IN THE INTERMEDIATE 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

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 alternative educational funding. Thousands of West Virginia families are now in limbo, questioning whether they can afford the education they planned for their kids 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.

This Court should stay the circuit court's order enjoining the State from implementing the Act. Riddled with jurisdictional problems and meritless theories of relief, the injunction will almost certainly fall on appeal. And absent a stay, the State and its families will suffer irreparable harm: A validly enacted law will stand 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 upcoming academic year. And given how the Act helps kids, a stay serves the public interest, too. 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. Although the circuit court considered the Act a "voucher law," it is not. Unlike single-use vouchers to private schools, the Act creates and funds education-savings accounts that parents can use 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 accounts—equal to the adjusted average of state funding for each student. *Id.* § 18-31-6. The Hope Scholarship Board oversees the program. *Id.* §§ 18-31-3, -4.

Although the law went into effect last summer, 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*, the Legislature purportedly can fund only public schools, not any other educational initiative. *Second*, the Legislature allegedly failed to establish a compelling purpose and narrowly tailored scheme. *Third*, Respondents insisted the Act improperly 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*, Respondents called the Act an unconstitutional "special law" that makes improper distinctions among students.

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. Respondents' motion relied on their same five claims. Despite alleging grave harms, they did not seek a temporary restraining order, move for an immediate hearing, ask the court to rule on an expedited basis, or otherwise request immediate relief. Nevertheless, several named defendants moved to dismiss, 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 marched forward. Through the spring and early summer, the Hope Scholarship 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, West Virginia seemed poised to become another success story in expanding learning options through education-savings accounts. *See generally* Alan Greenblatt, *School Choice Advances in the States*, 21 EDUC. NEXT 18 (2021).

But the circuit court changed all that. Respondents had never moved for a permanent injunction or even summary judgment, and the circuit court provided no notice that it intended to decide the entire case anytime soon. Even so, the court announced at a July 6 hearing that it was "granting preliminary and permanent injunctive relief enjoining the state from implementing [the Act]."[1] Ex. 1, Tr. 07/06/20 Hearing, 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. 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 to students enrolled in public schools to leave the public education system." *Id.* at 66. Although it cited no evidence, 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." *Id.* at 67. 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. *Id.*

[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).

Without further explanation, the court then said that "all [injunctive relief] factors weigh[ed] in [plaintiffs'] favor." *Id.* at 68.

Thus, the court "grant[ed] the Declaratory Judgment Relief" and enjoined enforcing the Act. Ex. 1, at 68. Renaming it the "Voucher Law," the court held that the Act "violates Article XII, Sections 1, 2, 4 and 5 of the West Virginia Constitution, and Article VI, Section 39 … and accordingly, is null and void." *Id.*

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 to send money out." 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, a full two weeks after the July 6 hearing. *See* Exs. 2-4, Correspondence Concerning Orders. The court has not said when it will ultimately issue its written orders, even though the program was set to start depositing funds for families next month.[2] The State plans to appeal from that order quickly. Given the urgency and interests at stake, it moves for a stay 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 traditionally 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

[2] The Court can grant relief without a written order. *See State ex rel. Kutil v. Blake*, 223 W. Va. 711, 718, 679 S.E.2d 310, 317 (2009) (Supreme Court of Appeals granted a stay filed "[b]efore the written order was issued," premised on "the [oral] pronouncement of the lower court"); *Moats v. Preston Cnty. Comm'n*, 206 W. Va. 8, 13, 521 S.E.2d 180, 185 (1999) ("An oral order has the same force, effect, and validity in the law as a written order."); W. VA. R. APP. P. 28(a)-(b) (anticipating stay motions before the appeal is presented).

proceeding; and (4) where the public interest lies." *Id.* at 434; *see also* W. VA. R. APP. P. 28(b) (stay motions must give "the reasons for the relief requested and the grounds for the appeal").

ARGUMENT

All four factors strongly support a stay. The State is likely to prevail in its appeal, but it will be irreparably harmed if the Hope Scholarship Program remains on hold while the circuit court drafts an appropriate order and the case then wends its way through appeal. Conversely, a stay would not injure Respondents because the program will not affect this year's school funding. And putting duly enacted laws into effect serves the public interest, especially when they concern interests as important as education.

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

The circuit court's grant of a permanent injunction "call[ed] for the exercise of sound judicial discretion in view of all the circumstances of the particular case," including "the nature of the controversy, the object for which the injunction is being sought, and the comparative hardship or convenience to the respective parties." Syl. pt. 2, *St. Paul Fire & Marine Ins. Co. v. AmerisourceBergen Drug Corp.*, 868 S.E.2d 724, 726 (W. Va. 2021). Appellate courts review injunctions under an abuse-of-discretion standard, evaluating factual findings for clear error and legal conclusions de novo. *Id.* at syl. pt. 3. 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. For one thing, it was "error" to issue a permanent injunction when "there had been no notice or order consolidating" requests for preliminary and permanent injunctive relief. *Wilson v. Zarhadnick*, 534 F.2d 55, 57

(5th Cir. 1976) (collecting authorities). For another, the circuit court did not have subject-matter jurisdiction for three separate reasons. 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.

Respondents' lack of standing is the first problem. Respondents must show "injury-in-fact"—that is, 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). Then they must tie that injury to the conduct they challenge and establish how a favorable decision will redress it. *Id.* But Respondents did none of that. Nor could they. Their children are enrolled in public schools, so they are eligible for Hope Scholarship funds should they choose. *See* W. VA. CODE §§ 18-31-2(5), 18-31-5, 18-31-6. 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,

[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.

759 S.E.2d 459, 464 (2014). Respondents' "speculative chain of possibilities" thus "does not establish" concrete and imminent injury. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013).

For much the same reason, Respondents' claims are not ripe. The ripeness doctrine ensures that courts do not issue advisory opinions, resolve academic disputes, or decide matters dependent on contingent events. *See State Farm Mut. Auto. Ins. Co. v. Schatken*, 230 W. Va. 201, 210, 737 S.E.2d 229, 238 (2012). Even when a party seeks declaratory relief, "future and contingent events will not be considered." *Id.* at 211, 737 S.E.2d at 239. 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 injury *now*. Hope Scholarship dollars do not come from public school appropriations. Projected enrollment figures do not create a present threat, either, as the State's public-school funding formulas look to the preceding year's enrollment figures. *See* W. VA. DEP'T OF EDUC., H.B. 2013 FISCAL NOTE (2013), https://bit.ly/3OavM9H. Given that lag, 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 that stays enrolled. So even if Respondents are right about what might happen in future years, that feared harm is not "imminent."

The political-question doctrine also bars this suit. Nonjusticiable political questions arise either 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). Here, we have both. Respondents rely on Article XII, Section 1, which includes the necessary "commitment"—it specifies that "[t]he Legislature shall provide, by general law, for a thorough and efficient system of free schools." *See also* W. VA.

CONST. art. XII, § 12 ("The Legislature shall foster and encourage[] moral, intellectual, scientific, and agricultural improvement."). And the constitutional 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, courts cannot decide the "wisdom, desirability, and fairness of a law"—these questions belong "in the court of public opinion and the ballot box, not before the judiciary." *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 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. To start, "a facial challenge to the constitutionality of legislation is the most difficult challenge." *Lewis v. Canaan Valley Resorts, Inc.*, 185 W. Va. 684, 691, 408 S.E.2d 634, 641 (1991). 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 Legislature's constitutional requirement to provide for "a thorough and efficient system of free schools." W. VA. CONST. art. XII, § 1.

Applying the canon of *expressio unius est exclusio alerius* ("the expression of one thing is the exclusion of another"), the circuit court incorrectly read the Legislature's duty to fund public schools to bar funding any other educational initiatives. Yet that canon "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 well 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 starts with "almost plenary" powers under our Constitution. *Robinson v. Charleston Area Med. Ctr., Inc.*, 186 W. Va. 720, 725, 414 S.E.2d 877, 882 (1991). In other words, the Constitution affirms the Legislature's broad "authority to enact any measure not inhibited thereby." *Cooper*, 229 W. Va. at 594, 730 S.E.2d at 377; *see also Robertson v. Hatcher*, 148 W. Va. 239, 251, 135 S.E.2d 675, 683 (1964) (if the Constitution does not forbid legislators from acting, "they may" (cleaned up)). 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. *See also State v. King*, 64 W. Va. 546, 63 S.E. 468, 493 (1908) (refusing to use *expressio unius* to limit legislative power). At most, the *expressio unius* canon implies that the Legislature is not *obligated* to fund educational initiatives beyond "free schools." But that would not foreclose its right to do so as a discretionary, policy matter.

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. And yes, under the current funding formula lower public-school numbers may eventually decrease county funding (though with fewer students at least some of the counties' costs will go down, too). But that means only that, at some point, the existing funding structure might prove inadequate. If that happens, the

Legislature would be duty-bound to come up with something else. The Act would not frustrate its ability to do so. The circuit court thought the program would cost $100 million (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 Hope Scholarship Program to account for future budgetary needs. And if a public-school 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).

The Constitution does not bar statutes that might "incentivize" students to leave public schools. Ex. 1, at 39-40. The Constitution requires funding public schools for every child who attends them—it is not a de facto bar on supporting anything else. And no precedent prohibits programs that might have eventual consequences for funding metrics. On that logic, *any* new spending program 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. Schools numbers fluctuate for many reasons, after all—West Virginia's have been declining for some time. No one suggests these fluctuations create a constitutional injury, and those that Hope Scholarships may spur are no different.

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). Here, the Act leaves public schools' doors open to all students—it provides more choice while leaving existing options in place. If freedom of choice causes enrollment to move, that shift is no constitutional

crisis; changing school sizes does not violate the Constitution. *See Pendleton Citizens for Cmty. Schs. v. Marockie*, 203 W. Va. 310, 317, 507 S.E.2d 673, 680 (1998) (school consolidation was constitutional even if some students would have done better in smaller schools). Speculating (again) that schools might be underfunded in the future is not enough, either. Strict scrutiny applies only if the Act actually denies or abridges public school students' educational rights.

Regardless, the Act would satisfy strict scrutiny's "compelling interest" and "narrowly tailored" hurdles. *See State ex rel. Loughry v. Tennant*, 229 W. Va. 630, 637, 732 S.E.2d 507, 514 (2012). Promoting "learning activity is indeed a compelling State interest." *Bailey v. Truby*, 174 W. Va. 8, 23, 321 S.E.2d 302, 317 (1984). The Act directly advances this interest by "provid[ing] the option for [parents] to better meet [their children's] individual education needs." W. VA. CODE § 18-31-5(a). And the Legislature narrowly tailored the Act by funding it through General Fund dollars instead of re-appropriating money set aside for public schools. The circuit court repeatedly questioned the wisdom of these choices. *E.g.*, Ex. 1, at 42 ("[The Legislature] might need to reevaluate. Isn't that what I'm supposed to do here today?"), *id.* at 54 ("It just seems to me to be fundamentally inappropriate, if not unconstitutional, to do what this statutory mechanism suggests."). But second-guessing policy choices is not the same as identifying a "less restrictive remed[y]" the Legislature could have chosen instead. *State ex rel. Loughry*, 229 W. Va. at 640, 732 S.E.2d at 517.

Third, the Act does not touch the School Fund. Nothing in the Act says that monies from that Fund will be diverted to the Hope Scholarship Program. 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 any tax funds used for educational ends into "School Fund" money. But Section 5 does not say funding public schools is the *only* permissible education-related way to use tax revenue; this argument seems to be another botched use of the *expressio unius* canon. And any doubt on that score "must be resolved in favor of the [Act's] constitutionality." *Cooper*, 229 W. Va. at 594, 730 S.E.2d at 377.

Fourth, the Act respects the Board of Education's role. The Act does not change the Board'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 somehow expanded the Board's constitutional powers. But the Constitution defines the reach of statutes, not the other way around—the statute itself reiterates that the Board's authority is "[s]ubject to and in conformity with the Constitution." W. VA. CODE § 18-2-5(a). At any rate, the statute refers only to the Board's "general supervision of the *public schools*." *Id.* § 18-2-5(a), (b) (emphasis added). And if there were a conflict between the Act and Section 18-2-5 despite all that, then the Act—the more recent law—would prevail. *Wiley v. Toppings*, 210 W. Va. 173, 175, 556 S.E.2d 818, 820 (2001).

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.* Respondents

tried to make hay from the discrimination laws that might apply to public but not private schools; not even the circuit court accepted that argument. The circuit court was right not to bite, as 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." *Id.* 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 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 likely to prevail because the circuit court's order flunks the rest of the injunction factors, too. 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 they would suffer irreparable harm absent an injunction. Respondents' arguments about insufficient public-school funding are "conjecture" arising from "unsubstantiated fears of what the future may have in store." *Justice*, 866 S.E.2d at 628. And any actual decreases in funding would not be irreparable because they could be remedied in many ways. *See id.* 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' fears of underfunding came to fruition, the Legislature's duty to address it would negate the asserted harm.

On the other hand, the injunction will irreparably injure the public, including the more than 3,100 students already approved for scholarships. With just over a month until school starts, the

"blessing" of the Hope Scholarship these students' families planned around has been "pulled out from under" them. 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 even longer to pursue any kind of injunctive relief. Plaintiffs' 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 circuit court should not have entered any injunction, permanent or otherwise. The appeal will almost certainly succeed.

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

All the above should make the relative harm to the parties plain enough: In the near-term while the stay would be in place pending appeal, the State faces serious, irreparable harm. Given that the Act could not cause *any* immediate decrease in school funding levels that derive from last year's enrollment numbers, Respondents face next to none. The school year is a few weeks away. So too is a key deadline: Under West Virginia Code § 18-31-6(d), "one half of the totally annually required deposit" must be deposited into eligible recipient accounts "no later than August 15 of every year." And whether in this Court or in the Supreme Court of Appeals, litigation will probably still be pending when the next statutory deadline rolls in on January 15. 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).

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. The public interest is even more pronounced here because the Act increases parental autonomy in the realm of education. The Act 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). Indeed, the "American people have always regarded education and the acquisition of knowledge as matters of supreme importance," *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (cleaned up), and the Act gives parents more tools to secure those precious items. The circuit court's order, on the other hand, assumes that the State should support a single model of education alone. But despite the circuit court's disagreement with the choice to use state funds for the Hope Scholarship, *e.g.*, Ex. 1, at 52 ("And [the Legislature] want[s] to spend money on this scholarship fund? … What's the purpose of it?"), substantial evidence supports the Legislature's conclusion that the program would help all students, participants and non-participants alike. *See* Ex. 5, Aff. of Benjamin Scafidi; Ex. 6, Aff. of Dr. Patrick Wolf; Ex. 7, Aff. of Dr. Anna Egalite. The public should not have to wait for final appellate vindication to benefit from the Legislature's deliberate choice. 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 INTERMEDIATE 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 via the E-Filing System or, for those parties who are not capable of receiving electronic service, by email and by depositing a copy of the same in the United States Mail, via first-class postage prepaid, this the 19th day of July, 2022, addressed as follows:

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