

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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KATHY S. GIBSON, CLERK
KANAWHA COUNTY CIRCUIT COURT
RC

TRAVIS BEAVER AND WENDY PETERS,

Petitioners/Plaintiffs,

v.

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; JIM JUSTICE, in his Official Capacity as Governor of West Virginia; and the State of WEST VIRGINIA,

Respondents/Defendants,

and

KATIE SWITZER and JENNIFER COMPTON,

Intervenor-Defendants.

Civil Action No. 22-P-24

Civil Action No. 22-P-26

Judge Joanna I. Tabit

FINAL ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF AND DECLARATORY JUDGMENT AND RULING ON VARIOUS OTHER MOTIONS

On July 6, 2022, came the Plaintiffs, Defendants, Parent-Intervenors, and the Prospective Intervenor State of West Virginia, by counsel, for hearing on the Plaintiffs' Motion for Preliminary Injunction and Declaratory Judgment; the Parent-Intervenors' Motion for Judgment on the Pleadings; the State of West Virginia's Motion to Intervene; Defendants Moore and Justice's

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Motion to Dismiss; Defendant Blair and Hanshaw’s Motion to Dismiss; and Plaintiffs’ Motion for Judicial Notice. Upon review and consideration of the parties’ respective motions and legal memoranda, responses, and replies, as well as oral argument presented at the hearing, the Court makes the following rulings:

- The State of West Virginia is preliminarily and permanently enjoined from implementing House Bill 2013 (“HB 2013”) codified at W. Va. Code § 18-31-1 *et seq.*
- Plaintiffs are entitled to a declaratory judgment that HB 2013 violates Article XII, Sections 1, 2, 4, and 5; Article X, Section 5; and Article VI, Section 39 of the West Virginia Constitution.
- Parent-Intervenors’ Motion for Judgment on the Pleadings is denied.
- The State of West Virginia’s Motion to Intervene is granted.
- Defendants Moore and Justice’s Motion to Dismiss on the merits is denied.
- Defendants Blair and Hanshaw’s Motion to Dismiss on the merits is denied.
- Plaintiffs’ Motion for Judicial Notice is denied.

FINDINGS OF FACT

A. The Parties to this Action

1. On January 19, 2022, Plaintiffs Travis Beaver and Wendy Peters¹ initiated this action challenging the constitutionality of HB 2013.
2. Plaintiffs are parents of students enrolled in West Virginia public schools.

¹ Karen Kalar was initially a plaintiff in the action but she withdrew for personal reasons. The parties agreed by stipulation to her dismissal.

3. Plaintiff Travis Beaver is a resident of Putnam County, West Virginia. He has two children in West Virginia public schools. Mr. Beaver's son, S.B., was in the sixth grade during the 2021-22 school year. Mr. Beaver's daughter, J.B., was in the fifth grade in 2021-22. J.B. has been diagnosed with nonverbal/preverbal autism and ADD/ADHD. J.B. has an individualized education program ("IEP") to address her need for special education and related services. Mr. Beaver is not aware of any private school in his area that would accept J.B. or be able to meet her special education needs.
4. Plaintiff Wendy Peters is a resident of Raleigh County, West Virginia and teaches middle school English Language Arts in the Raleigh County School District. Ms. Peters has been an educator for twenty years. Her child, M.P., was in third grade in 2021-22 and has autism. M.P. has an IEP. Ms. Peters is not aware of any private school in her area that would be able to meet M.P.'s special education needs.
5. Defendant Riley Moore is the West Virginia State Treasurer.
6. Defendant W. Clayton Burch is the West Virginia State Superintendent of Schools.
7. Defendant Miller L. Hall is the President of the West Virginia Board of Education ("WVBOE").
8. Defendant Craig Blair is the President of the West Virginia Senate.
9. Defendant Roger Hanshaw is the Speaker of the West Virginia House of Delegates.
10. Defendant Jim Justice is the Governor of the State of West Virginia.
11. Intervenor Kate Switzer is a resident of Morgantown, West Virginia and has four young children, two of whom, A.S. (aged six) and R.S. (aged four) will be school-aged in the fall. R.S. has a speech disorder that affects her ability to vocalize.

12. Intervenor Jennifer Compton is a resident of Albright, West Virginia. She has two children: K.C., who just graduated high school, and J.C., who is five and is in preschool. J.C. has a sensory sensitivity and feeding disorder.

13. The State of West Virginia has intervened in the action.

B. Procedural History

14. Plaintiffs filed their Complaint on January 19, 2022.

15. On January 21, 2022, parents Katie Switzer and Jennifer Compton moved to intervene as Defendants and filed an Answer to Plaintiffs' Complaint.

16. Defendants filed a Notice of Bona Fide Defense on March 4, 2022.

17. Plaintiffs filed a Motion for Preliminary Injunction and a Request for Judicial Notice in Support of Motion for Preliminary Injunction on March 30, 2022.

18. Defendants Moore and Justice filed a Motion to Dismiss on April 4, 2022. Defendants Blair and Hanshaw filed their own Motion to Dismiss on the same day.

19. On April 8, 2022, Parent-Intervenors filed a Motion for Judgment on the Pleadings.

20. On May 5, 2022, all of the parties to the action except for the State of West Virginia, which was not yet a party, filed a joint stipulation requesting the voluntary dismissal of Plaintiff Karen Kalar. That same day, those same parties submitted an agreed order for the consolidation of the remaining two cases; granting of the pending pro hac vice motions; and approval of the intervention of the Parent-Intervenors, subject to agreed terms. The Court entered the joint stipulation and agreed order on May 9, 2022.

21. On June 15, 2022, Plaintiffs filed their omnibus opposition to Defendants Moore and Justice's Motion to Dismiss, Defendants Blair and Hanshaw's Motion to Dismiss, and Parent-Intervenors' Motion for Judgment on the Pleadings; Defendants W. Clayton Burch

and Miller L. Hall filed a response in support of Granting Plaintiffs' Motion for Preliminary Injunction; Parent-Intervenors filed their Opposition to Plaintiffs' Motion for Preliminary Injunction; and Defendants Moore, Blair, Hanshaw, and Justice filed their Response to Plaintiffs' Motion for Preliminary Injunction and their Response to Plaintiffs' Request for Judicial Notice in Support of Motion for Preliminary Injunction.

22. On June 29, 2022, Plaintiffs filed their Reply in support of the Motion for a Preliminary Injunction; Parent-Intervenors filed their Reply in Support of their Motion for Judgment on the Pleadings; Defendants Moore and Justice filed their Reply to Plaintiff's Omnibus Opposition to their Motion to Dismiss; and Defendants Blair and Hanshaw filed their Reply to Plaintiff's Opposition. Defendants Moore, Blair, Hanshaw, and Justice also filed their Omnibus Reply to Defendant Burch and Miller's Response in Support of Plaintiffs and Amici Curiae Brief Supporting Plaintiffs.

23. The State of West Virginia also filed its Motion to Intervene on June 29, 2022.

24. A hearing on all of the pending motions was held on July 6, 2022.

C. HB 2013

25. On March 17, 2021, the Legislature enacted HB 2013, W. Va. Code § 18-31-1 *et seq.*, and on March 27, 2021, the Governor signed it into law.

26. HB 2013 establishes a program under which a student receives a payment of public money to subsidize private school tuition or pay for other private education or homeschooling expenditures (the "voucher program").

27. HB 2013 creates the Hope Scholarship Board to oversee the voucher program. W. Va. Code § 18-31-3.

28. Under HB 2013, funding for the voucher program is appropriated by the Legislature. W. Va. Code § 18-9A-25. The State Treasurer transfers the funds for the voucher program to the West Virginia Department of Education (“WVDOE”). West Va. Code § 18-31-6. The WVDOE then transfers the funds to the Hope Scholarship Board. W. Va. Code § 18-9A-25.
29. The WVDOE must transfer to the Hope Scholarship Board 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[.]” W. Va. Code § 18-9A-25; W. Va. Code § 18-31-6(b). The Hope Scholarship Board then places the money in accounts for parents referred to as Education Savings Accounts or ESAs. W. Va. Code § 18-31-5.
30. To be eligible for the voucher program during the first three years, applicants must be enrolled in a public school for 45 days at the time of application and remain so enrolled until an award letter is issued by the Hope Scholarship Board; have been enrolled in a public school for the previous year; or be eligible for enrollment in a kindergarten program. W. Va. Code § 18-31-2(5).
31. If, on July 1, 2026, the participation rate for the voucher program is less than five percent of public school enrollment for the previous school year, then any West Virginia child of public school age becomes eligible for the program. W. Va. Code § 18-31-2(5)(B).
32. Voucher funds can be used for a variety of private education and homeschool expenditures, including: private school tuition or fees; homeschooling expenses; tutoring services; fees for standardized tests; tuition for online non-public learning programs; transportation fees; curriculum materials; and summer or after-school programs. W. Va. Code § 18-31-7(a).

33. Parents can use the money to pay a wide array of “education service providers,” which are defined as “a person or organization that receives payments from Hope Scholarship accounts to provide educational goods and services to Hope Scholarship students.” W. Va. Code § 18-31-2(4). This includes all manner of schools and other providers, as well as parents engaging in home schooling.
34. There are no qualification requirements for private schools, other private education service providers, or homeschool parents to receive voucher funds. W. Va. Code § 18-31-11(c); *see* Lubienski Aff. ¶ 11.
35. If a student who receives a voucher wants to take classes at a public school or use any other public school resources, the student has to pay for these services. W. Va. Code, § 18-31-8(f); Pauley Aff. ¶ 17.
36. The price for the public school services will be set by the Hope Scholarship Board in conjunction with the WVDOE. *Id.*
37. The statute expressly limits governmental oversight of education service providers: “Education service providers shall be given maximum freedom to provide for the educational needs of students without governmental control.” W. Va. Code § 18-31-11(c).
38. HB 2013 does not require private schools to show that voucher students are making academic progress, nor does it mandate any curriculum standards or teacher certification requirements. W. Va. Code § 18-31-11(c).
39. The statute asks parents receiving the voucher funds to sign an agreement with the Hope Scholarship Board “promising” to provide education in reading, language, mathematics, science and social studies. *See* W. Va. Code § 18-31-5.

40. For students who are homeschooled, to remain eligible they can either (1) take a nationally normed standardized test that “show[s] improvement from the prior year’s results” or (2) obtain a determination from a certified teacher that the student is making academic progress commensurate with his or her age and ability. W. Va. Code § 18-31-8(a)(4).
41. HB 2013 provides limited mechanisms for fiscal accountability, providing only for random audits of the use of the voucher funds. W. Va. Code § 18-31-10.
42. HB 2013 provides no safeguards to prevent private entities from emerging to take state dollars without sufficient means and/or intent of ensuring quality education in return. Nor does the statute provide safeguards preventing parents in poverty or battling drug addiction from taking the money for their own ends. Thus, the opportunity for abuse by private education providers and parents is significant.
43. The financial impact of HB 2013 will be substantial. The WVDOE’s fiscal note projects that the cost of funding the voucher program will exceed \$120 million annually by fiscal school year 2027. Pauley Aff. ¶ 16; W. VA. DEP’T OF EDUC., HB 2013 FISCAL NOTE (2021).²
44. Because state funding for public education is based in large part on student enrollment, HB 2013 will result in a reduction in public school funding. Pauley Aff. ¶¶ 12-13; Meadows Aff. ¶¶ 4-5. This reduction in funding will occur without a reduction in fixed costs—libraries, administration, maintenance, and numerous other expenses that do not decrease with each individual student who takes a voucher. *See* Lubienski Aff. ¶ 28; Meadows Aff. ¶ 8; Pauley Aff. ¶ 14. Variable costs, including the amount necessary to pay teachers’

² Available at [https://www.wvlegislature.gov/Fiscalnotes/FN\(2\)/fnsubmit_recordview1.cfm?RecordID=799856152](https://www.wvlegislature.gov/Fiscalnotes/FN(2)/fnsubmit_recordview1.cfm?RecordID=799856152).

salaries, will also not decrease at a pace commensurate with the departure of students. *See* Lubienski Aff. ¶ 28.

45. Because private schools cost more than the voucher amount, and there are many expenses outside tuition that families must cover (such as food and transportation), vouchers can only be used by families with the resources to pay for the additional private school tuition and expenses or by families affluent enough for a parent with the necessary skills to stay home to educate their child. *Id* ¶ 23. Students in poverty cannot use them.
46. Because private schools are frequently unwilling and/or unable to serve students with disabilities, many of these students will be unable to use the vouchers. *See* Peters Aff. ¶¶ 9, 10, 23; Beaver Aff. ¶¶ 12-14; Lubienski Aff. ¶ 19. HB 2013 expressly provides that such private schools are “not required to alter [their] creed, practices, admission policy, hiring policy or curriculum” W.Va. Code § 18-31-11(d).
47. As a result, the public schools will have fewer funds to educate a higher proportion of students with the most significant needs—including students from low-income families and students with disabilities—who are among the most expensive to educate. *Meadows* Aff. ¶ 10; *Pauley* Aff. ¶ 15; *Lubienski* Aff. ¶ 30.
48. HB 2013 requires private schools accepting the funds not to discriminate on the basis of race but it specifically excludes the antidiscrimination provisions that protect public school students and families from discrimination on the basis of religion, gender identity, sexual orientation, or disability. W. Va. Code §18-31-11(a)(4) and 6(d).
49. Under HB 2013, private schools that accept voucher funds can discriminate on all of these grounds. Such discrimination may take the form of refusing admission; failing to provide services students need to access their education, such as special education; or disciplinary

practices, including expulsion, based on discriminatory criteria. *Id.* and *see* Lubienski Aff.

¶ 20.

50. The Hope Scholarship Board began accepting applications in March 2022. *See* W. Va. Code §18-31-5(c).

51. To date, it has been reported that over 3,000 applications for vouchers, at the amount of \$4300 per student, have been approved. *Conzett Aff.* ¶ 11.

CONCLUSIONS OF LAW

A. The West Virginia Constitution

52. Article XII, Section 1 of West Virginia’s Constitution states: “The legislature shall provide, by general law, for a thorough and efficient system of free schools.” W. VA. CONST. art. XII, § 1.

53. Section 2 states: “The general supervision of the free schools of the State shall be vested in the West Virginia board of education. . . .” *Id.* art. XII, § 2.

54. Section 4 creates a “School Fund” that must be “applied to the support of free schools throughout the State, and to no other purpose whatever.” *Id.* art. XII, § 4.

55. Under Section 5, the “Legislature shall provide for the support of free schools,” through School Fund interest, all forfeitures and fines, and “by general taxation of persons and property or otherwise.” *Id.* art. XII, § 5.

56. The Taxation article of the West Virginia Constitution 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. . . .” *Id.* art. X, § 5.

57. The Constitution also states that: “[I]n no case shall a special act be passed, where a general law would be proper[.]” *Id.* art. VI, § 39.
58. Since its founding, the State of West Virginia has emphasized the importance of public education. In 1861, delegates to the First Constitutional Convention recognized that the “virtue and general intelligence among the people . . . is the only sure foundation on which Republican governments can rest,” Granville Parker, *Debates & Proc.*, FIRST CONST. CONVENTION OF W. VA. (Dec. 2, 1861),³ and therefore mandated that “[t]he legislature shall as soon as conveniently may be, provide by law for the establishment of a system of public free schools throughout the State, in such manner as to make education as nearly universal as possible.” W. E. Stevenson, *Debates & Proc.*, FIRST CONST. CONVENTION OF W. VA. (Dec. 2, 1861).⁴ Another drafter added, “the highest and most binding duty of any community is to provide for the education of its children. . . . [T]he State owes it as a duty to the children themselves who are to become its future citizens.” P.G. Van Winkle, *Debates & Proc.*, FIRST CONST. CONVENTION OF W. VA. (Jan. 27, 1862).⁵ A third drafter explained the requests he heard from his constituents: “I well recollect when talking to my people on the subject of a new State that one of their great hopes was that we would get a good free school system.” Robert Hagar, *Debates & Proc.*, FIRST CONST. CONVENTION OF W. VA. (Jan. 27, 1862).⁶ A fourth drafter summed it up this way: “All Money [directed to fund education] . . . shall . . . be sacredly devoted and applied to the support of the primary education in common schools [that is, public schools] throughout the State, and to no other

³ Available at <https://archive.wvculture.org/history/statehood/cc120261.html>.

⁴ Available at <https://archive.wvculture.org/history/statehood/cc120261.html>.

⁵ Available at <https://archive.wvculture.org/history/statehood/cc012762.html>.

⁶ Available at <https://archive.wvculture.org/history/statehood/cc012762.html>.

purpose whatever.” Rev. Gordon Battelle, *Debates & Proc.*, FIRST CONST. CONVENTION OF W. VA. (Dec. 19, 1861).⁷

59. 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. *Randolph Cty. 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)). As the Supreme Court of Appeals has acknowledged, “[t]he framers of our Constitution lived among the ruins of a system that virtually ignored public education and its significance to a free people.” *Id.* As a result, when the convention met in 1861 to create West Virginia’s first constitution, the framers gave high priority to public education. *Id.* Likewise, the 1872 convention delegates “strengthened the education article.” *Id.* In doing so, the delegates cemented public education as a sacrosanct constitutional right in West Virginia.

B. Injunctive and Declaratory Relief

60. This Court may issue a preliminary injunction upon a balancing of the following factors:

“(1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff’s likelihood of success on the merits; and (4) the public interest.” *Ne. Nat. Energy LLC v. Pachira Energy LLC*, 243 W. Va. 362, 366 (2020).

61. Where a statute is unconstitutional on its face, the proper remedy is a permanent injunction, making the statute null and void. *See Simon v. Southern R. Co.*, 236 U.S. 115, 120 (1915);

⁷ Available at <https://archive.wvculture.org/history/statehood/cc121961.html>.

see also Norton v. Shelby Cty., 118 U.S. 425, 442 (1886); *Foster v. Cooper*, 155 W. Va. 619, 623 (1972); *Morton v. Godfrey L. Cabot, Inc.*, 134 W. Va. 55, 56 (1949).

62. Under West Virginia law, courts “shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed.” W. Va. Code § 55-13-1.

i. HB 2013 is Unconstitutional

a. HB 2013 Exceeds and Frustrates the Legislature’s Powers and Duties in Regard to Education.

63. The Federal Constitution is a grant of power, while a state Constitution is a restriction of power. *Foster*, 155 W. Va. at 622; *Robertson v. Hatcher*, 148 W. Va. 239, 250 (1964).

64. Provisions of the Constitution addressing the same subject, or *in pari materia*, should be read together. *Howard v. Ferguson*, 116 W. Va. 362, 362 (1935).

65. Under the doctrine of *expressio unius est exclusion alterius* (“*expressio unius*”)—“the expression of one thing, being the exclusion of the other”—the State may not take any actions that exceed or frustrate express constitutional obligations. *State v. Gilman*, 33 W. Va. 146, 150 (1889); *see also State ex rel. Downey v. Sims*, 125 W. Va. 627, 633 (1943); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 107 (2012).

66. Article XII, Section 1 of the West Virginia Constitution states that the “Legislature shall provide, by general law, for a thorough and efficient system of free schools.” W. VA. CONST. art. XII, § 1. Article XII, Section 2 states that “general supervision of the free schools of the State shall be vested in the West Virginia board of education” W. VA. CONST. art. XII, § 2. Article XII, Section 4 states that public monies existing in the “school fund . . . shall be annually applied to the support of free schools throughout the

state, and to no other purpose whatever.” W. VA. CONST. art. XII, § 4. Article XII, Section 5 states that the “Legislature shall provide for the support of free schools . . . by general taxation” and other public monies. W. VA. CONST. art. XII, § 5. And, the taxation provision provides that “[t]he power of taxation of the Legislature shall extend to. . . the support of free schools. . . .” W. VA. CONST. art. X, § 5.

67. Taken together these provisions of the Constitution require the State to raise revenue for, fund, and maintain only a thorough and efficient system of free schools supervised by the WVBOE.

68. HB 2013 exceeds Article XII, Sections 1, 2, 4, and 5 and Section 5 of Article X by authorizing a separate system of education, governed by a separate board, funded by West Virginia taxpayer money.

69. HB 2013 also exceeds the Constitution because it puts in place a system that requires students to exchange their fundamental right to a public education for a payment of \$4300.

70. HB 2013 further exceeds the Constitution because it requires students to pay for public school services. If a student who receives a voucher wants to take classes at a public school or use other public school resources, the student will have to pay for those public school resources. W. Va. Code, § 18-31-8(f).

71. HB 2013 frustrates Article XII, Sections 1, 2, 4, and 5 by incentivizing students enrolled in the public schools to leave public schools. Funding for the public schools, based largely on enrollment numbers, will decline. Pauley Aff. ¶¶ 12-13; Meadows Aff. ¶¶ 4-5; Lubienski Aff. ¶¶ 23, 30. Public schools must serve an increased concentration of high-need students.

72. HB 2013 also frustrates Sections 1, 2, 4, and 5 by diverting public funds that could be used for West Virginia's underfunded public schools to subsidize private education. When fully implemented, HB 2013 will cost taxpayers \$120 million a year to subsidize the private education of West Virginia's more affluent students. W. VA. DEP'T OF EDUC., HB 2013 FISCAL NOTE (2021).⁸ West Virginia has long struggled to fully fund its public schools. Siphoning off public money to subsidize those parents that choose private education will frustrate the State's ability to adequately fund public schools.

b. HB 2013 Impinges on West Virginia Children's Fundamental Right to an Education Without Meeting Strict Scrutiny

73. Public education is an "essential constitutional right." *W. Va. Educ. Ass'n v. Legislature of State of W.Va.*, 179 W.Va. 381, 382 (1988). The Legislature cannot take actions that impinge that right without meeting strict scrutiny. *State ex rel. Bd. of Ed. v. Rockefeller*, 167 W. Va. 72, 76 (1981). The State must demonstrate that such actions meet a compelling state interest and are narrowly tailored to achieve that compelling interest. *Pauley v. Kelly*, 162 W. Va. 672, 708 (1979). HB 2013 does not meet either prong of the strict scrutiny analysis.

74. HB 2013 impinges on the fundamental right to an education by reducing the funds available to public schools through the state-incentivized reduction in public school enrollment.

75. HB 2013 also trades a student's fundamental right to a public education for a sum of money. Students will not be protected from for-profit entities or parents that do not use these funds for providing an adequate education.

⁸ Available at [https://www.wvlegislature.gov/Fiscalnotes/FN\(2\)/fnsubmit_recordview1.cfm?RecordID=799856152](https://www.wvlegislature.gov/Fiscalnotes/FN(2)/fnsubmit_recordview1.cfm?RecordID=799856152).

76. The State cannot impinge on a single child's constitutional right to a public education without a compelling interest in doing so. The State has no constitutional interest in subsidizing the expenses of those who choose private school or homeschooling. The State's sole constitutional mandate is to create a thorough and efficient system of free schools. W. VA. CONST. art. XII, § 1.

77. HB 2013 also fails strict scrutiny because it is not narrowly tailored. *Cathe A. v. Doddridge County Bd. Of Educ.*, 200 W. Va. 521, 528 (1997). HB 2013 is an expansive program. There is no limitation on eligibility based on geography, family income, school performance, or the particular educational needs of the student, and no cap or limit on the number of vouchers that can be given out. HB 2013 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, and it will definitely be available to all such students when fully implemented because each new class of kindergarten students can start with a voucher that is paid out every year of their school career. HB 2013 does not require private schools or homeschooling parents to meet educational quality or other standards and offers insufficient accountability for those using the funds. It is therefore not narrowly tailored to meet a compelling interest and is unconstitutional.

c. Public Funds Can Only Be Used to Fund Public Schools

78. HB 2013 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.

79. Article XII, Section 4 states that the "School Fund" shall be dedicated to support "free schools throughout the State, and to no other purpose whatever." W. VA. CONST. art. XII,

§ 4. “If the language of a constitutional provision is plain and unambiguous it is not subject to judicial interpretation[.]” *State ex rel. Brotherton v. Blankenship*, 157 W. Va. 100, 108 (1973). 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.

80. Similarly, Article XII, Section 5 grants a broad mandate to the Legislature to use general taxation authority to provide only for free schools. Section 5 states: “The Legislature shall provide for the support of free schools . . . by general taxation of persons and property” W. VA. CONST. art. XII, § 5 (emphasis added).

81. The Taxation article 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.

82. Taken together, Article XII, Sections 4 and 5 and Article X, Section 5, comprise the constitutional parameters for raising and spending public dollars on K-12 education. Each provision makes clear that public funds for K-12 education are for the free schools and no other purpose whatsoever.

d. HB 2013 Improperly Places Authority over the State Expenditure of Funds for Education Outside the West Virginia Board of Education

83. HB 2013 improperly usurps the constitutional authority of the WVBOE, which is vested “general supervision of the free schools of the State.” W. VA. CONST. art. XII, § 2. The West Virginia code confirms the proper interpretation of 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.” W. Va. Code § 18-2-5. When the Legislature passes laws that “interfere[]”

with the Board of Education's constitutional authority, those laws are "unconstitutional." *West Virginia Bd. of Educ. v. Hechler*, 180 W.Va. 451, 454 (1988).

84. "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." *Hechler*, 180 W. Va. at 455.
85. HB 2013 unconstitutionally interferes with the Board of Education's supervisory and rule-making authority over public funds spent to educate the state's children by creating a separate Hope Scholarship Board to supervise spending of public funds for vouchers. HB 2013 unconstitutionally restricts the WVBOE's exercise of academic and financial oversight over the use of these funds, despite the fact that voucher funds flow directly through the WVDOE. W. Va. Code § 18-31-11(c), (e); W. Va. Code § 18-9A-25. The Hope Scholarship Board is unconstitutional.

e. HB 2013 is an Unconstitutional Special Law

86. The West Virginia Constitution has a strong presumption against laws that treat people differently, preferring generally applicable laws. W. VA. CONST. art. VI, § 39 ("[I]n no case shall a special act be passed, where a general law would be proper[.]"). 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." *State ex rel. City of Charleston v. Bosely*, 165 W. Va. 332, 339-40 (1980); *see also State ex rel. Heck's, Inc. v. Gates*, 149 W. Va. 421, 449 (1965) (every law must operate alike "on all persons and property similarly situated"). Legislation will be invalidated if it excludes without

reasonable basis persons that “would otherwise be subject to a general law.” *State ex rel. Cty. Ct. of Cabell Cty. v. Battle*, 147 W. Va. 841, 841 (1963); *see also State ex rel. Taxpayers Protective Ass'n of Raleigh Cty. v. Hanks*, 157 W. Va. 350, 355 (1973) (invalidating as a “special law” a statute that only allowed counties with more than 100,000 people to close their courthouses on Saturdays).

87. HB 2013 is an unconstitutional special law. It creates a class of students in private school or homeschooling who have to pay for public school resources—the voucher recipients—and those who do not—students without vouchers. It also creates two classes of students who receive public funds for education: students protected from all discrimination, and students unprotected from most types of discrimination.

88. Public school students are protected by federal and state antidiscrimination laws, including the West Virginia Human Rights Act and state special education law. *See, e.g.,* W. Va. Code § 5-11-9. These same antidiscrimination protections are not available to students receiving public funds for private education expenditures under the voucher program. 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[.]”). Private education service providers remain free to discriminate on the basis of religion, gender identity, sexual orientation, and disability.

89. Because HB 2013 creates separate classes of students with different benefits and protections, it is unconstitutional.

ii. Injunctive Relief

90. Because HB 2013 is unconstitutional on its face, the Court permanently enjoins the State from implementing the statute. As a result, the preliminary injunction analysis is not necessary. Nevertheless, the Court finds that the basis for a preliminary injunction is also met. As outlined above, Plaintiffs are likely to succeed and, indeed, have succeeded on the merits.
91. The Plaintiffs also will be irreparably harmed without an injunction. Constitutional violations constitute irreparable harm without an additional showing of injury. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Leaders of a Beautiful Struggle v. Baltimore Police Dept.*, 2 F.4th 330, 346 (4th Cir. 2021).⁹
92. There is also evidence of imminent and irreparable harm beyond the per se irreparable harm of implementing an unconstitutional statute. To date, over 3,000 applications for vouchers, at the amount of \$4,300 per student, have been accepted. Public funds will be disbursed to families as early as August 15, reducing public school enrollment and diminishing the public funds available for public education. *See W. VA. CODE § 18-31-6(d)*. Logistically, the State would have a very difficult task clawing back these public funds from families already putting them to use. Likewise, these 3,000 students exiting public schools or entering kindergarten, thus not attending the public schools, will reduce the enrollment for districts across the state in a mere few months. These students will be missing from the October 1, 2022 enrollment count, which sets the enrollment figures for funding for the next school year. Pauley Aff. ¶ 8.

⁹ West Virginia state courts look to federal courts where issues are not addressed in state law. *See Hardwood Group v. Larocco*, 219 W. Va. 56, 62 (2006); *Mauck v. City of Martinsburg*, 167 W. Va. 332, 337-38 (1981).

93. Defendants will not be irreparably harmed if an injunction is issued. The status quo remains in place. The State of West Virginia has never appropriated taxpayer dollars to subsidize private school or homeschooling. Families have always been able to choose private and home schooling at their own expense and they remain able to do so.

94. The public interest strongly favors an injunction. The need to “effectively educate students in our State with competent and qualified teachers in a safe environment” is squarely in the public interest. *Scott v. Stewart*, No. 02-C-1887, 2002 WL 34232464 (W. Va. Cir. Ct. Oct. 1, 2002); *see also Three Run Maintenance Ass'n, Inc. v. Heavner*, No. CC-02-2017-P-412, 2017 WL 11515028, at *1 (W. Va. Cir. Ct. 2017) (deciding that the risk of harm to children weighed in favor of a preliminary injunction). Public funds are set to be disbursed in August—no one is served well by distributing these funds if they are ultimately to be clawed back or cut off. Public schools lose enrollment and available public funds, families are given misdirection and children unsettled, and private entities will gain and then lose funding. Public schools would be further disrupted if the students from whom voucher funds were clawed back returned to public schools in the middle of the school year. In short, all of the preliminary injunction factors weigh in favor of a preliminary injunction.

C. Plaintiffs Have Standing

95. Taxpayers in West Virginia may challenge the constitutionality of a statute which affects the administration of justice and requires the payment of public funds. *Myers v. Frazier*, 173 W. Va. 658, 676 (1984) (recognizing taxpayer standing); *see also State ex rel Goodwin v. Cook*, 162 W. Va. 161, 164-65 (1978); *Howard v. Ferguson*, 116 W. Va. 362 (1935); *Kanawha Cnty Pub. Libr. Bd. v. Board of Educ. of Kanawha Cnty*, 231 W. Va. 386, 397

(2013); *Affiliated Constr. Trades Found. v. W. Va. Dep't of Transp.*, 227 W. Va. 653, 657 n.8 (2011).

96. Plaintiffs are residents of West Virginia who pay state and local taxes. Peters Aff. ¶¶ 1-2; Beaver Aff. ¶¶ 1-2. HB 2013 uses taxpayer funds to subsidize private education and homeschooling. Compl. ¶ 46. Plaintiffs have taxpayer standing here.
97. The elements of traditional standing are also met: (1) an “injury-in-fact” or “an invasion of a legally protected interest which is (a) concrete and particularized” and “(b) actual or imminent and not conjectural or hypothetical”; (2) a “causal connection” between the injury and the conduct forming the basis of the lawsuit; and (3) Plaintiffs’ injury will be redressed through a favorable decision of the court. *Men & Women Against Discrimination v. Family Protection Services Bd.*, 229 W. Va. 55, 61 (2011); *see also Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 94 (2002) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).
98. Constitutional violations are recognized as per se harm. *See Elrod*, 427 U.S. at 373; *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (same); *Leaders of a Beautiful Struggle*, 2 F. 4th at 346 (same); *Ross v. Meese*, 818, F.2d 1132, 1135 (4th Cir. 1987) (same).
99. HB 2013 will also imminently siphon millions of dollars in public funds that may otherwise be used for the support of public schools to subsidize more affluent families’ private education.
100. Because West Virginia appropriates money to public schools, in part, based on the number of students who attend public schools, this harm is two-fold. Parents have always

had the legal option to send their children to private school or provide home schooling. But, now the government is providing parents with \$4300 per child to take this route, diminishing the funds available for public education. At the same time, this is direct state action creating an incentive to leave the public school system, reducing its enrollment and funding. The loss of this funding will impact public school students, including Plaintiffs' children who have special needs that can only be met through West Virginia's public schools. See Peters Aff. ¶ 13, 15; Beaver Aff. ¶ 16; Lubienski Aff. ¶ 28.

101. The WVDOE and the West Virginia Legislative Auditor both conclude that HB 2013 will result in reduced public school enrollment and will cost the state over \$100 million, and potentially over \$120 million, a year when fully implemented, which will harm Plaintiffs in the public schools. W. VA. DEP'T OF EDUC., HB 2013 FISCAL NOTE (2021);¹⁰ W. VA. LEGIS. AUDITOR, H.B. 2013 FISCAL NOTE (2021);¹¹ Pauley Aff. ¶ 16.

102. This harm is redressed by an injunction permanently enjoining the statute. Thus, Plaintiffs have also met the requirements for traditional standing.

D. Plaintiffs' Claims are Ripe

103. Ripeness does not require Plaintiffs to "await consummation of threatened injury" before bringing an action. *State ex. Rel. Universal Underwriters Ins. Co. v. Wilson*, 239 W. Va. 338, 345 n.15 (2017) (citing *Gopher Oil Co. v. Bunker*, 84 F.3d 1047, 1050 (8th Cir. 1996) (internal quotes omitted)). Instead, a Plaintiff challenging a statute must demonstrate only "a realistic danger of sustaining a direct injury as a result of the statute's

¹⁰ Available at [https://www.wvlegislature.gov/Fiscalnotes/FN\(2\)/fnsubmit_recordview1.cfm?RecordID=799856152](https://www.wvlegislature.gov/Fiscalnotes/FN(2)/fnsubmit_recordview1.cfm?RecordID=799856152).

¹¹ Available at

[https://www.wvlegislature.gov/Fiscalnotes/FN\(2\)/fnsubmit_recordview1.cfm?submitID=10395&recordid=799669695](https://www.wvlegislature.gov/Fiscalnotes/FN(2)/fnsubmit_recordview1.cfm?submitID=10395&recordid=799669695).

operation or enforcement.” *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 298, 298 (1979); *see also State ex rel Rist v. Underwood*, 206 W. Va. 258 (1999). Passage and near implementation of an unconstitutional statute is sufficient to make it ripe for adjudication. *Id.*

E. Plaintiffs’ Constitutional Challenge is Not a “Political Question”

104. Courts are “charged with the solemn duty of determining what acts of the Legislature are constitutional[.]” *State ex rel. Heck's Discount Ctrs., Inc. v. Winters*, 147 W. Va. 861, 869 (1963).

105. The constitutionality of a statute is squarely “a question of law” for courts to determine. *State v. Haught*, 218 W. Va. 462, 464 (2005); *see also Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138 (1995). This case is entirely about whether HB 2013 is constitutional and thus it is not a political question.

Plaintiffs’ Request for Judicial Notice in Support of Preliminary Injunction

106. Rule 201 of the West Virginia Rules of Evidence does not allow for judicial notice of the documents identified by Plaintiffs in their request and the request is denied. W. Va. R. Evid. 201.

CONCLUSION AND COURT’S ORDERS

Based upon the foregoing, it is **ORDERED** that:

- The State of West Virginia is **PRELIMINARILY AND PERMANENTLY ENJOINED** from implementing House Bill 2013 (W. Va. Code § 18-31-1 *et seq.*), and declaratory relief is **GRANTED** as to the unconstitutionality of the statute;
- Plaintiffs’ Request for Judicial Notice in Support of Preliminary Injunction is **DENIED**;

- Parent-Intervenors' Motion for Judgment on the Pleadings is **DENIED**;
- Defendants Moore and Justice's Motion to Dismiss on the merits is **DENIED**;
- Defendants Blair and Hanshaw's Motion to Dismiss on the merits is **DENIED**; and
- The State of West Virginia's Motion to Intervene is **GRANTED**.

The State of West Virginia moved to Stay the Court's Preliminary and Permanent Injunction, which motion is **DENIED**.

The objections and exceptions of all parties aggrieved by this Order are noted and preserved.

The Clerk of the Circuit Court is directed to send a certified copy of this Order to all counsel of record.

All of which is **ORDERED**, accordingly.

ENTERED this 22nd day of July, 2022.




 THE HONORABLE JOANNA I. TABIT

Drafted by: **(Entered as Modified by the Court)*

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