

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Petitioner/Defendant,

KATIE SWITZER and JENNIFER
COMPTON,

Petitioners,

v.

TRAVIS BEAVER and WENDY PETERS,

Plaintiffs/Respondents.

CASE NO. 22-616

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

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INTRODUCTION

Petitioners filed these same motions for a stay before the Intermediate Court of Appeals (“ICA”). Significant briefing and materials were submitted, which the ICA reviewed and analyzed. The motions were denied. Unhappy with that result, Petitioners are now trying to switch courts. For the reasons set forth in Respondents’ Opposition to Petitioners’ motion for direct review, this Court should not take up the motions to stay for a second time. The ICA was formed to increase judicial efficiency and reduce the strain on this Court. Allowing Petitioners to utilize the resources of the ICA and, when dissatisfied with a ruling, file the identical motions here defeats the purposes of the ICA and wastes judicial resources. This is particularly important to avoid because this is the first case in the ICA and will set the template for future appellate procedure. The motions have been reviewed and denied. Reviewing again would only reward improper gamesmanship.

The ICA’s decision is also right. The question before the ICA—that Petitioners want this Court to hear again—was whether it should allow House Bill 2013 (“HB 2013” or the “Voucher Law”¹), codified as W. Va. Code § 18-31-1 *et seq.*, to be implemented even though the Circuit Court found the law facially unconstitutional on five separate grounds—preliminarily and permanently enjoining its implementation. To obtain a stay, Petitioners had a heavy burden they could not meet. Staying the injunction of a statute deemed facially unconstitutional is rare, has never been granted concerning a universal voucher law like HB 2013, and requires something more than vehement assertions that the court got it wrong—that question is for the appeal itself.

Once again Petitioners argue that enforcing the injunction pending appeal will cause irreparable harm. This is nonsense. The injunction maintains the state of affairs that has existed in

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

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

This appeal raises numerous and substantial issues that, as Petitioners acknowledge, will “take[] time.”² Hastily lifting the Circuit Court’s injunction—reached after hundreds of pages of briefing and careful analysis—would run roughshod over the Constitution and the fundamental education rights of West Virginia’s children. Indeed, staying the injunction would allow the nation’s very first universal voucher program to go forward. It would also *for the first time* subsidize private education for the wealthy. A permanent injunction cannot be set aside for such a seismic shift based on truncated motion briefing. The stay motion must be denied.

BACKGROUND

HB 2013 uses taxpayer dollars to subsidize private and homeschooling. When fully implemented, every private and homeschooled student in the State will receive \$4,300 a year from kindergarten through twelfth grade without regard to family income. W. Va. Code § 18-31-2(5). The West Virginia Department of Education estimates that this will cost the State over \$120 million a year. W. VA. DEP’T OF EDUC., HB 2013 FISCAL NOTE (2021).³ Parents who choose the \$4,300 exchange their child’s right to a free public education for the yearly payment, and students receiving the vouchers have to pay for public school resources they may continue to need that their private school or homeschooling cannot or will not provide. *Id.* § 18-31-8(f). The schools and

² Intervenor’s Mot. (“IM”) at 4.

³ Available at <https://tinyurl.com/5h2787xb>.

parents providing publicly subsidized education do not have to meet any education competency standards or requirements. W. Va. Code § 18-31-11(c). There are extremely limited mechanisms to detect and stop fraud and abuse by fly-by-night school operators, homeschooling parents, and service “providers” that stand to make significant profit. *See id.* § 18-31-10. HB 2013 establishes a new Board to oversee the expenditure of public funds for private education. *Id.* § 18-31-3.

The amount paid by the voucher is not enough to afford most private school tuition and fees, let alone the additional costs of essentials such as food and transportation, which are free to public school students. Thus, the vouchers can only be used by more affluent families who can afford to pay the remaining tuition and expenses or have a parent, qualified to educate, who can stay home full time. The vouchers will not be used by most students with disabilities because private schools in West Virginia generally do not provide special education services. LGBT students are also largely excluded because most private schools do not accept LGBT students.

Respondents are parents of West Virginia public school students. Travis Beaver has a daughter and son who are entering sixth and seventh grade respectively. His daughter, J.B., has nonverbal/preverbal autism and ADD/ADHD. Her public school provides an individualized education program (“IEP”) to address her special education needs. Mr. Beaver is unaware of any private schools that would accept his daughter or meet her educational needs. Ex. J Beaver Aff.⁴ Wendy Peters is a middle school teacher. Her son, M.P., is entering fourth grade. M.P. has autism and has an IEP. Ms. Peters is likewise unaware of any private school in her area that would meet M.P.’s needs. Ex. L Peters Aff. As a teacher, she has witnessed the ravages of family poverty and addiction on her students; this informs her concern about the abuse of public funds that would be diverted to vouchers and the impact on the State’s children. *Id.* ¶ 26.

⁴ All exhibits refer to the exhibits filed with Petitioner Switzer and Compton’s Motion to Stay.

In the fall of 2021, Respondents gave notice of the lawsuit to enjoin HB 2013 as unconstitutional. Suit was filed on January 19, 2022. Beginning in March 2022, the application period opened; ~3,000 were approved. Ex. P Conzett Aff. ¶ 11. The voucher funds were to be issued on August 15, 2022. W. Va. Code § 18-31-6(d). Following a hearing on July 6, 2022, the circuit court preliminarily and permanently enjoined HB 2013 on five separate grounds. The State moved for a stay at the hearing – motion was denied. Petitioners filed motions to stay before the ICA—the same ones they are trying again here—on July 19, 2022. The motions to stay were denied by the ICA on August 2, 2022. Only then did Petitioners decide to seek review in this Court.

LEGAL STANDARD

No reported case outlines the standard for a stay under W. Va. Rule 28(b). Under federal law, a party seeking a stay “bears the heavy burden” of showing that “clear and convincing circumstances” warrant such action. *See Nken v. Holder*, 556 U.S. 418, 433-34 (2009). Courts weigh: (1) whether the petitioner has made a strong showing of likely success on the merits; (2) whether the petitioner will be irreparably injured absent a stay; (3) whether issuance of a stay will substantially injure other parties; and (4) the public interest. *Id.* at 434. Critically, a party must show “something more” than what it has already argued. *N.Y. Life Ins. Co. v. Singh*, No. 14-CV-5726(NG)(SMG), 2017 WL 10187669, at *2 (E.D.N.Y. July 13, 2017) (a “strong showing” of likely success requires “more than simply reiterate[ing] arguments”). None of these factors weighs in favor of a stay. If the motion is taken up again, it must be denied a second time.

ARGUMENT

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

Petitioners argue they are “highly likely to succeed” even though they lost on every single ground in the Circuit Court. Petitioners refer to HB 2013 as a “scholarship.” State’s Mot. (“SM”)

at 2; IM at 4. But, in order to receive the funds, a child must forfeit his or her fundamental right to public education. Students can either go to public school *or* receive \$4300 and fend for themselves. Students accepting the vouchers have to pay for any public school resources and services they may still need that their private or homeschooling cannot or will not provide. W. Va. Code § 18-31-8(f). That is decidedly not what the West Virginia Constitution established for the State’s children. Parents have always been free to choose private education or homeschooling for their children at their own expense. But, if public funds are involved, the State must provide a thorough and efficient system of public education—including educational rigor and academic standards, accountability for the expenditure of the public funds, and protections against discrimination. The fundamental right to public education cannot be exchanged for \$4,300.

HB 2013 will put children in poverty particularly at risk. For 2016-2020, the median income in West Virginia was \$27,346. U.S. CENSUS BUREAU, QUICKFACTS W. VA.⁵ If a family at the median income had three children using vouchers, they could receive ~\$13,000 from the State, increasing their annual income by 48%. They could do so on the mere “promise” that they would educate their children at home. W. Va. Code § 18-31-5(d)(3). Of course, most families would take this obligation seriously. But even the most well-meaning family facing housing and food insecurity will be tempted to consider the option and may struggle to provide adequate education at home despite trying their best, because educating children—particularly those with elevated needs—can be a profoundly difficult task. The situation created by HB 2013 is even more intolerable when you consider children of parents in the throes of addiction. *See* Paris Dunford, *More recovering addicts relapse after receiving stimulus checks*, 59 NEWS, May 24, 2021.⁶ An additional and tangible danger based on other states’ experiences is the inevitable emergence of

⁵ Available at <https://tinyurl.com/ycksjrh9>.

⁶ Available at <https://tinyurl.com/uznb6zm3>.

fly-by-night scammers promising a private education for \$4,300 and then failing to deliver. *See, e.g., Leslie Postal et al., Florida Private Schools Get Nearly \$1 Billion in State Scholarships with Little Oversight, Sentinel Finds, ORLANDO SENTINEL (Oct. 17, 2017).*⁷

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

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

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

Simply put: the West Virginia Constitution sets up a very specific structure for the public education of its children. It did *not* set up a framework under which private school choices by more affluent families are subsidized by public funds; poor, marginalized, and special needs children are siloed in public schools; and the State abdicates its obligation to students by paying \$4,300. Petitioners contend that Respondents object because they have “an educational model [they] prefer.” SM at 1. But what Petitioners or Respondents “prefer” is *not* the province of the courts. It is what the Constitution provides. HB 2013 violates the Constitution on five separate grounds.

⁷ Available at <https://tinyurl.com/2f2z4583>.

A. Respondents Will Succeed on the Merits

1. The Constitution Bars HB 2013

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

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

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

At the First Constitutional Convention in 1861, the delegates were clear: the State’s “highest and most binding duty” is the education of its children. P.G. Van Winkle, *Debates & Proc.*, FIRST CONST. CONVENTION OF W. VA. (Jan. 27, 1862).⁸ Article XII enshrines how the State

⁸ Available at <https://tinyurl.com/547wsv4y>.

must meet this duty. Under Section 1, “[t]he Legislature shall provide, by general law, for a thorough and efficient system of free schools.” W. VA. CONST. art. XII, § 1. The “general supervision of the free schools” is “vested in the West Virginia board of education[.]” *Id.* § 2. The State “shall” support the free schools through public monies, including the “school fund,” *id.* § 4, and “general taxation,” *id.* § 5. The taxation article also provides that the “power of taxation of the Legislature shall extend to . . . the support of free schools” W. VA. CONST. art. X, § 5.

Thus, public monies raised and used to educate the State’s children must only go to support the system of *free* schools supervised by the Board of Education (“WVBOE”), subject to academic standards and accountability measures. HB 2013 plainly exceeds the clear mandate of these provisions. It applies taxpayer money to a separate system of private education governed by a separate board, without academic requirements or financial oversight. It asks students to sacrifice their fundamental right to a public education for \$4,300 without any protections for ensuring the child is educated. It requires voucher students to pay for otherwise-free public school classes and resources they want or need. W. Va. Code § 18-31-8(f). All of this is unconstitutional.

HB 2013 also frustrates the provisions of Article XII. It is an intentional act by the Legislature, using taxpayer dollars, to entice students to leave public schools. Because public school funding is based largely on enrollment, funding for public schools will decline. Ex. O Pauley Aff. ¶¶ 12-13; Ex. Q Meadows Aff. ¶¶ 4-5. The cost of educating the students remaining in public schools will not decrease proportionately. Fixed costs like facilities, bussing, and support staff are not reduced when an individual child leaves the public schools. Ex. O Pauley Aff. ¶ 14; Ex. K Lubienski Aff. I ¶ 28. HB 2013 also concentrates higher-need students, including students with disabilities and students in poverty, in public schools. Ex. K Lubienski Aff. I. ¶ 30; Ex. Q Meadows Aff. ¶¶ 4-11. Such students are more costly to educate. Ex. K Lubienski Aff. I ¶ 30.

Thus, HB 2013 silos students with special needs and those in poverty in the public schools while at the same time reducing the funds available to meet their educational needs. *Id.*; Ex. O Pauley Aff. ¶ 15. These actions harm public schools and their students. The State cannot frustrate its Education Article mandate by intentionally taking actions that harm public schools.

HB 2013 further frustrates the State’s constitutional mandate by taking funds that could be available for public education and, for the very first time in West Virginia history, subsidizing the private school tuition and homeschooling costs of all families regardless of their means. The State *will* be paying to subsidize the private education of the wealthy. It is well known that West Virginia public schools suffer from chronic underfunding. *See, e.g.*, EDUC. LAW CTR., MAKING THE GRADE 2020, (Jan. 14, 2021).⁹ Yet HB 2013 will divert \$120 million annually of taxpayer funds—which could address the challenges facing underfunded public schools—to subsidize private education. W. VA. DEP’T OF EDUC., *supra* note 3. This it cannot do.

The State claims that the cost of HB 2013 is not unconstitutional because the State is flush—this year. SM at 10. But good economies come and go and education is far too important to bear the brunt of unpredictable fiscal conditions. *See State ex rel. Board of Educ. v. Rockefeller*, 167 W. Va. 72, 76-79, 281 S.E.2d 131, 134-35 (1981). Thus, the framers of the Constitution limited public funds to *public* education—in good times and bad times. If there is public money spent on education, it “*shall*” be for the support of the free public schools.

Petitioners’ primary argument is that other states have validated voucher laws under their state constitutions. SM at 7-8; IM at 7-8. In fact, the only court that has addressed a universal voucher law like HB 2013 permanently enjoined that statute under the Nevada Education Article. *Schwartz v. Lopez*, 382 P.3d 886 (Nev. 2016). Assessing a more limited program, the Florida

⁹ Available at <https://tinyurl.com/5n8rskzv>.

Supreme Court also struck down a voucher statute under the canon of *expressio unius*. *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006). The remaining cases cited by Petitioners involve limited voucher programs that were restricted by income, participation levels, and/or to specific districts, and involve different state constitutional provisions. Two of the cases involve the *same* small “experimental” program in a single city—Milwaukee. *Davis v. Grover*, 480 N.W.2d 460 (Wis. 1992); *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998). The other two cases involve limited programs in Indiana and North Carolina. *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013); *Hart v. State*, 774 S.E.2d 281 (NC 2015). That’s it. *Not a single court* in the United States has approved a universal voucher program. Staying the injunction would allow this for the very first time.

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

2. HB 2013 Does Not Withstand Strict Scrutiny.

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

¹⁰ This Court has never extended Section 12 to non-public education. See *State ex rel. State Bldg. Comm'n v. Casey*, 232 S.E.2d 349, 351–52 (1977) (rejecting public support for private organization under Section 12).

intentional acts that diminish public school funding impinge on this fundamental right. *Id.*

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

The State argues that strict scrutiny does not apply to HB 2013 because “funding public schools *and* other educational options” does not impinge on a fundamental right. SM at 11. But, the State concedes that HB 2013 may financially incentivize students to leave public schools *and* that public education funds will decrease. SM at 9. The State does not contest that subsidizing the education of private and homeschooled students will cost over \$120 million annually. Nor does it refute that HB 2013 trades \$4,300 a year for any responsibility to educate the child. Thus, HB 2013 impinges on and directly endangers West Virginia children's education rights.¹¹

The State cannot do so unless the burden on those rights is narrowly tailored to meet a compelling state interest. Petitioners contend that the State's interest is enabling parents to choose private education for their children. IM at 11 n.5. But, Parents *are* free to choose private education or homeschooling—as they always have been. The State has no constitutionally legitimate interest in subsidizing the expenses of those who make that choice. Its sole constitutional mandate with regard to education is a thorough and efficient system of free schools.

Moreover, the program is not narrowly tailored. It is expansive, without limits on eligibility based on geography, family income, school performance, or the particular educational needs of the student. *See* W. Va. Code § 18-31-1 *et seq.*; Lubienski Aff. ¶ 8. It has no cap on the number of

¹¹ Intervenor Petitioners also strangely assert that public schools have always charged for services, IM at 10-11, but this is flatly wrong. *See, e.g.* Ex. N Bastress Aff. at 4-7; W. Va. Code § 18. Until HB 2013, public school services have always been offered to students free of charge. *Id.*

vouchers or the amount that can be spent on the program. *Id.* It offers a voucher to every child starting kindergarten (and ultimately every student in every grade) without regard to income levels. It does not require private schools or homeschooling parents to meet quality or achievement standards and offers insufficient accountability for those using the funds. W. Va. Code § 18-31-11(c); Lubienski Aff. ¶ 11. This expansive program is unconstitutional.

3. HB 2013 Improperly Uses Public Funds

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

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

4. HB 2013 Usurps the Board of Education’s Constitutional Authority

The Constitution creates the framework by which public monies are raised and spent for

education. It vests authority over this system in the WVBOE. The Constitution *refers* to the WVBOE’s oversight of the “free schools” precisely because the Constitution only *allows* for the expenditure of public funds on education through the system of free schools. The Legislature cannot set up a second system of education—with a different Board—paid for with public funds. As this Court explained:

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

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

5. HB 2013 Is an Unconstitutional Special Law.

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

B. The Circuit Court Correctly Found Jurisdiction

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

Standing. Respondents, taxpaying citizens have standing because the suit involves the unconstitutional use of taxpayer funds. *See Myers v. Frazier*, 173 W. Va. 658, 676, 319 S.E.2d 782, 800 (1984); *State ex rel. Goodwin v. Cook*, 162 W. Va. 161, 164-65, 248 S.E.2d 602, 604

(1978). Traditional standing is also met. *Men & Women Against Discrimination v. Fam. Prot. Servs. Bd.*, 229 W. Va. 55, 61-62, 725 S.E.2d 756, 762-63 (2011). Respondents will suffer injury. Constitutional violations are recognized as per se harm. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Leaders of a Beautiful Struggle v. Baltimore Police Dep't*, 2 F.4th 330, 346 (4th Cir. 2021). Respondents are also injured by HB 2013's intentional efforts to reduce public school enrollment, and hence their funding, as well as its diversion of public funds that could be used to support the underfunded public schools. The elements for standing are met.

Ripeness. Strangely, the State complains that Respondents waited too long, SM at 13, *and* that the dispute is not ripe, *id.* at 6. West Virginia law is clear that a party does not have to wait until the harm has occurred to take action. A suit on an unconstitutional statute is ripe when the statute is going into effect. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979); *State ex rel. Rist v. Underwood*, 206 W. Va. 258, 271-72, 524 S.E.2d 179, 192-93 (1999).

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

II. The Remainder of the Stay Considerations Preclude a Stay

The remaining factors also do not support a stay. It is no harm to the State to avoid implementing an unconstitutional statute. Indeed, the stay prevents the State from disbursing funds that Petitioners admit would be logistically difficult if not impossible to claw back when the injunction is upheld. SM at 14; IM at 15. The State is better off with the injunction in place until the constitutionality of HB 2013 is fully and finally resolved.¹²

¹² One of the Petitioners claims she cannot pay for charter school resources. IM at 6. But, charter school resources are free. It is only HB 2013 that would require payment. Petitioners also suggest that stays are

Regarding harm to others, Petitioners go to great lengths to try to establish that failure to subsidize private and homeschooling creates irreparable harm. Of course it does not—this has been the system in place for all of West Virginia’s history.¹³ And, unlike the constitutional right to public education, no one has a right to state-supported private education. To the extent Petitioners are arguing public school attendance creates irreparable harm, then the State is failing to fulfill its mandate to provide a thorough and efficient system of free schools.¹⁴

Petitioners suggest that the timing of the lawsuit somehow creates a basis for a stay. This is wrong. Respondents gave notice of the lawsuit in November 2021, which was widely publicized, putting the State and the public on alert that it may be struck down. Respondents filed suit on January 19, 2022—well before the opening of applications in March 2022. It took over three months for a judge to be assigned. Respondents brought the preliminary injunction in March 2022. When a judge was permanently assigned, it was the schedule of counsel for the Petitioners that required the July 6 hearing. The State complains that Respondents did not move for a TRO. SM at 2-3. This was unwarranted since no funds would flow until August 2022. If Petitioners thought there was urgency, they should have sought an expedited hearing. In any event, all parents knew or had notice that HB 2013 was under legal challenge and they could not count on the disbursement. Claims of surprise are disingenuous. Any reliance on the program was created by

common in cases involving vouchers. IM at 15. They cite to a partial stay on a limited program in North Carolina. In fact, the only universal voucher statute addressed by a state court remained enjoined until it was permanently enjoined on appeal. *Schwartz v. Lopez*, 382 P.3d 886 (Nev. 2016).

¹³ Petitioners rely on *Issa v. Sch. Dist. of Lancaster*, 847 F.3d 121, 142 (3d Cir. 2017) (*private school* was unsound and thus student permitted to enroll in public school). To do so, they must *presume* the *public schools* are a detrimental environment. Such a presumption is unsupported and requires this Court to conclude that the Legislature is not meeting its obligations. *See Pauley v. Kelly*, 162 W. Va. 672, 708 (1979).

¹⁴ It is also much more disruptive to families and schools to issue vouchers, have students enroll in private schools, and then discontinue the vouchers mid-year—causing chaos for the families, the private schools they leave and the public schools to which they return—rather than waiting until the lawsuit is resolved.

the State's failure to adequately communicate about the suit—this cannot count in the State's favor.

CONCLUSION

For all of the reasons set forth herein, if the Court takes up this motion for a second time, the Court should deny Petitioners' motions for a stay—again.

August 15, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2022, I served the foregoing Omnibus Opposition to Petitioners' Motions to Stay via the Court's e-filing system, as well as a courtesy copy via email, on the following counsel:

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