IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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; and JIM JUSTICE, in his Official Capacity as Governor of West Virginia,

Respondents/Defendants.

Civil Action No. 22-P-24
Civil Action No. 22-P-26

Judge: Hon. Joanna Tabit

PLAINTIFFS' OMNIBUS OPPOSITION TO (1) DEFENDANTS MOORE AND JUSTICE'S MOTIONS TO DISMISS; (2) DEFENDANTS BLAIR AND HANSHAW'S MOTION TO DISMISS; AND (3) POTENTIAL INTERVENORS' MOTION FOR JUDGMENT ON THE PLEADINGS

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' OMNIBUS OPPOSITION TO (1) DEFENDANTS MOORE AND JUSTICE'S MOTIONS TO DISMISS; (2) DEFENDANTS BLAIR AND HANSHAW'S MOTION TO DISMISS; AND (3) POTENTIAL INTERVENORS' MOTION FOR JUDGMENT ON THE PLEADINGS

I. INTRODUCTION

Defendants Blair, Hanshaw, Moore and Justice (the "Moving Defendants") and Potential Intervenors (together the "Moving Parties") style their agenda as support for "choice." But choice is not the legal issue in this case: West Virginia families have long been and remain free to choose private education and home schooling for their children. Plaintiffs' suit does not stand in the way of this choice. The policy wisdom of vouchers is also irrelevant. What is at issue in

this litigation are the Legislature's constitutional powers and duties regarding education. Simply put, the Legislature cannot enact laws that undermine public education to fund private education expenditures nor allow students receiving publicly funded education to experience discrimination. The West Virginia Constitution does not allow it. But HB 2013 (the "Voucher Law") does just that. The Moving Parties' motions to dismiss or for judgment on the pleadings are without merit and must be denied.

Motions to Dismiss/for Judgment on the Pleadings. The Moving Defendants move to dismiss for failure to state a claim, and the Potential Intervenors move for judgment on the pleadings. Plaintiffs' claims plainly surpass the Rule 8 pleading requirements.

The Voucher Law entices more affluent parents who can adequately supplement the voucher amount to leave West Virginia public schools, undermining the funding of public education, which all parties acknowledge is based largely upon enrollment. Every child who leaves the public schools results in a drop in funding. The almost-$4300 vouchers[1]—or Education Savings Accounts ("ESAs"), as the Moving Parties euphemistically call them—can only be utilized by families with sufficient means to afford the remaining tuition and other costs not covered by that amount, or have the means and expertise to stay home all day to educate their children. The voucher funds also cannot be used by children with disabilities because private schools by and large do not provide these services. As a result, ESA vouchers silo students in poverty and students with special needs in public schools while at the same time diminishing the funding necessary to educate them. This puts our most vulnerable students at risk.

The Voucher Law also impermissibly prompts parents to exchange their child's right to a public education for $4300 a year without meaningful educational standards, accountability, or

[1] In line with previous estimates, the voucher amount for the 2022-23 school year is $4,298.60. *FAQ*, HOPESCHOLARSHIPWV.COM, https://www.hopescholarshipwv.com/FAQ (last visited June 13, 2022).

support. And, if a voucher student wants to use public school resources for part of their education, HB 2013 requires their family to pay for those resources. For the students who claim vouchers, the Legislature is abdicating its obligation to provide a thorough, efficient, and free education. There are a multiplicity of Constitutional problems with the Voucher Law.

First, under the doctrine of *expressio unius* (Count I), the Legislature cannot frustrate or exceed its Constitutional power and duty to provide a thorough and efficient system of free schools. The Voucher Law *exceeds* the Legislature's constitutional power by setting up a separate system, led by a different Board than provided for in the Constitution, which uses public monies for private educational expenses. It also *frustrates* the Legislature's duty by diverting scarce public dollars to private education expenses in a manner that incentivizes students to forego public education—strapping public school budgets that are based significantly on enrollment numbers. Further, the alternative system the Voucher Law creates leaves children vulnerable to fly-by night private school scams promising and not delivering education for $4300 (or an adult choosing the $4300 to make ends meet or due to an addiction without providing any education at all). It is unconstitutional for the Legislature to self-sabotage its ability to provide thorough and efficient public schools. Nor can the Legislature shirk its duty to the children of West Virginia by giving them $4300 and leaving them otherwise on their own.

Second, a quality, free education is a constitutional right that can only be abridged if the action meets strict scrutiny—that is, an action narrowly tailored to meet a compelling state interest. Significantly reducing funds to already-underfunded public education abridges a child's constitutional rights under the Education Clause (Count II). Moving Parties argue that strict scrutiny does not apply to the Act. Moving Defendants argue that, even if it did, it passes strict scrutiny. Moving Parties' arguments fail on both counts. The Voucher Law decreases public

school funding, full stop. This is neither speculative nor far in the future. It does so in an expansive program that subsidizes private educational expenses barred by the constitution—expenditures in which the State has no interest. The Voucher Law fails strict scrutiny.

Third, the Voucher Law violates Article XII, Sections 4 and 5 (Count III). Taken together, these two provisions establish a Constitutional requirement that *public* funds may only be used for *public* education. Section 4 initially provided the only Constitutional funding mechanism for education. It makes clear that public funds, in the form of the interest on the "School Fund," must go to "free schools . . . and to no other purpose whatever." W. VA. CONST. art. XII, § 4. The subsequent addition of Section 5 provided additional funding mechanisms, including "general taxation," but did not change this limitation on education spending. It specified that the additional sources of funding "shall" be for "free schools." *Id.* § 5.

Fourth, the Voucher Law unconstitutionally strips the West Virginia Board of Education ("WVBOE'") of its exclusive constitutional authority to supervise state-funded K-12 education (Count IV). W. VA. CONST. art. XII, § 2. The Voucher Law creates the Hope Scholarship Board, which is separate from the WVBOE, to oversee the administration of the voucher program. It expressly bars the WVBOE from exercising any oversight over the use of the public funds devoted to vouchers or establishing quality and accountability standards that must be met by the educational entities or parents receiving the funds. This is unconstitutional.

Fifth, the Voucher Law is an unconstitutional "special law" (Count V). W. VA. CONST. art. VI, § 39. It sanctions differential treatment for various students receiving public funds for education. Students receiving a publicly funded education in public school are protected by the full panoply of anti-discrimination laws while students receiving public funds for vouchers are subject to discrimination by private schools on the basis of protected categories including

religion, gender identity, sexual orientation, and disability. Public funds may not be allocated in this manner under the Constitution's strong presumption against special laws that lead to differential treatment among similarly situated students.

Standing. Moving Defendants move to dismiss the Complaint for lack of standing. Plaintiffs, West Virginia taxpaying citizens and parents of children enrolled in public schools in the State, plainly have standing to bring this suit. Because the suit involves the unconstitutional use of taxpayer funds, taxpayer standing is sufficient. Traditional standing is also met. As discussed herein, the Voucher Law harms Plaintiffs and this harm will be redressed by a court order permanently enjoining the statute, which is all that is required for standing.

Ripeness. Moving Defendants seek dismissal on ripeness grounds. But West Virginia law is clear that a plaintiff does not have to wait until the harm has already occurred to take action. A suit to protest an unconstitutional statute is ripe when the statute is enacted and going into effect.

Justiciability. Moving Defendants further move to dismiss on "political question" grounds, but the Courts unquestionably have authority to determine whether a law enacted by West Virginia's Legislature violates the West Virginia Constitution. There is significant authority in support of this, and none to the contrary.

Proper Defendants. Finally, Moving Defendants move to dismiss as purported improper Defendants. Plaintiffs named each Defendant because they were involved with the enactment and/or charged with implementation of the Voucher Law. However, Plaintiffs care only that the Defendant(s) necessary to effectively enjoin the unconstitutional statute remain. If this result can proceed with only the WVBOE and Superintendent as defendants, Plaintiffs do not object.

II. LEGAL STANDARDS

Motions to dismiss are disfavored. *John W. Lodge Distrib. Co., Inc. v. Texaco, Inc.*, 161 W. Va. 603, 605 (1978). West Virginia Rules of Civil Procedure require only that a complaint

"contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks." W. Va. R. Civ. P. 8(a). "No technical forms of pleading or motions are required." W. Va. R. Civ. P. 8(e)(1). Courts construe the complaint in "the light most favorable to plaintiff[s]" with "allegations...taken as true." W. Va. Civ. P. 12(b)(6); *Lodge Distrib. Co.*, 161 W. Va. at 604-05.

A Rule 12(c) motion for judgment on the pleadings is analogous to a federal Rule 12(b)(6) motion to dismiss. *Kopelman and Assocs., L.C. v. Collins*, 196 W. Va. 489, 493 (1996). To overcome such a motion, the pleader must only "set forth sufficient information to outline the elements of his claim or to permit inferences to be drawn that these elements exist." *Lodge Distrib. Co.,* 161 W. Va. at 605. The trial court cannot issue judgment on the pleadings "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Judy v. E. W. Va. Cmty. & Tech. Coll.*, No. 21-0004, 2022 W. Va. LEXIS 308, at *8-9 (Apr. 25, 2022) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

III. ARGUMENT

A. Plaintiffs Assert Valid Claims Under the West Virginia Constitution

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

No one disputes that the West Virginia Constitution empowers and requires the Legislature to provide a thorough and efficient system of free schools. W. VA. CONST. art. XII, § 1. As explained in Plaintiffs' preliminary injunction motion, proper interpretation of the Education Article pursuant to *expressio unius* prohibits the Legislature from enacting laws that exceed or frustrate this mandate. PI Mot. at 10-14.

The Moving Parties argue that the Legislature has broad discretion to make laws. Moore and Justice's Motion to Dismiss ("MJ Mot.") at 9-12; Parent-Intervenors' Motion for Judgment on the Pleadings ("Pot. Int. Mot.") at 3-7. But, as they must, Moving Parties acknowledge that

there are Constitutional limits. The Legislature cannot enact statutes beyond its powers where the negation of legislative power appears beyond a reasonable doubt. *Kanawha Cnty. Pub. Libr. Bd. v. Board of Educ. of Cnty of Kanawha*, 231 W. Va. 386, 401 (2013). Nor can the Legislature enact statutes that frustrate its duty to fulfill its express Education Article mandate. *State v. Gilman*, 33 W. Va. 146, 150 (1889); *State ex rel. Downey v. Sims*, 125 W. Va. 627, 633 (1943). Those are exactly the circumstances here.

a. The Voucher Law Exceeds the Legislature's Powers and Duties Set Forth in the Constitution

The Education Article gives the Legislature the power and the duty to (1) maintain a system of *free* schools (Section 1); (2) provide oversight for the system of *free* schools through the Board of Education (Section 2); (3) spend the interest from certain public assets to support *free* schools and "no other purpose whatever" (Section 4); and (4) raise funds through taxation and other revenue generation that "shall" support *free* schools (Section 5). W. VA. CONST. art. XII, §§ 1, 2, 4, and 5. Creating a second system—with a separate Board and oversight—and raising and spending public money for private educational expenditures is outside the duties and powers set forth in the Constitution. Simply put, the Legislature cannot do exactly what the framers of the Constitution intended to prohibit. *See Bush v. Holmes*, 919 So. 2d 392, 398 (Fla. 2006) (applying the doctrine of *expressio unius* and holding that a broad voucher program exceeded the Constitution's mandate to provide free public schools).

Specific provisions of the Voucher Law underscore the extent to which it exceeds the Legislature's powers. For example, under HB 2013, a student who takes a voucher can use those funds for home schooling or to subsidize tuition at a private school. W. Va. Code, § 18-31-7(a). If that student wants to then take one or more classes at the public school, which is not unusual, under the Voucher Law the public school will have to charge that student. *Id.* §18-31-8(f). The

Hope Scholarship Board will set the price for these services. *Id.* The public schools will invoice and then collect from the student. *Id.* The system of "free schools" is no longer free.

The Voucher Law is particularly alarming for families in poverty. For 2016-2020, the median income in West Virginia was $27,346. *QuickFacts West Virginia*, CENSUS.GOV.[2] If a family at the median income had three children, they could receive ~$13,000 from the state, increasing their annual income by 48%. They could do so on the mere promise that they would educate their children at home. W. Va. Code § 18-31-5(d)(3). Of course, most families would take this obligation seriously. But even the most well-meaning family facing housing and food insecurity will be tempted to consider the option and may struggle to provide adequate education at home despite trying their best, because educating children—particularly those with elevated needs—can be a profoundly difficult task. The situation created by the Voucher Law is even more intolerable when you consider children of parents in the throes of addiction. *See* Paris Dunford, *More recovering addicts relapse after receiving stimulus checks*, 59 NEWS, May 24, 2021.[3] An equally difficult risk is the inevitable emergence of fly-by-night scammers promising a private education for $4300 and then not delivering. *See, e.g.*, Leslie Postal et al., *Florida Private Schools Get Nearly $1 Billion in State Scholarships with Little Oversight, Sentinel Finds*, ORLANDO SENTINEL, Oct. 17, 2017.[4]

The Constitution expressly protects children from the vagaries of their circumstance, requiring the state to provide a thorough and efficient system of free schools. W. VA. CONST. art. XII, § 1; *Pauley v. Kelly*, 162 W. Va. 672, 705-06 (1979); *see also* Peters Affidavit ISO PI Mot. ("Peters Aff.") ¶¶ 13-16 . Whether children live in families of poverty or wealth, they are entitled

[2] *Available at* https://www.census.gov/quickfacts/fact/table/WV# (last visited June 13, 2022).
[3] *Available at* https://www.wvnstv.com/news/local-news/more-recovering-addicts-relapse-after-receiving-stimulus-checks/.
[4] *Available at* https://tinyurl.com/2f2z4583.

to a system of free schools. Whether children live in families of health or addiction, they are entitled to a system of free schools. Whether children have disabilities or not, they are entitled to a system of free schools. Families can always choose private school, if they pay for it privately, and home schooling if they have the time and expertise to provide it. That is a small subset of children. But, no matter their circumstances, all children are entitled to a thorough and efficient system of free schools *provided by the State*. *Id.* HB 2013 turns this on its head. Under the Voucher Law, a child is entitled to $4300 and nothing more. If, for reasons beyond their control, a child's family chooses the $4300, that child loses the guarantee of a thorough and efficient public education. If after a year or two, the Hope Scholarship Board recognizes and determines that sufficient education has not occurred, the student has lost crucial time and educational opportunities. This is in complete contradiction to the constitutional mandate to provide the children of West Virginia a thorough and efficient education and, thus, outside what the Legislature can legally do . *Id.*

The Moving Parties inadvertently make this point clear in their papers. The Potential Intervenors describe HB 2013 as "financial aid to students who desire an alternative to a public-school education." Pot. Int. Mot. at 5. The Constitution requires that students get a full education provided entirely and without charge by the State, W. VA. CONST. art. XII, § 1, *not* financial assistance for efforts to obtain education on their own. Likewise, Moving Defendants argue that "[i]f there are not suitable private schools near Plaintiffs, they could still use Hope Scholarship Funds for one of the other allowable educational purposes." MJ Mot. at 6. But how would they obtain an education without a school to attend, having exchanged their right to an education for $4300? The private system created by HB 2013 is inconsistent with the express dictates of the public system established by the Constitution and, therefore, exceeds the Legislature's powers.

The Legislature simply cannot exceed its constitutional powers by creating a second system that fails to protect children's right to a thorough and efficient education no matter their specific needs or circumstances, as guaranteed by the Constitution.

b. The Voucher Law Frustrates the Legislature's Ability to Provide a Thorough and Efficient System of Free Schools

The Voucher Law also frustrates the Legislature's Education Article mandate, requiring an injunction on this independent ground. PI Mot. at 13-14. Peer-reviewed research establishes that the primary result of voucher programs structured like HB 2013 is to concentrate children with disabilities and those from low-income families in the public schools without the resources to serve their needs. Lubienski Affidavit ISO PI Mot. ("Lubienski Aff.") ¶¶ 23, 30. More affluent parents with the means to make up the remainder of private school tuition and other expenses normally covered by public schools (transportation, food, etc.), or the ability to forego work outside the home and provide home schooling, are the *only* families whose children who can use the vouchers. *Id.* ¶¶ 17, 23. Students with disabilities cannot use the vouchers because most private schools in the state do not have the resources, expertise, or willingness to educate these children.[5] So it is without doubt that the Voucher Law will increasingly silo high-need students requiring increased educational resources in the public schools. *See* Lubienski Aff. ¶ 30.

It is also certain that the Voucher Law will mean insufficient funds to educate those students in public schools, which are already financially strapped. First, the voucher law incentivizes families to disenroll in public schools, meaning the funding for those schools, which is based largely on enrollment numbers,[6] will decline. Second, public education expenses will

[5] We have identified only one private institution in the entire state that serves students with disabilities—a kindergarten through third grade program for students with autism, with approximately ten enrollees. *Augusta Levy Learning Ctr.*, PRIVATE SCH. REV., https://www.privateschoolreview.com/augusta-levylearning-center-profile (last visited June 14, 2022).

[6] As admitted by Moving Parties. MJ Mot. at 6; Pot. Int. Mot. at 8.

not be reduced but will actually rise, in relative terms, as fixed costs remain high and public schools must serve an increased concentration of high-need students. Lubienski Aff. ¶¶ 23, 30. School systems are shared endeavors where the costs are incurred across the student population. This is much like health insurance that requires both the healthy and those needing increased services to participate in the insurance pool to make the economics feasible. A voucher system creates a situation where the most expensive to educate are part of the public schools and the money flows out of the system to those less expensive to educate—it is no longer available for public goods and so there are insufficient funds to meet the high needs in public schools. In short, the very construct of the Voucher Law frustrates the Legislature's ability to provide a system of thorough and efficient schools that can adequately serve all students. This inherent structural problem is clear on the face of the law.

Moving Defendants erroneously contend that the Voucher Law does not frustrate the Legislature's ability to provide a thorough and efficient system of free schools because: (1) to the extent the Voucher Law negatively impacts schools, that is a problem with the school funding formula and not the Voucher Law; (2) students leave a school district for various reasons and students who leave for vouchers are no different; and (3) the Legislature and/or local levies may raise enough money in the future to fund the $100 million for students whose parents already choosing home schooling and private school, the cost of the students who move out of the public schools, *and* the costs of the public school system. MJ Mot. at 11-12; Pot. Int. Mot. at 6.

The Moving Parties' enrollment and funding law arguments are wrong. When a student moves to a different location or chooses private or home-schooling, they do so for individual reasons that are unrelated to state action. Here, however, a student will be moving out of the public schools at the enticement of the Legislature; the Voucher Law creates an incentive for the

student to leave the public schools. It is the Legislature's action that is causing the drop in enrollment and the concomitant drop in public school funding. The Constitution forbids the Legislature from intentionally undermining public schools.

Further, typically when a student opts out of the public school system, the funds to educate that student stay with the State to be used for the benefit of the remaining children; they do not leave the public treasury. That is not true under HB 2013. When a child takes a voucher, the State pays that amount. Thus, the Voucher Law is entirely different from the ordinary ebb and flow of enrollment and funding that is encapsulated in the school funding formula. It is the action of the State in enacting the Voucher Law—not the funding formula itself—which directly frustrates the Legislature's obligation to adequately fund a system of free schools. Although the funding formula is an existing element of the system, as the Moving Defendants note, the Voucher Law is the but-for cause of the enrollment and funding declines at issue.

Moving Defendants speculate that the Legislature will be able to fund the more than $100 million required for children in private and home schooling who have never before been a part of the state budget as well as the students who leave the public schools, plus the separate cost of the students who remain in the public schools. MJ Mot. at 12. This wishful thinking is belied by the facts. West Virginia has struggled to fund its public schools even before the drain on funding the Voucher Law would cause. Education Law Center, *Making the Grade: How Fair Is School Funding In Your State*? 8-9 (2021).[7] It will be even more unable to do so with the vouchers that the State itself projects will impose significant *additional* costs on the public treasury.

The Legislature cannot itself take action that actively harms the public schools and the children in them. HB 2013 does just that by using precious tax dollars to fund a program other

[7] *Available at* edlawcenter.org/assets/MTG%202021/2021_ELC_MakingTheGrade_Report_Dec2021.pdf (last visited June 14, 2022).

than the public schools, enticing affluent and lower-need students away from the public schools to the overall detriment of the students remaining, and guaranteeing children only $4300 in "financial aid," rather than an adequate education, to students who take vouchers. None of these structural infirmities with HB 2013 can be overcome by rank speculation on future funding.

c. Moving Parties' Case Law Does Not Change the Analysis

The various cases cited by the Moving Parties are inapposite. Moving Defendants assert that *expressio unius* "is not of universal application" relying on *State Road Commission v. Kanawha County Court*, 112 W. Va. 98 (1932). MJ Mot. at 10. All this statement means is that the maxim is not always triggered by the facts in the case at hand—which is of course self-evident. *State Road Commission* involved a challenge to the constitutionality of a statute requiring counties to pay for road improvements ordered by the State. 112 W. Va. at 98. The Constitution clearly gave the State authority to create and maintain a highway system. *Id.* The court found that counties are subdivisions of the State and, thus, whether the State or the counties pay for the roads, it is all within the Legislature's constitutional powers. *Id.* Essentially, the statute did not frustrate or exceed the Legislature's constitutional duties and powers in regard to the creation and maintenance of roadways. *Id.* This decision has no bearing on whether *expressio unius* applies to the case at hand.

Moving Defendants also cite to Justice McGraw's concurrence in *State v. Euman*, 210 W. Va. 519, 524 (2001) (McGraw, J., concurring) in support of their argument that *expressio unius* should be rejected. MJ Mot. at 10. But the concurrence directly acknowledges that *expressio unius* "is a well-accepted canon." *Euman*, 210 W. Va. at 523 (quoting *State ex rel. Riffle v. Ranson,* 195 W. Va. 121, 128 (1995)). It also states the obvious: *expressio unius* is not a rule of law but an aid for construction. *Id.* In *Euman*, the court addressed a statute penalizing driving after a license has been revoked for a DUI. *Id.* at 521. A driver contended that he should not

receive a citation for driving with a revoked license because his license was revoked in Ohio and not West Virginia. *Id.* The court rightly held that this was nonsense. The statute clearly applied to any revoked license—not just one revoked in West Virginia. *Id.* at 522. There was no need for the application of *expressio unius.*

Finally, the Potential Intervenors cite a series of cases from outside West Virginia for the proposition that "a state constitutional mandate to provide for a public school system is not a restriction on the state's ability to provide financial aid to students who opt out of that system." Pot. Int. Mot. at 5. Notably, Potential Intervenors do not cite *Bush v. Holmes*, 919 So. 2d 392, 398 (Fla. 2006). In *Bush*, the Supreme Court of Florida applied the doctrine of *expressio unius* and held that the constitution's mandate to provide "*free public schools*" barred the Legislature from funding private educational expenses through ESA vouchers. *Bush*, 919 So. 2d at 406-07. The same result is required here.

The cases the Potential Intervenors do cite are inapplicable to the expansive, universal voucher program contained in HB 2013. Instead, they support the notion that a small, limited voucher program may not be enough to exceed or frustrate the Legislature's constitutional duties and powers. *Jackson v. Benson*, 578 N.W.2d 602, 607-08 (Wis. 1998) (evaluating a voucher program only for students of Milwaukee Public Schools, restricted by income, and participation-capped); *Davis v. Grover*, 480 N.W.2d 460, 462 (Wis. 1992) (same); *Hart v. State*, 774 S.E.2d 281 (N.C. 2015) (evaluating a limited voucher program in North Carolina restricted by income and participation-capped); *Meredith v. Pence*, 984 N.E.2d 1213, 1219 (Ind. 2013) (evaluating a limited Indiana voucher program restricted by income and participation-capped).[8]

This distinction was made explicit in *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio

[8] Potential Intervenors also cite *Schwartz v. Lopez*, 382 P.3d 886, 892, 896 (Nev. 2016), which invalidated an expansive voucher program like the one at hand but did so on different grounds.

1999), also not cited by the Potential Intervenors. In *Simmons-Harris*, the Ohio Supreme Court evaluated a voucher program limited to one school district for students whose families were below a certain income. The Ohio Constitution, like West Virginia's, requires a "thorough and efficient system of common schools." The court rejected an *expressio unius* challenge because the program's limited scope, restricted to a single school district and income-capped, meant it did not "undermine[] the state's obligation to public education." *Id.* at 212. The court took care to note, however, that "a greatly expanded School Voucher Program . . . could damage public education" and "be subject to a renewed constitutional challenge." *Id.* at 212 n.2. The Voucher Law at issue here, characterized by its proponents as the "most expansive" in the country, is exactly what the *Simmons-Harris* court envisioned as unconstitutional. Lubienski Aff. ¶ 8.

2. The Voucher Law Fails Strict Scrutiny

As Plaintiffs explained in their Preliminary Injunction motion (PI Mot. at 14-15), 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), and the "financing of education is, among mandated public services, *the first constitutional priority*." *W. Va. Educ. Ass'n*, 179 W. Va. at 382 (emphasis added). As such, the Legislature cannot take actions that diminish public school funding without showing that those actions meet strict scrutiny. *State ex rel. Bd. of Educ. of Cnty. of Kanawha v. Caperton*, 190 W. Va. 652, 653 (1994); *W. Va. Educ. Ass'n*, 179 W. Va. at 382 n.2. The State must demonstrate that such actions meet a compelling state interest and are narrowly tailored to achieve that compelling interest. *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) ("[A]ny denial or infringement of the fundamental right to an education for a compelling State interest must be narrowly tailored"); *State ex. rel. Bd. of Ed. v. Rockefeller*, 167 W. Va. 72, 79-81 (1981) (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 taking action that undermines a thorough and efficient system of public schools). The Voucher Law does not meet either prong of the strict scrutiny standard.

a. Strict Scrutiny Applies

Moving Parties assert that the Hope Scholarship Fund does not reduce public school funding, so strict scrutiny does not apply. MJ Mot. at 14; Pot. Int. Mot. at 7-9. This is flatly wrong. Moving Parties admit that schools in West Virginia are funded based in large part on enrollment. MJ Mot. at 6; Pot. Int. Mot. at 8. There is no dispute that public school enrollment, and thus public school funding, will decrease as a direct result of the voucher program. Strict scrutiny applies to actions that reduce school funding and endanger the Legislature's ability to fulfill its Education Clause duty.[9]

Likewise, the Voucher Law subsidizes the education of every student currently in private school or home-schooling. Compl. ¶ 46. This will happen either in three years, if certain utilization targets are unmet, or in 12 years after each class of kindergarteners begins to receive a voucher for the lifetime of their schooling. PI Mot. at 16-17. Vouchers for these additional students will cost the State over $100 million every year. *See* Reynolds Affidavit ISO PI Mot. ("Reynolds Aff.") ¶¶ 2-3, Ex. 1 & 2 (West Va. Dep't of Educ. Fiscal Notes). The State will be unable to fund this extra $100 million *and* what is necessary for a thorough and efficient public school system, further reason this law requires strict scrutiny. *See* Peters Aff. ¶¶ 13, 16; Beaver Affidavit ISO PI Mot. ("Beaver Aff.") ¶ 16.

[9] *See* Education Law Center, *Making the Grade: How Fair Is School Funding In Your State*? 8-9 (2021) (noting that, for the 2018-2019 school year, West Virginia ranked below-average relative to other states in funding distribution and cost-adjusted per-pupil funding level).

The Voucher Law also requires the State to take funds that could be used for public education and reallocate them to non-public education uses—the ESA vouchers—reducing the funds available for public schools. This forced reallocation is itself subject to strict scrutiny.

Moving Defendants again argue that in the future the Legislature may allocate funds that would ameliorate the negative impacts of the Voucher Law or the Counties may use levies to raise more money for the schools. MJ Mot. at 6-7. But, speculative future actions do not save an unconstitutional statute that admittedly reduces public school funding for children now.

b. Strict Scrutiny is Not Met

Because the Voucher Law reduces state public education funding, it must meet strict scrutiny. The Potential Intervenors do not argue that the Voucher Law meets strict scrutiny, implicitly conceding that it does not. The Moving Defendants' arguments are also unavailing.

First, the Moving Defendants argue that "the promotion of learning activity" is a compelling State interest. MJ Mot. at 14. That is, of course, true. But, it is not the interest that is served by HB 2013. There are three categories of people who can use the vouchers: (1) those who always intended for their child to be home-schooled or private-schooled and now get a state subsidy to do so; (2) those in the public schools who are affluent enough to pay the remainder of the private school expenses not covered by vouchers or to have one parent stay home to educate their children themselves; and (3) those who will take the money but not make sure their child receives an adequate education because of poor motives or difficult circumstances. Categories one and two are children who would be learning in any event, so there is no promotion of learning activity. Category three will be involved in *less* learning activity.

Further, as empirically demonstrated by the overwhelming weight of peer-reviewed research, students who use vouchers are proven to reap no educational benefit, and their academic outcomes are often substantially *decreased*. Lubienski Aff. ¶ 14-15. Again, a decrease

in learning activity. Likewise, the decreased funds and increased high-need student demands in the public schools will diminish learning activity therein. *Id.* ¶ 30. Thus, the Voucher Law does not serve the interest of promoting learning; instead it puts children at risk for less learning—particularly students in poverty and with special needs. No compelling state interest is served.

Second, Moving Defendants argue that the Voucher Law is narrowly tailored "because it does nothing to reduce the availability of public education as an option for West Virginia families." MJ Mot. at 15. That is untrue, as explained above, because the Voucher Law will harm the public education system.[10] It is also irrelevant. That children can still attend a public school has nothing to do with whether or not the *Voucher Law* is carefully and specifically crafted to meet a compelling state interest.

In fact, as proponents tout, the statute is the "most expansive" voucher program in the country.[11] There is no limitation on eligibility such as family income, school performance, or the particular educational needs of the student. *See* W. Va. Code § 18-31-1 *et seq.*; Lubienski Aff. ¶ 8. There is no cap on the number of students nor ceiling on the public funds that can be spent on the program. The Voucher Law offers a set amount to every child starting kindergarten without regard to whether their family can already afford private school or homeschooling.[12] The Voucher Law requires virtually no educational standards and demands no educational expertise from providers. W. Va. Code § 18-31-1 l(c). It has fewer standards than the voucher laws passed in other states. Lubienski Aff. ¶ 11. In short, HB 2013 is not narrowly tailored nor does it serve a compelling state interest. It fails strict scrutiny, and it must be enjoined.

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[10] Additionally. the Voucher Law *will* negatively impact the availability of public schools. Decreased enrollment often results in the closure of schools and long travel to reach public schools. Decreased enrollment will also negatively impact the ability of the Counties to provide adequate educational services at the sites that are open.
[11] Available at https://www.edchoice.org/school-choice/programs/hope-scholarship-program (last visited Mar. 24, 2022).
[12] *FAQ*, HOPESCHOLARSHIPWV.COM, https://www.hopescholarshipwv.com/FAQ (last visited June 13, 2022).

3. The Voucher Law Violates Article XII, Sections 4 and 5, Requiring That Public Funds be Used only for Public Schools

Taken together, Article XII, Sections 4 and 5 of the West Virginia Constitution mandate that *public* funding be used only for *public* education. *See* PI Mot. at 16-17.

Section 4 specifies that the interest of the "School Fund" must be applied to "the support of free schools throughout the State, and to no other purpose whatever." W. VA. CONST. art. XII, § 4. The School Fund was the only source of revenue that the delegates at the 1861 Constitutional Convention contemplated for the "thorough and efficient system of free schools." *See* Bastress Affidavit ISO PI Mot. ("Bastress Aff.") ¶ 3. So, from the outset, the drafters of the West Virginia Constitution intended that the state use public monies only for public schools.

Delegates at the 1872 Constitutional Convention added Section 5, which states: "The Legislature *shall* provide for the support of *free schools* by appropriating thereto the interest of the invested 'School Fund,' the net proceeds of all forfeitures and fines accruing to this state under the laws thereof and by general taxation of persons and property or otherwise." W. VA. CONST. art. XII, § 5 (emphasis added).

The Constitution expressly establishes, then, that public monies collected for education must be used "for the support of free schools." This alone dooms the Voucher Law. *See Blankenship*, 157 W. Va. at 108 ("If the language of a constitutional provision is plain and unambiguous it is not subject to judicial interpretation[.]").

Moving Defendants argue that the Voucher Law does not violate these provisions because it is funded out of the General Fund. MJ Mot. at 16. That the money starts in the General Fund is true for the majority of money received by the Department of Education and is irrelevant. It is not the specific fund that matters. What Sections 4 and 5 establish is that the framers of the Constitution expressly intended for public funds raised or set aside for education

be used solely for support of the system of free schools.

Moving Defendants then argue that general taxation supports many things in addition to free schools. This is, of course, true, but also irrelevant. The Constitution expressly directs that the funds raised, to the extent used for *education*, "shall" be used "to support the free schools." The Potential Intervenors' reliance on *Hart v. State*, 774 S.E.2d 281 (N.C. 2015) (Pot. Int. Mot. at 10-11) is misplaced. Unlike the expansive voucher program at issue here, the *Hart* case involved a limited North Carolina program that created vouchers for "a small number of students in lower-income families." *Id.* at 285. Plaintiffs argued that public monies could not be used for these vouchers. Unlike the West Virginia Constitution, the North Carolina Constitution provides only that general taxation revenue "may" be set aside for the support of free schools. *Id.* at 289. While Plaintiffs disagree with the holding in *Hart*, it has no application here. The West Virginia Constitution says that general revenues raised "shall"—not "may"— be used for "the support of the free schools." W. VA. CONST. art. XII, § 5.

4. The Voucher Law Improperly Usurps the WVBOE

The Voucher Law also improperly usurps the constitutional authority of the WVBOE. Article XII, Section 2 imposes 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; *West Virginia Bd. of Educ. v. Bd. of Educ. of the Cnty. of Nicholas*, 239 W. Va. 705, 714 (2017). And, the WVBOE does so, promulgating regulations for public and private institutions, including regulations governing private schools, home-schooling, accreditation of non-public schools, and other matters. *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).

At a minimum, the WVBOE is entrusted with the oversight of *public* funds used for K-12 education. Parents who choose private school and home-schooling use their own funds and take

on this responsibility for themselves. But, the children who are educated using taxpayer dollars are protected by the accountability and oversight of the Board of Education. W. Va. Code § 18-2-5.

Under the Voucher Law, however, the Hope Scholarship Board is the entity that oversees the award of vouchers, the renewal of vouchers, and the expenditure of voucher funds. W. Va. Code § 18-31-3. The Board of Education has no ability to ensure that students receiving the vouchers receive an adequate education—or are actually educated at all—with the public funds. *Id.* §§ 18-31-9 & 10. The Board of Education cannot even determine how much families will be charged for the public services provided by the public schools for voucher students who obtain services from them. Under the Voucher Law, the WVBOE suddenly has no ability to monitor, regulate, supervise and control how public dollars are spent on education. It has no ability to protect vulnerable children and ensure that they are in appropriate educational settings. This is contrary to the language and intent of the Constitution.

Moving Parties argue that the Board of Education has no authority over "education savings account programs" or "financial aid programs." MJ Mot. at 17; Pot. Int. Mot. at 12. Not true. If the expenditure involves public funds for education, it falls under their purview.

Potential Intervenors also argue that private schools' receipt of public money does not make them public schools. Pot. Int. Mot. at 13. No one argues otherwise. The WVBOE has oversight over the publicly funded instruction of West Virginia's children. The Legislature purports to offer cost-free instruction using public dollars via the voucher program. As such, the program is subject to the oversight of the WVBOE. The Voucher Law wrests away the WVBOE's Constitutional powers and duties and therefore must be enjoined.

5. The Voucher Law Is an Unconstitutional Special Law

The West Virginia Constitution has a strong presumption against laws that treat people

differently, overwhelmingly preferring generally applicable laws. W. VA. CONST. art. VI, § 39 (providing that "in no case shall a special act be passed, where a general law would be proper"). This constitutional 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 Bailey v. Truby*, 174 W. Va. 8, 24 (1984) (holding that every law must operate alike "on all persons and property similarly situated"). Legislation must 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 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).

Here, the Voucher Law creates two different classifications of publicly funded students. First, there are the students who remain in the public schools. They are protected by all relevant state and federal antidiscrimination laws, including the West Virginia Human Rights Act and state special education law. *See, e.g.*, W. Va. Code § 5-11-9; Policy 2419: Regulations for the Education of Students with Exceptionalities Effective August 14, 2017. They can also use all of the academic resources of the public schools without charge. Then, there are students who use the publicly funded vouchers. They are educated in part for "free" but do not have the same discrimination protections. The schools at which they use vouchers may discriminate against them on numerous otherwise-protected grounds and they must pay for any public school resources they wish to use. There can be no reasonable basis to allow the state to fund private educational entities that discriminate against vulnerable groups of students.

Moving Defendants argue that the Voucher Law is not a special law because it applies uniformly to all who accept the money. MJ Mot. at 19. Defendants argument misses the point. A

special law that creates two classes of publicly funded students—those protected from discrimination, and those students who are not—is still an unconstitutional special law even if the students in each sub-class are treated the same. *Bosely*, 165 W. Va. At 339-40 (1980). Because the Voucher Law creates two classes of students, it violates the bar against special laws.

Relatedly, Potential Interveners argue that the Voucher Law is not a special law because private schools remain subject to the same anti-discriminatory provisions that those institutions were subject to prior to enactment of the Voucher Law. Pot. Int. Mot. at 14-15. This is likewise true but irrelevant. What the Voucher Law *does change* are the antidiscrimination protections covering voucher students educated with public funds. It also changes the status quo from the State simply allowing discriminatory entities to operate, to *actively underwriting* this discrimination with public funds. Prior to HB 2013, all students educated using public dollars were subject to the same antidiscrimination protections. After HB 2013, students using vouchers are no longer subject to the same protections. HB 2013 causes the difference and is therefore unconstitutional.[13] Put simply, because the Voucher Law creates two classes of publicly funded students in West Virginia, it violates the constitutional mandate against special laws.

All of the Moving Parties' arguments regarding failure to state a claim are wrong and their motions on this ground should be denied.

B. Plaintiffs Have Standing to Bring Constitutional Challenges Against The Voucher Law

Moving Defendants also argue that Plaintiffs lack standing to bring constitutional claims against the Voucher Law. MJ Mot. at 4-7; Blaire and Hanshaw's Motion to Dismiss ("BH Mot.") at 3-6. They are wrong. Plaintiffs have standing as taxpayers and under traditional standing rules.

[13] Notably, the Legislature considered, and rejected, amendments to the Voucher Law that would have required private schools accepting ESAs to comply with anti-discriminatory protections. Thus, the Legislature expressly considered a general law and chose a special law instead.

Plaintiffs plainly meet the elemental criteria for each, but either one suffices. *See Men & Women Against Discrimination v. Family Protection Serv. Bd.*, 229 W. Va. 55, 61 (2011) (laying out the traditional standing requirements); *Kanawha Cnty Pub. Libr. Bd.*, 231 W. Va. at 397 (recognizing that "there are other concepts of standing" including "taxpayer standing").

1. Plaintiffs Have Standing to Sue as West Virginia Taxpayers.

Moving Defendants do not address at all Plaintiffs' standing as taxpayers. 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.*, 231 W. Va. at 397; *Affiliated Constr. Trades Found. v. W. Va. Dep't of Transp.*, 227 W. Va. 653, 657 n.8 (2011). To establish taxpayer standing, the plaintiff must show (1) a "logical link" between the plaintiff's taxpayer status and "the precise nature of the constitutional infringement alleged"; and (2) a "nexus" between taxpayer status and "the precise nature of the constitutional infringement alleged." *E.g, Flast v. Cohen*, 392 U.S. 83, 106 (1968).

Plaintiffs are residents of West Virginia who pay state and local taxes. Peters Aff. ¶¶ 1-2; Beaver Aff. ¶¶ 1-2. Plaintiffs allege that the Voucher Law is unconstitutional, in part, because it diverts taxpayer dollars away from public schools to fund private education and homeschooling. Compl. ¶ 46. Plaintiffs' claims go to the constitutionality of a statute: claims that directly implicate their tax dollars. Plaintiffs have standing.

2. Plaintiffs Meet the Elemental Requirements for Traditional Standing.

Plaintiffs also meet the traditional standing requirements. The elements of traditional standing are: (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, 84 (2002) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)), Plaintiffs meet the elemental requirements.

a. *Plaintiffs' injury is concrete, particularized, actual and imminent and it is caused by the Voucher Law*

Plaintiffs will suffer injury. First, Constitutional violations are recognized as per se harm—indeed, irreparable harm. *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 Dep't*, 2 F. 4th 330, 346 (4th Cir. 2021) (same); *Ross v. Meese*, 818, F.2d 1132, 1135 (4th Cir. 1987) (same).[14] Plaintiffs, West Virginia residents with children in West Virginia public schools, are thus harmed by the constitutional violations caused by HB 2013.

Likewise, the Voucher Law—if permitted to be implemented—will imminently siphon millions of dollars in public funds that may otherwise be used for the support of public schools, to instead subsidize more affluent families' private education. As discussed herein, West Virginia appropriates money to public schools, in part, based on the number of students who attend public schools. With fewer public school students, there will be less money appropriated to the public schools. 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. Compl. ¶¶ 10, 12, 33; *see* Peters Aff. ¶ 13, 15; Beaver Aff. ¶ 16; Lubienski Aff. ¶ 28.

This harm is not speculative; it is certain. The West Virginia Department of Education

[14] 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).

and the West Virginia Legislative Auditor concede that the Voucher Law will reduce money otherwise appropriated to public schools and, within a few years, will cost West Virginia taxpayers more than $100 million *annually*. *See* Reynolds Aff. ¶¶ 2-3, Ex. 1-4 (Fiscal Notes). West Virginia Courts have found that "[a] child's constitutional, fundamental right to an education includes the *right* to be provided with educational opportunities and services . . . at public expense." *See Cathe A.*, 200 W. Va. at 530. The Voucher Law diverts funds away from public schools in a way that deprives Plaintiffs' children of this right, and in violation of Article XII, Sections 1, 2, 4 and 5, and Article VI, Section 39 of the West Virginia Constitution. *See* Compl. ¶¶ 67, 71, 72, 80, 84; PI Mot. at 2.

Defendants' arguments to the contrary are unavailing. First, Defendants argue there is no harm because the Voucher Law does not exclude Plaintiffs or treat them less favorably. M.J. Mot. at 5. This is both untrue and irrelevant. Plaintiffs are excluded from using the vouchers, even if they wanted to do so, for three reasons: (1) they do not have enough income to make up the amounts needed to afford private school fees and tuition; (2) alternatively, they do not have the financial wherewithal or specialized training to stay home and educate their children themselves; and (3) there are no private schools near them that would be able to meet the special needs of their children with disabilities. Additionally, LGBT students would be excluded due to a lack of schools willing to enroll them. The "choice" Moving Defendants tout is *only* for the more affluent and easy to educate students, and not those who have disabilities or identify as LGBTQ.

Moreover, the harm to every child in the public schools, including Plaintiffs' children, is that the government is enticing more affluent families away from the system of free schools into a voucher program. 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. This is direct state action creating an incentive to leave the public school system, reducing its enrollment and funding. Less funding means less services and even greater barriers to providing the constitutionally required level of education in the public schools that are open to all students. This is a real and serious harm.

Second, Defendants argue that the lack of availability of private schools to serve Plaintiffs is not an injury because "they can use the funds for a wide array of educational expenses. . . . If there are no suitable private schools near Plaintiffs, they could still use Hope Scholarship funds for one of the other allowable educational purposes." MJ Mot. at 5-6. This is simply not reasonable or realistic. If a student trades enrollment in public school for $4300, they need another school to attend. Paying for some extras will not replace the core curriculum.

Third, Moving Defendants argue that there is no standing because the injury is only speculative—the legislature may make up the difference in enrollment in the future. MJ Mot. at 6. Moving Defendants admit that school aid is "tied to enrollment." *Id.* at 6 n.2. The West Virginia Department of Education and the West Virginia Legislative Auditor both conclude that the Voucher Law will result in reduced enrollment. And, the West Virginia Legislative Auditor estimates the cost of the Voucher Law at over $100 million a year when fully implemented. Reynolds Aff. ¶¶ 2-5, Ex. 1-4 (Fiscal Notes). The harm is not speculative, it is certain. Plaintiffs' injury is not alleviated by empty promises that in the future the Legislature might make choices to properly support the public schools—particularly when it has not done so in the past.

Fourth, Moving Defendants argue that the injury is not caused by the Voucher Law because the lack of private schools with special education services and the school funding formula both existed before the Voucher Law, and these are the real culprits. MJ Mot. at 11. That is not how causation works. It is the Voucher Law that is directly causing the harm, not these

pre-existing factors. For example, what private schools do or do not offer makes no difference—except for the introduction of the Voucher Law, which entices students away, decreases public school funding, and silos high-need students in the public schools. The Voucher Law was passed in the context of certain realities, and it is the express cause of the harm asserted by Plaintiffs.

b. *This Court may redress Plaintiffs' harms*

Plaintiffs seek injunctive relief—preliminary and permanent—and a judicial declaration by this Court that the Voucher Law is unconstitutional, stopping the Voucher Law in its tracks.

Moving Defendants argue that "any order against Defendants is unlikely to stop the [Board created through enactment of the Voucher Law] from approving . . . applications." BH Mot. at 6. This is wrong. A declaratory judgment that the Voucher Law is unconstitutional will render the entirety of the law, and thus the Board it created to administer it, completely defunct. The law is in accord. *See, e.g.*, *Foster v. Cooper*, 155 W. Va. 619, 623 (1972) ("Inasmuch as the legislature in the instant case undertook to increase the number of judicial circuits at a session other than one 'next preceding any general election of the judges of said circuits,' it acted in an unconstitutional manner and the act amending and reenacting Section 1, Article 2, Chapter 51 of the Code of West Virginia is *unconstitutional, void and of no effect.*") (emphasis added); *see also Morton v. Godfrey L. Cabot, Inc.*, 134 W. Va. 55, 61 (1949) ("An unconstitutional Act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.").[15]

C. <u>Plaintiffs' Claims Are Ripe</u>

Moving Defendants argue that Plaintiffs' claims are not ripe. They make the same failed arguments used to challenge Plaintiffs' standing, suggesting Plaintiffs' injury is speculative. MJ

[15] Plaintiffs also have representational standing to vindicate the rights of their children. *Kanawha Cnty. Public Library Bd.*, 231 W.Va. at 397.

Mot. at 8. These arguments fail.

Ripeness does not require Plaintiffs to "await consummation of threatened injury before bringing a declaratory judgment 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 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).

Defendants contend that because there is a "one-year lag before the school aid formula reflects any decrease in enrollment," the Plaintiffs' harm is too remote. MJ Mot. at 8. This argument ignores that public funding for public schools—a constitutional mandate of the highest order—is based in part on the prior year enrollment for public school. *Id.* Thus, any *present year* reduction resulting from public school students accepting the unconstitutional voucher and not enrolling in public school, *will* negatively impact public funding for public schools next year. To date, it has been reported that over 3,000 applications for vouchers, at the amount of $4300 per student, have been accepted. Staff Reports, *More than 2,000 Hope Scholarships have been awarded in W. Va; application deadline May 16*, EYEWITNESS NEWS WCHS FOX (May 3, 2022).[16] These immediate harms will cause long-term repercussions. Moreover, starting August 15, public funds will be dispersed to families—funds that put both voucher and public school students at risk. Plaintiffs' claims are ripe.

D. Plaintiffs' Constitutional Challenge is not a "Political Question"

Plaintiffs' claims are not "political questions," as asserted by Moving Defendants. BH

[16] *Available at* https://wchstv.com/news/local/more-than-2000-hope-scholarships-have-been-awarded-in-wva-application-deadline-may-16.

Mot. at 7-9. Courts are "charged with the solemn duty of determining whether acts of the Legislature are constitutional[.]" *Heck's Discount Ctrs., Inc. v. Winters*, 147 W. Va. 861, 869 (1963). 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). That is plainly the issue before the Court and justiciable.

Moving Defendants contend the dispute raises a political question because "there is no judicially manageable standard for determining how to allocate the state's financial resources." BH Mot. at 9. But that is not the question raised here. The issue is whether HB 2013 is constitutional, or whether it violates one of several constitutional provisions. If the latter, it is void—a very straightforward remedy.

E. Moving Defendants are Proper Defendants

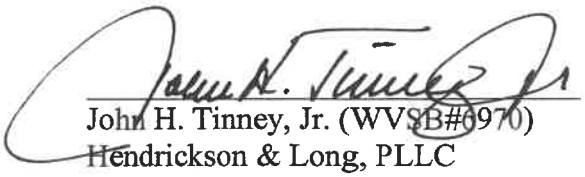
Finally, Moving Defendants argue that they are not the proper Defendants. Defendants were each named because they are connected to the enactment (Blair, Hanshaw, Justice), implementation (Moore), and/or funding (Moore) of the Voucher Law. Plaintiffs care only that the Defendants necessary to enjoin the statute are named. If an injunction is available against the WVBOE and Superintendent, Plaintiffs do not object to Moving Defendants' dismissal.

IV. CONCLUSION

For the foregoing reasons, this Court should deny Defendants Moore, Justice, Blair, and Hanshaw's Motions to Dismiss and Potential Intervener's Motion for Judgment on the Pleadings.

June 15, 2022

HENDRICKSON & LONG, PLLC



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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

TRAVIS BEAVER, KAREN KALAR and WENDY PETERS,

Petitioners/Plaintiffs,

v.

Civil Action No. 22-P-24

Civil Action No. 22-P-26

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.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on the 15th day of June, 2022, a true copy of the foregoing "Plaintiffs' Omnibus Opposition to (1) Defendants Moore and Justice's Motions to Dismiss; (2) Defendants Blair and Hanshaw's Motion to Dismiss; and (3) Potential Intervenors' Motion for Judgment on the Pleadings" was served on the following counsel by electronic mail and via U.S. Mail, postage prepaid as follows:

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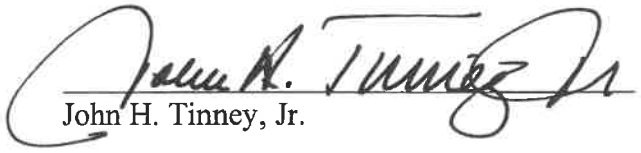

John H. Tinney, Jr.