No. 18-1189

In the Supreme Court of the United States

MITCH CARMICHAEL, President of the West Virginia Senate, DONNA J. BOLEY, President Pro Tempore of the West Virginia Senate, TOM TAKUBO, West Virginia Senate Majority Leader, LEE CASSIS, Clerk of the West Virginia Senate, and the WEST VIRGINIA SENATE,
Petitioners,

v.

West Virginia ex. rel. MARGARET L. WORKMAN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(c*ontinued*)

Page(s)

OTHER AUTHORITY

REPLY BRIEF FOR PETITIONERS

By inserting itself into the merits of pending impeachment proceedings against members of the judiciary, the court below undercut impeachment's power to provide meaningful accountability for coordinate branches in a republican regime. Article IV, § 4 demands a remedy for this separation-of-powers failure. Respondent urges the Court to decline review because the decision below turned primarily on state law—yet there is no state-law corollary to the Guarantee Clause. Rather, this case presents two federal questions that warrant review. *First*, despite growing recognition after *New York* v. *United States*, 505 U.S. 144 (1992) that at least some Guarantee Clause claims are justiciable, courts are still divided whether and when these claims have a judicial remedy. The court below necessarily addressed this issue, and joined the Fifth, Sixth, Seventh, and Ninth Circuits by summarily dismissing the Senate's claim. *Second*, Respondent does not meaningfully dispute state courts' disagreement whether separation-of-powers principles are part of the republican-government guarantee. This issue also deserves an answer, and the extreme decision below means that answer should come now.

I. NO ADEQUATE AND INDEPENDENT STATE-LAW GROUNDS BAR REVIEW.

Where a state court's decision is "based on bona fide separate, adequate, and independent grounds," this Court "will not undertake to review the decision." *Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983). There

are no such grounds shielding the Senate's Guarantee Clause claim from review.

Respondent argues (at 11-12) that the decision below is steeped in state separation-of-powers principles and the particulars of West Virginia impeachment law. Yet while the court's rulings on those fronts were wrong, that is not why the Senate seeks review. The Guarantee Clause is a distinctly federal issue, and has no counterpart in West Virginia's Constitution. Indeed, the court below relied on just one—*federal*—case when addressing the Guarantee Clause claim. App. 37 n.22 (citing *New York*, 505 U.S. at 184). A state court is certainly "free to read its own State's constitution more broadly" than the federal Constitution or apply a "different analysis [to] its corresponding constitutional guarantee," *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982), but those principles are irrelevant where there is no "corresponding" state-constitutional provision in the first place.

The Guarantee Clause recognizes that even a correct interpretation of state law can run afoul of the federal Constitution where it causes a State to veer from the minimum elements of republicanism. Granting review to ensure that a state court's interpretation of state law is consistent with the U.S. Constitution is always a sensitive endeavor, but it is one of this Court's critical—and common—functions.

The state court's summary disposition of the Guarantee Clause claim, see Opp. 14, also does not insulate it from review. The Senate briefed the Guarantee Clause claim below. Resp. Br. in Opp. to Pet. for Writ of Mandamus 27-30, No. 18-0816 (W. Va. Oct. 3, 2018); App. 142-43. The court noted an

absence of precedent "support[ing] the proposition that issuance of a writ against another branch of government violates the Guarantee Clause," App. 37 n.22, but requiring precedent arising in an identical procedural posture before entertaining a claim is a high burden—particularly for one that is and should be rare in a well-functioning Republic. Nor can this demanding approach be cast as adequate and independent *procedural* grounds for rejecting it. The state court did not apply the same standard before thoroughly considering the parties' other arguments, and courts cannot evade federal issues "by invoking procedural rules that they do not apply evenhandedly." *Hathorn* v. *Lovorn*, 457 U.S. 255, 263 (1982). And at minimum, where the Guarantee Clause is raised to hold a state court accountable, it would be a perverse result to deem that court's refusal to "substantively address" the claim, Opp. 12, an adequate basis for denying review.

II. THIS COURT SHOULD RESOLVE DIVISION OVER JUSTICIABILITY OF THE GUARANTEE CLAUSE.

Notwithstanding Respondent's arguments to the contrary (at 15-25), this is the right case to clarify whether and when Guarantee Clause claims are justiciable.

A. Justiciability of the Guarantee Clause is properly before the Court. Respondent's suggestion that the issue "was not decided by the Supreme Court of Appeals," Opp. 15, is inaccurate because the state court necessarily resolved the issue, and in any event, the Senate "pressed" it below. *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (Court reviews issues "pressed or passed on" below).

In its footnote disposing of the Guarantee Clause claim, the state court found "no merit" in the argument based on *New York*'s recognition that "[i]n most of the cases in which the Court has been asked to apply the [Guarantee] Clause, the Court has found the claims presented to be nonjusticiable." App. 37 n.22 (quoting 505 U.S. at 184). Respondent characterizes this reference as "an isolated parenthetical," Opp. 17, but *New York* is the only case the court cited. The better reading—one that does not give the court's reliance on *New York* short shrift—is also the most natural: The court deemed the Guarantee Clause claim nonjusticiable.

This view comports with the overall tenor of the decision as well. Across a lengthy opinion—spanning 90 Appendix pages—the court addressed the parties' other claims in great detail. Its choice to address the merits of the federal Guarantee Clause claim in a single footnote is a curious contrast. A fair explanation is that it considered the claim beyond its authority to resolve.

Justiciability would be squarely presented even if the Court determines that the state court did not resolve it directly. Because justiciability is a threshold question, ruling on the merits of a claim necessarily implies finding it cognizable. *Nixon* v. *United States*, 506 U.S. 224, 226 (1993) ("[B]efore we reach the merits of such a claim, we must decide whether it is 'justiciable'" (citation omitted)). And if the court below used *New York*'s *justiciability* discussion to dispose of the claim on the *merits*, that would only further highlight courts' confusion in this sphere.

Finally, this Court may consider justiciability even if the state court did not reach the issue—explicitly or implicitly—because the Senate advanced the claim below. In its rehearing petition, for example, the Senate argued a proper understanding of *New York* supports reaching the merits of its claim. App. 142-43. If anything, a state court's failure to address in detail a claim intended to provide a check on the judiciary's power should prove the rule that the "pressed or passed upon" guideline "operates (as it is phrased) in the disjunctive." *Williams*, 504 U.S. at 41.

B. This is also the right time for the Court to resolve if and when courts may address Guarantee Clause claims. Respondent minimizes the confusion surrounding this issue by claiming that circuit courts recognize "that Guarantee Clause claims occasionally present justiciable questions." Opp. 19. This characterization is over-inclusive. It also papers over the considerable disagreement in approach for the courts that do adopt some version of this rule.

Respondent highlights a trend, in the wake of *New York,* toward acknowledging the possibility of justiciable Guarantee Clause claims. *E.g.*, Opp. 20. Yet in the Ninth Circuit, both *California* v. *United States*, 104 F.3d 1086 (9th Cir. 1997), and *Murtishaw* v. *Woodford*, 255 F.3d 926 (9th Cir. 2001) were decided after *New York*—and both found Guarantee Clause claims non-cognizable. For *California*, Respondent does not dispute the nonjusticiability holding, but argues it stems from the court's view that Guarantee Clause claims raise political questions. Opp. 23. *Why* the Clause is nonjusticiable may be a further point of judicial disagreement, but it does not change the Ninth Circuit's absolutist *outcome*. Similarly,

Respondent would limit *Murtishaw*'s holding to its facts, yet points to nothing supporting this narrow view. Opp. 24. To the contrary, *Murtishaw* relied on *New York* to hold that "[a] challenge based on the Guarantee Clause . . . is a nonjusticiable political question." 255 F.3d at 961. And the Ninth Circuit has issued similarly clear holdings at least twice more. See *Jones* v. *Brown*, 670 F. App'x 579, 580 (9th Cir. 2016); *Ventura Grp. Ventures, Inc.* v. *Ventura Port Dist.*, 17 F. App'x 676, 678 (9th Cir. 2001).

As for the Fifth Circuit, Respondent points to *Texas* v. *United States*, 106 F.3d 661 (5th Cir. 1997), but *Texas*'s suggestion that "perhaps not all" Guarantee Clause claims are nonjusticiable is at best a tentative retreat from the *per se* rule. *Id.* at 666. Further, *Texas*'s analysis of "the 'manageable standards' test announced in *Baker* v. *Carr*[, 369 U.S. 186 (1962)]," Opp. 20, consists of a single sentence. 106 F.3d at 667. Compared to the Fifth Circuit's more thorough application of *Baker* in other contexts, *e.g.*, *Kuwait Pearls Catering Co.* v. *Kellogg Brown & Root Servs., Inc.*, 853 F.3d 173, 178-85 (5th Cir. 2017), *Texas* underscores the Circuit's strong presumption against justiciability.

Nor does *Phillips* v. *Snyder*, 836 F.3d 707 (6th Cir. 2016) show substantive change in the Sixth Circuit. *Phillips* read this Court's precedents to reject justiciability in an "unqualified fashion" because "it is up to the political branches" to "maintain a republican form of government"—and concluded that reasoning "dispose[d] of plaintiffs' Guarantee Clause claim." *Id.* at 716-17 (citations omitted). Only after this definitive statement did *Phillips* reference *New York*'s "doubt that all Guarantee Clause challenges are not

justiciable," and even then it emphasized that *New York* did not decide the issue. *Id.* at 717. Ultimately, *Phillips* avoided justiciability by assuming the claim was cognizable, then rejecting it on the merits. *Id.* This approach would not have been tenable in a more difficult case—like this one.

Finally, the Seventh Circuit's post-*New York* cases are consistent with its earlier holding that Guarantee Clause claims have "been held not to be justiciable," *Risser* v. *Thompsen*, 930 F.2d 549, 552 (7th Cir. 1991). In 1998, the court reiterated that Guarantee Clause claims "are not justiciable when raised by private persons." *Travis* v. *Reno*, 163 F.3d 1000, 1007 (7th Cir. 1998). Respondent's preferred cases are similar. *Mueller* v. *Reich* refused to "speculate" whether this Court "continues to believe that the clause does not create any legally enforceable rights" by resolving the claim on the merits. 54 F.3d 438, 443 (7th Cir. 1995). And *Bowman* v. *Indianapolis* perfunctorily "agree[d] with the district court" that the claim was "without merit," 133 F.3d 513, 518 (7th Cir. 1998)—where the district court had taken this merits-first approach because it was "unclear" under current law whether the claim was "even justiciable." *Bowman* v. *City of Indianapolis*, 927 F. Supp. 309, 312 (S.D. Ind. 1996). Like in the Sixth Circuit, this pattern of skirting justiciability because that threshold question is murkier than the merits highlights the need for review.

By contrast, Respondent admits that "the Second, Fourth, and Tenth Circuit[s] more strongly state that Guarantee Clause claims are occasionally justiciable." Opp. 25. In the Fourth Circuit, this "strong[er]" approach manifests as not hiding behind "doubt" or

"perhaps": it holds that "'not all' claims under the Guarantee Clause are nonjusticiable." *Kerpen* v. *Metro. Wash. Airports Auth.*, 907 F.3d 152, 163 (4th Cir. 2018) (citation omitted). The Tenth Circuit has gone further still, "reject[ing] the proposition" that "all Guarantee Clause claims [are] per se non-justiciable." *Kerr* v. *Hickenlooper*, 744 F.3d 1156, 1176 (10th Cir. 2014). *Kerr* then thoroughly analyzed whether the particular claim was cognizable, and concluded it was. *Id.* at 1176-81. Because Guarantee Clause claims should not face such different receptions in the lower courts, this Court should finish what it started in *New York*, and "resolve the issue" now. *Phillips*, 836 F.3d at 717.

III. THE COURT SHOULD RESOLVE WHETHER SEPARATION OF POWERS IS ESSENTIAL TO REPUBLICANISM.

The Petition's second question is also worthy of review: Assuming Guarantee Clause violations are cognizable, can a separation-of-powers breakdown form the basis of a successful claim? Respondent does not meaningfully refute the division over this question, and the significance of the decision below makes this the right case to resolve it.

A. Respondent characterizes apportionment of power between a State's political branches as a question that falls entirely outside federal purview. Opp. 25-26, 33-34. Yet the Senate agrees with the uncontroversial principles that States have wide latitude when it comes to governmental organization, and that the federal Constitution does not "mandate[] a specific balance of power." Opp. 1. The harder question is whether *every* potential division—

whether created by design or judicial recreation—is consistent with Article IV, § 4's guarantee.

Respondent emphasizes that state courts have reached similar outcomes in cases raising separation-of-powers theories in Guarantee Clause claims. Opp. 31-32. This approach, however, overlooks the courts' serious disagreement in *methods*. For example, the Supreme Court of Kansas held expressly that "[t]he doctrine of separation of powers is an *inherent and integral element* of the republican form of government" as "guaranteed to the states by Article IV, Section 4." *VanSickle* v. *Shanahan*, 511 P.2d 223, 226 (Kan. 1973) (emphasis added). Although it found the merits of the specific challenge before it lacking, the court emphasized that States' discretion to "amend[] or chang[e] their constitutions" has limits: States may not "exchange republican for anti-republican constitutions." *Id.* at 226.

By contrast, the Supreme Court of Colorado has cut off separation-of-powers claims at the outset—twice. *In re Interrogatories Concerning House Bill 1078* declared that "one would be hard pressed to conclude that the separation of powers doctrine and the concept of republicanism are inextricably united." 536 P.2d 308, 318 (Colo. 1975). A year later, the court reiterated that the Clause "does not" "guarantee the doctrine of separation of powers to the states." *City of Thornton* v. *Horan*, 556 P.2d 1217, 1220 (Colo. 1976).

Only this Court can resolve the division by clarifying whether a separation-of-powers claim can ever violate the Guarantee Clause—and if so, when. After all, it seems likely that the federal Constitution would have something to say if a State consolidated

the legislative, judicial, and executive powers into a functional monarchy. Yet in Colorado, at least, even this extreme example would not offend the Clause. See also *Largess* v. *Supreme Jud. Ct. for Mass.*, 373 F.3d 219, 225 (1st Cir. 2004) (noting that Guarantee Clause only "may" be justiciable even in "extreme" situation of declaring a monarchy). Respondent tips a hat to the value of the Court's guidance by arguing that *Baker* has already "implicitly" resolved it. Opp. 32. Kansas and Colorado—and now West Virginia—show it is time that direction became explicit.

B. Finally, this case—brought by one of the State's political branches—is the right one to take up. Respondent argues that the federal Constitution has nothing to say about States' internal organizational choices, but does not dispute that separation of powers is a key component of republicanism. Pet. 30-31. Nor does Respondent challenge the importance of meaningful checks on coordinate branches, that impeachment is one of the strongest, or the unique concern when the judiciary intervenes in a proceeding against its own members. Pet. 33-35; see also, *e.g.*, *Nixon* v. *United States*, 938 F.2d. 239, 242 (D.C. Cir. 1991) (describing impeachment as primary method of "constraining usurpation by judges").

Respondent instead cites a lack of precedent "showing judicial review of [state] impeachment proceedings" can violate the Guarantee Clause. Opp. 30. Yet regardless how the merits of this particular case are resolved, lack of guidance militates in favor of review, not against—especially where the purported dearth of authority stems from confusion over whether the Clause is justiciable, and whether separation of powers is part of its guarantee.

Respondent also argues that the Petition overstates the decision below, deeming its substantive intervention into impeachment "unremarkable." Opp. 26-30. Yet the state court took a fine-tooth comb to the Articles of Impeachment, holding for instance that two Articles did not allege "wrongful impeachable conduct" because they referred only to "potential[]" violations of criminal law—even though the Senate had not yet tried those allegations. App. 69 n.32. And contrary to Respondent's assurance that the court "did not hold that conduct that might run afoul of the Canons of Judicial Conduct could not serve as a basis for impeachment," Opp. 28, the court asserted "*exclusive authority and jurisdiction*" to sanction "a violation of a Canon" and "*prohibit*[*ed*]" the Senate "from prosecuting a judicial officer for an alleged violation." App. 3 (emphases added).

Further, Respondent minimizes the serious irregularities that led to this intrusion. Respondent argues that the court properly rejected the Senate's rehearing petition because the court chose to issue its mandate early, Opp. 7 n.5, yet ignores the court's failure to provide an alternate timeline for rehearing, see W. Va. R. App. Proc. 25(a). Respondent faults the House of Delegates for not seeking intervention before the mandate issued, Opp. 34, but not the court's more fundamental failure to join the House as an indispensable party. Respondent also elides the court's failure to conduct oral argument, as well as the Catch-22 it created by requiring the Senate to pre-judge the merits of an impeachment trial that had not yet occurred, or else have its merits arguments deemed waived, App. 7 & n.3, 91 n.1. And Respondent cannot dispute that this all occurred in the context of an impeachment proceeding designed to review the

conduct of the very branch that brought the action to a halt.

Few separation-of-powers disputes will threaten to undermine a State's republican character. Yet judicial actions raise inescapable concerns where, as here, they "effectively insulate [the judiciary] from impeachment" by "impos[ing] onerous procedures on the . . . conduct of impeachment trials or limit[ing] impeachable offenses" to a few crimes "subject to judicially reviewable elements of proof." Randall K. Miller, *The Collateral Matter Doctrine: The Justiciability of Cases Regarding the Impeachment Process*, 22 Ohio N.U. L. Rev. 777, 782 (1996). This is one of the egregious decisions that warrants review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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