IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia ex rel. Margaret L. Workman, Petitioner, v. Mitch Carmichael, President of the West Virginia Senate; Donna J. Boley, President Pro Tempore of the West Virginia Senate; Ryan Ferns, Majority Leader of the West Virginia Senate; Lee Cassis, Clerk of the West Virginia Senate; and the West Virginia Senate, Respondents.	No. 18-0816

RESPONDENTS' PETITION FOR REHEARING

J. Mark Adkins *(WVSB #7414)*
Floyd E. Boone Jr. *(WVSB #8784)*
Richard R. Heath, Jr. *(WVSB #9067)*
Lara R. Brandfass *(WVSB #12962)*
Bowles Rice LLP
600 Quarrier Street
Charleston, West Virginia 25301

Counsel for Mitch Carmichael, President of the West Virginia Senate; Donna J. Boley, President Pro Tempore of the West Virginia Senate; Ryan Ferns, Majority Leader of the West Virginia Senate; Lee Cassis, Clerk of the West Virginia Senate; and the West Virginia Senate

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treatises

Constitutional Provisions

INTRODUCTION

Pursuant to Rule 25 of the West Virginia Rules of Appellate Procedure, Respondents respectfully submit this Petition for Rehearing ("Petition") in response to the Opinion of the Court, delivered by Acting Chief Justice Matish, on October 11, 2018 ("Opinion"), from which Acting Justices Bloom and Reger concurred in part and dissented in part.[1]

A petition for rehearing may be filed within 30 days of release of any decision that passes upon the merits of an action. *See,* W. Va. R. App. P. 25(a). Rehearing is granted "only in exceptional cases." W. Va. R. App. P. 25(b). "[R]ehearing exists expressly for the purpose of ensuring that opinions which are not well-founded due to misapprehension of the issues, the law, or the facts are rectified." *Leggett v. EQT Production Company*, 239 W. Va. 264, 268, 800 S.E.2d 850, 854 (2017). Given the circumstances, this is one of those cases. As explained below, the Opinion misapprehended several critical points:

- The Opinion has misapprehended the language of Article IV, Section 9 of the *Constitution of West Virginia* with respect to the "Law and Evidence Clause" and, in doing so, incorrectly found jurisdiction where none actually exists.
- The Opinion also misapprehends the Separation of Powers Doctrine and, in doing so, has infringed upon the exclusive jurisdiction of the West Virginia Senate.
- The Opinion's misapprehension of the distinction between promulgated rules and administrative orders sets a dangerous precedent that threatens our constitutional foundation of checks and balances.
- The Opinion violates the Respondents' right to due process under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.
- The Opinion violates the Guarantee Clause of the U.S. Constitution by undermining the foundational principles of our republican form of government.

---

[1] Given the breadth of the Opinion and the number of issues involved—several of which were neither raised nor argued previously by the parties—this case would merit additional briefing and oral argument under the circumstances, which deal with issues of first impression that fundamentally affect West Virginia's constitutional framework.

As previously noted in *Leggett,* "neither hubris nor sanctimony should give the Court pause in granting rehearing to correct any such error of law or fact." *Id.* at 269, 800 S.E.2d at 855. For the reasons set forth herein, Respondents respectfully request rehearing to rectify the misapprehension of the issues, law, and facts in the Opinion.

ARGUMENT

I. The Court misapprehended the Impeachment Clause.

The Opinion's most consequential holding is that the Impeachment Clause's "plain language" provides this Court with original jurisdiction to review "the actions or inactions of the Court of Impeachment." *State ex rel. Workman v. Carmichael,* No. 18-0816, 2018 WL 4941057 at *6 (W. Va. Oct. 11, 2018). According to the Opinion:

> The authority for this proposition is contained in the Law and Evidence Clause found in Section 9, which states: "the senators shall . . . do justice according to law and evidence." The Law and Evidence Clause of Section 9 uses the word "shall" in requiring the Court of Impeachment to follow the law. . . . Insofar as the Law and Evidence Clause imposes a mandatory duty on the Court of Impeachment to follow the law, there is an implicit right of an impeached official to have access to the courts to seek redress, if he or she believes actions or inactions by the Court of Impeachment violate his or her rights under the law.

Workman, 2018 WL 4941057, at *6 (first ellipsis in original) (footnote omitted). The entire opinion thus turns on the correctness of the Opinion's interpretation of what it describes as the "Law and Evidence Clause." The Opinion's "Law and Evidence Clause" holding is, however, incorrect and is not supported by the text of the Impeachment Clause, the history underlying the *Constitution of West Virginia,* or legal precedent.

A. The "Law and Evidence Clause" only refers to the oath each *individual* senator serving on the Court of Impeachment must take.

In its entirety, the "Law and Evidence Clause" states as follows: "***the senators shall be on oath or affirmation,*** to do justice according to law and evidence." W. Va. Const. art. IV, § 9 (emphasis added). Viewed in context, the "Law and Evidence Clause" merely mandates that each

senator take an oath to do justice according to law and evidence. The Clause in no way subjects the Court of Impeachment—as a body—to judicial oversight. The word "shall" refers only to each senator's duty to take an oath to do justice.

This interpretation is consistent with other court decisions that have evaluated similar oaths. Arizona is cited in the Opinion as having a "Law and Evidence Clause" in its constitution. *See, Workman*, 2018 WL 4941057, at *6 n.17. However, in interpreting its impeachment clause, the Arizona Supreme Court did not read the "Law and Evidence Clause" as granting the court original jurisdiction. Rather, the Arizona court noted that "the constitution essentially requires only ... that the senators take a prescribed oath." *Mecham v. Arizona House of Representatives,* 782 P.2d 1160, 1161 (Ariz. 1989). Consequently, the Arizona Supreme Court found that it had "***no jurisdiction to review the [impeachment] proceedings in the legislature, to examine for error of fact or law, or to prescribe or reject rules to be followed by the Senate during the trial.***"[2] *Id.* (emphasis added). This interpretation is also consistent with U.S. Supreme Court precedent, which has recognized that the purpose of enacting oaths such as the one contained in the "Law and Evidence Clause" "***was not to create specific responsibilities*** but to assure that those in positions of public trust were willing to commit themselves to live by the constitutional processes of our system." *Cole v. Richardson*, 405 U.S. 676, 684 (1972) (emphasis added). The plain reading of the "Law and Evidence Clause," then, is that it is solely the oath taken by the senators, individually, to commit themselves to do justice according to law and evidence during the impeachment trial, and was not intended to, and does not, confer jurisdiction in this Court during the impeachment process.

---

[2] In interpreting nearly identical language in the Illinois State Constitution, the U.S. District Court for the Southern District of Illinois opined that such language merely "provide[s] that the senators shall be upon oath or affirmation to do justice according to law and evidence. The meaning ***generally ascribed to such a provision*** is that impeachment proceedings generally lie as a rule for treason, bribery or any high crime or misdemeanor." *Palmer v. U.S. Civil Service Commission*, 191 F. Supp. 495, 510 (1961) (emphasis added).

B. The "Law and Evidence Clause" provides no basis to distinguish the U.S. Constitution.

The Opinion bolstered its reading of the "Law and Evidence Clause" by noting its absence from the U.S. Constitution, thus, in its view, heightening the significance of its infusion in the *Constitution of West Virginia*, and allowing it to distinguish U.S. Supreme Court precedent contrary to the Opinion's jurisdiction conclusion. But, although the Opinion found that the impeachment provisions within the U.S. Constitution and the *Constitution of West Virginia* differ, a comparison of the provisions and a brief historical review demonstrate that the two constitutions are materially identical:

W. Va. Constitution	U.S. Constitution
"The Senate shall have the sole power to try impeachments and no person shall be convicted without the concurrence of two thirds of the members elected thereto. When sitting as a court of impeachment, the president of the supreme court of appeals . . . shall preside; and ***the senators shall be on oath or affirmation, to do justice according to law and evidence.***"	"The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, ***they shall be on Oath or Affirmation.*** When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present."

Like the U.S. Senate, the West Virginia Senate has the "sole power to try impeachments." Most significantly, both documents mandate that individual senators, sitting as members of courts of impeachment, "shall be on oath or affirmation." The only difference between the two provisions is that the *Constitution of West Virginia* is more descriptive in identifying the nature of the oath: "senators shall be on oath or affirmation, to do justice according to law and evidence."

It has always been understood that the impeachment oath taken by U.S. senators is effectively the same and equally demanding. Professor Charles L. Black, Jr., has noted that "the senators take a special oath (over and above their oaths of office) to 'do impartial justice according to the Constitution and laws.' Both these circumstances give emphasis to the fact that the Senate ... is taking on quite a different role from its normal legislative one." Charles L. Black, Jr., Impeachment:

A Handbook 9-10 (1974) (1998 reprint). This different role was illustrated in the impeachment trial of President Clinton, in which each senator was required to take the following oath: "I solemnly swear . . . that in all things pertaining to the trial of the impeachment of William Jefferson Clinton, now pending, that ***I will do impartial justice according to the Constitution and laws***: So help me God." *Procedure and Guidelines for Impeachment Trials in the United States Senate*, 99th Cong. 2d Session 61 (1986) (emphasis added).[3]

Professor Laurence Tribe also noted the significance of the senatorial oath:

> [B]efore consideration of the articles, each senator must swear a special oath: 'I solemnly swear (or affirm) that in all things appertaining to the trial of the impeachment of [the president], now pending, I will do impartial justice according to the Constitution and laws: So help me God.' Although the Constitution provides that senators 'shall be on Oath or Affirmation' when trying impeachments, this language was devised by the Senate itself. ... It's therefore striking that the Framers added an extra oath here. After being sworn into office, legislators can exercise all their other powers without taking additional oaths. Indeed, House members can debate and vote on articles of impeachment in the ordinary course of business. Only in the Senate, and only for impeachments, is a further oath required. The Constitution thus impresses on each senator the unparalleled gravity of his or her decision in the case at bar.

Laurence Tribe & Joshua Matz, To End a Presidency: The Power of Impeachment 132-133 (2018).

Perhaps most notably, the Official Journal of the 1872 Constitutional Convention provides no support for the Opinion's interpretation of the "Law and Evidence Clause." Rather, it appears that "to do justice according to law and evidence" was added as an afterthought, with little debate or discussion. *See,* Official Journal of the West Virginia Constitutional Convention at 170 (January 16, 1872).

In sum, there is no basis to find that the impeachment provisions of the U.S. and West Virginia constitutions are materially different. Senators sitting as members of courts of impeachment both in the United States and West Virginia senates must take an additional oath swear-

---

[3] *See also,* https://www.cbsnews.com/news/impeachment-trial-oath-for-senators/.

ing to do justice and follow the law. Senators in both bodies are constitutionally obligated to consider the "law and evidence." For both, the oath is intended to serve as a reminder of each senator's obligations when exercising their exclusive authority as members of the Court of Impeachment. Given the absence of any substantive difference between the federal and West Virginia impeachment provisions, no basis exists to conclude that the "Law and Evidence Clause" in Article IV, § 9 of the *Constitution of West Virginia* was intended to, or does, bestow upon this Court original jurisdiction to review an impeachment mid-process. The Court was incorrect in so holding.

C. The "Law and Evidence Clause" provides no basis for the Court to exercise judicial review of actions taken by the House of Delegates.

Using the "Law and Evidence Clause" from the *Constitution of West Virginia's* oath for senators as the basis for exercising review, the Opinion found the Articles of Impeachment against Petitioner, and the process by which they were adopted, defective. *Workman*, 2018 WL 4941057, at *6. Those actions were, of course, not taken by the Senate, the Court of Impeachment, or by any individual senator. They were exclusively actions of the House of Delegates. The "Law and Evidence Clause" ***does not, however, apply to the House of Delegates.*** *See,* W. Va. Const. art. IV § 9. The "Law and Evidence Clause," therefore, cannot serve as the foundation for the Court's exercise of jurisdiction in this case.

In tacit recognition that impeachment is a political process, members of the House of Delegates are not "on oath or affirmation, to do justice according to the law and evidence" in exercising the power of impeachment. To the contrary, that oath is placed ***only*** upon the senators, sitting as the Court of Impeachment. Thus, even if one were to accept for the sake of argument that the "Law and Evidence Clause" affords the Court jurisdiction to review the "actions or inactions by the Court of Impeachment," *Workman*, 2018 WL 4941057, at *6-7, it provides ***no basis to review*** the actions of the House of Delegates.

The Opinion cites *Kinsella v. Jaekle,* 192 Conn. 704, 723 (1984), in support of the proposition that the exercise of jurisdiction is proper where, as is alleged here, the "legislature's action is clearly outside the confines of its constitutional jurisdiction." *Workman,* 2018 WL 4941057, at *6-7. However, the Supreme Court of Connecticut notably ***rejected the contention that jurisdiction existed*** in *Kinsella. See, Office of Governor v. Select Committee Inquiry,* 271 Conn. 540, 553-54 (2004). In doing so, the court determined that alleged violations of due process of law "were entirely speculative" and actionable ***only if*** the Senate "failed to define properly the scope of conduct" warranting impeachment because it "refused to speculate that the legislature would conduct itself in a manner inconsistent with constitutional precepts...." *Id.* at 554 (citing *Kinsella,* 192 Conn. at 729). Because the Senate has not had the opportunity to act in the present matter, the foundational jurisdiction for deciding this case is unsound.[4]

II. The Court misapprehends the Separation of Powers Doctrine.

The Opinion also misapprehends several points of law with respect to the Separation of Powers Doctrine, resulting in the Court impermissibly exercising powers that belong exclusively to the Legislature. This further warrants a rehearing.

A. The Court's failure to include the House of Delegates as an indispensable party raises Separation of Powers concerns.

The omission of the House of Delegates from these proceedings, in light of the issuance of a writ of prohibition, raises a Separation of Powers issue that warrants rehearing. While the Opinion takes exception with the Respondents' position regarding the merits of this case, *Workman,*

---

[4] The Opinion additionally argues that the inclusion of a judicial officer to preside over impeachment proceedings during the 1872 Constitution of West Virginia is further evidence of this Court's jurisdiction. *Workman,* 2018 WL 4941057, at *6. However, such an addition simply tracks the constitutional history of similar provisions of the U.S. and 33 other state constitutions, which have the Chief Justice preside in some manner or another. Our Framers specifically noted that while the Supreme Court was "an improper substitute for the Senate" as a court of impeachment, any benefits of a proposed union of the Court and the Senate is "obtained from making the chief justice...the president of the courts of impeachment." The Federalist No. 65 at 420-21 (Alexander Hamilton) (Modern Library ed., 2000).

2018 WL 4941057, at *2, it makes clear that the actions of the House of Delegates, and not those of the Senate, prompted action by this Court.[5] As a general matter, this Court has previously held that "all persons who are materially interested in the subject-matter involved in a suit, and who will be affected by the result of the proceedings, should be made parties thereto."[6] Syl. Pt. 3, *State ex rel. One-Gateway v. Johnson,* 208 W. Va. 731, 542 S.E.2d 894 (2000). By adjudicating the validity of procedures used by the House of Delegates, this Court has clearly affected the House of Delegates' inherent authority to "keep its own house in order" pursuant to the Separation of Powers Doctrine.[7] Without hearing from the House of Delegates, this Court has overruled its prior precedent that "courts have no authority—by mandamus, prohibition, contempt or otherwise—to interfere with the proceedings of either house of the Legislature." *Workman*, 2018 WL 4941057, at *8 (citing Syl. Pt. 3, *State ex rel. Holmes v. Clawges*, 226 W. Va. 479, 702 S.E.2d 611 (2010)). The House of Delegates is an indispensable party that should have been included in this case, and, in fact, has since sought the opportunity to intervene in this matter to ensure that its rights are protected.[8] Such action warrants reconsideration.

---

[5] Specifically, the Opinion questioned, among other things, the "unwieldy compilation of allegations" contained in Article XIV, *Workman*, 2018 WL 4941057, at *25, the "viability of all of the alleged violations" in Articles IV and VI, *Id.* at *23, and the "procedural flaws that occurred in the House of Delegates." *Id.* at *30.

[6] This Court has further held that "when the attention of the court is called to the absence of any such interested persons, it should see that they are made parties before entering a decree affecting their interests." Syl. Pt. 3, *State ex rel. One-Gateway v. Johnson*, 208 W. Va. 731, 542 S.E.2d 894.

[7] In dissent, Acting Justices Bloom and Reger noted that "[i]t is the exclusive province of the Legislature to determine what, if any, consequences should follow from its [alleged] failure to adhere to an impeachment procedure." *Workman*, 2018 WL 4941057 (Bloom, J., & Reger, J., dissenting).

[8] On October 25, 2018, the House of Delegates filed a Motion to Intervene, in which it notes that "the Court has adjudicated the conduct of the House and issued an extraordinary legal writ that could restrict the rights of the House to fulfill its constitutional obligations with respect to impeachment." (Mot. to Intervene at 4.)

B. The Opinion ignores the *Constitution's* exclusive grant of impeachment power to the Legislature.

In striking down the Articles of Impeachment against Petitioner on the ground that they violate the Separation of Powers Doctrine, and the Judicial Branch's inherent authority to "keep its own house in order," the Opinion ignores that the judiciary's authority in that regard is explicitly overridden when it comes to the *Constitution's* "specific grant" of impeachment to the Legislature.

The Court quotes *State v. Clark*, 232 W. Va. 480, 498, 752 S.E.2d 907, 925 (2013), for the proposition that the Judicial Branch has the inherent authority to "keep its own house in order," free of any legislative intrusion. *Workman*, 2018 WL 4941057, at *14. The Opinion notes that:

> The separation of powers doctrine implies that each branch of government has inherent power to "keep its own house in order," ***absent a specific grant of power to another branch....*** This theory recognizes that each branch of government must have sufficient power to carry out its assigned tasks and that these constitutionally assigned tasks will be performed properly within the governmental branch itself.

Workman, 2018 WL 4941057, at *14 (ellipsis in original) (emphasis added). The Court's recitation of *Clark* is notably incomplete. In *Clark*, this Court observed that: "[t]he separation of powers doctrine implies that each branch of government has inherent powers to 'keep its own house in order,' absent a specific grant of power to another branch, ***such as the power to impeach."*** 232 W. Va. at 498, 752 S.E.2d at 925; citing *In re Watkins*, 233 W. Va. 170, 177, 757 S.E.2d 594, 601 (2013) (emphasis added).

By omitting the critical reference to the Legislature's power to impeach, the Court relied upon an incomplete statement of the law on the extent to which it is free to "keep its own house in order." This failure to consider the complete law on the question, and subsequent invalidation of Articles of Impeachment, caused the Court to vitiate the Legislature's constitutional impeachment powers. The power of the Court to "keep its own house in order" lives alongside "***a specific grant of power to another branch, such as the power to impeach."*** *Id.*

While the Court acknowledged that "the separation of powers doctrine ***ensures*** that the three branches of government are ***distinct unto themselves***, and that they, ***exclusively***, exercise the rights and responsibilities ***reserved unto them***," it failed to apply those principles correctly to the case at hand. *Workman*, 2018 WL 4941057, at *14 (quoting *Simpson v. W. Virginia Office of Ins. Com'r.*, 232 W. Va. 495, 505, 678 S.E.2d 1, 11 (2009)) (emphasis added). In fact, the Opinion itself is an impermissible intrusion into the rights and responsibilities that are explicitly reserved to the Legislative Branch, and, specifically, the West Virginia Senate, which "shall have the ***sole power to try impeachments....***" W. VA. CONST. art. IV, § 9 (emphasis added). Although courts certainly have a role of judicial review of impeachment proceedings that "transgress[] identifiable textual limits" of power granted by the Impeachment Clause, the role is limited, and no state or federal court has ever gone so far as to rule upon the validity of Articles of Impeachment mid-process.[9] To the contrary, American constitutional history indicates that we have "rejected any proposal that the articles of impeachment adopted by the house of representatives ***would be tried by the judicial branch of government....***" *Mecham v. Gordon,* 156 Ariz. 297, 301 (1988)) (emphasis added). And, yet, that is the effect that the Opinion has in this case. Such a decision warrants rehearing.

C. The Court misapprehends its authority to issue a writ of prohibition because the Court of Impeachment is not an "inferior" court of law.

A writ of prohibition issues when an "inferior court" lacks subject matter jurisdiction or "exceeds its legitimate powers." W. Va. Code § 53-1-1. Applying the plain language of the statute, this Court has only issued such writs to ***inferior*** tribunals. *See, Moore v. Holt*, 55 W. Va. 507, 47 S.E. 251, 252 (W. Va. 1909) ("Prohibition lies from a superior to an inferior . . . tribunal"). In prac-

---

[9] A court's limited role of judicial review of impeachment proceedings applies to those textual limits set forth in the Impeachment Clause: "that the House adopt the Articles of Impeachment by a majority vote; that the Senate try the charges; that the chief justice, as presiding officer, preside over the trial in the Senate; that the senators take a prescribed oath; that the conviction be had by a two-thirds vote of the elected senators; and that conviction extend only to removal from office and disqualification from future office." *Mecham,* 782 P.2d at 268.

tice, a writ of prohibition issues against circuit courts and administrative bodies. To that end, this Court has previously held that "***prohibition does not lie to control a legislative body.***" *State ex rel. Miller v. Smith,* 168 W. Va. 745, 755, 285 S.E.2d 500, 506 (1981) (citing *Gates v. Council of City of Huntington,* 93 F. Supp. 757 (S.D. W. Va. 1950)) (emphasis added).[10]

The Opinion notes that the "purpose of the writ is 'to restrain inferior courts from *proceeding in causes over which they have no jurisdiction.*'" *Workman*, 2018 WL 4941057, at *12 (quoting Syl. Pt. 1, in part, *Crawford v. Taylor,* 138 W. Va. 207, 75 S.E.2d 370 (1953) (emphasis in original). That is simply not an accurate assessment of the case at hand. The Senate is not an "inferior" body to the Supreme Court of Appeals – a crucial point that the Opinion misapprehends. Nor does the Senate lack jurisdiction. To the contrary, the Impeachment Clause bestows upon the Senate ***the exclusive jurisdiction*** over trials of impeachment. *See,* W. Va. Const. art. IV, § 9.

In holding that this Court may sit in place of the Court of Impeachment, the Court misapprehended the express language of the Impeachment Clause and the historical record, which demonstrates that constitutionally based courts of impeachment are uniquely legislative in nature rather than inferior judicial bodies.[11] The framers of the U.S. and West Virginia constitutions in-

---

[10] Other states similarly reserve the writ of prohibition for issuance against inferior tribunals. *See, Zaabel v. Konetski*, 807 N.E.2d 372, 374 (Ill. 2004) ("For a writ of prohibition to issue . . . the jurisdiction of the tribunal against which the writ issues must be inferior to that of the issuing court."); *In re Rahr Malting Co.*, 632 N.W.2d 572, 576 (Minn. 2001) ("A writ of prohibition may be issued when . . . an inferior court or tribunal is about to exercise judicial or quasi-judicial power."); *Lowery v. Steel*, 219 S.W.2d 932, 933–34 (Ark. 1949) ("The office of the writ of prohibition is to restrain an inferior tribunal from proceeding."); *Oklahoma ex rel Wester v. Caldwell*, 181 P.2d 843, 844 (1947) ("The remedy under a writ of 'prohibition' is limited to cases where act sought to be prohibited is of a judicial nature . . . and is directed against the encroachment of jurisdiction by inferior courts, for the purpose of keeping such courts within the bounds prescribed for them by law."); *Wisner v. Probate Court of Columbiana Cty.*, 61 N.E.2d 889 (1945) ("A Court of *superior* jurisdiction may grant a writ of prohibition to prevent the attempted exercise of ultra vires jurisdiction by a court of *inferior jurisdiction.*") (emphasis added).

[11] The Judicial Branch was eschewed jurisdiction over impeachment proceedings because of their political nature. "There is wisdom, and sound policy, and intrinsic justice in this separation of the offence, at least so far as the jurisdiction and trial are concerned, into its proper elements, ***bringing the political part under the power of the political department of the government***, and retaining the civil part for presentment and trial

tended for impeachment to encompass offenses "committed by public men in violation of their public trust and duties," and intended those offenses to be tried in the political branches of government. *See, e.g.,* Ronald D. Rotunda & John E. Nowak, 1 Treatise on Const. L. § 8.15(a) ("Because the framers placed the sole power of impeachment in two *political* bodies—the House and the Senate—it would certainly appear that such an issue remains a political question."). Subjecting the Senate to a writ of prohibition plainly reserved for inferior judicial bodies violates the Separation of Powers Doctrine, eliminates the Legislature's only check on the Judicial Branch, and further necessitates a rehearing.

III. The Court erroneously ignores the distinction between rules and administrative orders.

In striking down Articles IV and VI of the Articles of Impeachment, the Opinion relies extensively on the constitutionally prescribed rule-making authority of the Court, noting that "statutory laws that are repugnant to the constitutionally promulgated rules of this Court are void." *Workman*, 2018 WL 4941057, at *23. In doing so, the Opinion disregards the distinction between rules promulgated pursuant to Article VIII, Section 3 of the *Constitution of West Virginia* and administrative orders issued exclusively by the Chief Justice as "the administrative head of all the courts." W. Va. Const. art. VIII § 3; *see also, State ex rel. J.C. v. Mazzone,* 233 W. Va. 457, 472, 759 S.E.2d 200, 215 (2014).

Article VIII, Section 3 of the *Constitution of West Virginia* specifically provides that "***[t]he court*** shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to writs, warrants, process, practice and procedure, which

---

in the ordinary forum." III Joseph Story, Commentaries on the Constitution of the United States 273, 281 (1833) (emphasis added).

shall have the force and effect of law." W. Va. Const. art. VIII § 3 (emphasis added).[12] The rules traditionally promulgated by the Court are subjected to a rigorous public comment period, which typically involves input from other jurists, members of the state bar and the public at large. The proposed rules are then revised and approved by a majority of the Court in order to take effect. By contrast, an administrative order is issued unilaterally by the Chief Justice without the express input or approval of a majority of the Court.[13]

Despite the clear distinction between a rule and an administrative order, the Opinion notes that "the statute's limitation on payment to senior-status judges is void and unenforceable, ***because of the administrative order*** promulgated on May 17, 2017." *Workman*, 2018 WL 4941057, at *24 (emphasis added). By ignoring the difference between a rule promulgated under the Court's inherent rule-making authority and an administrative order issued singularly by a Chief Justice, the Opinion sets in place a precedent in which duly enacted statutes can now be ***invalidated by a single member of the Court*** who disagrees with it. This result is outside the scope of the rule-making authority given to the supreme court ***as a body*** by the *Constitution of West Virginia*, as well as our system of checks and balances and, thus, warrants rehearing.

IV. The Court's decision violates the Respondents' right to due process under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

The Opinion's failure to address Respondents' Motion to Disqualify Acting Justice Wilson presents an additional constitutional infirmity that supports rehearing.[14] The U. S. Supreme Court recognizes several specific instances, under the Fourteenth Amendment to the U.S. Constitu-

---

[12] Article VIII, Section 8 further provides that "[u]nder its inherent rule-making power ... ***the supreme court of appeals shall*** ... prescribe, adopt, promulgate and amend rules ..." W. Va. Const. art. VIII § 8 (emphasis added).

[13] For this reason, an administrative order from the Chief Justice is more akin to an Executive Order issued by the Governor as an act of administrative governance.

[14] It is worth noting that failure of an adjudicator to "state the reasons for his determination," itself, raises due process concerns. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

tion, where due process ***requires*** judicial recusal, including when a judge has a conflict arising "from his participation in an earlier proceeding." *See, Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 877, 880 (2009). Specifically, due process requires disqualification in such cases where "it is difficult if not impossible for a judge to free himself from the influence of what took place" in the prior proceeding. *In re Murchison*, 349 U.S. 133, 138 (1955). To this end, the U.S. Supreme Court has recently held that "under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case." *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016). Judicial recusal is warranted due to the "risk that the judge 'would be so psychologically wedded' to his or her previous position...that the judge 'would consciously or unconsciously avoid the appearance of having erred or changed position.'" Id. at 1906-1907 (quoting *Withrow v. Larkin*, 421 U.S. 35, 57 (1975)). This Court's failure to even ***address*** the "serious risk" and due process concerns arising from Acting Justice Wilson's involvement in the Judicial Investigation Commission proceedings constitutes a clear basis to reconsider the decision.[15] *Id.* at 1907.

V. The Court's opinion violates the Guarantee Clause of the U.S. Constitution.

The Opinion's footnote disposing of Respondents' Guarantee Clause argument also presents a misapprehension of the issues and justifies rehearing. Specifically, the Opinion cited *New York v. United States* for the proposition that, "[i]n most cases," the United States Supreme Court has found Guarantee Clause claims "nonjusticiable under the political question doctrine." *Workman*, 2018 WL 4941057, at *11 (quoting 505 U.S. 144, 184 (1992)). But it is important to note that the

[15] Acting Justice Wilson's role in investigating allegations of misconduct against Petitioner, and clearing her of such conduct, raises concerns that "the judge's 'own personal knowledge and impression' of the case, acquired through his or her [prior] role...may carry far more weight with the judge than the parties' arguments to the court." *Id.* at 1906-1907 (quoting *Murchison*, 349 U.S. at 128).

Court in *New York* **did** reach the merits of New York's Guarantee Clause claim.[16] *Id.* And, on those merits, the U.S. Supreme Court's analysis actually ***bolsters*** Respondents' instant argument. While New York's Guarantee Clause claim failed because the challenged statutory provisions "d[id] not pose any realistic risk of altering the form or the method of functioning of New York's government," the instant decision differs substantially because it deactivates the sole mechanism by which the Legislative Branch can hold judicial officers accountable for maladministration, corruption, incompetency, or neglect of duty. *New York*, 505 U.S. at 185–86. Such a misapprehension of law and fact justifies further rehearing on the extent to which the Opinion runs afoul of the United States Constitution's basic guarantee of a republican form of government.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court grant the Petition and allow the parties the additional opportunity to submit briefs and present oral argument.

Mitch Carmichael, President of the West Virginia Senate; Donna J. Boley, President Pro Tempore of the West Virginia Senate; Ryan Ferns, Majority Leader of the West Virginia Senate; Lee Cassis, Clerk of the West Virginia Senate; and the West Virginia Senate

By Counsel

J. Mark Adkins *(WVSB #7414)*
Floyd E. Boone Jr. *(WVSB #8784)*
Richard R. Heath, Jr. *(WVSB #9067)*
Lara R. Brandfass *(WVSB #12962)*
BOWLES RICE LLP
600 Quarrier Street
Post Office Box 1386
Charleston, West Virginia 25325-1386
(304) 347-1100

[16] "More recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions. . . . Contemporary commentators have likewise suggested that courts should address the merits of such claims, at least in some circumstances." *New York*, 505 U.S. at 185 (citing *Reynolds v. Sims*, 377 U.S. 533, 582 (1964)); also citing L. Tribe, American Constitutional Law 398 (2d ed. 1988).

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia ex rel. Margaret L. Workman, Petitioner, v. Mitch Carmichael, President of the West Virginia Senate; Donna J. Boley, President Pro Tempore of the West Virginia Senate; Ryan Ferns, Majority Leader of the West Virginia Senate; Lee Cassis, Clerk of the West Virginia Senate; and the West Virginia Senate, Respondents.	No. 18-0816

CERTIFICATE OF SERVICE

I, J. Mark Adkins, counsel for Respondents do hereby certify that service of the foregoing RESPONDENTS' PETITION FOR REHEARING has been made upon counsel of record by United States mail, postage pre-paid and via e-mail to the following on this 5th day of November, 2018:

Marc Williams, Esquire
Melissa Foster Bird, Esquire
Thomas M. Hancock, Esquire
Christopher D. Smith, Esquire
Nelson Mullins Riley & Scarborough, LLP
949 Third Avenue, Suite 200
Huntington, West Virginia 25701
Email: Marc.Williams@nelsonmullins.com

J. Mark Adkins (WVSB 7414)