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107 (2012). More importantly, it conflicts with both the canon's ordinary meaning under the law and this Court's experience applying it.

First, the law. Courts decline to apply *expressio unius* where "language suggesting exclusiveness is missing," the provision does not include "a series of terms from which an omission bespeaks a negative implication," and "there is no apparent stopping point" to the doctrine's use. *Chevron USA Inc. v. Echazabal*, 536 U.S. 73, 81-83 (2002). These cues rebut the canon's assumption that drafters "considered the unnamed possibility and meant to say no to it." *Marx v. Gen. Rev. Corp.*, 568 U.S. 371, 381 (2013). And each cue is present here. Language of exclusiveness is nowhere in sight; Article XII does not say, for example, that the Legislature shall make no appropriation or create no program beyond the free schools. *Contrast with* W. VA. CONST. art. XII, § 11 ("No appropriation shall hereafter be made to any state normal school …."); *id.* § 10 ("No independent free school district, or organization shall hereafter be created …."). No series of terms—"two or more terms or things that should be understood to go hand in hand"—appears either. *Eschazabal*, 536 U.S. at 81; *see also*, *e.g.*, *Christopher J. v. Ames*, 241 W. Va. 822, 832, 828 S.E.2d 884, 894 (2019) (explaining that the canon excludes "items not included in the list of elements"). And no textually apparent limiting principle applies. If Respondents are right, every education-related program outside public-school funding is unconstitutional—West Virginia University would be surprised to find itself in question. And Respondents fail to explain how the many other programs that currently benefit non-public K-12 schools escape their standard's teeth—they punt the fallout of their constitutional theory to another day. Parent Resp. Br. 33 ("It is outside the scope of this matter whether any of these statutes are Constitutional.").

Second, experience. Respondents have little to say against the cases the State already described that reject expansive *expressio unius* theories. State Br. 20-21. More are easy to find. In one of its earliest cases, this Court rejected an argument that the Legislature could not require officeholders to take one kind of oath because the Constitution required another one, too. *Ex parte*

*Stratton*, 1 W. Va. 305, 306-07 (1866). "[R]emote and obscure implication" was not enough to limit the Legislature's authority. *Id.* Since then, the Court has found the canon an ill fit for limiting legislative discretion. *See*, *e.g.*, *State ex rel. Metz v. Bailey*, 152 W. Va. 53, 56-57, 159 S.E.2d 673, 675 (1968) (finding "no inhibition" against superimposing judicial circuits on each other, despite comprehensive constitutional provisions regulating creation of circuit courts); *State ex rel. Farley v. Brown*, 151 W. Va. 887, 895, 157 S.E.2d 850, 854-55 (1967) (finding county courts could establish airports at Legislature's direction in the absence of "prohibitive [constitutional] language"). The reason is simple: Negative implication does not defeat the rule that the Legislature "has the authority to enact any measure not inhibited" by the Constitution. Syl. pt. 1, *Foster v. Cooper*, 155 W. Va. 619, 186 S.E.2d 837 (1972). Lack of "express inhibition" means the Legislature's "plenary power" holds sway. *Harbert v. Harrison Cty. Ct.*, 129 W. Va. 54, 66, 39 S.E.2d 177, 187 (1946).

None of Respondents' authority changes that. *State v. Gilman* explained that constitutional *mention* of a power affects the permitted *methods* to exercise it. Nothing is controversial about saying the Legislature must honor the "purpose and effect" of a "restrict[ion] and limit[ation]" on power that the Constitution "expressly grant[s]." 33 W. Va. 146, 10 S.E. 283, 285 (1889). What *is* controversial is Respondents' attempt to extend this logic to engulf exercising legislative power in related—but separate—areas. After all, *Gilman* limited the Legislature's discretion over alcohol regulation; it did not touch the Legislature's prerogative to regulate drugs. But here, Respondents read into a duty to fund public schools a moratorium on funding any other educational options. That approach goes too far. Refuting it was the whole point of *State v. King*, decided just a few years after *Gilman*: Courts "shall not defy legislative will on mere implication"; an act must be "plainly, palpably, contra the Constitution." 64 W. Va. 546, 606-07, 63 S.E. 468, 493 (1908).

Respondents' other cases say much the same. In *Dunham v. Morton*, the Governor could not break ties in elections the Constitution said county voters must decide. 115 W. Va. 310, 175 S.E. 787, 788 (1934). Specifying "one method of selection … operates to the exclusion of all other methods," *id.*, but it does not limit power to craft other election laws. *Downey v. Sims*'s thrust was similar: Because a "precisely stated" grant of power made someone ineligible for appointment to the "same office" he was previously denied, the Legislature could not effectively rewrite the provision to close the door on "other" offices as well. 125 W. Va. 627, 26 S.E.2d 161, 164 (1943).

Nothing about the Act conflicts with the Legislature's duty to provide a thorough and efficient system of public schools (or to use certain funding mechanisms to do so, *see infra* Part III.A). Supporting more educational choice neither alters the content of that duty nor tinkers with the method the Constitution set for fulfilling it. Respondents do not draw fair meaning from omitted words as much as insert words into the text that aren't there. The Court should not cross out the entire subject area of non-public education based on implication alone.

### B. The Way The Legislature Exercised Its Discretion Through the Act Does Not Infringe the Constitution.

Not only does the Constitution allow non-public education spending programs generally, but this specific statute does not infringe the Article XII right, either.

Respondents are no longer on the same page on what this case is about. Parent Respondents insist that "this is *not* a funding case." Parent Resp. Br. 39. The Board maintains it is and always was—it faults Petitioners for supposedly "distract[ing] the Court from the loss of funding" by discussing school districts' "fixed costs." BOE Br. 11. The Board has the better of the argument, and the difference matters because Respondents must discharge a heavy evidentiary burden to show that the Act denies or infringes the constitutional right by depleting public schools' resources.

They did not below, and they scarcely try to make up that lack here. And Parent Respondents' "non-funding" claim gets the nature of the constitutional right wrong. It fails, too.

**1.** Respondents must do more than allege a funding decrease to get strict scrutiny for the Act. They must show that the drop is big enough to fall below the constitutional floor. And they must show that—rather than following the Court-endorsed method of challenging insufficient funding allocations *directly*—the only solution is to strike down the Act on its face because it contributes to decreased public-school enrollment. State Br. 22-32.

Respondents barely mention the elements, much less build them out. They address the standard once, arguing that the State bears an "'affirmative burden' … to demonstrate the necessity of diminishing expenditures for public education." Parent Resp. Br. 40 (citing *State ex rel. Bd. of Educ. of Kanawha Cty. v. Rockefeller*, 167 W. Va. 72, 281 S.E.2d 131 (1981)). They also suggest that the Court "rejected" the idea that the right to education is respected so long as funding does not fall below the constitutional floor. *Id.* at 39 (citing *Kanawha Cty. Pub. Libr. Bd.*, 231 W. Va. 386). On the first point, *Rockefeller* involved a direct challenge to an unexplained, across-the-board school-funding cut. *See* 167 W. Va. 72, 78, 281 S.E.2d 131, 135 (1981). It did not hold that strict scrutiny applies outside of indiscriminate attacks on school budgets, much less to every law that may affect the (current) funding-formula's inputs, no matter how large or small a funding change may be the next time the formula is run. On the second, the *Kanawha Library* case explains that funding public schools above the constitutional minimum is not necessarily a defense to an equal-protection claim. *See* 231 W. Va. at 404, 745 S.E.2d at 442. Respondents, however, did not file an equal-protection case.

So Respondents cannot offload their burden to show funding loss "to such an extent that a constitutionally mandated function could not be performed." *State ex rel. W. Va. Bd. of Educ. v.*

*Gainer*, 192 W. Va. 417, 420 n.1, 252 S.E.2d 733, 736 n.1 (1994). They offer surmise and speculation about public-school enrollment, but they lack evidence or hard numbers on actual funding loss and its consequences. Speculation is not enough to discharge Respondents' burden to show unconstitutionality beyond reasonable doubt.

Respondents' primary theory is that the Act will encourage decreased public-school enrollment and, with it, funding tied to per-student enrollment; that loss will in turn challenge "teacher resources and professional development programs which are critical to improving instruction." BOE Br. 16 (citing JA Vol. 1, at 8-10); *see also id.* at 2-4, 9-11. Professional resources are important, but not every canceled training session reaches constitutional heights. At some point budget cuts can stress resources enough to constitutionally compromise schools' abilities to offer "supportive services" like these. *Id.* at 10 (quoting *Pauley v. Kelly*, 162 W. Va. 672, 706, 255 S.E.2d 859, 877 (1979)). The record, though, does not show how Act-related funding loss reaches that level. True, the Board discussed how many students applied for Hope Scholarship in a few counties. *Id.* at 13-14. But without knowing a county's total budget, the effect of fixed and variable costs on funding calculations, or the per-student costs of educating the students who remain—"distractions," says the Board, *id.* at 11—stating *how much* a county might stand to lose is not enough to answer the relevant question. Just as a drop in tax revenues in a given year does not prove that the State will run a deficit, showing that counties will likely lose some funds does not prove that loss is unconstitutional. Measuring how student attrition affects counties' funding and the quality of education they can provide in response may be complex. But parties lodging a facial constitutional challenge assume that heavy burden.

Respondents' other objections have even weaker evidentiary footing. *First*, the Act does not "decrease[] the public funds available for public schools." Parent Resp. Br. 37-38. The

educational-funding pie is not fixed—a dollar spent on Hope Scholarships does not mean the Legislature cannot appropriate other dollars to public schools. When assessing even direct school-budget cuts, courts consider "supplement[s] from other sources" and unspent "fiscal appropriations." *Rockefeller*, 167 W. Va. at 80-81, 281 S.E.2d at 136. *Second*, even if Respondents were right that more-costly-to-educate students might end up siloed in public schools, Parent Resp. Br. 27-28, they still would have to show that funding loss will be great enough that affected districts could not "provide reasonable basic educational opportunities and services" under more concentrated conditions. *Cathe A. v. Doddridge Cty. Bd. of Educ.*, 200 W. Va. 521, 530, 490 S.E.2d 340, 349 (1997). *Third*, the Legislature's purported motive—passing a law "to directly … incentiviz[e] the fleeing from public education," BOE Br. 15 (emphasis omitted)—does not excuse Respondents' evidentiary burden. "Courts have nothing to do with [a law's] motives," *State ex rel. Mountain Fuel Co. v. Trent*, 138 W. Va. 737, 741, 77 S.E.2d 608, 611 (1953); they are concerned with the law's outcomes. The Court has already rejected an argument that tuition subsidies for private high schools "induced hurtful activity and competiti[on]" against public schools. *Gissy*, 105 W. Va. 429, 143 S.E. at 113. The same "incentives" argument should fail here, too.

Finally, Respondents have still not offered any authority for their "collateral-consequences theory for invalidating new spending programs." State Br. 28. They likewise never explain why the *Pauley* framework is insufficient to resolve their claim that the Legislature will not fund public schools at a constitutional level once the Act goes into effect. The also do not give a workable limiting principle to cabin their theory to education laws rather than open a new avenue of attack on any program that uses state funds. *Id.* at 29-30. And they do not explain why, even if the Court overlooks their traceability problem, striking down the Act would be the right remedy. When the

Governor and the Legislature *conceded* that an education budget was unconstitutional, this Court did not exercise the sort of veto power Respondents ask for here: It returned the matter to the Legislature to develop a budget that would satisfy its constitutional obligations. *W. Va. Educ. Ass'n*, 179 W. Va. at 383, 369 S.E.2d at 456. A restrained approach is even more appropriate here because several legislative options (existing or new) short of repealing the Act could make potential funding concerns evaporate. The Board agrees that smaller counties' funding is safe against enrollment drops already, BOE Br. 14, though it ignores the ongoing mechanism to adjust this safety valve to account for new circumstances, *see* W. VA. CODE §§ 18-9A-25, 18-31-6. And of course, the Legislature can adjust or supplement the funding metric itself whenever needed.

**2.** While repeatedly attacking the Act for its effect on public-school funding, *see*, *e.g.*, Parent Resp. Br. 26, the Parent Respondents simultaneously insist that "this is *not* a funding case," *id.*at 39; *see also id.* at 5, 8. But if it is not, what is it?

It takes some careful reading, but the Parent Respondents' fallback argument appears to be this: Any time "public funds are involved" in a child's schooling, the State takes on a host of "[c]onstitutional obligations." Parent Resp. Br. 25 n.19. If public funds are implicated and a parent voluntarily elects not to send their child to a public school, then Parent Respondents feel that the State keeps a full "duty" to "provide for a full education" for that *non*-public-school student. *Id.* at 1. On this reading, the Constitution demands that "[t]he education West Virginia's children receive must be 'thorough and efficient,'" even if children leave the public system for private schools or individualized options. *Id.* at 28, 30. Respondents believe that the Legislature can fulfill this duty only by providing full-freight financial aid, "educational rigor and academic standards" to Respondents' liking, "accountability" and anti-fraud mechanisms, and specific "protections against discrimination." *Id.* at 1-2; *see also id.* at 23-25, 28-30, 40, 48-50.

The Constitution does not sweep so far. The text—again—is the starting line. Article XII, Section 1 compels the Legislature to "provide … for" a "thorough and efficient system of free schools." The reference to "free schools" is enough to show that Respondents overplay the text. "Provide" confirms it. The verb has a "plain and ordinary meaning": "to make available for use." *Moulton v. Simon*, 883 N.W.2d 819, 825 (Minn. 2016); *see also*, *e.g.*, *Gen. Motors Corp. v. Auto. Servs.*, No. 275702, 2008 WL 3155965, at *5 (Mich. Ct. App. Aug. 7, 2008) ("[S]upply" and "provide" are, by definition, nearly interchangeable."). So the text says that the Legislature fulfills the constitutional duty when it makes an appropriate system of free schools *available for use*, even if a particular student does not use it. And indeed, this Court has described the Legislature's obligation in that way. *See*, *e.g.*, *Pauley v. Bailey*, 174 W. Va. 167, 170, 324 S.E.2d 128, 130 (1984) ("[T]he legislature has the constitutional duty to develop a high quality Statewide education system." (cleaned up)); *State ex rel. Brotherton v. Blankenship*, 157 W. Va. 100, 125, 207 S.E.2d 421, 436 (1973) ("[T]his section requiring the establishment and maintenance of free schools is an absolute and mandatory duty on the part of the Legislature.").

Education is "unquestionably" a "fundamental right." *Kanawha Cty. Pub. Libr. Bd.*, 231 W. Va. at 402, 745 S.E.2d at 440. And the Legislature has valid interests in education for all West Virginia school kids that can justify some regulation, like compulsory education laws, outside the public schools' walls. When it comes to laws for non-public schools, however, the Legislature acts under its discretionary, plenary power, not by constitutional command. Families that choose not to use the constitutionally available free schools system do not take the Article XII, Section 1 right with them.

Were it otherwise, Article XII, Section 1 would force the Legislature to assume an expansive constitutional mandate: policing the educational experience of every child in West

Virginia, including those in homeschools, private schools, tutoring programs, and beyond. *See* Parent Resp. Br. 30 (describing the "constitutional mandate to provide the children of West Virginia with a quality education"). In other words, Respondents' rule would mean that the State becomes a steward for a child's education once a single state dollar goes towards his or her schooling—in a public school or not. But nothing in the Constitution supports that broad and intrusive state reach. Rather than saying that the Legislature must layer on government requirements wherever it spends state education funds, the Constitution's "central mandate" requires "equal and quality educational *opportunities*," through the public schools, "for all West Virginians." *Randolph Cty. Bd. of Educ.*, 196 W. Va. at 14, 467 S.E.2d at 155 (emphasis added). The Act gives families a choice; it removes none of those opportunities. And though Respondents disagree with the standards and oversight measures the Legislature wrote into the Act, the Constitution does not place the same duty on the Legislature when families choose a path for their children outside the constitutionally available public schools.

* * * *

Respondents' theory of the case asks the Court to write new constitutional language to invalidate a law because of concerns based mostly on disagreement with the Act's "wisdom, desirability, and fairness." Syl. pt. 1, *Morrisey v. W. Va. AFL-CIO*, 239 W. Va. 633, 804 S.E.2d 883 (2017). These questions are for the "ballot box." *Id.* As for the Constitution, the Act is consistent with the Legislature's constitutional duties *and* its constitutional discretion.

## III. The Act Complies With Our Constitution's Other Provisions.

Respondents invoke several other constitutional requirements beyond Article XII, Section 1. The Hope Scholarship is consistent with them, too.

### A. The Constitution Does Not Contain A "Public School Funding Only" Limit On General Revenue.

When it comes to the School Fund, the parties agree that the fund's interest "*shall*" be used for the State's "free schools," and for the free schools *only*—as the Constitution puts it, for "no other purpose whatever." W. VA. CONST. art. XII, § 4 (emphasis added); *see also* State Br. 32, Parent Resp. Br. 41. And because Respondents agree that the Act's funding mechanisms are separate from the School Fund, *see* State Br. 32-33, they effectively concede that the Act does not violate Article XII, Section 4.

So the daylight between the parties is whether Article X, Section 5 and Article XII, Section 5 say that when the Legislature spends on education, even non-School Fund revenues must be used for public schools only. They don't.

Respondents argue first that the text of these provisions "is also plain." Parent Resp. Br. 41. Yet the text they quote says that the Legislature "shall" spend and tax to support the State's public schools. *Id.* at 41-42. To reach their broader conclusion that "in the realm of education" writ large, public funds "go to public schools and 'to no other purpose whatever,'" Respondents must borrow the School Fund provision's words. *Id.* at 44 (quoting W. VA. CONST. art. XII, § 4). When the Constitution describes the Legislature's general taxing and spending powers, neither the "no other purpose whatever" language nor anything like it is anywhere to be found.

Respondents also hope the Court will minimize some words that are on the page. Article XII, Section 5 tells the Legislature to fund public schools with "the net proceeds of all forfeitures and fines," but the next clause refers simply to "general taxation" revenue—not "all" of it. Similarly, it is true that taxing power extends to the "support of free schools." W. VA. CONST. art. X, § 5. But even if Scalia and Garner's advice on reading a "listing of particulars" narrowly fits here, Parent Resp. Br. 42, Respondents ignore that paying the "annual estimated expenses of the

State"—like an annual appropriation for a spending program—is one of those particulars. W. VA. CONST. art. X, § 5; State Br. 34.

So next Respondents urge the Court to look past the missing textual prohibition on funding non-public education. But the Court's work is done when "a constitutional provision is plain and unambiguous." *Brotherton*, 157 W. Va. at 108, 207 S.E.2d at 427. In any event, looking for support from implicit constitutional hostility fails, too.

*First*, Respondents are wrong that "it is not the fund that matters." Parent Resp. Br. 44. Article XII, Section 4 speaks to the "permanent and invested school fund," not all sources of state revenue. And again, the provision's "no other purpose whatever" language is missing elsewhere. *Cf. Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). So it *is* money's "presence in the School Fund that makes the money sacrosanct"; the Constitution's spending limits apply to the interest from that account, not all "taxation kept in the General Revenue Fund." Parent Resp. Br. 44. Put another way, Respondents are right that "it is the directives of the Constitution" that matter. *Id.* The directives are just not on their side.

*Second*, "shall" cannot carry the weight Respondents pile on. Of course "shall" "mean[s] something," Parent Resp. Br. 41—the state budget contains plenty of line items the Legislature can slash or take out as needs and priorities change, but public-school funding is not one of them. The Legislature's taxing power "shall extend to … the support of free schools," W. VA. CONST. art. X, § 5, and the Legislature must use revenue it gets from this "general taxation" power to "provide for the support of free schools," *id.* art. XII, § 5. So "shall" is mandatory. The sticking point for Respondents is that it is not *exclusive*.

Respondents argue that West Virginia is different from States like North Carolina that say that "a portion of the state's revenue *may* be set apart" for public schools. Parents Resp. Br. 44 (citation omitted). But they overlook that, as here, that set-aside portion "shall be faithfully appropriated and used exclusively" for that purpose. N.C. CONST. art. IX, § 6. Like our School Fund then, once North Carolina designates funds for public education the money must be used to that end. And rather than read those provisions to bar funding non-public education, the Supreme Court of North Carolina held that it is a legislative decision "how much of the revenue of the State will be appropriated" to public schools above the constitutional floor. *Hart v. State*, 774 S.E.2d 281, 289 (N.C. 2015). North Carolina's General Assembly is thus free to "appropriat[e] general revenue to support other educational initiatives." *Id.* So too here: Article XII, Sections 1 and 5 work together, "requir[ing] the legislature to provide for a thorough and efficient system of free schools," but "with discretion vested in the legislature as to an equitable application of state funds." *Berry v. Fox*, 114 W. Va. 513, 172 S.E. 896, 902 (1934). Similar constitutional structures support similar legislative flexibility.

*Third*, it is inaccurate and irrelevant that "in the last 150 years, no one has taken the position that the State can raise and spend public funds" to support non-public education. Parent Resp. Br. 43. Respondents cite six statutes that have long allowed public funds to supplement non-public school kids' educational needs. *Id.* at 43. They argue (while reserving the right to challenge these statutes as unconstitutional, *id.* at 43 n.37) that they are different from the Act because public schools provide the same services to their students. The distinction does not hold up: Bussing students to their private schools subsidizes the transportation costs of private education. W. VA. CODE § 18-5-13(f)(1)(A). Giving a textbook to a private school student, *id.* § 18-5-21B, or reimbursing their parents for it instead, *id.* § 18-31-7(a)(10), are not functionally different. And

even if Respondents were right that extending public funds to non-public education is a new concept, the Constitution does not apply a use-it-or-lose-it caveat to legislative power. If the Constitution does not prohibit the Legislature's methods "beyond reasonable doubt," syl. pt. 1, *Gainer*, *supra*, the Legislature can innovate within its plenary powers as circumstances and priorities change.

*Fourth*, the Court should reject the idea that the constitutional provisions add up collectively to something none says on its own. Parents Resp. Br. 42 & n.34. Fair enough, sometimes fixating on "any single phrase" can lead to far-fetched constitutional constructions. *Id.* (quoting *Heydenfeldt v. Daney Gold & Silver Mining Co.*, 93 US. 634, 638 (1876)). But that truism does not mean the Court should turn away from phrases that do not help a party and write in ones that do. Respondents' own support explains that the Court must still look at "the words"—just all of them, and in context. *Heydenfeldt*, 93 U.S. at 638. This constitutional discipline is particularly important when evaluating a statute, which carries a strong presumption of constitutionality. Respondents have little to say about that aspect of blackletter law.

Article X, Section 5 and Article XII, Section 5 are best read to make funding public schools mandatory, and they set out the "mandatory manner" to do it. *Brotherton*, 157 W. Va. at 125, 207 S.E.2d at 436. But when that job is done, the Legislature can use the same tools for other ends.

### B. The Act Does Not Touch The Board of Education's Authority Over Public Schools.

The Board challenges its inability to control Hope Scholarship funds as infringing its "authority to supervise the public funding of education in the State." BOE Br. 20. According to the Parent Respondents, no one disputes that "the Constitution squarely places the Board of Education over the public expenditure of funds on K-12 education." Parent Resp. Br. 46. But the Board has authority over the State's public schools, not all public-education dollars.

No one challenges that the Constitution gives the Board "general supervision *of the free schools*." W. VA. CONST. art. XII, § 2 (emphasis added). The Parent Respondents admit it (at 46), but explain away this textual limit because, on their view, no system of publicly funded education can exist other than the free schools, so the framers of our Constitution would have had no reason to specify that the Board's powers reach further. Their only support, however, is *West Virginia Board of Education v. Hechler*, 180 W. Va. 451, 376 S.E.2d 839 (1988). It's a poor choice to go all-in with the circuit court's selective quotation of that case—even after the State pointed them out, State Br. 35, Respondents do not even try to explain away *Hechler*'s multiple references to the Board's supervisory power over public schools, not all education involving public dollars. But ultimately, Respondents' premise—that the Legislature is powerless to support non-public educational initiatives—is wrong. So the conclusion they draw from it—that the Constitution implicitly gives the Board power to supervise more than the State's free schools—is also wrong.

Respondents' non-constitutional arguments fare no better. They rely on West Virginia Code § 18-2-5(a)'s discussion of power to "carry[] into effect the laws and policies of the state relating to education." BOE Br. 19; Parent Resp. Br. 45. They ignore that the same subsection describes this power as part of the Board's "general supervision of the public schools." W. VA. CODE § 18-2-5(a). The provision about rulemaking relating to "[e]ducation of all children of school age," *id.* § 18-2-5(a)(3), also cannot mean "whether they attend a public school or not"—it falls under the same public-school-supervision statutory umbrella. Similarly, in the two statutes Respondents cite for the Board's purported power to issue "regulations governing private schools," Parent Resp. Br. 45, the Legislature set the relevant policies directly—making English the basic language of instruction, W. VA. CODE § 18-2-7, and requiring a year of West Virginia history before eighth grade, *id.* § 18-2-9. Those laws do not give the Board power to second-guess those

policies, much less make policy for non-public educational providers more generally. And finally, Respondents' only non-*Hechler* case puts its focus on supervising public schools right in the syllabus points. Syl. pt. 5, *W. Va. Bd. of Educ. v. Bd. of Educ. of the Cty. of Nicholas*, 239 W. Va. 705, 806 S.E.2d 136 (2017) (describing supervisory power as part of the Board's duty to "ensure the complete executive delivery and maintenance of a thorough and efficient system of free schools" (cleaned up)); syl. pt. 6, *id.* (explaining that "[r]ule-making" "is within the meaning of general supervision of state schools" (cleaned up)).

Thus, there is no support for transforming the Board's authority over the State's public school system into power over all educational initiatives that public funds might touch. So the Act's governance and oversight structures do not "strip[]" any powers the State Board possesses. BOE Br. 20. Nor do Respondents explain why making the Board responsible for adding a line item to its budget request and passing appropriated funds to the Hope Scholarship program crosses constitutional lines. Even the rule Respondents cite about the Board's role in approving accreditation organizations for private schools, Parent Resp. Br. 45, shows that tasking the Board with some duties outside its constitutionally mandated powers is not new.

In short, Respondents make a play for new power, not a plea to keep what the Constitution rightly protects. Because "the state board of education has no supervision over schools other than public schools," *Gissy*, 105 W. Va. 428, 143 S.E. at 112, the Court should reject that play.

**C. The Act Is A General Law.**

Lastly, Respondents continue to say that the Act is a special law. Plaintiffs often make these claims, but they are most often unsuccessful. It is easy to understand why: "Construction as a general law is favored, and the Legislature's determination [to use classifications] will be accepted where the class is rational and not arbitrary or unreasonable." *Gallant v. Cty. Comm'n*

*of Jefferson Cty.*, 212 W. Va. 612, 620, 575 S.E.2d 222, 230 (2002). "Rational" is a low bar. This case is not the exceptional one that justifies pushing the Legislature's determinations aside.

Respondents struggle to identify what "classification" they object to. In various places, they argue that the Act distinguishes between rich and poor, disabled and non-disabled, rural and urban, those who pay for schooling and those who do not, and those covered by anti-discrimination provisions and those who are not. *See* Parent Resp. Br. 48-49. But Respondents raised only the last two of these "classifications" below. *See* JA Vol. 2, at 87-88, 262-63. They forfeited any arguments about the remainder. *See Greaser v. Hinkle*, 245 W. Va. 122, 127, 857 S.E.2d 614, 619 (2021).

Respondents' confusion over who the Act even classifies reflects the chief flaw in their argument: They mistakenly conclude that any disparate *effect* renders the law "special." When it comes to a general-special law dispute, though, our Constitution is concerned with distinctions that the law itself draws. And even then, "[t]he constitutional requirement that a law be general does not imply that it must be uniform in its operation and effect in the full sense of its terms." Syl. pt. 7, *Gallant*, *supra*; *accord Ravitz v. Steurele*, 77 S.W.2d 360, 364 (Ky. 1934) ("The mere fact that [a law's] practical effect is special, or local, does not necessarily bring it within the constitutional provisions against special, or local or class legislation.").

*State ex rel. City of Charleston v. Bosely*, 165 W. Va. 332, 268 S.E.2d 590 (1980), proves that point. The law there fell not because of its "practical[]" effects, Parent Resp. Br. 48, but because it limited who could receive its benefits *by its own terms*, *Bosely*, 165 W. Va. at 340, 268 S.E.2d at 595 (noting the law was limited to "Class I cities"). Yet the only distinction the Act itself draws is between current public-school students (and incoming kindergartners) and all others. While at times suggesting that the Act should have *more* eligibility restrictions, *see* Parent Resp.

Br. 40, Respondents never complain about the line it in fact draws. *See Janasiewicz v. Bd. of Educ. of Kanawha Cty.*, 171 W. Va. 423, 426, 299 S.E.2d 34, 37 (1982) ("Public and parochial school children may rationally be treated differently because they are not similarly situated.").

With no tie to the Act's text, Respondents' special-law objection falls away. Differences in discrimination protections stem from anti-discrimination statutes, not this one. Differences in disabled or lower-income students' application rates derive from personal circumstances or choices, not the Act's criteria. *See Bailey v. Truby*, 174 W. Va. 8, 24, 321 S.E.2d 302, 318 (1984) (finding law was not special where "[i]t applie[d] uniformly to all [those] who wish[ed] to take advantage of its provisions"). And differences among those who elect to receive benefits and those who do not are a natural result of any opt-in law. No court has ever said that this expected variation creates a constitutional problem. *See*, *e.g.*, *Hart v. Warner*, 395 P.3d 861, 866 (Okla. Civ. App. 2017) ("The creation of new 'classes' as a result of a change in the law does not inherently result in a violation."); *L. Sch. Admission Council, Inc. v. California*, 166 Cal. Rptr. 3d 647, 673-74 (Ct. App. 2014) ("[The] inequality which necessarily results … in every selection of persons for regulation does not place the classification within the constitutional prohibition.").

The Hope Scholarship Act is constitutionally sound—in this way, and in all others.

## CONCLUSION

This Court should dissolve the permanent injunction and remand for entry of judgment for Petitioners.[*]

[*] Respondents argue otherwise, Parent Resp. Br. 9 n.6, but there is no preliminary injunction to reverse. As the State explained in its motion to stay, a preliminary injunction merely "preserve[s] the relative positions of the parties until a trial on the merits can be held." *Ne. Nat. Energy LLC v. Pachira Energy LLC*, 243 W. Va. 362, 370, 844 S.E.2d 133, 141 (2020). Because the circuit court's permanent injunction was a final order, *Edlis, Inc. v. Miller*, 132 W. Va. 147, 155, 51 S.E.2d 132, 136 (1948), it mooted any preliminary injunction. The preliminary injunction "merg[ed]" into the permanent one. *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 314 (1999); *see also*, *e.g.*, *W. Platte R-II Sch. Dist. v. Wilson*, 439 F.3d 782, 785 (8th Cir. 2006) (collecting authorities).

Respectfully submitted,

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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**Appeal No. 22-616**

**STATE OF WEST VIRGINIA, et al.,**

**Petitioners,**

**v.**

**TRAVIS BEAVER and WENDY PETERS, et al.,**

**Respondents.**

## CERTIFICATE OF SERVICE

I, Lindsay S. See, do hereby certify that the foregoing Petitioner State of West Virginia's Reply Brief is being served on all counsel of record by email and File & Serve Xpress this 30th day of September 2022.

/s/ Lindsay S. See
Lindsay S. See
*Solicitor General*