IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No.

STATE OF WEST VIRGINIA,

Petitioner,

v.

TRAVIS BEAVER and WENDY PETERS,

Respondents.

PETITIONER'S MOTION FOR STAY PENDING APPEAL

Intermediate Court of Appeals of West Virginia
No. 22-ICA-1 (consolidated with 22-ICA-3)

Circuit Court of Kanawha County
Case Nos. 22-P-24, 22-P-26

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INTRODUCTION

Just weeks before school starts, the lower court granted "preliminary and permanent injunctive relief" against the Hope Scholarship Act, a celebrated law building on other States' success providing more educational options for kids. Thousands of West Virginia families are now in limbo, questioning whether they can afford the education they planned for this coming year. This should not have happened. The district court acted without jurisdiction, awarded relief that no party had requested, agreed with baseless claims, and speculated harms into existence.

The Intermediate Court of Appeals refused to stay the circuit court's order enjoining the State from implementing the Act, costing another two weeks of uncertainty. This Court should step in. Riddled with jurisdictional problems and meritless theories of relief, the injunction will almost certainly fall on appeal. But in the meantime, the State and its families will suffer irreparable harm: A validly enacted law now stands mute because the Legislature's policy judgments "troubled" a single judge, and students across the State will be stripped of educational opportunities for at least a year. On the other hand, a stay will not hurt Respondents because the Act does not disturb public school funding for the coming year; counties' funding turns on last year's enrollment numbers. So at least during the time a stay would be in effect, Hope Scholarships represent millions in *additional* money for education that will be lost if the program remains stagnant. The Court should stay this order to help ensure that West Virginia's students have the best available education options for their individual needs—this school year.

BACKGROUND

In March 2021, the West Virginia Legislature passed and the Governor signed House Bill 2013, the Hope Scholarship Act. W. VA. CODE §§ 18-31-1 to -13. The Act creates and funds education-savings accounts that can be used to pay for many educational expenses: tutoring,

college-prep courses, homeschool curriculum, education therapies, and more. *Id.* § 18-31-7. As an alternative to public-school enrollment, eligible students receive a scholarship—paid into their State-controlled accounts and not to the parent "in any manner"—equal to the adjusted average of state funding for each student. *Id.* §§ 18-31-6, -7. The Hope Scholarship Board oversees the program; among other things, it ensures that parents direct funds to qualifying educational expenses and verifies annually that Hope Scholarship students attend participating schools or make adequate academic progress. *Id.* §§ 18-31-3, -4, -8. The Board may close scholarship accounts if it sees "intentional and fraudulent misuse" (or other diversion of funds), or if parents breach their agreement to provide an education in certain subjects and to give students "opportunities for educational enrichment." *Id.* §§ 18-31-5, -10(b). And the program is open to all, including students with special learning challenges or disabilities.

The law went into effect last summer, but Respondents waited until January 2022—weeks before the scholarship application period opened, *id.* § 18-31-5(c)—to file a complaint for injunctive and declaratory relief. The complaint against the State Treasurer, State Superintendent, President of the Senate, Speaker of the House, and Governor alleged the Act was unconstitutional for five reasons. *First*, public schools are purportedly the only educational initiative the Legislature can fund. *Second*, strict scrutiny allegedly applies to this funding program and the law violates it. *Third*, Respondents insisted the Act took money from the "School Fund" enshrined in Article XII, Section 4 of the West Virginia Constitution. *Fourth*, they argued the Act usurps the Board of Education's authority. And *fifth*, they called the Act an unconstitutional "special law."

Respondents did not move for a preliminary injunction until March 30—months after suing, well after the application period opened, and more than a year after the Act was passed. Despite alleging grave harms, they did not seek a temporary restraining order, ask the court to rule

on an expedited basis, or otherwise request immediate relief. Several named defendants moved to dismiss, however, while a group of intervening parents moved for judgment on the pleadings and the State of West Virginia moved to intervene.

Meanwhile, the Hope Scholarship Program moved ahead under the statute's timeframes. Through the spring and early summer, the Board approved more than 3,100 students to receive scholarships, with hundreds more still in the application process. *See* Jeff Jenkins, *Hope Scholarship numbers grow, some late applications will be processed*, METRONEWS (June 21, 2022 7:17 PM), https://bit.ly/3PqWuM9. The program met its July 1 statutory deadline to become "operational." W. VA. CODE § 18-31-5(a). It was set to distribute millions of dollars in scholarship funds no later than August 15. *See id.* § 18-31-6(d). In short, the program was poised for a successful launch.

But the circuit court changed all that. Respondents never moved for a permanent injunction or even summary judgment. Despite these failings, the circuit court announced at a July 6 hearing —with no notice to the parties—that it was "granting preliminary and permanent injunctive relief enjoining the state from implementing [the Act]."[1] Ex. 1, at 68. Observing that the Legislature must provide "a thorough and efficient system of free schools," W. VA. CONST. art. XII, § 1, the court applied "the doctrine of expressio unius" to hold that "the state of West Virginia cannot [also] provide for nonpublic education," Ex. 1, at 65; *see also* Ex. 2 ¶ 67. The court was "troubled" by the Legislature's choice how to oversee the program and found it "problematic" that scholarship funds would purportedly "divert[]" money from public schools and "provide[] a financial incentive

[1] A preliminary injunction "preserve[s] the relative positions of the parties until a trial on the merits can be held." *Ne. Nat. Energy LLC v. Pachira Energy LLC*, 243 W. Va. 362, 370, 844 S.E.2d 133, 141 (2020). Because the circuit court's permanent injunction was a final order, *Edlis, Inc. v. Miller*, 132 W. Va. 147, 155, 51 S.E.2d 132, 136 (1948), it immediately mooted any preliminary injunction, *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 314 (1999); *see also, e.g., W. Platte R-II Sch. Dist. v. Wilson*, 439 F.3d 782, 785 (8th Cir. 2006) (collecting authorities).

to students enrolled in public schools to leave the public education system." Ex. 1, at 66; Ex. 2 ¶¶ 68-71. The court expected that "many disabled or special needs students are not going to be utilizing the vouchers," so "public schools will be left with less funds to educate the students with the most needs." Ex. 1, at 67; Ex. 2 ¶¶ 45-47. And the court determined that the Hope Scholarship Board "usurp[ed]" the Board of Education's role and the Act otherwise offended limits on using the School Fund. Ex. 1, at 67; Ex. 2 ¶ 85. Without further explanation, the court then said that "all [injunctive relief] factors weigh[ed] in [plaintiffs'] favor." Ex. 1, at 68; *but see* Ex. 2 ¶¶ 90-94 (declaring that the "preliminary injunction analysis is not necessary" while offering additional findings on that analysis). Thus, the court "grant[ed] the Declaratory Judgment Relief" and enjoined enforcing the Act. Ex. 1, at 68; *see also* Ex. 2, at 24.

The State immediately requested a stay, which the court denied; it agreed with Respondents' suggestion that "[t]hese monies are getting set to go out, and that is part of the harm." Ex. 1, at 70. After the State stressed again that time is of the essence, the circuit court eventually called for Respondents to submit proposed orders by July 20, beyond the default 11-day deadline and a full two weeks after the July 6 hearing. *See* W. VA. TRIAL CT. R. 24.01(a). The court ultimately issued a written order tracking Respondents' proposed order on July 22. *See* Ex. 2.

As the school year drew closer, the State and intervening parents sought a stay pending appeal and expedited consideration in the Intermediate Court of Appeals on July 19. Another two weeks later, on August 2, that Court refused the stays (as well as a motion to dismiss from Respondents) and deemed the motions for expedited treatment moot. Ex. 3. It also issued expedited scheduling orders for the State's and intervenors' appeals from the injunction, though briefing will not finish until late September—more than a month into the school year. Ex. 4. Given the urgency and interests at stake, the State moves for a stay from this Court now.

LEGAL STANDARD

A stay "simply suspend[s] judicial alteration of the status quo" long enough to "allow[] an appellate court to act responsibly." *Nken v. Holder*, 556 U.S. 418, 427, 429 (2009). Courts consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* at 434.[2]

ARGUMENT

I. The State Is Exceedingly Likely To Prevail On Appeal.

Appellate courts review injunctions under an abuse-of-discretion standard, evaluating factual findings for clear error and legal conclusions de novo. Syl. pt. 3, *St. Paul Fire & Marine Ins. Co. v. AmerisourceBergen Drug Corp.*, 868 S.E.2d 724, 726 (W. Va. 2021). Declaratory judgment awards are reviewed de novo, too. *Orville Young, LLC v. Bonacci*, 246 W. Va. 26, 866 S.E.2d 91, 96 (2021). Because the circuit court's ruling is flawed on jurisdictional, merits, and prudential grounds, the State is very likely to win on appeal under these standards.

A. Several threshold issues doom the circuit court's order. It was "error" to issue a permanent injunction with "no notice or order consolidating" requests for preliminary and permanent relief. *Wilson v. Zarhadnick*, 534 F.2d 55, 57 (5th Cir. 1976) (collecting authorities). More importantly, the circuit court lacked subject-matter jurisdiction. Because "any decree made by a court lacking jurisdiction is void," *State ex rel. TermNet Merch. Servs., Inc. v. Jordan*, 217 W. Va. 696, 700, 619 S.E.2d 209, 213 (2005), the State is extremely likely to succeed on appeal.

[2] Parties may seek a stay from "the appellate court with jurisdiction over the appeal." W. VA. R. APP. P. 28(b). This Court has "appellate jurisdiction" in cases challenging "the Constitutionality of a law," W. VA. CODE § 51-1-3, and it may "obtain jurisdiction over any civil case filed in the Intermediate Court," W. VA. R. APP. P. 1(b).

Respondents' lack of standing is the first problem. Respondents must show "injury-in-fact"—a "concrete and particularized" injury that is also "actual or imminent and not conjectural or hypothetical." *Men & Women Against Discrimination v. Fam. Prot. Servs. Bd.*, 229 W. Va. 55, 61, 725 S.E.2d 756, 762 (2011). They did not. Their children are enrolled in public schools, so they are eligible for Hope Scholarship funds. *See* W. VA. CODE §§ 18-31-2(5), -5, -6. The Act on its face also takes nothing from public school funding. So Respondents' theory is necessarily indirect: The Act *might* encourage other students to leave their children's public schools, which *might* lead to a significant drop in enrollment, which *might* eventually cause decreased state public-school funding (at least under existing formulas),[3] which *might* be large enough for their particular schools' funding to slip below adequate levels, which the Legislature *might* fail to correct through new appropriations, and which *might* then hurt their children should they remain in public schools. To trace this logic defeats it; Respondents' theory of standing is too attenuated to survive. After all, when "a prospective injury" is "conjectural," it "does not meet the requirement for standing." *Tabata v. Charleston Area Med. Ctr., Inc.*, 233 W. Va. 512, 517, 759 S.E.2d 459, 464 (2014).

For much the same reason, Respondents' claims are not ripe. The ripeness doctrine ensures that courts do not decide matters dependent on "future and contingent events." *See State Farm Mut. Auto. Ins. Co. v. Schatken*, 230 W. Va. 201, 210-11, 737 S.E.2d 229, 238-39 (2012). And the circuit court should have been especially reluctant to jump into the fray here, as courts should not "act to prematurely reach ultimate constitutional issues." *Wampler Foods, Inc. v. Workers' Comp. Div.*, 216 W. Va. 129, 146, 602 S.E.2d 805, 822 (2004). Yet Respondents are not suffering any

[3] The school-aid formula provides an allowance to each county for various categories of costs, including some tied to enrollment. *See generally* W. VA. CODE §§ 18-9A-1-10. The sum of these costs is called the county's "basic foundation program." *Id.* § 18-9A-12. Generally, the amount of state aid per county is the difference between the cost of the county's basic foundation program and its local share, which is the county's projected property tax collections for the year. *See id.*; *see also id.* § 18-9A-11.

injury *now*. Hope Scholarship dollars do not come from public school appropriations. Projected enrollment figures do not create a present threat, either, as public-school funding formulas look to the preceding year's enrollment. *See* W. VA. DEP'T OF EDUC., H.B. 2013 FISCAL NOTE (2013), https://bit.ly/3OavM9H. So if there are fewer children in a given public school this year because of the Hope Scholarship Program, that school will have *more* funding this year for each student. Even if Respondents are right about what might happen later, that feared harm is not "imminent."

The political-question doctrine also bars this suit. Nonjusticiable political questions arise when "a textually demonstrable constitutional commitment" hands the "issue to a coordinate political department" or there is a "lack of judicially discoverable and manageable standards." *Baker v. Carr*, 369 U.S. 186, 217 (1962). Article XII, Section 1 includes the necessary "commitment"—it specifies that "[t]he Legislature shall provide, by general law, for a thorough and efficient system of free schools." And the text gives no judicially manageable standard, as Respondents are asking the courts to make policy-based judgments like "how much money is enough" or "what educational programs beyond public schools should the State support." But school-funding issues usually must be decided in "the voting booth." *State ex rel. W. Va. Bd. of Educ. v. Gainer*, 192 W. Va. 417, 419, 452 S.E.2d 733, 735 (1994). More generally, debating the "wisdom, desirability, and fairness of a law" is for "the court of public opinion and the ballot box." *Morrisey v. W. Va. AFL-CIO*, 239 W. Va. 633, 636, 804 S.E.2d 883, 886 (2017).

B. If Respondents get past jurisdiction, their claims will very likely fail on the merits, too. Challenges like these have failed in many other courts. *See*, *e.g.*, *Schwartz v. Lopez*, 382 P.3d 886, 896 (Nev. 2016) (rejecting claims analogous to Respondents' and enjoining law only concerning funding features—namely, the lack of a separate appropriation—not present here); *Hart v. State*, 774 S.E.2d 281, 289 (N.C. 2015); *Meredith v. Pence*, 984 N.E.2d 1213, 1222-23

(Ind. 2013); *Jackson v. Benson*, 578 N.W.2d 602, 628 (Wis. 1998). For good reason. Courts presume statutes are constitutional; Respondents must prove otherwise. *See Justice v. W. Va. AFL-CIO*, 246 W. Va. 205, 866 S.E.2d 613, 620-21 (2021). To make that showing, Respondents must "establish that no set of circumstances exists under which [the Act] would be valid." *State ex rel. Cooper v. Tennant*, 229 W. Va. 585, 594, 730 S.E.2d 368, 377 (2012) (citation omitted). Despite their five-way, scattershot effort, Respondents cannot.

First, the Act does not offend the constitutional requirement that the Legislature "shall provide" for "a thorough and efficient system of free schools." W. VA. CONST. art. XII, § 1.

Applying the canon of *expressio unius est exclusio alterius* ("the expression of one thing is the exclusion of another"), the circuit court read the command that the Legislature "shall" fund public schools to mean that it "shall not" fund anything else related to education. That approach makes little sense. At most, Article XII, Section 1's reference to free schools implies that the Legislature is not *obligated* to fund other educational initiatives. It doesn't mean the Legislature cannot choose to do so as a discretionary, policy matter. The more natural reading is that the Legislature cannot choose to fund other types of education—or any other spending project, for that matter—at the expense of free schools. It does not forbid the Legislature from funding them all.

More generally, the circuit court ignored that *expressio unius* "is not of universal application," and applying it requires "great caution." *State Rd. Comm'n v. Kanawha Cnty. Ct.*, 112 W. Va. 98, 163 S.E. 815, 817 (1932). Here, especially: Unlike situations when courts might presume the Legislature did not intend more than it said expressly (like when making conduct criminal or delegating certain powers to a state board), the Legislature *itself* starts with "almost plenary" powers. *Robinson v. Charleston Area Med. Ctr., Inc.*, 186 W. Va. 720, 725, 414 S.E.2d 877, 882 (1991). In other words, if the Constitution does not forbid legislators from acting, "they

may." *Robertson v. Hatcher*, 148 W. Va. 239, 251, 135 S.E.2d 675, 683 (1964) (cleaned up). This is why the Court has refused to use *expressio unius* to limit legislative power. *See State v. King*, 64 W. Va. 546, 63 S.E. 468, 493 (1908). So Respondents would have to point to a specific provision negating the Legislature's power "beyond reasonable doubt." Syl. pt. 4, *State ex rel. Metz v. Bailey*, 152 W. Va. 53, 159 S.E.2d 673, 674 (1968). They have not.

Nor does the Act frustrate the Legislature's obligation to provide and fund free schools. The Act gives parents more options for their children's education while leaving existing options in place. A statute that might "incentivize" a different choice, Ex. 2 ¶ 71, is not unconstitutional: The Court has already held that changing school sizes does not violate the Constitution, so it is no constitutional crisis if freedom of choice causes enrollment to move. *See Pendleton Citizens for Cmty. Schs. v. Marockie*, 203 W. Va. 310, 317, 507 S.E.2d 673, 680 (1998) (upholding school consolidation). Nor does the Act "require[] students to exchange their fundamental right to a public education for a payment of $4300." Ex. 2 ¶ 69. All parents can still choose to send their children to public schools for free, and the Constitution still requires the Legislature to fund those schools. The only difference is that the Legislature has also chosen to make it $4,300 easier for the families who choose a different path.

To be sure, lower public-school numbers may eventually decrease county funding under the current funding formula (though only some portions of the formula are tied to enrollment, and with fewer students at least some of the counties' costs will go down, too). But not every decrease is unconstitutional—Respondents must show, beyond a reasonable doubt, that the drop will be big enough to slip below the constitutional floor. Schools' numbers fluctuate for many reasons, after all. West Virginia's have been declining for some time, yet no one suggests these fluctuations create a constitutional injury. And even if Respondents could show that those Hope Scholarships

spur are different, all that might prove is that the *funding structure* might become inadequate. It would say nothing about *the Act*'s legality. If the existing funding formula were to fail—for any combination of factors—then the Legislature would be duty-bound to come up with something else. Any denial of the right to education in that scenario would flow from the Legislature's independent, future, and hypothetical refusal to supplement public-school funding.

Critically, the Act does not mandate lower public-school funding. The circuit court pointed to no precedent barring programs that might have eventual consequences for school-funding metrics. No surprise there: On that logic, any appropriation that draws down the State fisc could be said to "frustrate" the constitutional obligation if someone thinks it does not leave enough money to cover public-school funding challenges down the road. The circuit court also balked at the Act's supposed $100 million price tag (despite numbers closer to $13 million for the coming year). *See, e.g.*, Ex. 1, at 29, 38, 58, 62. But that cost is not an unconstitutional frustration when last fiscal year's revenue collections closed more than $1.3 billion ahead of estimates. *See* W. VA. STATE BUDGET OFFICE, REVENUE COLLECTIONS FISCAL YEAR 2022 (2022), https://bit.ly/3O5LqDa. The Legislature can also amend the Program to account for future budgetary needs, not to mention that it can and has amended the school formula itself. And if a funding shortage ever did occur and the Legislature failed to correct it, Respondents would be able to sue for a declaration that the shortage is unconstitutional. *See Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979). Even so, their remedy would be an order to force adequate funding using *some* state dollars. The Legislature's choice to spend other dollars on Hope Scholarships—or roads, or public-safety measures, or anything else—would have nothing to do with it.

Second, strict scrutiny does not apply and thus cannot defeat the Act. Only a "denial or infringement of the fundamental right to an education" triggers strict scrutiny review. *Cathe A. v.*

Doddridge Cnty. Bd. of Educ., 200 W. Va. 521, 528, 490 S.E.2d 340, 347 (1997). But for the same reasons that Respondents' first claim fails, funding public schools *and* other educational options does not violate the Constitution. The circuit court repeatedly questioned the wisdom of the Legislature's choices, insisting that the Legislature "might need to reevaluate," and "[i]sn't that what I'm supposed to do here today?" Ex. 1, at 42; *see also, e.g.*, *id.* at 54 ("It just seems to me to be fundamentally inappropriate, if not unconstitutional, to do what this statutory mechanism suggests."). Second-guessing policy choices is not the same as identifying a fatal constitutional flaw. *State ex rel. Loughry v. Tennant*, 229 W. Va. 630, 640, 732 S.E.2d 507, 517 (2012).

Third, the Act does not touch the School Fund. Quite the opposite: The General Fund pays for the Act, *see* S.B. 250, Title II, Section 1 (Appropriations for general revenue), 2022 Leg., Reg. Sess. 33-34 (W. Va. 2022), and the Department of Education seeks a *separate* appropriation to meet program obligations, *see* W. VA. CODE §§ 18-9A-25, 18-31-6. Given that, the Act conforms to the Constitution's limits on using the "permanent and invested school fund." W. VA. CONST. art. XII, § 4. Running from Section 4's plain text, Respondents tried to read Article XII, Section 5's direction that the Legislature support public schools through "general taxation of persons and property or otherwise" to transform all tax funds used for education into "School Fund" money. But Section 5 does not say funding public schools is the only permissible way to use tax revenue for educational ends; this argument seems to be another botched use of the *expressio unius* canon.

Fourth, the Act does not restrict the Board of Education's responsibilities. Below, Respondents invoked Article XII, Section 2, but that provision gives the Board "[t]he general supervision of the free schools of the State." It does not assign authority over all schools or education writ large. Respondents also thought that West Virginia Code § 18-2-5 expanded the Board's constitutional powers. But the Constitution defines the reach of statutes, not the other

way around—the statute itself affirms that the Board's authority is "[s]ubject to and in conformity with the Constitution." W. VA. CODE § 18-2-5(a). And, like Section 2, the statute speaks to the Board's "general supervision of the public schools." *Id.* § 18-2-5(a), (b). All this to say, the Board had power over the State's free schools before the Act. It still does now. The circuit court's insistence that the Act "restricts" the Board's "exercise of academic and financial oversight" of Hope Scholarship funds, Ex. 2 ¶ 85, is a claim for *new* power without constitutional backing. In any event, the statute respects the Board's role by giving the State Superintendent of Schools a required seat on the Hope Scholarship Board and requiring "consultation" with the Department of Education before adopting rules touching on public schools. W. VA. CODE §§ 18-31-3(b)(4), -8(f).

Fifth, the Act is not a special law. It is a general law because it operates "uniformly on all persons and things of a class"—here, parents and guardians with school-age kids. *Gallant v. Cnty. Comm'n of Jefferson Cnty.*, 212 W. Va. 612, 620, 575 S.E.2d 222, 230 (2002) (citation omitted). This classification is "natural, reasonable and appropriate to the [Act's] purpose." *Id.* The circuit court tried to make hay from the discrimination laws that might apply to public but not private schools, Ex. 2 ¶ 88, but any differences in how anti-discrimination laws might apply in one school versus another arise from other, pre-existing laws. Nor must the Act be fully "uniform in its operation and effect." *Gallant*, 212 W. Va. at 620, 575 S.E.2d at 230. Instead, it need only operate "alike on all persons and property similarly situated." *Id.* The Act does just that. It empowers families to make the same choices by subjecting everyone who wants to take advantage of its terms to the same requirements, spending restrictions, and funding caps. *See* W. VA. CODE §§ 18-31-5(d), 18-31-6(b), 18-31-7.

Because all of Respondents' claims fail, awarding an injunction was an abuse of discretion and the State's appeal is highly likely to succeed.

C. The State is also likely to prevail because the circuit court's order flunks the rest of the injunction factors. Consider "the comparative hardship or convenience to the respective parties involved in the award or denial of the writ." Syl. pt. 2, *St. Paul Fire*, 868 S.E.2d 724, 726 (W. Va. 2021). Respondents did not meet their burden to show irreparable harm absent an injunction. Not all alleged constitutional harms are irreparable, at least where (as here) they boil down to a dispute over money. *See, e.g.*, *A Helping Hand, LLC v. Baltimore Cnty.*, 355 F. App'x 773, 777 (4th Cir. 2009). And Respondents' arguments about insufficient school funding are "conjecture" arising from "unsubstantiated fears of what the future may have in store." *Justice*, 866 S.E.2d at 628. The Act cannot discharge the Legislature of its duty to provide "a thorough and efficient system of free schools." W. VA. CONST. art. XII, § 1. So if—and it is a big if—Respondents' underfunding fears came to fruition, their remedy would be a separate legal claim to hold the Legislature to that task.

On the other hand, the injunction will irreparably injure the public, including the more than 3,100 students already approved for scholarships and the many others in the process of being approved. With under three weeks until school starts, the rug has been "pulled out from under" the families who planned this school year around the Hope Scholarship. Brad McElhinny, *3,000 students must reassess school plans after Hope Scholarship is halted*, METRONEWS (July 7, 2022, 4:57 PM), https://bit.ly/3nVg738. Respondents heightened those problems by waiting to act—suing months after the Governor signed the bill, then waiting to pursue any kind of injunctive relief. Strategic delays like these, even when they do not "involve[] a long period of time," can justify denying injunctive relief. *Ballard v. Kitchen*, 128 W. Va. 276, 285, 36 S.E.2d 390, 394-95 (1945). And the State suffers, too. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland*

v. King, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (citation omitted). So the State is likely to succeed in showing that the circuit court should not have entered any injunction.

II. The Other Stay Factors Support The State's Request.

All the above underscores the relative harm to the parties: In the near-term while the stay would be in place, the State faces serious, irreparable harm. Respondents face next to none.

The school year starts this month. There is still time with a stay—barely—to meet a key deadline: "[O]ne half of the total annually required deposit" must be deposited into accounts "no later than August 15 of every year." W. VA. CODE § 18-31-6(d). Without an immediate stay, the program will miss that and very likely the next statutory deadline on January 15, too. So if the circuit court's injunction stays in place, students will lose the chance to use the Hope Scholarship for most or all of this school year. That one year can be critical: "A sound educational program has power to change the trajectory of a child's life, while even a few months in an unsound program can make a world of difference in harm to a child's educational development." *Issa v. Sch. Dist. of Lancaster*, 847 F.3d 121, 142 (3d Cir. 2017) (cleaned up); *see also, e.g.*, *In re A.H.*, 999 F.3d 98, 106 (2d Cir. 2021) (irreparable harm from loss of preferred school for a semester).

Yet even setting aside the speculative nature of Respondents' alleged harms, they will not feel that injury for at least a year. The circuit court said that disbursing funds this month would be the trigger for "diminishing the public funds available for public education," Ex. 2 ¶ 92, but this year's public-school funding numbers are locked. Concern about the "[l]ogistically" "difficult task" of clawing back scholarship money if Respondents ultimately win is also not irreparable harm. Difficult to collect or not, financial loss is not irreparable unless "incapable of measurement by any ordinarily accurate standard." *Wiles v. Wiles*, 134 W. Va. 81, 90, 58 S.E.2d 601, 606 (1950). The program will know exactly how much money it sends out and where it goes.

A stay would also serve the public interest. A State's interest in enforcing a valid law merges with the public interest. *Nken*, 556 U.S. at 435. That interest is even more pronounced because the Act increases choice in the realm of education. It supports parents' "fundamental right" "to make decisions concerning the care, custody, and control of their children," *Lindsie D.L. v. Richard W.S.*, 214 W. Va. 750, 755, 591 S.E.2d 308, 313 (2003). Even the circuit court agreed that "effectively educat[ing] students" is "squarely in the public interest." Ex. 2 ¶ 94 (citation omitted). The court assumed that effective education takes place only in public schools—or at least that the State should not support anything else. *E.g.*, Ex. 1, at 52 ("And [the Legislature] want[s] to spend money on this scholarship fund? … What's the purpose of it?"). But despite that policy disagreement, substantial evidence supports the Legislature's conclusion that the program would help all students, participants and non-participants alike. *See* Exs. 5-7.

So all that's left is the circuit court's idea that the injunction preserves the status quo. Ex. 2 ¶ 93. That may have been true if Respondents moved for expedited relief months sooner. But the status quo was *July* when the circuit court sprung its permanent injunction without notice. By then the status quo was thousands of families who had been approved for scholarships and had kids starting new schools in a matter of weeks they might not be able to afford alone. The injunction is not costless. So if the Court has any doubt on the merits, better to err on the side of a presumptively constitutional law. And better to allow the millions in *new* education funding to flow this school year—the Act's year-one money on top of public-school funding from last year's numbers. The public should not have to lose the new educational choices that money allows while waiting on appellate vindication. West Virginia students are counting on Hope Scholarships now.

CONCLUSION

This Court should stay the circuit court's order until this appeal is resolved.

Respectfully submitted,

STATE OF WEST VIRGINIA

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No.

STATE OF WEST VIRGINIA,

Petitioner,

v.

TRAVIS BEAVER and WENDY PETERS,

Respondents.

CERTIFICATE OF SERVICE

I, Lindsay See, do hereby certify that the foregoing "*Motion for Stay Pending Appeal*" has been served on counsel of record by email and/or File and Serve Xpress this the 3rd day of August, 2022, and by depositing a copy of the same in the United States Mail, via first-class postage prepaid, on August 4, 2022, addressed as follows:

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