No. 22-616

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, et al.,

Petitioners,

v.

TRAVIS BEAVER, et al.,

Respondents.

On Appeal from the Circuit Court of Kanawha County, West Virginia
Case # 22-P-24 & 22-P-26

AMICUS CURIAE BRIEF OF THE WEST VIRGINIA CHRISTIAN EDUCATION ASSOCIATION IN SUPPORT OF PETITIONERS AND REVERSAL

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INTRODUCTION

The enactment of the Hope Scholarship program was a godsend for thousands of West Virginia families seeking to improve their children's educational experience. For the first time, many low-income families would be able to send their children to a school that was aligned with the tenets of their faith. The circuit court's injunction irreparably harms those families—and many schools, including WVCEA members institutions—that had planned for and reasonably relied on the availability of Hope Scholarship funds.

Families who were relying on the scholarship suddenly faced an unexpected and significant expense. Schools that had made hiring decisions and other expenditures (such as purchasing new textbooks) accounting for the influx of new students found themselves facing significant budget shortfalls. These hardships were compounded by the timing of the circuit court's action—the injunction was entered less than two months before the start of the 2022-23 school year. Both families and schools were forced to make difficult choices under time pressure, amid the haze of legal uncertainty about the future of the Hope Scholarship program.

These harms should not be inflicted on West Virginia schools and families. The circuit court disregarded well-settled principles of West Virginia law when it deemed the Hope Scholarship program unconstitutional. Absent a specific restriction set forth in the text of the West Virginia Constitution, the Legislature has broad power to act to promote education. Furthermore, legislative enactments are presumed constitutional, and the judiciary must assume that the Legislature will act in good faith to satisfy its mandatory constitutional duties.

Although the circuit court noted these principles, practically speaking, it turned them on its head. The court effectively declared that unless the West Virginia Constitution specifically *authorizes* the Legislature to act, it is *forbidden* to do so. That is exactly backwards. The court

also assumed that because the Legislature has chosen to fund the Hope Scholarship program, it would fail to meet its obligation to provide constitutionally adequate funding for public schools. This critical assumption—a lynchpin for the court's finding that the Hope Scholarship program is unconstitutional—defies this Court's caselaw. When examining the constitutionality of a statute, a reviewing court should adopt a deferential posture. Only when an alleged constitutional infringement is beyond any doubt should a permanent injunction issue.

Viewed through the proper lens, the Hope Scholarship program is well within the Legislature's broad authority. Accordingly, this Court should promptly reverse the decision below and allow the program to go into full effect. Doing so will ease the hardship imposed by the issuance of the injunction on the dozens of schools, hundreds of families, and thousands of children that acted in justifiable reliance on the Legislature's lawful action.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus Curiae, the West Virginia Christian Education Association ("WVCEA"),[1] a state-level affiliate of the American Association of Christian Schools, is an educational association established to protect and preserve the freedom of Christian schools in West Virginia, to provide them with quality programs and services, and to aid in the promotion, maintenance, and improvement of their moral, spiritual, and academic standards. WVCEA promotes the development of high-quality Christian schooling that attends to the intellectual, spiritual, physical,

[1] In accordance with Rule 30(a), the WVCEA has sought consent of all parties to submit this amicus curiae brief. W. Va. R. App. P. 30(a)-(b). No party to this action or its counsel authored this brief in whole or in part, and no such counsel or party made a monetary contribution specifically intended to fund the preparation or submission of the brief. W. Va. R. App. P. 30(e)(5).

and social growth of children who attend its member schools. The WVCEA has nearly two dozen member schools that collectively enroll approximately 3,000 West Virginia children.[2]

WVCEA adds its voice to those who have highlighted the fundamental legal errors that fatally undermine the circuit court's injunction. WVCEA also offers the experience of its member schools to correct mistaken factual contentions that underlie the circuit court's decision.

First, despite the circuit court's declaration that "students in poverty cannot use [Hope Scholarships]," Joint Appendix ("JA") Vol. 1 at 9, many Hope Scholarship applicants who enrolled in WVCEA schools come from low-income families. Indeed, it was *because of* the Hope Scholarship that those families could even consider sending their children to a private school.

Second, it was wrong for the circuit court to declare that "private schools are frequently unwilling and/or unable to serve students with disabilities." *Id.* Quite the contrary, many parents of students with disabilities and other special needs choose to send their children to WVCEA member schools *because of* the smaller class sizes and individualized attention a child with special needs can receive in that setting.

This brief will help the Court evaluate the real-world impact of the Hope Scholarship program, the negative repercussions that flow from the program being halted, and the unlawful nature of the circuit court's injunction.

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[2] The current member schools of the WVCEA are: Ballard Christian School, Berean Baptist School, Beth Haven Christian School, Cornerstone Christian Academy, Cross Country Christian Academy, Cross Lanes Christian School, Danese Christian School, Elk Valley Christian School, Faith Christian Academy, Grace Christian School, Heritage Christian School, Indian Creek Christian School, Joseph Academy, Lewisburg Baptist Academy, Little Kanawha Valley Christian School, Mercer Christian Academy, Morgantown Christian Academy, Mountain State Christian School, Ohio Valley Christian School, Pipestem Christian Academy, Ripley Christian Academy, Seneca Trail Christian Academy, Victory Baptist Academy, and Wood County Christian School.

ARGUMENT

A. The West Virginia Constitution contains no express or implied restriction on the otherwise plenary power of the Legislature to enact programs—such as the Hope Scholarship—which foster and encourage moral, intellectual, and scientific improvement or otherwise promote the general welfare.

West Virginia, like the other 49 States in our national union, is a residual sovereign that possesses the power to "enact laws, within constitutional limits, to promote the general welfare of its citizens." Syl. Pt. 5, in part, *Farley v. Graney*, 146 W. Va. 22, 119 S.E.2d 833 (1960); *see also City of Huntington v. State Water Comm'n*, 137 W. Va. 786, 795, 73 S.E.2d 833, 839 (1953). This general power to govern—the "police power"—is "an inherent attribute of sovereignty, existing independently of a constitutional grant thereof." *Farley*, 146 W. Va. at 38, 119 S.E.2d at 843. Although derived originally from the people, W. Va. Const. Art. III, § 2; *City of Huntington*, 137 W. Va. at 795, 73 S.E.2d at 840, by constitutional allocation the "Legislature is the depository of the police power of the State." Syl. Pt. 2, in part, *Quesenberry v. Estep*, 142 W. Va. 426, 426, 95 S.E.2d 832, 833 (1956); *see* W. Va. Const. Art. VI, § 1.

The scope of the police power is "broad and sweeping." *State ex rel. Barker v. Manchin*, 167 W. Va. 155, 168, 279 S.E.2d 622, 631 (1981). "In general terms . . . it is as broad and comprehensive as the demands of society for its exercise." *Farley*, 146 W. Va. at 38, 119 S.E.2d at 843. It is a "vast reservoir of authority to be drawn on by the law-making branch of the government for the public good." *Hinebaugh v. James*, 119 W. Va. 162, 192 S.E. 177, 178 (1937). "[I]n effect . . . [it] sums up the whole power of government." *City of Huntington*, 137 W. Va. at 796, 73 S.E.2d at 840. Thus, "the police power may be exercised to promote the safety, health, morals, and general welfare of society." *Hinebaugh*, 119 W. Va. 162, 192 S.E. at 178.

Given the existence and breadth of the police power, "[a]s a general rule . . . the Legislature has plenary power to act unless prohibited from doing so by the constitution itself." *SER Barker*,

167 W. Va. at 168, 279 S.E.2d at 631. It is a rule that flows from the long-established principle that "the Legislature of this State [possesses] almost plenary powers on every subject[] not foreclosed by some other provision of the Constitution." *Kanawha Cty. Pub. Libr. v. Cty. Ct. of Kanawha Cty.*, 143 W. Va. 385, 390, 102 S.E.2d 712, 716 (1958). That principle can be traced to West Virginia's infancy. In a decision handed down less than three years after West Virginia's secession from Virginia, this Court explained:

> The very delicate and important question [presented in this case is] whether or not the legislature transcended its legitimate powers[.]
>
> Unlike the general government, the legislatures of the several States possess all the legislative powers of state, except so far as they are withheld or restricted by the fundamental law of each, whereas the Congress of the United States can exercise no powers except such as are expressly granted by the constitution of the United States, and such incidental and implied powers as are proper and necessary to carry into effect the powers so expressly granted.
>
> In other words, in order to ascertain what powers belong to Congress, we must look to the constitution of the United States to see what are *granted*, while on the other hand we look to the constitutions of the States to ascertain not what powers are *given*, but what are *withheld*, and what restrictions and limitations are imposed by their provisions.
>
> Our legislature possessing all the legislative power of the State, it follows that it was competent for it to pass the act [addressing the question at issue], unless such power is *excluded* by the *terms* of the constitution . . . or by clear and necessary *implication*.

Ex parte Stratton, 1 W. Va. 305, 306 (1866) (emphasis in original).

In the more than 150 years since, the Court has consistently reiterated and adhered to this principle.[3] Thus, as this Court declared in the first Syllabus Point of *Foster v. Cooper*: "The Constitution of West Virginia being a restriction of power rather than a grant thereof, the

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[3] *See*, e.g., Syl. Pt. 5, *State ex rel. Cooper v. Tennant*, 229 W. Va. 585, 730 S.E.2d 368 (2012); Syl. Pt. 2, *State Rd. Comm'n v. Kanawha Cty. Ct.*, 112 W. Va. 98, 163 S.E. 815 (1932); *see also Morrisey v. W. Virginia AFL-CIO*, 243 W. Va. 86, 99 n.41, 842 S.E.2d 455, 468 n. 41 (2020); *Lewis v. Canaan Valley Resorts, Inc.*, 185 W. Va. 684, 690, 408 S.E.2d 634, 640 (1991); *Robertson v. Hatcher*, 148 W. Va. 239, 250, 135 S.E.2d 675, 683 (1964).

legislature has the authority to enact any measure not inhibited thereby." Syl. Pt. 1, 155 W. Va. 619, 186 S.E.2d 837 (1972).

Accordingly, when reviewing the constitutionality of a statute, two critical questions need be answered. First, is there any provision in the state constitution that *expressly prohibits* the Legislature from taking the challenged action? Second, is there a provision or synthesis of provisions that *necessarily implies* that the Legislature cannot act in the challenged way? If the answer to both questions is "no"—as it is here—then the Legislature is free to act.

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The court below paid lip service to this fundamental principle—that the Legislature possesses broad power subject only to restraints spelled out in the constitutional text—by acknowledging that "[t]he Federal Constitution is a grant of power, while a state Constitution is a restriction of power." JA Vol. 1 at 13. But the circuit court almost immediately cast that principle aside, instead pointing to a canon of construction—*expressio unius est exclusion alterius*[4]—used exclusively to *constrain* the scope of written texts. *Id. See, e.g., State ex rel. Riffle v. Ranson*, 195 W. Va. 121, 128, 464 S.E.2d 763, 770 (1995) (explaining that when the *expressio unius* canon applies, "courts should infer the [drafter of the provision in question] intended [a] limited rule [that] would not apply to any other situation"). That was a misstep.

Given the sweeping nature of the police power, it is unlikely that the *expressio unius* canon should ever be deployed when assessing the proper scope of a legislature's affirmative power to act under a state constitution.[5] *See* Antonin Scalia & Bryan A Garner, *Reading Law: The*

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[4] *Expressio unius exclusion alterius* is the "familiar maxim" that "the express mention of one thing implies the exclusion of another." Syl. Pt. 3, *Manchin v. Dunfee*, 174 W. Va. 532, 327 S.E.2d 710 (1984).

[5] The canon may have utility when examining the scope of a constitutional *restriction* on legislative power. *See* FN 6, *infra.*

Interpretation of Legal Texts § 10 (2012) (explaining that the *expressio unius* canon "properly applies only when the . . . thing specified can reasonably be thought to be an expression of *all* that shares in the grant or prohibition involved."); *see also N.L.R.B. v. SW General, Inc.*, 137 S. Ct. 929, 941 (2017) ("The *expressio unius* canon applies only when circumstances support a sensible inference that the term left out must have been meant to be excluded.") (cleaned up). After all, because the police power—the general power to govern and enact statutes that serve the general welfare—is an inherent aspect of sovereignty, there is no need for the drafters of a state constitution to spell out what the legislature *can* do, only what it *cannot* do.

As one state high court has stated, "[i]t is elementary law that grants of power by state Constitutions to state Legislatures include all legislative power that is not expressly withheld." *Leek v. Theis*, 217 Kan. 784, 802 (1975). And, as another has declared, "[b]ecause [our] Constitution is not a grant of power, there is no reason to believe that a Constitutional provision enumerating [the] powers of a branch of government was intended to be an exclusive list." *Idaho Press Club, Inc. v. State Legislature of the State*, 142 Idaho 640, 643 (2006).

In sum, the very nature of a state constitution dictates the limited utility of the *expressio unius* canon in cases like this. *See* Scalia & Garner, *Reading Law* § 10 (2012) (the application of *expressio unius* "depends so much on context"). There is no reason to infer that the "express mention of one thing implies the exclusion of another" in a context where the default assumption is exactly the opposite—that the Legislature "would inherently have powers that were not included in the list." *Idaho Press Club*, 142 Idaho at 643, 132 P.3d at 400.[6] The circuit court's reliance on the *expressio unius* canon undermines the entirety of the court's opinion.

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[6] In an interesting contrast, the *expressio unius* canon likely has interpretative force when examining the scope of state constitutional provisions that *limit* (as opposed to affirmatively

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Yet the circuit court's reliance on the *expressio unius* canon was hardly the only flaw in its interpretative method. The court also veered off course when it concluded that certain affirmative constitutional *obligations* actually act as implied *limitations* on the Legislature's power. As outlined below, that conclusion is not dictated by logic, linguistic convention, or context. Nor is it consistent with unchallenged legislative practice dating back to the State's early history.

This Court has recognized that the West Virginia constitution "imposes certain mandatory duties upon the Legislature." *SER Barker*, 167 W. Va. at 168, 279 S.E.2d at 631; *see also id.* at n. 4 (identifying more than two dozen such duties). When it is alleged that the Legislature has shirked one of these duties, the judiciary should assess that claim, and if necessary, provide guidance as to how the Legislature can remedy any shortcoming and satisfy the obligation. *See, e.g., Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979); *West Virginia Educ. Ass'n v. Legislature of State of West Virginia*, 179 W. Va. 381, 369 S.E.2d 454 (1988).

Cases like *Pauley* and *West Virginia Education Association* demonstrate that the Legislature cannot blithely ignore its constitutional obligations. That said, the mere existence of an affirmative obligation does not, in all (or even most) cases, create an implied limitation on the Legislature's power. It does not necessarily follow that a constitutional requirement to allocate

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define, describe, or enumerate) legislative power. Given the default assumption that state legislatures enjoy plenary power unless checked by a specific constitutional limitation, the drafters of state constitutions have every reason to outline any limitation on legislative power with specificity—"[t]he purpose of [any] such provision is to define the limitation[]." *Idaho Press Club*, 142 Idaho at 643. Because that is the case, "it is not reasonable to assume that [the drafters] intended to impose other, unstated limitations" on the legislature because "[h]ad they wanted to impose limitations in addition to those stated, they could easily have done so." *Id.* Thus, the Idaho Supreme Court has held that "the rule of construction *expressio unius est exclusio alterius* applies to provisions of [a state] Constitution that expressly limit power, but it does not apply to provisions that merely enumerate powers." *Id.* (internal citations omitted).

sufficient resources to "thing X" *precludes* the Legislature from allocating any resources to "thing Y."

Yet that is exactly what the court below concluded. Purporting to read several constitutional provisions in tandem, chief among them Sections 1, 2, 4, and 5 of Article XII, along with Section 5 of Article X, the court declared that the Legislature is "required to raise revenue for, fund, and maintain *only* a thorough and efficient system of free schools supervised by the [West Virginia Board of Education]." JA Vol. 1 at 14 (emphasis added); *see also id.* (claiming that the Legislature's enactment of the Hope Scholarship program "frustrates Article XII, Sections 1, 2, 4, and 5" and "exceeds . . . Section 5 of Article X"); *id.* at 16 ("[The Hope Scholarship] violates Article XII, Sections 4 and 5, and Article X, Section 5, which require that state taxation and funding pay only for *public* K-12 education") (emphasis in original); *id.* at 16 ("The State's sole constitutional mandate is to create a thorough and efficient system of free schools."). But those provisions cannot bear the weight the circuit court has placed upon them for two reasons.

First, the plain language of those provisions expounds obligations, not limitations.[7] As this Court has oft repeated, when "language in a constitutional provision is clear and without

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[7] The text of the relevant provisions, in pertinent part, is as follows –

Art. X, § 5: The power of taxation of the Legislature shall extend to provisions for the payment of the state debt, and interest thereon, the support of free schools, and the payment of the annual estimated expenses of the state . . . .

Art. XII, § 1: The Legislature shall provide, by general law, for a thorough and efficient system of free schools.

Art. XII, § 2: The general supervision of the free schools of the State shall be vested in the West Virginia board of education which shall perform such duties as may be prescribed by law.

Art. XII, § 4: The existing permanent and invested school fund, and all money accruing to this state from [various, specifically delineated sources] . . . shall be set apart as a separate fund, to be called the 'School Fund' . . . [which] shall be invested [in the manner hereby described] . . . and the interest thereof shall be annually applied to the support of free schools throughout the state, and to no other purpose whatever.

ambiguity, [its] plain meaning is to be accepted." *Contractors Ass'n of W. Virginia v. W. Virginia Dep't of Pub. Safety*, 189 W. Va. 685, 691, 434 S.E.2d 357, 363 (1993). Courts engaging with plain text should give the words used "their common, ordinary and accepted meaning." *State v. Connor*, 244 W. Va. 594, 601, 855 S.E.2d 902, 909 (2021).

The plain language of the provisions cited by the court below belies the notion that they *limit* the Legislature's power. Each of the provisions (with only one exception—Article XII, Section 4)[8] contain only affirmative declarations—exhortations about what the Legislature "shall" do, without any mention of actions it "shall not" undertake. Article XII, Section 1 declares that the Legislature "shall provide" a "system of free schools." Article XII, Section 2 dictates that the "supervision" of those free schools "shall be vested" in the State Board of Education. Article XII, Section 5, commands the Legislature to fund those schools, stating that "the Legislature shall provide for the support of free schools" and then goes on to describe two permissible sources of revenue—interest from the "School Fund" established in Article XII, Section 4 and the "general taxation" of "persons and property or otherwise." Art. X, Section 5 lists a series of items for which taxes can be collected that is capstoned with effectively unlimited catch-all language permitting taxation for the "payment of the annual estimated expenses of the state."[9]

Art. XII, § 5: The Legislature shall provide for the support of free schools by appropriating thereto the interest of the invested 'School Fund' . . . and by general taxation of persons and property or otherwise . . . .

[8] Art. XII, Section 4 does contain limiting language: Money that accrues in the School Fund established by that section "shall be annually applied to the support of free schools . . . and to no other purpose whatever." But as explained in the State's Opening Brief, funding for the Hope Scholarship is not drawn from the School Fund, so this limitation is not implicated—much less transgressed. State's Opening Brief at 32-33.

[9] As Professor Bastress, the preeminent commentator on the West Virginia Constitution, has remarked, Article X, Section 5 "confers a broad power of taxation on the legislature" that is understood to be "plenary." Robert M. Bastress, Jr. *The West Virginia State Constitution* 277 (2012).

There is no "common, ordinary, accepted" meaning of the word "shall" that has a negatory, inhibiting connotation.[10] A simple example proves the point: If a parent tells her child that the child "shall" clean his room before bedtime, it is easy to understand what that parent means—the child is required to perform a specific task within a specific timeframe. But that command, without more, says nothing about the *other things* her child is permitted to do on that day. In the absence of any additional limiting instructions, the child is free to complete homework assignments, watch television, or go to the park. The only requirement is that the child fulfill her parent's request that the room be cleaned before bedtime.

To conclude otherwise would read into the plain language meaning that is simply not there. The circuit court's holding effectively inserts the proviso "and nothing else" at the end of each of the constitutional provisions it cites. This Court's precedent firmly counsels against that sort of judicial blue-pencilling: Where the text of a constitutional provision is plain, "courts must be governed thereby, and should never attempt to read into a constitutional . . . provision a meaning which was not intended." *State v. Conley*, 118 W. Va. 508, 190 S.E. 908, 916 (1937).

Moreover, Article XII, Section 4 is the perfect example of an exception that proves the rule. Section 4 *does* contain a limiting proviso; it ends with language requiring certain funds (interest earned off investments of the money in the School Fund) to be spent in a certain manner. Those funds "shall be annually applied to the support of free schools throughout the state, *and to no other purpose whatever.*"[11] Article XII, Section 4 is proof that the drafters of the constitution knew how to deploy limiting language and, indeed, included such language when it was their intent

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[10] *See, e.g.*, Meriam-Webster Online, "Shall" https://www.merriam-webster.com/dictionary/shall (last accessed September 22, 2022).

[11] The existence of this limiting language does not vindicate the circuit court's ultimate conclusion because the Hope Scholarship is not funded from the School Fund. *See* FN 8, *supra.*

to limit the Legislature's otherwise unfettered discretion. The absence of any such language in the other provisions relied upon by the circuit court is telling.

Second, the circuit court's constitutional interpretation is facially inconsistent with longstanding, unchallenged legislative practice. The court below claims that the provisions on which it relies, read together, "require the State to raise revenue for, fund, and maintain *only* a thorough and efficient system of free schools supervised by the [West Virginia Board of Education]." JA Vol. 1 at 14 (emphasis added). Extending the circuit court's logic to its natural endpoint, any time the Legislature raises revenue for or allocates funds to an educational-related entity that is not part of the system of free schools supervised by the State Board of Education, it has stepped outside of permissible constitutional bounds.

Such a conclusion ignores West Virginia's longstanding and ongoing support for public institutions of higher learning. Since the earliest days of its existence, the Legislature has provided public funding for at least one such school—West Virginia University (WVU). Today, the Legislature also provides funding for more than half a dozen other state colleges or universities.[12] WVU is neither free (students are charged tuition) nor supervised by the State Board of Education (it is instead overseen by an independent board of governors). *See* W. Va. Code § 18-11-1 (outlining the powers of and appointment process for the WVU Board of Governors). *Cf.* W. Va. Code § 18B-2A-1 (establishing boards of governors at other public colleges and universities). And

[12] In the most recent state budget, in addition to WVU, the Legislature appropriated funds to the following public colleges and universities: Marshall University ($51.5 million), the West Virginia School of Osteopathic Medicine ($5.9 million), Bluefield State College ($6.6 million), Concord University ($10.8 million), Fairmont State University ($19.2 million), Glenville State university ($6.7 million); Shephard University ($13 million), West Liberty University ($9.5 million), and West Virginia State University ($16.1 million). *See* FN 13, *infra*.

yet, WVU receives millions in annual funding from the Legislature.[13] Moreover, this funding is not a recent phenomenon—WVU has been receiving public money since the State's infancy.

Indeed, one of the then-newly constituted Legislature's first acts, in October 1863—barely four months after West Virginia was admitted to the Union—was to "accept[] the conditions of the Congressional Land-Grant (Morrill) Act," thereby laying the groundwork for the institution that would become WVU. Charles H. Ambler, *A History of Education in West Virginia: From Early Colonial Times to 1949* 186 (1951). As this Court has recognized, "WVU is a publicly owned and supported land-grant institution of higher education established by the West Virginia Legislature in 1867." *United Mine Workers of Am. Int'l Union by Trumka v. Parsons*, 172 W. Va. 386, 390, 305 S.E.2d 343, 346 (1983). From the 1870s to now, the Legislature has consistently appropriated public money to support WVU's operations. *See* Ambler at 187, 191 (discussing appropriations to WVU in the State's early history). In West Virginia's most recent budget, the Legislature allocated more than $114 million to WVU.[14]

Under the circuit court's logic, the Legislature's longstanding support for institutions of higher learning violates the West Virginia Constitution. Of course, such an interpretation would have surprised West Virginia's founding generation, many of whom served in the early incarnations of the Legislature, and thus oversaw and approved appropriations to WVU. *See, e.g.*, West Virginia Department of Art, Culture, and History, *A State of Convenience: The Creation of West Virginia*, https://archive.wvculture.org/history/statehood/images/brownjohnjames.html. *Cf.*

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[13] *See* West Virginia Legislature, Senate Bill 250 (Enrolled Final Version) (Budget Fiscal Year 2023), https://www.wvlegislature.gov/bill_status/bills_text.cfm?billdoc=SB250%20SUB1%20ENR.htm&yr=2022&sesstype=RS&i=250.

[14] *See* FN 13, *supra*. *See also* West Virginia University Government Relations, *Under the Dome*, https://governmentrelations.wvu.edu/under-the-dome/2022/01/24/january-24-2022-edition (Jan 24, 2022) ("WVU's appropriation, as proposed by the governor, will be around $114 million and overall is about $4.6 million more than what WVU will receive this fiscal year.").

McCulloch v. Maryland, 17 U.S. 316, 379 (1819) ("The members of the convention who framed the constitution, passed into the first congress, by which the new government was organized; they must have understood their own work."). Moreover, it would be flatly inconsistent with sentiments expressed by this Court in *Herold v. McQueen*. There, rejecting a constitutional challenge predicated on an alleged violation of Article XII, Section 1—the provision that requires the Legislature to establish a system of free public schools—this Court remarked that:

> The Constitution does not provide for the establishment of [WVU], or the state normal school at Huntington [now Marshall University], or their respective branch schools. These are established and maintained by special legislation . . . yet the right and power of the Legislature to create them, and to provide for their maintenance by taxing the people of the whole state, has not been questioned.

71 W. Va. 43, 75 S.E. 313, 316 (1912). In the over 100 years since *Herold* was issued, no decision has called this statement into question.

* * *

Any lingering doubt that the Legislature possesses the power to enact and fund educational initiatives that fall outside the "system of free schools" is laid to rest by the existence of Article XII, Section 12. There, the Constitution provides:

> The Legislature shall foster and encourage, moral, intellectual, scientific and agricultural improvement; it shall, whenever it may be practicable, make suitable provision for the blind, mute and insane, and for the organization of such institutions of learning as the best interests of general education in the state may demand.

W. Va. Const. Art. XII, § 12.

Both the first and last lines of Section 12 belie the circuit court's suggestion that the Legislature is impliedly prohibited from allocating public money to educational initiatives other than free public schools. As Professor Bastress has said, Section 12 "confers a sweeping power on the legislature" to "promote achievement in the arts and sciences . . . and to establish institutions of learning." Robert M. Bastress, Jr., *The West Virginia State Constitution* 305 (2012). It is

notable that, consistent with the discussion of the expansive nature of the police power discussed above, Professor Bastress went on to say that the Legislature would possess this sweeping power "even without section 12's express delegation." *Id.*

This Court implicitly adopted Professor Bastress's understanding of Section 12 when it described the existence of WVU as an example of the "legislative fulfillment of [the] constitutional mandate [to] 'foster and encourage, moral, intellectual, scientific and agricultural improvement [and] wherever it may be practicable, make suitable provision . . . for the organization of such institutions of learning as the best interests of general education in the State may demand.'" *Trumka*, 172 W. Va. at 394, 305 S.E.2d at 350 (quoting Article XII, Section 12). If, as the court below concluded, the Legislature was constitutionally permitted to fund *only* free public schools overseen by the State Board of Education, then establishing and supporting WVU would be inconsistent with the constitution, contrary to anyone's recorded understanding of the West Virginia Constitution since the time of its ratification.

That is clearly not the case.

B. The circuit court failed to heed the presumption of constitutionality and improperly assumed the Legislature would not satisfy its constitutional obligations.

Declaring a statute inconsistent with the constitution is a heady matter not to be lightly undertaken. *See Herold*, 71 W. Va. 43, 75 S.E. at 314 ("It is a grave responsibility for the court to sit in judgment upon the acts of a co-ordinate branch of the government, and it should approach such a task with the greatest of caution."). Because the "general powers of the legislature, within constitutional limits, are almost plenary," the "negation of legislative power must appear beyond reasonable doubt." Syl. Pt. 1, in part, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 143 S.E.2d 351 (1965). Thus, "[t]here is a presumption of constitutionality with regard to legislation." Syl. Pt. 1, in part, *Gibson v. W. Virginia Dep't of Highways*, 185 W. Va. 214, 406

S.E.2d 440 (1991). In line with that presumption, a court considering a constitutional challenge must entertain "every reasonable construction of the statute . . . [that could] sustain [its] constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment." *State ex rel. Cooper v. Tennant*, 229 W. Va. 585, 594, 730 S.E.2d 368, 377 (2012) (citing Syl. Pt. 3, *Willis v. O'Brien*, 151 W.Va. 628, 153 S.E.2d 178 (1967)).

The circuit court did not heed this presumption. Quite the opposite, the court assumed the worst when evaluating both the Legislature's intention and the real-world impacts of the Hope Scholarship program. The court declared that the Legislature was "diverting public funds [for the Hope Scholarship] that could be used for West Virginia's underfunded public schools" and "siphoning off public money to subsidize parents that choose private education." JA Vol. 1 at 15. The court further declared that, due to the enactment of the Hope Scholarship program, "funding for the public schools . . . will decline" and that public schools will necessarily "serve an increased concentration of high needs students." JA Vol. 1 at 14.

These pronouncements are flatly inconsistent with the deferential posture this Court's precedent dictates when engaged in constitutional review. It is a "well settled general rule" that "the intent of the Legislature not to exceed its constitutional powers is to be presumed." Syl. Pt. 8, *State ex rel. Heck's Inc. v. Gates*, 149 W. Va. 421, 141 S.E.2d 369 (1965); *see also West Virginia Educ. Ass'n,* 179 W. Va. at 383, 369 S.E.2d at 456 ("The law presumes the Legislature to know its dut[ies] too.") (footnotes omitted). Here, the circuit court proceeded from the basic assumption that, because the Legislature has allocated general revenue funds for the Hope Scholarship, it plans to disregard the constitutional mandate to adequately fund West Virginia's public school system. But there is no reason the Legislature cannot do both. The most recent fiscal figures indicate that

West Virginia is enjoying "record-setting budget surpluses."[15] And nothing in the Hope Scholarship legislation instructs the Legislature to shirk its duty to adequately fund public schools.

Had the circuit court faithfully applied this Court's precedent, it would have proceeded from the assumption that the Legislature will act in good faith to meet its constitutional obligations. From that starting point, an objective assessment of the Hope Scholarship's impact would be drastically different. Rather than robbing Peter to pay Paul, the Legislature's creation of the Hope Scholarship would qualify as a significant investment in education by the Legislature. Public schools undoubtedly play a vital role in educating West Virginia's youth. But private institutions, like WVCEA's member schools, also play an important role. As the United States Supreme Court has recognized, "private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience" among our nation's students. *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 247 (1968).

In sum, the Legislature's endorsement of a "Yes And" approach to education—both making resources available to parents who believe a private school education best fits the needs of their children *and* funding West Virginia's public schools as required by the constitution—is a policy decision that should be lauded. From a purely legal perspective, that policy choice is the starting point from which a court considering the constitutionality of the Hope Scholarship program should have begun its analysis. That did not happen here. Because the circuit court failed to consider "every reasonable construction of the statute" that might render it constitutional and instead looked for every possible reason to strike that statute down, this Court should reverse.

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[15] *Gov. Justice: Record-setting revenue surpluses continue into new Fiscal Year*, https://governor.wv.gov/News/press-releases/2022/Pages/Governor-Justice-Record-setting-revenue-surpluses-continue-into-new-Fiscal-Year.aspx (August 2, 2022) (detailing West Virginia's $1.308 billion surplus for Fiscal Year 2022 and noting that revenue collections for Fiscal Year 2023 are also significantly ahead of projections).

C. The circuit court made dubious factual findings.

In addition to the legal missteps described above, the circuit court, relying on information set forth in affidavits, made several factual findings that are (at best) imprecise or (at worst) plainly inaccurate.

Two findings are particularly dubious: (1) that "students in poverty cannot use [Hope Scholarships]" and (2) that "private schools are frequently unwilling and/or unable to serve students with disabilities" and therefore those students "will be unable to use [Hope Scholarships]." JA Vol. 1 at 9. WVCEA offers the following representations from its member schools to supplement—and when necessary, correct—the record with respect to those findings.

The notion that low-income families will be unable to take advantage of the Hope Scholarship cannot be squared with reality.[16] For many low-income families, it is only the *existence* of the Hope Scholarship that makes private school more than a pipedream for their children.[17] The experience of WVCEA's member schools provide proof.

Consider the makeup of Hope Scholarship applicants at various WVCEA member schools. Of the 26 families who applied for a Hope Scholarship at Wood County Christian School, 10 qualify for free or reduced lunch assistance.[18] The median household income of students' families

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[16] Marc LeBlond & Ed Tarnowski, *For 3,000 West Virginia families, hope for education freedom hangs in the balance*, The Washington Examiner, https://www.washingtonexaminer.com/restoring-america/community-family/for-3-000-west-virginia-families-hope-for-education-freedom-hangs-in-the-balance (Aug 15, 2022) (noting that "many" of the "more than 3,000 families" to whom Hope Scholarships were awarded prior to the circuit court's injunction "are disadvantaged").

[17] *See, e.g.*, Bradley Foster, *Let's Give Hope (Scholarship) To Those That Need It*, The Cardinal Institute for West Virginia Policy, https://www.cardinalinstitute.com/hope-scholarship-for-those-in-need/ (explaining that the Hope Scholarship "gives kids from low-income families . . . the space to invest in and choose their own educational path").

[18] *See* United States Department of Agriculture, *The National School Lunch Program*, https://fns-prod.azureedge.us/sites/default/files/resource-files/NSLPFactSheet.pdf (explaining that children can "qualify for free or reduced price school meals based on household income and family size").

(including those of Hope Scholarship applicants) at Faith Christian Academy is $21,139, which is beneath the federal "poverty line" of $23,030 for a family of three and well below the line for larger families.[19]

And the experiences of Wood County Christian and Faith Christian are not outliers. At Emmanuel Christian School, 33% of Hope Scholarship applicants came from low-income families. At Lewis Baptist Academy, the number is 40%. At Ohio Valley Christian School, a full half of the Hope Scholarship applicants came from low-income families. And at Cornerstone Christian Academy, the number is 70%. There can be no real disagreement on this point: The Hope Scholarship is readily available to—and empowers—low-income families.

The circuit court's claim regarding students with disabilities and other special needs is equally spurious. Around 14% of West Virginia public school students have special education needs.[20] The percentage of children with such needs enrolled at WVCEA schools are comparable to and sometimes greater than at public schools: 8% at Grace Christian, 10% at Cornerstone Christian Academy, 10% at Cross Lanes Christian, 12% at Emmanuel Christian School, and 20% at Wood County Christian School.

Unsurprisingly, WVCEA member schools dedicate significant resources and expend considerable effort to care for their students with special needs. Some, like Wood County Christian and Cross Lanes Christian, employ full-time special education teachers or have dedicated classrooms and programs designed to cater to the needs of students with disabilities and other

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[19] *See* Office of the Assistant Secretary for Planning and Evaluation, *HHS Poverty Guidelines for 2022*, https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines (identifying federal poverty line for a family of three $23,030, which raises to $27,750 for a family of four, $32,470 for a family of five, and even higher as family size increases).

[20] *See* The National Center for Learning Disabilities, *West Virginia State Snapshot*, https://www.ncld.org/wp-content/uploads/2017/03/West-Virginia.Snapshot.v2.pdf (2017).

special educational needs. Others, like Emmanuel Christian, partner with nearby public schools, combining public resources (including both the individualized education (IEP) program and access to specialists, like speech therapists) with private efforts (such as extra individualized attention from teachers, parent volunteers, and after-school tutors). Ultimately, no matter how they go about it, every WVCEA member school seeks to live up to the Biblical ideal that "whatever is done for the least of our brothers and sisters, it is done for me." Matthew 25:40.

D. The circuit court's injunction has imposed significant hardships on WVCEA's member schools and students.

Finally, a few words about the real-world impact of the circuit court's injunction. It is hard to overstate the degree to which the injunction pulled the rug out from under both schools and families. WVCEA hopes the following examples are illuminating.

Cross Lanes Christian had more than 60 students who applied for, received, and were relying on the Hope Scholarship for the upcoming academic year. Preparing for this influx of new students was expensive; the school spent thousands of dollars on textbooks and other supplies to accommodate this significant increase in its enrollment.

The injunction left both the families of those students and the school scrambling. Without access to Hope Scholarship funds, many of the new enrollees lacked the resources to pay their tuition which left the school facing a sudden, unexpected budget shortfall of over $160,000. Taking a leap of faith, Cross Lanes Christian chose to absorb the costs associated with the vast majority of these new enrollees rather than force their families to make the difficult decision to withdraw their children for financial reasons. Because of that decision, the school predicts it will end the school year with a budget deficit approaching $100,000. In a worst-case scenario—where the injunction is not dissolved and the school is unable to solicit sufficient donations or find other

collateral sources of funding—this financial hit will cause Cross Lanes Christian to shut down its operations at the end of this school year.

Beth Haven Christian School had more than 20 families who planned to use the Hope Scholarship to newly enroll their children there. Beth Haven built its budget for the upcoming school year counting on those new enrollees, incorporating, for instance, a long overdue raise for its teachers. The school also increased its outlays for transportation, textbooks, and non-teacher staff based on the projected increase in enrollment attributable to the new Hope Scholarship enrollees.

The injunction upended these plans and devastated Beth Haven's finances. Although the school offered discounted tuition to the affected families, many were unable to afford even the discounted rate and had to re-enroll their children in public schools. Because many Beth Haven teachers adjusted their personal budgets in reliance on the forthcoming raise, the school has decided it cannot, in good conscience, retract it. It, too, has taken on a huge deficit, compounded by the additional spending on transportation, staff, and curricula material intended to serve students who are no longer enrolled.

Similar stories could be recounted for nearly all WVCEA's member schools. Faith Christian had to revamp its budget and stop hiring personnel. Wood County Christian faced hard decisions about hiring that were compounded by the uncertainty regarding whether the school's enrollment would be increasing. The administration at Ohio Valley Christian School spent weeks trying to come up with resources to help 11 students from 5 families who could not afford to enroll without Hope Scholarship funds. Each story represents a slightly different reprise of the same frustrated melody. The circuit court's flawed constitutional analysis has harmed dozens of schools, hundreds of families, and thousands of students.

* * *

As this Court has said many times, it is not the role of the judiciary to "sit as a superlegislature, commissioned to pass upon the political, social, economic or scientific merits of statutes pertaining to proper subjects of legislation." *Boyd v. Merritt*, 177 W. Va. 472, 474, 354 S.E.2d 106, 108 (1986). "It is the duty of the legislature to consider facts, establish policy, and embody that policy in legislation." *Id.*

But when the Legislature properly exercises its authority within constitutional bounds—when it has considered the wisdom of a particular policy and then duly enacted that policy into law—the judiciary oversteps its constitutional role if it issues an injunction preventing that policy from going into effect.

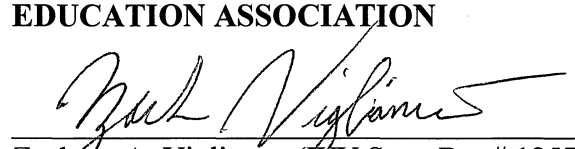
The circuit court's injunction, predicated on the panoply of legal and factual errors described above, is contrary to law. That unlawful injunction has imposed substantial hardships on WVCEA's member schools and students. To avoid compounding the problems already wrought by the injunction, this Court should set things right as expeditiously as possible and dissolve the injunction.

CONCLUSION

WVCEA joins Petitioners' request that this Court dissolve the circuit court's permanent injunction and allow the Hope Scholarship program to once again become operational.

Respectfully submitted,

THE WEST VIRGINIA CHRISTIAN EDUCATION ASSOCIATION



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Case No. 22-616

STATE OF WEST VIRGINIA et al.,

Petitioners,

v.

TRAVIS BEAVER, et al.,

Respondents,

CERTIFICATE OF SERVICE

I, Zachary A. Viglianco, do hereby certify that on this 22 day of September, 2022, this *Amicus Brief of the West Virginia Christian Education Association in Support of Petitioner and Reversal* is being served on all counsel of record via upload to this Court's electronic docket via File&ServeXpress.

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