IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, Petitioner/Defendant, KATIE SWITZER and JENNIFER COMPTON, Petitioners, v. TRAVIS BEAVER and WENDY PETERS Plaintiffs/Respondents.	**CASE NO. 22-1CA-1**

RESPONDENTS' OMNIBUS OPPOSITION TO PETITIONERS' MOTIONS FOR STAY PENDING APPEAL

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INTRODUCTION

The sole question before the Court now is whether it should allow House Bill 2013 ("HB 2013" or the "Voucher Law"[1]), codified as W. Va. Code § 18-31-1 *et seq.*, to go forward even though the circuit court found the law facially unconstitutional on five separate grounds—preliminarily and permanently enjoining its implementation. Petitioners seek a stay of this injunction pending appeal, but they have a heavy burden they cannot meet. The stay of a statute deemed facially unconstitutional is rare, has never been granted on an appeal concerning a universal voucher law like HB 2013, and requires something much more than vehement assertions that the circuit court got it wrong—that question is for the appeal itself.

Petitioners argue that enforcing the injunction pending appeal will cause irreparable harm. This is nonsense. The injunction maintains the state of affairs that has existed in West Virginia for over 150 years. Parents are free to choose private education or homeschooling—as they always have been—but the State will not use taxpayer dollars to subsidize this private choice—as has always been the case. There is no harm, let alone irreparable harm, in preserving this long-standing framework. To the extent families are inconvenienced, that is because the State did not adequately inform parents of the legal challenge and potential outcomes, which it has known about since 2021.

The appeal of the circuit court's decision raises numerous and substantial issues that, as Petitioners acknowledge, will "take[] time."[2] Hastily lifting the circuit court's injunction—reached after hundreds of pages of briefing and careful analysis—would run roughshod over the Constitution and the fundamental education rights of West Virginia's children. Indeed, not a single

[1] The State insists that HB 2013 does not provide "vouchers," yet the Legislature itself refers to its payouts as "vouchers" in its official blog. Christopher Marshall, *Senate Completes Hope Scholarship Program*, W. Va. Legis. Blog (Mar. 17, 2021), https://tinyurl.com/5n873md3 ("The Hope Scholarship Program would give students a voucher").

[2] Intervenor's Mot. ("IM") at 4.

state in the country has implemented a universal voucher program like HB 2013. Staying the injunction would allow the nation's first universal program to go forward. It would also *for the first time* subsidize affluent families' private education. A permanent injunction cannot be set aside for such a seismic shift based on truncated motion briefing. The stay motion must be denied.

BACKGROUND

Under HB 2013, state taxpayer dollars will be used to subsidize private and homeschooling. When fully implemented, every student in private and homeschooling in the State will receive upwards of $4,300 a year from kindergarten through twelfth grade without regard to their income. W. Va. Code § 18-31-2(5).[3] The West Virginia Department of Education ("DOE") estimates that when fully implemented HB 2013 will cost the State over $120 million a year. W. VA. DEP'T OF EDUC., HB 2013 FISCAL NOTE (2021).[4] Parents who choose the $4,300 exchange their child's right to a free public education for the yearly payment. The schools and parents providing the publicly subsidized education do not have to establish any type of competency and there are no academic achievement standards. W. Va. Code § 18-31-11(c). There are extremely limited mechanisms to detect and stop fraud and abuse by fly-by-night school operators, homeschooling parents, and a host of service "providers" that stand to make significant profit. *See id.* § 18-31-10. Students receiving the vouchers have to pay for any public school resources they may continue to need. *Id.* § 18-31-8(f). HB 2013 establishes a new Board, the Hope Scholarship Board, to oversee this expenditure of public funds for private education. *Id.* § 18-31-3.

The amount paid by the voucher is not enough for a child to afford most private school

[3] Currently a student qualifies if he or she: (1) attended a public school the previous year; or (2) was attending a public school for 45 days at the time of the application; or (3) is starting kindergarten. *Id.* § 18-31-2(5). If, by July 2026, 5% of the public school population is not using vouchers, the program becomes open to every child in the State. *Id.* Otherwise, this will occur over time as each new cohort starts kindergarten. *Id.*

[4] *Available at* https://tinyurl.com/5h2787xb.

tuition and fees, let alone the additional costs for resources like food and transportation that are free to public school students. Thus, the vouchers can only be used by students whose families are affluent enough to pay the remaining tuition and expenses or have a parent that can stay home full time who is qualified to educate them. The vouchers will not be used by students with special needs because private schools in West Virginia generally do not provide special education services to adequately meet their needs, and many would not admit these students. LGBT students also largely cannot use the vouchers because most private schools do not accept LGBT students.

Respondents are parents of West Virginia public school students. Travis Beaver is a resident of Putnam County. He has a daughter and son who are respectively entering sixth grade and seventh grade. His daughter, J.B., has nonverbal/preverbal autism and ADD/ADHD. Through her public school she has an individualized education program ("IEP") to address her special education needs. Mr. Beaver is unaware of any private schools in the area that would accept his daughter or meet her educational needs. Ex. J Beaver Aff.[5] Wendy Peters is a middle school teacher in the Raleigh County School District. Her son, M.P., is entering the fourth grade. M.P. has autism and has an IEP. Ms. Peters is likewise unaware of any private school in her area that would meet M.P.'s needs. Ex. L Peters Aff. As a teacher, she has also witnessed the ravages of family poverty and addiction on her students; this informs her concern about the abuse of public funds that would be diverted to vouchers and the impact on the State's children. *Id.* ¶ 26.

In the fall of 2021, Respondents gave notice of the suit to enjoin HB 2013 as unconstitutional, which suit was filed on January 19, 2022. Beginning in March 2022, the Hope Scholarship Board began taking applications, and has approved over 3,000. Ex. P Conzett Aff. ¶ 11. The voucher funds are set to be issued on August 15, 2022. W. VA. CODE § 18-31-6(d).

[5] All exhibits refer to the exhibits filed with Petitioner Switzer and Compton's Motion to Stay.

Following a hearing on July 6, 2022, the circuit court preliminarily and permanently enjoined HB 2013 on five separate grounds.

LEGAL STANDARD

As Petitioners note, no reported case outlines the standard for a stay under W. Va. Rule 28(b). Under federal law, a party seeking a stay "bears the heavy burden" of showing that "clear and convincing circumstances" warrant such action. *See Nken v. Holder*, 556 U.S. 418, 433-34 (2009).[6] In considering a motion to stay, courts weigh: (1) whether the petitioner has made a strong showing of likely success on the merits; (2) whether the petitioner will be irreparably injured absent a stay; (3) whether issuance of a stay will substantially injure other parties interested in the proceeding; and (4) the public interest. *Id*. at 434 (citation omitted). Critically, a party must show "something more" than what it has argued previously. *N.Y. Life Ins. Co. v. Singh*, No. 14-CV-5726(NG)(SMG), 2017 WL 10187669, at *2 (E.D.N.Y. July 13, 2017) (a 'strong showing' of likely success requires a party to "do more than simply reiterate arguments").

None of the factors weighs in favor of a stay. The motions must be denied.

ARGUMENT

I. An Appeal of the Circuit Court's Order Is Unlikely to Succeed.

Petitioners argue they are "highly likely to succeed" even though they lost on every single ground. Petitioners refer to HB 2013 as a "scholarship." State's Mot. ("SM") at 2; IM at 1. But, in order to receive the funds, a child must forfeit his or her fundamental right to an education. Students can either go to public school or receive $4300 and fend for themselves. Indeed, students accepting the vouchers have to pay for any public school resources and services they may still need. W. Va. Code § 18-31-8(f). That is decidedly not what the West Virginia Constitution

[6] West Virginia state courts look to federal courts. *See Hardwood Grp. v. Larocco*, 219 W. Va. 56, 62 (2006); *Mauck v. City of Martinsburg*, 167 W. Va. 332, 337-38 (1981).

established for its children. Parents have always been free to choose private education or homeschooling for their children at their own expense. But, if public funds are involved, the State takes on a duty to provide a thorough and efficient system of public education—including educational rigor and academic standards, accountability for the expenditure of the public funds, and protections against discrimination. This fundamental right cannot be exchanged for $4,300.

HB 2013 will put children in poverty particularly at risk. For 2016-2020, the median income in West Virginia was $27,346. U.S. CENSUS BUREAU, QUICKFACTS W. VA.[7] If a family at the median income had three children using vouchers, they could receive ~$13,000 from the State, increasing their annual income by 48%. They could do so on the mere "promise" that they would educate their children at home. W. Va. Code § 18-31-5(d)(3). Of course, most families would take this obligation seriously. But even the most well-meaning family facing housing and food insecurity will be tempted to consider the option and may struggle to provide adequate education at home despite trying their best, because educating children—particularly those with elevated needs—can be a profoundly difficult task. The situation created by HB 2013 is even more intolerable when you consider children of parents in the throes of addiction. *See* Paris Dunford, *More recovering addicts relapse after receiving stimulus checks*, 59 NEWS, May 24, 2021.[8] An additional and quite tangible danger based on other states' experiences is the inevitable emergence of fly-by-night scammers promising a private education for $4,300 and then failing to deliver. *See, e.g.*, Leslie Postal et al., *Florida Private Schools Get Nearly $1 Billion in State Scholarships with Little Oversight, Sentinel Finds*, ORLANDO SENTINEL, (Oct. 17, 2017).[9]

The Constitution expressly protects children from the vagaries of their circumstance.

[7] *Available at* https://tinyurl.com/ycksjrh9.
[8] *Available at* https://tinyurl.com/uznb6zm3.
[9] *Available at* https://tinyurl.com/2f2z4583.

Whether children live in families of poverty or wealth, health or addiction, they are entitled to a thorough and efficient system of free schools *provided by the State*. W. VA. CONST. art. XII, § 1; *Pauley v. Kelly*, 162 W. Va. 672, 705-06, 255 S.E.2d 859 (1979); *see also* Ex. N Bastress Aff.

Nor is HB 2013 available for *all* students. It is necessarily limited to use by select groups:

- Students whose parents are affluent enough to pay for the expenses not covered by a $4,300 voucher: the remaining private school tuition and fees, and other expenses that would be covered in public schools—such as food, transportation, and special education.
- Students whose parents are affluent enough for one parent, who also has the skills to educate their child, to stay home so the child can be home-schooled.
- Students whose parents will take the funds and *not* make sure their children are educated.
- Students who do not have disabilities or needs that can only be met in public schools.
- Students who are not LGBTQ, as LGBTQ students cannot attend most private schools.

Simply put: the West Virginia Constitution sets up a very specific structure for the public education of its children. It did *not* set up a framework under which private school choices by more affluent families are subsidized; the poor, marginalized, and special needs children are siloed in the public schools; and the State can abdicate its obligation to a student by paying out $4,300. HB 2013 violates the Constitution on five separate grounds.

A. Respondents Will Succeed on the Merits

1. The Constitution Bars HB 2013

Under the doctrine of *expressio unius est exclusio alterius* ("*expressio unius*"), the State cannot frustrate or exceed its constitutional obligations. *State v. Gilman*, 33 W. Va. 146, 10 S.E. 283, 285 (1889); *see also State ex rel. Downey v. Sims*, 125 W. Va. 627, 26 S.E.2d 161, 164 (1943). The State constitution is not a grant of power like the federal constitution; it is a restriction on power. *Robertson v. Hatcher*, 148 W. Va. 239, 250, 135 S.E.2d 675, 682-83 (1964). Where the Constitution addresses a topic, it limits the Legislature. As the Supreme Court explained regarding

a provision governing alcohol:

> The express power here given to regulate or prohibit the sale of liquors, unless it was intended to limit the legislative authority, would render this provision of the constitution wholly nugatory and useless; because, as we have seen, without this provision the legislature would have had plenary power over the whole subject.

Gilman, 10 S.E. at 285. The same is true here. Without the Article XII (the "Education Article"), the Legislature could have done as it pleased in regard to education. But, with the Education Article, the Framers carefully set forth the Legislature's powers and duties regarding publicly funded education. After much debate, the Framers decided that the Legislature "shall" provide a system of thorough and efficient free schools. Ex. N, Bastress Aff. ¶ 3. Private schools existed at the time. *Id.* ¶ 2. The Framers could have decided that the State would pay for private education or make payments to parents to take care of it themselves. That is not what the Framers mandated.

At the First Constitutional Convention in 1861, the delegates were clear: the State's "highest and most binding duty" is the education of its children. P.G. Van Winkle, *Debates & Proc.*, FIRST CONST. CONVENTION OF W. VA. (Jan. 27, 1862).[10] Article XII enshrines how the State must meet this duty. Under Section 1, "[t]he Legislature *shall* provide, by general law, for a thorough and efficient system of free schools." W. VA. CONST. art. XII, § 1 (emphasis added). The "general supervision of the free schools" is "vested in the West Virginia board of education[.]" *Id.* § 2. The State "shall" support the free schools through public monies, including the "school fund," *Id.* § 4, and "general taxation," *Id.* § 5. The taxation article also provides that the "power of taxation of the Legislature shall extend to . . . the support of free schools . . . ." W. VA. CONST. art. X, § 5.

Thus, public monies raised and used to educate the State's children must only go to support the system of *free* schools supervised by the Board of Education ("WVBOE"), subject to academic

[10] *Available at* https://tinyurl.com/547wsv4y.

standards and accountability measures. HB 2013 plainly exceeds the clear mandate of these provisions. It applies taxpayer money to a separate system of private education governed by a separate board, without academic requirements or financial oversight. It asks students to sacrifice their fundamental right to a public education for $4,300 without any protections for ensuring the child is educated. It requires voucher students to pay for otherwise-free public school classes and resources they want or need. W. Va. Code § 18-31-8(f). All of this is unconstitutional.

HB 2013 also frustrates the provisions of Article XII. It is an intentional act by the Legislature, using taxpayer dollars, to entice students to leave public schools. Because public school funding is based largely on enrollment, funding for public schools will decline. Ex. O Pauley Aff. ¶¶ 12-13; Ex. Q Meadows Aff. ¶¶ 4-5. The cost of educating the students remaining in public schools will not decrease proportionately. Certain fixed costs like facilities, bussing, and support staff are not reduced when an individual child leaves the public schools. Ex. O Pauley Aff. ¶ 14; Ex. K, Lubienski Aff. I ¶ 28. HB 2013 also concentrates higher-need students, including students with disabilities and students in poverty, in public schools. Ex. K Lubienski Aff. I. ¶ 30; Ex. Q Meadows Aff. ¶¶ 4-11. Such students are more costly to educate. Thus, HB 2013 silos students with special needs and those in poverty in the public schools while at the same time reducing the funds available to meet their educational needs. Ex. K Lubienski Aff. I ¶ 30; Ex. O Pauley Aff. ¶ 15. These actions harm public schools. The State cannot frustrate its Education Article mandate by intentionally taking actions that harm public schools.

HB 2013 further frustrates the State's constitutional mandate by taking funds that could be available for public education and, for the very first time in West Virginia history, subsidizing the private school tuition and home schooling costs of all families regardless of their means. The State *will* be paying to subsidize the private education of the wealthy. It is well known that West Virginia

public schools suffer from chronic underfunding. *See, e.g.,* EDUC. LAW CTR., MAKING THE GRADE 2020, (Jan. 14, 2021).[11] Yet HB 2013 will divert $120 million of taxpayer funds—funds which could address the challenges facing underfunded public schools—to subsidize private education. W. VA. DEP'T OF EDUC., *supra* note 3. This it cannot do.

The State argues that it is flush with cash—this year. SM at 10. Many states are experiencing the benefits of Covid federal relief monies. But good economies come and go and education is far too important to bear the brunt of unpredictable fiscal conditions. *See State ex rel. Board of Educ. v. Rockefeller*, 167 W. Va. 72, 76-79, 281 S.E.2d 131, 134-35 (1981). Thus, the framers of the Constitution limited public funds to public education—in good times and bad times. If there is public money spent on education, it "*shall*" be for the support of the free public schools.

Moving Parties' primary argument is that other states have validated voucher laws under their state constitutions. SM at 8; IM at 7-8. In fact, the only court that has addressed a universal voucher law like HB 2013 permanently enjoined that statute under the Nevada Education Article. *Schwartz v. Lopez*, 382 P.3d 886 (Nev. 2016). Assessing a more limited program, the Florida Supreme Court also struck down a voucher statute under the canon of *expressio unius*. *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006). The remaining cases cited by Petitioners involve limited voucher programs that were restricted by income, participation levels, and/or to specific districts, and involve different state constitutional provisions. Two of the cases involve the *same* small "experimental" program in Milwaukee. *Davis v. Grover*, 480 N.W.2d 460 (Wis. 1992); *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998). The other two cases involve limited programs in Indiana and North Carolina. *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013); *Hart v. State*, 774 S.E.2d 281 (NC 2015). That's it. *Not a single court* in the United States has approved a universal voucher

[11] *Available at* https://tinyurl.com/5n8rskzv.

program. Staying the injunction would allow this for the very first time.

Realizing the limitations imposed by Article XII, Sections 1-5, Petitioners try to support HB 2013 on the thin reed of Section 12, arguing this vague and general sentence gives the Legislature the ability to do whatever it wants in regard to education. SM at 7-8; IM at 9-10. Section 12 states that the Legislature "shall foster and encourage, moral, intellectual, scientific and agricultural improvement . . . ." W. VA. CONST. art. XII, § 12. West Virginia law makes plain that "[g]eneral and indefinite terms of one provision of a Constitution, literally embracing numerous subjects, are impliedly limited and restrained by definite and specific terms of another[.]" *Lawson v. Kanawha County Court*, 80 W. Va. 612, 92 S.E. 786, 787 (1917). Thus, Section 12 is constrained by Sections 1-5, which specifically relate to the means, oversight and funding of K-12 education.

2. HB 2013 Does Not Withstand Strict Scrutiny.

All parties agree that the Legislature cannot take actions that impinge the fundamental right to a free public education without meeting strict scrutiny. *Rockefeller*, 281 S.E.2d at 134-35; SM at 10; IM at 11. The funding of public education has a constitutionally preferred status; intentional acts that diminish public school funding impinge on this fundamental right. *Id.*

HB 2013 impinges on the fundamental right to an education in three distinct ways: (i) it reduces the funds appropriated to public schools through state-incentivized reduction in enrollment; (ii) it diverts $120 million a year in public funds to private and home-schooled students that could otherwise be used for public schools; and (iii) it trades a student's fundamental right to a public education for a sum of money.

The State argues that strict scrutiny does not apply to HB 2013 because it "leaves public schools' doors open to all students[.]" SM at 10. But keeping public school doors "open" is not the constitutional standard. Indeed, the State concedes that HB 2013 financially incentives students

to leave public schools *and* that public education funds are dependent on student enrollment. SM at 14. The State does not contest that subsidizing the education of private and home-schooled students will cost over $120 million annually. Nor does it refute that HB 2013 trades $4,300 a year for any responsibility to educate the child. Thus, HB 2013 impinges on children's education rights.

This it cannot do unless it is a narrowly tailored program that meets a compelling state interest. The State says its interest is to "promote[] learning activity," but the State has no constitutional interest in subsidizing the expenses of those who choose private school or homeschooling. Its sole constitutional mandate is a thorough and efficient system of free schools.

Moreover, the program is not narrowly tailored. It is expansive, without limits on eligibility based on geography, family income, school performance, or the particular educational needs of the student. It has no cap on the number of vouchers or the amount that can be spent on the program. It offers a voucher to every child starting kindergarten (and ultimately every student in every grade) without regard to family income. HB 2013 does not require private schools or homeschooling parents to meet quality or achievement standards and offers insufficient accountability for those using the funds. It is unconstitutional.

3. HB 2013 Improperly Uses Public Funds

The West Virginia Constitution limits taxation and spending on education to taxation and spending for "the support of free schools." Section 4 of the Education Article requires that the interest on the School Fund be used for public education and "no other purpose whatever." W. VA. CONST. art. XII, § 4. This was the original funding mechanism for public education in the Constitution and makes patent that the Framers intended public funds only be used for *public* education. Section 5 says that the Legislature "*shall* provide for the support of free schools" by general taxation and other specified revenue. W. VA. CONST. art. XII, § 5 (emphasis added). And

Article X of the Constitution expressly states:

> 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 . . . ."

W. VA. CONST. art. X, § 5 (emphasis added).

As Antonin Scalia explains, a listing of particulars limits the designated power to those items listed. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107 (2012). Likewise, "[m]andatory words [like shall] impose a duty; permissive words grant discretion." *Id.* at 112; *see also Terry v. Sencindiver*, 153 W. Va. 651, 657, 171 S.E.2d 480, 483 (1969). The Constitution establishes in three provisions that taxation and spending for education is limited to free schools. HB 2013 violates these provisions.

Petitioners contend that HB 2013 does not violate the Constitution because it is funded out of the General Fund. That the money starts in the General Fund is true for the majority of money received by the DOE and is irrelevant. It is not the fund that matters. What matters is that the Constitution limits taxation and spending for education to the free schools.

4. HB 2013 Usurps The Board of Education's Constitutional Authority

The Constitution creates the framework by which public monies are raised and spent for education. It vests authority over this system in the WVBOE. The Constitution *refers* to the WVBOE's oversight of the "free schools" precisely because the Constitution only *allows* one system for the expenditure of public funds on education—the system of free schools. The Legislature cannot set up a second system of education—with a different Board—paid for with public funds. As the West Virginia Supreme Court of Appeals explained:

> "General supervision" is not an axiomatic blend of words designed to fill the pages of our State *Constitution,* but it is a meaningful concept to the governance of schools and education in this state. Decisions that pertain to education must be faced by those who

> possess expertise in the educational area. These issues are critical to the progress of schools in this state, and, ultimately, the welfare of its citizens.

W. Va. Bd. of Educ. v. Hechler, 180 W. Va. 451, 455, 376 S.E.2d 839, 842 (1988).The Legislature's attempt to evade the supervisory authority of the WVBOE is unconstitutional.

5. HB 2013 Is an Unconstitutional Special Law.

The State argues that HB 2013 is not a special law because it operates uniformly on "school-aged kids." SM at 12. This is not true. Students receiving vouchers will be charged to use public school resources while non-voucher students in private school or homeschooling will not. W. VA. CODE § 18-31-8(f); Ex. O Pauley Aff. ¶ 17. Students receiving public funds for vouchers will not be treated the same as students attending public school, who benefit from the full range of anti-discrimination protections. Ex. K Lubienski Aff. ¶¶ 16-24. Thus, students educated through public funds are treated differently from each other, which is unconstitutional.

B. The Circuit Court Correctly Found Jurisdiction

The State also raises three jurisdiction arguments that can be readily dispatched. Indeed, they are so weak that the Interveners do not even raise them.

Standing. Respondents, West Virginia taxpaying citizens and parents of children enrolled in public schools have standing because the suit involves the unconstitutional use of taxpayer funds. *See Myers v. Frazier*, 173 W. Va. 658, 676, 319 S.E.2d 782, 800 (1984) (recognizing taxpayer standing); *see also State ex rel Goodwin v. Cook*, 162 W. Va. 161, 164-65, 248 S.E.2d 602, 604 (1978). Traditional standing is also met. *Men & Women Against Discrimination v. Fam. Prot. Servs. Bd.*, 229 W. Va. 55, 61-62, 725 S.E.2d 756, 762-63 (2011). Respondents will undoubtedly suffer injury. Constitutional violations are recognized as per se harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Leaders of a Beautiful Struggle v. Baltimore Police Dep't*, 2 F.4th 330, 346 (4th Cir. 2021) (same). Respondents are also injured by HB 2013's intentional

efforts to reduce public school enrollment, and hence their funding, as well as its diversion of public funds. This harm has been redressed by a court order. The elements for standing are met.

Ripeness. Strangely, the State complains that Respondents waited too long, SM at 13, *and* that the dispute is not ripe, *id.* at 7. West Virginia law is clear that a party does not have to wait until the harm has occurred to take action. A suit on an unconstitutional statute is ripe when the statute is going into effect. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979); *State ex rel. Rist v. Underwood*, 206 W. Va. 258, 271-72, 524 S.E.2d 179, 192-93 (1999).

Justiciability. The courts unquestionably have authority to determine whether a law enacted by the Legislature violates the West Virginia Constitution. *State ex rel. Heck's Disc. Ctrs., Inc. v. Winters*, 147 W. Va. 861, 869, 132 S.E.2d 374, 379 (1963). The only question at issue here is whether HB 2013 is constitutional. That is not a political question.

II. The Remainder of the Stay Considerations Preclude a Stay

The remaining stay factors also do not support a stay. It is no harm to the State to avoid implementing an unconstitutional statute. Indeed, the stay prevents the State from disbursing funds that it would have to try to claw back when the injunction is upheld. The State is better off with the injunction in place until the constitutionality of HB 2013 is fully and finally resolved.

As to harm to others, Petitioners go to great lengths to try to establish that failure to subsidize private and homeschooling creates irreparable harm. Of course it does not—this has been the system in place for all of West Virginia's history. And, unlike the constitutional right to public education, no one has a right to state-supported private education. To the extent Petitioners are arguing public school attendance creates irreparable harm, the State is failing its mandate to provide a thorough and efficient system of free schools and the siphoning of public funds is particularly egregious. Moreover, the State created the reliance on the voucher program by plowing

ahead with implementation in the face of the lawsuit—this cannot count in the State's favor.[12]

Petitioners suggest that the timing of the lawsuit somehow creates a basis for a stay. This is wrong. Respondents gave notice of the lawsuit in fall 2021, which was widely publicized, putting the public on alert that it may be struck down. Respondents carefully researched their claims and filed suit on January 19, 2022—well before the opening of applications in March 2022. It took over three months for a judge to be permanently assigned. With the suit, the public again knew that the statute may be enjoined. It was the State's responsibility to ensure this was understood by all applicants. Respondents brought the preliminary injunction in March 2022 and when a judge was finally assigned, the parties agreed to a hearing and briefing schedule. It was the schedule of counsel for the Intervenors that required the July 6 hearing date. The State argues that Respondents did not move for a TRO or request an expedited hearing. SM at 2. This was unwarranted since no funds would flow until August 2022. If Petitioners truly thought there was urgency, they should have sought an expedited hearing themselves—which they did not do. In any event, all parents knew or had notice that HB 2013 was under a legal challenge and that they could not count on the disbursement of any state funds for private education unless and until the courts fully and finally weighed in. Claims of surprise are disingenuous.[13]

CONCLUSION

For all of the reasons set forth herein, the Court should deny Petitioners' motion for a stay.

[12] It is also much more disruptive to families and schools to issue vouchers, have students enroll in private schools, and then discontinue the vouchers mid-year—causing chaos for the families, the private schools they leave and the public schools to which they return—rather than waiting until the lawsuit is resolved.

[13] One of the petitioners claims she cannot pay for charter school resources. IM at 6. But, charter school resources are free and remain free under the injunction. It is only HB 2013 that would require her to pay for public school resources. Intervenors also try to suggest that a stay is common in cases involving voucher statutes. IM at 15. They cite only to a partial stay in regard to a limited program in North Carolina. In fact, the only other universal voucher statute addressed by a state court, in Nevada, remained enjoined until it was permanently enjoined on appeal.

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, Petitioner/Defendant, KATIE SWITZER and JENNIFER COMPTON, Petitioners, v. TRAVIS BEAVER and WENDY PETERS Plaintiffs/Respondents.	**CASE NO. 22-1CA-1**

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2022, I served the foregoing Omnibus Opposition to Petitioners' Motion to Stay Pending Appeal via the Court's e-filing system, as well as a courtesy copy via email, on the following counsel:

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