

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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CATHY S. GATSON, CLERK  
KANAWHA COUNTY CIRCUIT COURT

TRAVIS BEAVER and WENDY PETERS,

Petitioners/Plaintiffs,

Civil Action No. 22-P-26

Civil Action No. 22-P-26

v.

Judges: Bloom; Bailey

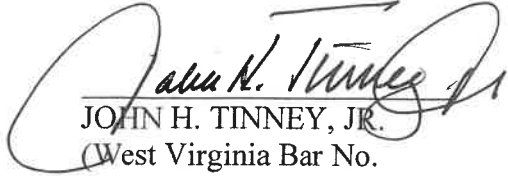
RILEY MOORE, in his Official Capacity as State Treasurer of West Virginia; W. CLAYTON BURCH, in his Official Capacity as State Superintendent of West Virginia; MILLER L. HALL, in his Official Capacity as President of West Virginia's Board of Education; CRAIG BLAIR, in his Official Capacity as the President of the West Virginia Senate; ROGER HANSHAW, in his Official Capacity as the Speaker of the West Virginia House of Delegates; and JIM JUSTICE, in his Official Capacity as Governor of West Virginia,

Respondents/Defendants.

**PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

Pursuant to West Virginia Rule of Civil Procedure 65, Plaintiffs hereby seek a preliminary injunction enjoining Defendants in their official capacities from implementing House Bill 2013 on the grounds that it violates Article XII, Sections 1, 2, 4, and 5, and Article VI, Section 39 of the West Virginia Constitution.

In support of this motion, Petitioners submit the accompanying memorandum and affidavits.



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Respondents/Defendants.

Civil Action No. 22-P-24

Civil Action No. 22-P-26

Judges: Bloom; Bailey

**MEMORANDUM OF LAW IN SUPPORT  
OF MOTION FOR PRELIMINARY INJUNCTION**

**I. INTRODUCTION**

The State of West Virginia has a constitutional duty to provide a thorough and efficient system of *public* schools for its children. In March 2021, the Legislature passed House Bill 2013 (“H.B. 2013” or the “Voucher Law”), codified as W. Va. Code § 18-31-1 *et seq.*, which will redirect precious public dollars away from public schools to fund private education and homeschooling. Legislative analysts estimate the Voucher Law will cost taxpayers over \$100 million per year when fully implemented. The West Virginia Constitution bars the Voucher Law

on multiple grounds. Plaintiffs are parents of public school children who—like public school students across the state—will be irreparably harmed if the Voucher Law is implemented. They bring this motion to preliminarily enjoin this unconstitutional law.

Success on the Merits. Plaintiffs are entitled to a preliminary injunction because they are likely to succeed on the merits. First, under the doctrine of *expressio unius*, the Legislature cannot take action that exceeds or frustrates its constitutional responsibility under Article XII (the “Education Article”) to provide for a system of free schools. The Voucher Law exceeds the constitutional mandate because it funds *private schools and homeschools*, not public schools. The Legislature cannot do that.

The Voucher Law also frustrates this constitutional mandate because it diverts public money that should be spent on the State’s already underfunded public schools toward private schools and homeschooling—significantly undermining the State’s ability to provide adequate education in the public schools. A thorough and efficient education costs money, and siphoning money away from that effort makes it more difficult, if not impossible, for public schools to meet students’ needs. Of course, parents are free to choose whatever type of education they want for their children, but the Legislature must—and may only—fund and support a system of *public* schools. Because the Voucher Law exceeds and frustrates the Legislature’s specified Education Article duties, it is unconstitutional.

Second, the Voucher Law fails strict scrutiny. Public education in West Virginia is a fundamental right. Legislative actions that negatively impact public school funding are subject to strict scrutiny. That is: the Legislature can only reduce funds available for public education for a compelling purpose and such legislation must be narrowly tailored to that purpose. The Voucher Law fails this test on both grounds. Subsidizing non-public education is *not* a compelling

government interest. In fact, it is not a government interest at all. Private education is the province of the private and religious sectors—not the state government. The Voucher Law is also *not* narrowly tailored. It has no enrollment restrictions, it is neither need- nor means-based, and it imposes no educational or accountability standards. The Voucher Law is a broad giveaway of public funds to subsidize private education expenses, including private school tuition and homeschooling, with no restrictions, requirements, or controls—the opposite of a narrowly tailored program. Because the Voucher Law fails strict scrutiny, it cannot stand.

Third, the West Virginia Constitution only provides mechanisms for the funding of *public* education. At the outset, public schools were funded through the “School Fund,” which drew revenue from specific sources. Section 4 of the Education Article expressly states that the School Fund “shall be annually applied *to the support of free schools* throughout the state, and to *no other purpose whatever.*”<sup>1</sup> Section 5 was added to the Education Article to provide mechanisms for raising additional funds for public education, stating: “The Legislature shall provide *for the support of free schools* by [various revenue sources] and by general taxation of persons and property or otherwise. It shall also provide for raising in each county or district . . . the amount required *for the support of free schools* therein . . . .”<sup>2</sup> Taken together, Sections 4 and 5 of the Education Article make up the entire constitutional funding mechanisms for education in the State. These provisions make clear that funding for education must be used to support free schools—*public* funds can be used for *public* education only. The Voucher Law uses public monies to fund private education in direct violation of the Constitution.

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<sup>1</sup> W. VA. CONST. art. XII, § 4 (emphases added).

<sup>2</sup> W. VA. CONST. art. XII, § 5 (emphasis added).

Fourth, the Voucher Law impinges on the West Virginia Board of Education’s (“Board of Education” or “WVBOE”) constitutional authority. The Constitution places authority over state-funded K-12 education solely in the WVBOE.<sup>3</sup> The Voucher Law improperly creates a new and separate board, the Hope Scholarship Board, to oversee the use of public funds for vouchers. Indeed, the Voucher Law expressly bars the Board of Education from exercising any oversight over the use of these public funds. The Voucher Law is unconstitutional because it eliminates the WVBOE’s authority to oversee the expenditure of public funds—\$100 million or more each year—on K-12 education for students receiving vouchers.

Fifth, the Voucher Law is an unconstitutional “special law.”<sup>4</sup> The Constitution has a strong presumption against laws that treat people differently. Here, the Voucher Law excludes students receiving public funds for education through vouchers from numerous, critical antidiscrimination protections afforded to students attending public schools. Specifically, the Voucher Law allows students using publicly funded vouchers to be *discriminated against* by private schools on the basis of religion, gender identity, sexual orientation, or disability status, while students attending public schools cannot be discriminated against on these grounds. The Constitution does not countenance this differential treatment where public funds are involved.

Irreparable Harm. Plaintiffs are also entitled to a preliminary injunction because the Voucher Law will inflict considerable and irreparable harm if not enjoined. Violations of constitutional rights are so serious that they are considered per se irreparable harm. The inquiry can end there. Even if an additional showing of irreparable harm were necessary, the harm here is obvious. The Voucher Law will divert millions of dollars in public funds to private education. West Virginia’s public schools already struggle to meet students’ needs because of chronic and

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<sup>3</sup> W. VA. CONST. art. XII, § 2

<sup>4</sup> W. VA. CONST. art. VI, § 39.

severe state underfunding—taking away additional, critical dollars will make these conditions materially worse. Likewise, peer-reviewed social science research unequivocally establishes that vouchers concentrate students in poverty and those with special needs in public schools while diminishing the resources necessary to educate them. Segregating students in this manner and failing to provide sufficient educational resources has a profound, negative effect on student achievement, wellbeing, and lifelong success. Impairing a child’s educational development is the *sine qua non* of irreparable harm. The Voucher Law must be enjoined.

## **II. BACKGROUND**

### **A. The Primacy of Public Education Under the West Virginia Constitution**

Under Section 1 of the Education Article, the Legislature has a duty to provide a “thorough and efficient system of free schools” for the children of the State.<sup>5</sup> Section 2 vests “general supervision” of public funds spent on K-12 education in the West Virginia Board of Education.<sup>6</sup> Section 4 creates a fund “applied to the support of free schools throughout the State, and to no other purpose whatever.”<sup>7</sup> Section 5 directs the Legislature to “provide for the support of free schools,” by various additional measures.<sup>8</sup>

The drafters of the Constitution put a high priority on public education.<sup>9</sup> Prior to West Virginia becoming a separate state, “Virginia’s failure to provide a system of free public education had long rankled the western counties” that seceded to form West Virginia.<sup>10</sup> As the Supreme Court of Appeals acknowledged, “[t]he framers of our Constitution lived among the

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<sup>5</sup> W. VA. CONST. art. XII, § 1.

<sup>6</sup> W. VA. CONST. art. XII, § 2.

<sup>7</sup> W. VA. CONST. art. XII, § 4.

<sup>8</sup> W. VA. CONST. art. XII, § 5.

<sup>9</sup> *Bastress Aff.* ¶¶ 3-5 (“The desire to push towards universal free, public education garnered more support among the delegates than any other issue[.]”).

<sup>10</sup> *Randolph Cnty. Bd. of Educ. v. Adams*, 196 W. Va. 9, 15 (1995) (quoting ROBERT M. BASTRESS, *THE W. VA. STATE CONST.—A REFERENCE GUIDE* 271 (1995)); *see also* *Bastress Aff.* ¶ 2.

ruins of a system that virtually ignored public education and its significance to a free people.”<sup>11</sup> As a result, when the convention met in 1861 to create West Virginia’s first constitution, the framers gave high priority to public education, stating that the “virtue and general intelligence among the people . . . is the only sure foundation on which Republican governments can rest.”<sup>12</sup> The delegates cemented public education as a sacrosanct constitutional right in West Virginia.

The drafters were explicit about the mandate to create and maintain a system of public schools, and they were just as explicit about funding *only* public schools. A report from the Constitutional Convention’s Committee on Education explained: “[a]ll money . . . shall be . . . sacredly devoted and applied to the support of primary education in common schools throughout the State, and to no other purpose whatever.”<sup>13</sup> West Virginia would provide quality public education and would allocate public education funds for that purpose *only*.<sup>14</sup>

### **B. Public Education Funding in West Virginia**

West Virginia public schools rely on two primary sources of funding: state-level funds and local property taxes.<sup>15</sup> The state-level funds pull from several sources, including the General School Fund,<sup>16</sup> general tax revenue,<sup>17</sup> state lottery proceeds, and fees from state licenses, such as marriage licenses.<sup>18</sup> All of these funds can be used only for support of the free schools.<sup>19</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> Granville Parker, First Constitutional Convention. Dec. 2, 1861, available at <https://archive.wvculture.org/history/statehood/cc120261.html>.

<sup>13</sup> Rev. Gordon Battelle, *Debates & Proc.*, FIRST CONST. CONVENTION OF W. VA. (Dec. 19, 1861), <https://archive.wvculture.org/history/statehood/cc121961.html> (prefacing what would become Article XII, § 4).

<sup>14</sup> See e.g., *Adams*, 196 W. Va. at 14 (referring to Article XII § 1 as “a constitutional provision that seeks broadly to overcome all hostility to quality public education”).

<sup>15</sup> FundEd: State Policy Analysis, *West Virginia*, <http://funded.edbuild.org/state/WV> (last visited Mar. 23, 2022).

<sup>16</sup> See W. VA. CONST. art. XII, § 4; W. Va. Code § 18-9A-16.

<sup>17</sup> See W. VA. CONST. art. XII, § 5.

<sup>18</sup> See *Board of Educ. of Wyoming Cnty. v. Bd. of Pub. Works*, 144 W. Va. 593, 609 (1959). See also H.B. 2022 Enrolled Budget, 39, 148-49, 201, <https://budget.wv.gov/approvedbudget/Documents/HB2022%20SUB%20ENR.pdf>.

<sup>19</sup> W. VA. CONST. art. XII, § 5.



The basic state aid appropriation—how much money local districts receive from the State—is calculated through the Public School Support Program (“PSSP”).<sup>20</sup> Under the PSSP, the West Virginia Department of Education (“WVDOE”) is tasked with determining the amount of funding sufficient to operate and provide educational resources to the public schools in the State.<sup>21</sup> For the 2021-22 school year, the basic state aid per pupil is approximately \$4,600.<sup>22</sup>

### **C. The Voucher Law**

On March 27, 2021, Defendant Governor Jim Justice signed into law H.B. 2013, the Voucher Law. Under H.B. 2013, a child is eligible to receive a voucher for private school or homeschooling if the child is a resident of the State, and either (a) is enrolled full time in public school for at least 45 days; (b) is enrolled full time in public school for the entire term of the previous year; or (c) is eligible at the time of application to enroll in kindergarten.<sup>23</sup> If less than 5% of eligible students enroll after two years, the eligibility expands to any student in the State, regardless of whether they have ever attended public school.<sup>24</sup>

H.B. 2013 creates a special Hope Scholarship Board to administer the voucher program. Parents can submit a voucher application and, provided the minimal requirements are met, the Hope Scholarship Board “shall” approve the application.<sup>25</sup> Funds are deposited into each voucher recipient’s personal education savings account (“ESA”), to be used for qualifying education expenses. These include private school tuition, homeschooling expenses, tuition and

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<sup>20</sup> W. Va. Code §§ 18-9A-1 *et seq.*

<sup>21</sup> State of West Virginia Abbreviated Summary of the Public School Support Program Based on the Final Computations for the 2022-23 Year, <https://wvde.us/wp-content/uploads/2021/12/PSSP-Abbreviated-Summary-23-Prel-Comps.pdf>.

<sup>22</sup> Reynolds Aff., ¶¶ 3-4, Ex. 3 & 4 (W. VA. LEGIS. AUDITOR, H.B. 2013 FISCAL NOTE (2021).)

<sup>23</sup> W. Va. Code § 18-31-2(5).

<sup>24</sup> *Id.*

<sup>25</sup> W. Va. Code § 18-31-5(d).

fees for nonpublic online learning programs, and other private educational costs.<sup>26</sup> Each ESA is to receive on a yearly basis an amount “equal to 100 percent of the prior year’s statewide average net state aid share allotted per pupil based on net enrollment adjusted for state aid purposes[.]”<sup>27</sup>

The voucher program must be operational no later than July 1, 2022<sup>28</sup> and the Hope Scholarship Board is to create an application made available no later than March 1, 2022.<sup>29</sup> The Hope Scholarship Board began accepting applications on March 1, 2022.<sup>30</sup>

In 2022, the Legislature will appropriate a minimum of approximately \$22 million to the voucher program.<sup>31</sup> If applications necessitate additional funds, the statute mandates that the funds be appropriated.<sup>32</sup> If the program opens up to all private and home-schooled students in the State in 2026, funding for vouchers is estimated to increase over \$100 million annually.<sup>33</sup>

The Voucher Law does not impose academic testing requirements to monitor whether private school or homeschooled students who receive vouchers meet education standards. Indeed, the statute contains no academic requirements beyond a school or parent’s *promise* that they will:

- a. Provide an education for the student “in at least the subjects of reading, language, mathematics, science, and social studies”
- b. Use the funds exclusively for qualifying expenses as provided in W. Va. Code § 18-31-7
- c. Comply with the rules of the program
- d. “[A]fford the Hope Scholarship student opportunities for educational enrichment such as organized athletics, art, music, or literature.”<sup>34</sup>

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<sup>26</sup> W. Va. Code § 18-31-7(a).

<sup>27</sup> W. Va. Code § 18-31-6(b).

<sup>28</sup> W. Va. Code § 18-31-5(a).

<sup>29</sup> *Id.*

<sup>30</sup> See Hope Scholarship West Virginia, <https://www.hopescholarshipwv.com/> (last visited Mar. 23, 2022).

<sup>31</sup> Reynolds Aff., Ex. 3 & 4 (W. VA. LEGIS. AUDITOR, H.B. 2013 FISCAL NOTE (2021)); W. Va. Code § 18-9A-25.

<sup>32</sup> *Id.*

<sup>33</sup> Reynolds Aff., Ex. 1 & 2 (W. VA. DEP’T OF EDUC., H.B. 2013 FISCAL NOTE (2021)); *Id.* at Ex. 3 & 4 (W. VA. LEGIS. AUDITOR, H.B. 2013 FISCAL NOTE (2021)).

<sup>34</sup> W. Va. Code § 18-31-5(d)(3).

In short, private entities and parents can take the voucher money with no obligation under the Voucher Law to show any academic progress at all.<sup>35</sup>

The statute also expressly limits—and actively forbids—oversight of entities that will be publicly funded by the voucher program. It states: “Education service providers [(“ESPs”) which include both schools and parents]<sup>36</sup> shall be given maximum freedom. . . without governmental control” and “[t]his article does not expand the regulatory authority of the state, its officers, or any school district to impose any additional regulation of education service providers beyond those necessary to enforce the requirements of the program.”<sup>37</sup>

The statute also restricts the State’s ability to audit private schools and homeschooling parents to ensure the voucher funds are used for educational expenses. The Hope Scholarship Board “may” audit only “if it determines that the [ESP] has: (1) [i]ntentionally and substantially misrepresented information or failed to refund any overpayments in a timely manner; or (2) [r]outinely failed to provide students with promised educational goods or services.”<sup>38</sup>

Finally, the Voucher Law does not prohibit discrimination on the basis of religion, gender identity, sexual orientation, or disability. The Voucher Law includes only limited federal antidiscrimination protections under 42 U.S.C. § 1981<sup>39</sup>—which covers racial discrimination—and otherwise expressly states that any ESP that accepts voucher funds need not “alter its creed, practices, admission policy, hiring policy or curriculum[.]”<sup>40</sup> Indeed, the Legislature refused to adopt an amendment to H.B. 2013 that would have made it illegal to discriminate—thus

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<sup>35</sup> Lubienski Aff. ¶ 11 (noting there are “virtually no requirements” for participating private schools).

<sup>36</sup> W. Va. Code § 18-31-2(4).

<sup>37</sup> W. Va. Code § 18-31-11(c), (e).

<sup>38</sup> W. Va. Code § 18-31-10.

<sup>39</sup> W. Va. Code § 18-31-11(a)(4).

<sup>40</sup> W. Va. Code § 18-31-11(d).

expressly choosing to permit private institutions that accept public voucher money to discriminate on grounds such as those noted above.<sup>41</sup>

### **III. ARGUMENT**

#### **A. Legal Standard**

Courts assess four elements to determine whether a preliminary injunction should be issued: (1) the plaintiff's likelihood of success on the merits; (2) the likelihood of irreparable harm to the plaintiff without the injunction; (3) the likelihood of harm to the defendant with an injunction; and (4) the public interest.<sup>42</sup> All of these factors weigh in favor of an injunction here.

#### **B. Plaintiffs Will Prevail on the Merits**

The plaintiffs are likely to prevail on multiple, independent constitutional grounds.

##### **1. The Doctrine of *Expressio Unius* Bars the Voucher Law**

First, the principle of constitutional construction known as *expressio unius est exclusio alterius* (“*expressio unius*”) prohibits statutes that exceed or frustrate express constitutional duties,<sup>43</sup> with either being sufficient to bar a statute as unconstitutional. A “grant of a specific and clearly defined power is, by implication equally potent, a denial of any other power in the premises.”<sup>44</sup> The doctrine of *expressio unius* is “axiomatic law” in West Virginia<sup>45</sup> and is relied on in cases “simply overwhelming in number.”<sup>46</sup>

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<sup>41</sup> Ryan Quinn, *WV House passes sweeping bill providing public money to home-, private-school families*, CHARLESTON GAZETTE-MAIL (Mar. 4, 2021), [https://www.wvgazettemail.com/news/legislative\\_session/wv-house-passes-sweeping-bill-providing-public-money-to-home--private-school-families/article\\_314bf68d-dba0-55d1-a036-b2c883eb83dd.html](https://www.wvgazettemail.com/news/legislative_session/wv-house-passes-sweeping-bill-providing-public-money-to-home--private-school-families/article_314bf68d-dba0-55d1-a036-b2c883eb83dd.html).

<sup>42</sup> *Three Run Maint. Ass'n, Inc. v. Heavner*, No. CC-02-2017-P-412, 2017 WL 11515028, at \*1 (W. Va. Cir. Ct. Jan. 1, 2017) (citing *Jefferson Cty Bd. of Educ. v. Jefferson Cty. Educ. Ass'n*, 183 W. Va. 15, 24 (1990) and *Camden-Clark Mem'l Hosp. Corp. v. Turner*, 212 W. Va. 752, 756 (2002)).

<sup>43</sup> *State v. Gilman*, 33 W. Va. 146, 150 (1889); see also *State ex rel. Downey v. Sims*, 125 W. Va. 627, 633 (1943).

<sup>44</sup> *State ex rel. Downey*, 125 W. Va. at 632.

<sup>45</sup> *Dunham v. Morton*, 115 W. Va. 310, 313 (1934).

<sup>46</sup> *State ex rel. Downey*, 125 W. Va. at 633.

In *State v. Gilman*, the Supreme Court of Appeals applied *expressio unius* and barred the Legislature from going beyond its constitutional duties regarding the regulation of alcohol.<sup>47</sup> The Legislature passed a law criminalizing *possession* of alcohol even though the Constitution only allowed legislative regulation of the *sale* of intoxicating liquors.<sup>48</sup> The court invalidated the law because it exceeded the express constitutional mandate,<sup>49</sup> explaining: “[b]y granting an express authority to the legislature to regulate or prohibit the sale, there is an implied inhibition to the exercise of any authority in respect to that subject which is not embraced in the grant.”<sup>50</sup>

Likewise, in *State ex rel. Downey v. Sims*, the Supreme Court of Appeals applied *expressio unius* to bar a statute allowing the Legislature to invalidate the appointment of a previously rejected person for a *different* office during a recess.<sup>51</sup> The Constitution states: “[i]n case of a vacancy, during the recess of the Senate . . . [n]o person, after being rejected by the Senate . . . shall . . . be appointed to the *same* office during the recess of the Senate.”<sup>52</sup> Because the Constitution gave the Senate “express grant . . . to render a person ineligible for” the previously rejected appointment during a recess, the Senate did not have the power to exceed that constitutional mandate by invalidating the appointment of a person to a different position.<sup>53</sup>

Similarly, in *Dunham v. Morton*, the Supreme Court of Appeals applied *expressio unius* to invalidate a statute allowing the Governor to break ties in votes for county commissioners. The Constitution specifies that commissioners “shall be elected by the voters of the county.”<sup>54</sup>

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<sup>47</sup> *Gilman*, 33 W. Va. at 149-50.

<sup>48</sup> *Id.* (emphasis added).

<sup>49</sup> *Id.* at 147.

<sup>50</sup> *Id.* at 150.

<sup>51</sup> 125 W. Va. at 627 (emphasis added).

<sup>52</sup> *Id.* at 631-32 (emphasis added).

<sup>53</sup> *Id.* at 632.

<sup>54</sup> *Dunham*, 115 W. Va. at 313.

The court held that “constitutional specification of the one method . . . operates to the exclusion of all other methods,” including a tiebreaking vote by the Governor.<sup>55</sup>

Finally, in *Geeslin v. Workmen’s Comp. Com’r*, the Supreme Court of Appeals applied *expressio unius* to bar the application of common law that frustrated the purpose of the Workmen’s Compensation Act.<sup>56</sup> The statute specified certain exceptions to compensation claims.<sup>57</sup> In light of these express statutory exceptions to a claim, the *Geeslin* court refused to recognize common law exceptions.<sup>58</sup> As the court explained, recognizing a non-statutory bar to recovery “would *frustrate*” the purpose of the Act.<sup>59</sup>

**a. The Voucher Law Exceeds the State’s Constitutional Obligation to Provide a Thorough and Efficient System of Free Schools**

Article XII, Section 1 states that the “Legislature shall provide . . . for a thorough and efficient system of free schools.”<sup>60</sup> Section 5 obligates the Legislature to “provide for the support of free schools” through public revenue.<sup>61</sup> Pursuant to the doctrine of *expressio unius*, the Constitution prohibits the Legislature from exceeding this mandate by publicly funding private education outside the system of free schools. Public funds for free schools are mandated by the Constitution. Public funds for private education exceed that mandate. A publicly funded system of private education separate from public education is exactly what the Legislature is attempting to establish here—with a separate Board, no academic requirements, and fewer antidiscrimination requirement. This separate program is unconstitutional.

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<sup>55</sup> *Id.*

<sup>56</sup> 170 W. Va. 347, 351 (1982).

<sup>57</sup> *Id.* at 348 n.1.

<sup>58</sup> *Id.* at 352.

<sup>59</sup> *Id.* at 351 (emphasis added).

<sup>60</sup> W. VA. CONST. art. XII, § 1; *see also Pauley v. Kelly*, 162 W. Va. 672, 689 (1979) (The duty placed on the Legislature by Section 1 is “absolutely mandatory.”).

<sup>61</sup> W. VA. CONST. art. XII, § 5; *see also* W. VA. CONST. art. XII, § 4 (“[T]he interest [of the School Fund] shall be annually applied to the support of free schools throughout the state, and to no other purpose whatever.”).

The Florida Supreme Court enjoined an expansive voucher program on this very ground. The Florida Constitution mandates “a uniform, efficient, safe, secure, and high quality system of free public schools[.]”<sup>62</sup> In *Bush v. Holmes*, the court struck down a broad voucher statute under the *expressio unius* principle, holding that the Legislature’s mandate to provide free public schools prohibited it from creating a system of funding for non-free schools with different academic and antidiscrimination standards.<sup>63</sup> The same result is required here.

**b. The Voucher Law Frustrates the State’s Constitutional Obligation to Provide a Thorough and Efficient System of Free Schools**

Exceeding constitutional authority alone bars the Voucher Law, but the statute also actively frustrates the Legislature’s constitutional obligations. A thorough and efficient system of public schools requires adequate funding. The Voucher Law takes public funds that could be used to meet this obligation, and diverts those scarce dollars to subsidize private schools and homeschooling. And it goes one step further by providing a monetary incentive for students to leave the public school system, depleting public school budgets that are significantly based on enrollment.<sup>64</sup> It also provides vouchers to students who would never have gone to public school—every student starting in kindergarten can take the public money. Moreover, media reports demonstrate that students who have never been in public school plan to claim the funds even before they become universal.<sup>65</sup> Finally, this Voucher Law will concentrate the most vulnerable and costly to educate students in public schools without sufficient resources to meet

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<sup>62</sup> FL. CONST. art. IX, § 1(a).

<sup>63</sup> 919 So. 2d 392, 407 (Fla. 2006).

<sup>64</sup> State of West Virginia Abbreviated Summary of the Public School Support Program Based on the Final Computations for the 2022-23 Year, <https://wvde.us/wp-content/uploads/2021/12/PSSP-Abbreviated-Summary-23-Prel-Comps.pdf>.

<sup>65</sup> Ryan Quinn, *WV private schoolers discussing workaround to get voucher money*, CHARLESTON GAZETTE-MAIL (Nov. 24, 2021), [https://www.wvgazette.com/news/education/wv-private-schoolers-discussing-workaround-to-get-voucher-money/article\\_54a173e3-b51c-54c4-ac50-e9a72e70d76e.html](https://www.wvgazette.com/news/education/wv-private-schoolers-discussing-workaround-to-get-voucher-money/article_54a173e3-b51c-54c4-ac50-e9a72e70d76e.html).

their elevated needs,<sup>66</sup> while West Virginia’s public school funding already disproportionately disadvantages high poverty districts.<sup>67</sup> When every child in private school and homeschooling receives these voucher funds, there will be a \$100 million hole in the State’s budget—frustrating its ability to deliver quality public education.<sup>68</sup>

The Ohio Supreme Court indicated that an expansive voucher program would violate a similar provision of Ohio’s Education Article. The Ohio Constitution mandates “a thorough and efficient system of common schools.”<sup>69</sup> In *Simmons-Harris v. Goff*, the court rejected a challenge to a limited voucher program that targeted students only in one school district because the program’s small scope did not “undermine[] the state’s obligation to public education.”<sup>70</sup> However, the court expressly noted that “a greatly expanded School Voucher Program . . . could damage public education” and “be subject to a renewed constitutional challenge.”<sup>71</sup> The Voucher Law at issue here is exactly the type of “greatly expanded” voucher program that would frustrate West Virginia’s constitutional obligation to provide a “thorough and efficient system of free schools.”<sup>72</sup>

## **2. The Voucher Law Diminishes Public School Funding Without Meeting Strict Scrutiny**

In West Virginia, public education is an “essential constitutional right.”<sup>73</sup> “The financing

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<sup>66</sup> Lubienski Aff. ¶¶ 23, 30.

<sup>67</sup> See *Making the Grade 2020*, Education Law Center, <https://edlawcenter.org/research/making-the-grade-2020.html> (last visited Mar. 24, 2022).

<sup>68</sup> The budgetary impact will not be minimal. Eligibility extends to all upcoming kindergarteners, see *supra* Section II.C, and private schools are advising families how to circumvent this requirement, see Reynolds Aff. ¶ 8, Ex. 7.

<sup>69</sup> OHIO CONST. art. VI, § 2.

<sup>70</sup> See *Simmons-Harris v. Goff*, 86 Ohio St. 3d 1, 11 (1999).

<sup>71</sup> *Id.* at 11 n.2.

<sup>72</sup> See Lubienski Aff. ¶¶ 7-12 (detailing that the Voucher Law is “by far the broadest” program in the country).

<sup>73</sup> *W. Va. Educ. Ass’n v. Legislature of State of W. Va.*, 179 W. Va. 381, 382 (1988); see *Bastress Aff.* ¶¶ 3-5.



of education is, among mandated public services, *the first constitutional priority*.<sup>74</sup> Because an adequate public education is a constitutional right, West Virginia courts have made clear that the Legislature cannot take actions that diminish public school funding without showing that those actions meet strict scrutiny. That is, the State must demonstrate that such actions meet a compelling state interest and are narrowly tailored to achieve that compelling interest.<sup>75</sup> The Voucher Law does not meet either prong of the strict scrutiny standard.

**a. The Voucher Law Does Not Advance Any Compelling State Interest**

The Voucher Law reduces the funds available to public schools without a compelling state interest.<sup>76</sup> The State has no interest in funding private schools or homeschools. The State's sole constitutional mandate is to create a thorough and efficient system of free schools.<sup>77</sup>

**b. The Voucher Law Is Not Narrowly Tailored**

Even if the State were to identify a compelling interest in funding vouchers—which it cannot—the Voucher Law fails strict scrutiny because it is not narrowly tailored to meet a state interest.<sup>78</sup> In *Cathe A. v. Doddridge County Board of Education*, the Supreme Court of Appeals enjoined legislation that permitted the removal of students from the classroom for up to twelve months for threatening behavior detrimental to other students.<sup>79</sup> The court held the law was not

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<sup>74</sup> 179 W. Va. at 382 (emphasis added); *State ex rel. Bd. of Educ. Of Cnty. of Kanawha v. Caperton*, 190 W. Va. 652, 653 (1994); *W. Va. Educ. Ass'n v. Legislature of State of W. Va.*, 179 W. Va. at 382; *State ex rel. Bd. of Ed., Kanawha Cty. v. Rockefeller*, 167 W. Va. 72, 76 (1981); *Bastress Aff.* ¶ 7.

<sup>75</sup> *Pauley*, 162 W. Va. at 708; *Bd. of Educ. of Cnty. of Kanawha v. W. Va. Bd. of Educ.*, 219 W. Va. 801, 807 (2006); *Cathe A. v. Doddridge Cnty. Bd. of Educ.*, 200 W. Va. 521, 528 (1997) (“any denial or infringement of the fundamental right to an education for a compelling State interest must be narrowly tailored”); *Rockefeller*, 167 W. Va. at 79-81 (applying strict scrutiny and holding that a coal strike did not justify reduction in public school funding); *State ex rel. Brotherton v. Blankenship*, 157 W. Va. 100, 125 (1973) (holding that the Legislature is prohibited from “perform[ing] any act which would result in the elimination of [a thorough and efficient system of public schools]”).

<sup>76</sup> See *supra* Section I.

<sup>77</sup> W. VA. CONST. art. XII, § 1; see also *supra* Section III.B.1.

<sup>78</sup> *Cathe A.*, 200 W. Va. at 528.

<sup>79</sup> *Id.* at 531-32.

narrowly tailored because it applied the policy to all children in all circumstances.<sup>80</sup>

Similarly, the Voucher Law is expansive by any measure. Proponents of H.B. 2013 tout the statute as the “most expansive” voucher program in the country.<sup>81</sup> There is no limitation on eligibility such as family income, geographic location or school district, or the particular educational needs of the student.<sup>82</sup> The Voucher Law offers a voucher to every child starting kindergarten without regard to whether their family can already afford private school or homeschooling. In three years, the voucher program can be available to every child in the State. The Voucher Law does not require private schools or homeschooling parents to meet any educational or other standards to receive voucher funds. It is quite simply an indiscriminate giveaway of public funds without accountability for the use of those funds. It is not tailored at all, let alone narrowly tailored to meet any compelling interest.

### **3. The School Fund and Other Public Funds for Education Can Only Be Used to Fund Public Schools**

The Voucher Law violates the explicit text and history of Article XII, Sections 4 and 5, which require that State funding pay only for *public* K-12 education. Section 4 plainly states that the “School Fund” shall be used to support “free schools throughout the State, and *to no other purpose whatever*.”<sup>83</sup> “If the language of a constitutional provision is plain and unambiguous it is not subject to judicial interpretation[.]”<sup>84</sup> Similarly, Section 5 grants a broad mandate to the Legislature to use general taxation authority to provide *only* for free schools: “The Legislature

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<sup>80</sup> *Id.*

<sup>81</sup> *Hope Scholarship Program*, EDCHOICE.ORG, <https://www.edchoice.org/school-choice/programs/hope-scholarship-program> (last visited Mar. 24, 2022).

<sup>82</sup> See *Lubienski Aff.* ¶ 8 (noting that most voucher programs cap participation based on factors like family income, school performance, or student need).

<sup>83</sup> W. VA. CONST. art. XII, § 4 (emphasis added). The 1902 amendment to Section 4 stated that interest from the School Fund would accrue to the General School Fund only “for the support of free schools.” CONST. AMEND. THE IRREDUCIBLE SCHOOL FUND AMENDMENT, CONST. OF W. VA. (1872); *State v. Conley*, 118 W. Va. 508, 510(1937).

<sup>84</sup> *Blankenship*, 157 W. Va. at 108.

shall provide *for the support of free schools . . .* by general taxation of persons and property . . .

.”<sup>85</sup> These funds make up the General School Fund. Based upon the plain language of the Constitution, the courts have held that the General School Fund “shall be set apart for the support of the free schools of the State.”<sup>86</sup>

Taken together, Sections 4 and 5 comprise the constitutional parameters for raising and spending public dollars on K-12 education. Each provision makes clear that public funds for education are for the free schools and no other purpose whatsoever. The Voucher Law violates this plain constitutional mandate, allowing public money to be used to fund private schools, homeschooling, and an array of other private education expenditures.

#### **4. The Voucher Law Improperly Places Authority Over State Expenditure of Funds for Education Outside the West Virginia Board of Education**

The Voucher Law improperly usurps the constitutional authority of the WVBOE. The West Virginia code interprets Article XII, Section 2 as imposing upon the WVBOE the duty to “carry[] into effect the laws and policies of the state relating to education.”<sup>87</sup> When the Legislature passes laws that “interfere[]” with the Board of Education’s constitutional authority, those laws are “unconstitutional.”<sup>88</sup>

The Voucher Law unconstitutionally interferes with the Board of Education’s supervisory and rule-making authority over public funding for education by creating a separate Hope Scholarship Board to *supervise* spending of public funds for vouchers.<sup>89</sup> This unconstitutionally

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<sup>85</sup> W. VA. CONST. art. XII, § 5 (emphasis added).

<sup>86</sup> *Board of Ed. of Wyoming Cnty.*, 144 W. Va. at 609.

<sup>87</sup> W. Va. Code § 18-2-5; *West Virginia Bd. of Educ. v. Bd. of Educ. of the Cnty. of Nicholas*, 239 W. Va. 705, 714 (2017) (citing statute). The WVBOE has previously used its constitutional authority to promulgate regulations governing private schools. *See, e.g.*, W. Va. Code St. R. § 126-13C-2 (governing voluntary accreditation for non-public schools); W. Va. Code § 18-2-7 (providing that English shall be the basic language of instruction).

<sup>88</sup> *West Virginia Board of Education v. Hechler*, 180 W. Va. 451, 454 (1988).

<sup>89</sup> W. Va. Code § 18-31-3.

precludes the WVBOE from exercising its mandate to supervise public funding of education.<sup>90</sup> And it does so despite the fact that voucher funds flow directly through the WVDOE.<sup>91</sup>

### 5. The Voucher Law Is an Unconstitutional Special Law

Finally, Plaintiffs will prevail in their claim that H.B. 2013 violates West Virginia's prohibition on special laws. The West Virginia Constitution has a strong presumption against laws that treat people differently, preferring generally applicable laws.<sup>92</sup> This provision operates as "an equal protection clause [that is designed] to prevent the arbitrary creation of special classes, and the unequal conferring of statutory benefits."<sup>93</sup> Legislation will be invalidated if it excludes without reasonable basis persons that "would otherwise be subject to a general law."<sup>94</sup>

The Voucher Law is not a general law. It effectively creates two classes of students who receive public funds for education: students protected from all discrimination, and students unprotected from most types of discrimination. Public school students are protected by general state and federal antidiscrimination laws, including the West Virginia Human Rights Act and state special education law.<sup>95</sup> But these same antidiscrimination protections are not available to students receiving public funds for private education expenditures.<sup>96</sup> ESPs remain free to discriminate on the basis of religion, gender identity, sexual orientation, and disability.<sup>97</sup> The

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<sup>90</sup> W. Va. Code § 18-31-11(c), (e).

<sup>91</sup> W. Va. Code § 18-9A-25.

<sup>92</sup> W. VA. CONST. art. VI, § 39 ("in no case shall a special act be passed, where a general law would be proper")

<sup>93</sup> *State ex rel. City of Charleston v. Bosely*, 165 W. Va. 332, 339-40 (1980); *see also Bailey v. Truby*, 174 W. Va. 8, 24 (1984) (every law must operate alike "on all persons and property similarly situated").

<sup>94</sup> *State ex rel. Cty. Ct. of Cabell Cnty. v. Battle*, 147 W. Va. 841, 841 (1963); *see also State ex rel. Taxpayers Protective Ass'n of Raleigh Cnty. v. Hanks*, 157 W. Va. 350, 355-56 (1973) (invalidating as a "special law" a statute that only allowed counties with more than 100,000 people to close their courthouses on Saturdays).

<sup>95</sup> *See, e.g.*, W. Va. Code § 5-11-9; Policy 2419: Regulations for the Education of Students with Exceptionalities Effective August 14, 2017.

<sup>96</sup> W. Va. Code § 18-31-11(d) ("A participating school or education service provider is not required to alter its creed, practices, admission policy, hiring policy or curriculum in order to accept eligible recipients whose parents pay tuition or fees from a Hope Scholarship account").

<sup>97</sup> *See Lubienski Aff.* ¶ 19 (finding numerous instances in the U.S. where voucher schools rejected students based on factors such as religious beliefs, disability, academic ability, or sexual orientation of the child or parent.); Reynolds

Voucher Law is an unlawful special law: West Virginia students receiving public funds for education are not uniformly protected from discrimination.

**C. Plaintiffs Will be Irreparably Harmed if a Preliminary Injunction Is Not Issued**

Plaintiffs will suffer irreparable harm if H.B. 2013 is not enjoined. Constitutional violations are per se irreparable harm.<sup>98</sup> This well recognized principle ends the inquiry.

Even absent a presumption of harm, the Voucher Law will create irreparable injury. Peer-reviewed social science research unequivocally establishes that vouchers segregate the most vulnerable students in public schools without sufficient resources to meet their elevated needs.<sup>99</sup> When fully implemented, the *annual* cost of the voucher program to state taxpayers will exceed \$100 million *indefinitely*.<sup>100</sup> Districts will be compelled to reduce their budgets, disrupting basic programs and services essential to a constitutionally adequate education. This includes special education resources; courses like robotics, drama, and art; tutoring programs; student access to school transportation; as well as services that provide low-income students with much-needed meals.<sup>101</sup> Students will be negatively impacted by increased class sizes, reduced programming, and lack of maintenance for buildings already in need of repair.<sup>102</sup> Additionally, H.B. 2013 will likely lead to reductions in school hiring or cuts to existing staff and/or to decreased teachers'

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Aff. ¶ 9, Ex. 8 (citing news report that the majority of West Virginia's largest private schools are religious and many discriminate on the basis of sexual orientation and gender identity); *Id.* at Ex. 9-12 (exemplars).

<sup>98</sup> See *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (same); *Leaders of a Beautiful Struggle v. Baltimore Police Dept.*, 2 F.4th 330, 346 (4th Cir. 2021) (same); *Ross v. Meese*, 818 F.2d 1132, 1135 (4th Cir. 1987) (same). 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).

<sup>99</sup> *Lubienski Aff.* ¶ 30 (voucher programs concentrate students with special education needs, economic disadvantage, behavioral issues or the need to learn English in public schools, even as revenues decline for these schools).

<sup>100</sup> See *Reynolds Aff.* ¶¶ 2-3, Ex. 1 & 2 (West Va. Dep't of Educ. Fiscal Notes).

<sup>101</sup> See *Peters Aff.* ¶¶ 13, 15; *Beaver Aff.* ¶ 16; see also *Pauley*, 162 W. Va. at 705-06 (defining a "thorough and efficient" system of schools to include ten key factors, such as work-training, interest in creative arts, equipping children to be informed citizens, and good physical facilities, instructional materials, and personnel).

<sup>102</sup> See *Lubienski Aff.* ¶ 28 (noting that "fixed costs . . . would remain largely the same for public school districts and "teacher salaries cannot be expected to be reduced consistently with the loss of students").

salaries, resulting in reduced access to teachers, counselors, and social workers for public school students.<sup>103</sup> Since West Virginia’s per pupil funding is already considerably lower than the national average, and since funding in the State is distributed in a way that disadvantages high poverty districts, districts serving high numbers of vulnerable students will be disproportionately impacted by the Voucher Law.<sup>104</sup>

Defendants will not be harmed if a preliminary injunction is issued. The status quo remains in place—Defendants are not, and never have been, entitled to public funds for private education. Families continue to have access to public schools, or the choice to pay for private school, as contemplated by the Constitution.

#### **D. Public Interest Also Favors Granting a Preliminary Injunction**

The public interest strongly favors an injunction. Upholding the Constitution always advances the public interest.<sup>105</sup> “Effectively educat[ing] students in our State with competent and qualified teachers” is squarely in the public interest.<sup>106</sup> Lost funding will prevent schools from providing constitutionally required services, retaining talented teachers, and ensuring a safe environment for public school students. Research also shows significant learning losses for voucher students relative to their peers in public schools.<sup>107</sup> These dire impacts must be avoided.

#### **IV. CONCLUSION**

For the foregoing reasons, this court should grant a preliminary injunction enjoining the implementation of H.B. 2013.

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<sup>103</sup> *Id.*; see also Peters Aff. ¶ 17.

<sup>104</sup> See *Making the Grade 2020*, Education Law Center, <https://edlawcenter.org/research/making-the-grade-2020.html> (last visited Mar. 24, 2022).

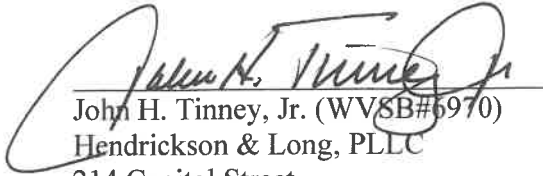
<sup>105</sup> *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (upholding preliminary injunction on grounds that constitutional harm constituted irreparable harm).

<sup>106</sup> *Scott v. Stewart*, No. 02-C-1887, 2002 WL 34232464 (W. Va. Cir. Ct. Oct. 1, 2002); see also *Three Run Maint. Ass’n Inc.*, 2017 WL 11515028, at \*1 (determining that the risk of harm to children weighed in favor of a preliminary injunction).

<sup>107</sup> See Lubienski Aff. ¶ 14.

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