No. 18-893

IN THE

Supreme Court of the United States

WEST VIRGINIA HOUSE OF DELEGATES,

Petitioner,

v.

STATE OF WEST VIRGINIA *ex rel.* MARGARET L. WORKMAN, 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.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

MARK A. CARTER
Counsel of Record
DINSMORE & SHOHL LLP
707 Virginia Street, East
Chase Tower, Suite 1300
Charleston, WV 25301
(304) 357-0900
mark.carter@dinsmore.com

Counsel for Petitioner

June 6, 2019

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ARGUMENT

I. THIS COURT SHOULD CONSIDER PETITIONER'S GUARANTEE CLAUSE ARGUMENT.

The first question presented by Respondent is premised upon an inaccurate representation of the decision of the Supreme Court of Appeals of West Virginia ("Supreme Court of Appeals"). Respondent asks: "Whether this Court should consider the justiciability of Guarantee Clause claims where the Supreme Court of Appeals of West Virginia **did not** rule on the justiciability of those claims." Resp't's Br. in Opp'n at i (emphasis added).

The Supreme Court of Appeals plainly considered whether the state impeachment proceedings were justiciable and concluded they were. The majority opinion expressly references the opinion of this Court in *Nixon v. United States,*[1] and accurately recites its holding that "the judiciary does not have jurisdiction over impeachment proceedings." House Pet. at 26a. The reason why the judiciary does not have jurisdiction over impeachment proceedings is because they are political in nature and as such are nonjusticiable. *Nixon*, 506 U.S. at 228. Nonetheless, the Supreme Court of Appeals explicitly addressed the State Senate's Guarantee Clause argument and its justiciability. Rejecting that argument, the Supreme Court of Appeals noted: "In most of the cases in which the Court has been asked to apply the [Guarantee] Clause, the

[1] 506 U.S. 224 (1993).

Court has found the claims presented to be nonjusticiable under the 'political question' doctrine." House Pet. at 34a n.22 (alternation in original).

However, in the concurring and dissenting opinion, two of the five justices acknowledged the direct application of *Nixon* and concluded that the "political question" doctrine precluded the majority from addressing two procedural flaws in the impeachment proceeding as nonjusticiable. *Id.* at 86a. According to the majority, those "procedural flaws," which warranted the issuance of a writ of prohibition, were Petitioner's failure to (1) include findings of fact in its Articles of Impeachment and (2) ultimately pass a resolution adopting those articles.

Simply put, the Supreme Court of Appeals did consider justiciability in concluding the proceedings were subject to its review. Simultaneously, the Supreme Court of Appeals considered the justiciability of the State Senate's Guarantee Clause argument and concluded it was not justiciable, citing the Senate's failure to present precedent from any court concluding that the Guarantee Clause operated to prohibit the judiciary's review of a state impeachment proceeding. In so doing, the Supreme Court of Appeals: (1) rejected this Court's holding in *Nixon* and found a political action—the impeachment proceedings—were reviewable and justiciable; and (2) found the Senate's argument that usurping its authority would violate the Guarantee Clause of the U.S. Constitution was **not** justiciable. These determinations underscore the inextricably interwoven character of the state and federal constitutional questions and the fact the Supreme Court of Appeals evaded analysis of the latter. The Supreme Court of Appeals is wrong on both accounts.

Respondent argues that the Supreme Court of Appeals described independent and "adequate state law grounds" for its decision, thereby warranting dismissal of the Petition. While the Supreme Court of Appeals did interpret the state constitution's separation of powers doctrine, this argument fails. The **impact** of the decision is not "adequate" as it eviscerates the state's republican form of government.

Petitioner's research has not evidenced another case where the judiciary has so brazenly usurped the authority of a state legislature's impeachment process so as to trigger the application of the Guarantee Clause. As recounted in the Petition, the Arizona Supreme Court correctly interpreted its constitution to conclude that it had no oversight over impeachment proceedings involving the state's governor due to the doctrine of separation of powers and the political nature of such proceedings, thereby rendering review nonjusticiable. *Mecham v. Gordon*, 751 P.2d 957, 961 (1988). In doing so, that court respected the fact its constitution, like West Virginia's, reserves the "sole" power of impeachment to the state house and obligates the state senate "upon oath or affirmation to do justice according to law and evidence." *Id.* at 960; *see* Ariz. Const. art VIII, pt. 2, § 2; W. Va. Const. IV, § 9.

As the Arizona Supreme Court faithfully applied the doctrine of separation of powers and concluded it had no authority to usurp the role of the legislature, its constitutional framework remained intact and its republican form of government was preserved. Such was not the case in West Virginia.[2]

---

[2] Respondent argues that Petitioner has failed to demonstrate a split in the circuits warranting this Court's attention. This argument is inapposite. Petitioner is required to show a split in state courts of last resort, which it has—not a split among the

The majority opinion runs afoul of West Virginia's separation of powers article by adjudicating the impeachment process of the Petitioner and limiting its authority. House Pet. at 83a. The concurring justices recognized that the doctrine of separation of powers was ultimately designed "to save the people from autocracy," and consistent with that objective, the West Virginia Constitution vests "absolute authority in the Legislature to bring impeachment charges against a public officer and to prosecute those charges." *Id.* at 84a. That recognition is significant for the reason that "if the text of the constitution has demonstrably committed the disposition of a particular matter to a coordinate branch of government, a court should decline to adjudicate the issue to avoid encroaching upon the powers and functions of that branch." *Id.* at 85a-86a.

Ultimately, the dissenting justices concluded the obvious; the majority's treatment of Petitioner "has a lethal consequence—it has invalidated the impeachment trials of the two remaining judicial officers." *Id.* at 89a. This seminal distinction between the holdings of the Arizona Supreme Court and the Supreme Court of Appeals establishes the distinction necessary for this Court to assume jurisdiction under 28 U.S.C. § 1257.

However, and to the confusion of Respondent, this error by the Supreme Court of Appeals is not what triggers the application of the Guarantee Clause before this Court. Respondent devotes much of her response arguing this Court has no jurisdiction to entertain a Guarantee Clause argument and that it

---

federal circuits, which do not entertain appeals of this nature from state courts.

must defer to a state court's interpretation of a state law or constitution where its decision is adequate and based upon independent state specific grounds. The answer to the first question lends to the resolution of the second.

Petitioner is not seeking review of the Supreme Court of Appeals' plainly incorrect decision regarding the doctrine of separation of powers under the West Virginia Constitution. That is indeed a state law determination, although inadequate at best, reserved to state courts. Rather, Petitioner seeks review of the **impact** of that decision which has eviscerated the republican form of government previously enjoyed by the State. That form of government was defined by three co-equal branches of government; whereas, now—as a result of the decision—the judiciary has empowered itself with primacy over the legislative branch. That is not an adequate or routine state law interpretation as it necessarily eviscerates the State's right under the Guarantee Clause.

While this Court has been sparing in consideration of the Guarantee Clause, the language is present in our constitution, it has plain meaning, and it is applicable here. Although the U.S. Constitution may not require states to divide governmental authority in a specific fashion as argued by the Respondent, this Court has recognized that a state may lose its republican form of government so as to justify a remedy under the Guarantee Clause.

In *Luther v. Borden*,[3] cited with approval by this Court in *Baker v. Carr*,[4] this Court recognized scenar-

[3] 48 U.S. (7 How.) 1 (1849).

[4] 369 U.S. 186, 218 (1962).

ios exist where the Guarantee Clause's invocation is appropriate.

> "Unquestionably a military government, established as the permanent government of the State, would not be a republican government, and it would be the duty of Congress to overthrow it." Of course, it does not necessarily follow that if Congress did not act, the Court would. For while the judiciary might be able to decide the limits of the meaning of "republican form," and thus the factor of lack of criteria might fall away, there would remain other possible barriers to decision because of primary commitment to another branch, which would have to be considered in the particular fact setting presented.

Id. at 222 n.48 (internal citation omitted).

Here, no military government has been established. Rather, the judiciary has usurped and regulated the authority of the legislature.[5] Petitioner's recourse to the ruling of the Supreme Court of Appeals is neither the federal legislature nor the Chief Executive—it is to this Court as required by 28 U.S.C. § 1257. The remedy is simple: restore the West Virginia's republican form of government by overruling the Supreme Court of Appeals.[6]

The crux of this Petition is that when the separation of powers doctrine of a state is eviscerated, and the

---

[5] Rather than a military junta, the term "Kritarchy" is closer to the government of West Virginia.

[6] Indeed, when the State of Nebraska unseated the elected governor by declaring he was not a citizen, this Court overruled that decision determining he was in fact a United States citizen. *See Boyd v. Nebraska*, 143 U.S. 135 (1892).

actions of one branch place the people of the state in danger of an "autocracy," as the dissenting opinion of the Supreme Court of Appeals observed, then the "republican form" of government guaranteed by our constitution has been denied. The political question the Supreme Court of Appeals inappropriately resolved, which is inextricably interwoven with the federal constitutional issue the Court evaded, is a jurisprudential problem that this Court is uniquely empowered to repair. Petitioner prays for that remedy.

II. THIS COURT HAS JURISDICTION PURSUANT TO 28 U.S.C. § 1257 TO ISSUE A WRIT OF CERTIORARI.

Respondent argues that because Petitioner was never a party to the litigation in the Supreme Court of Appeals, never sought to intervene until after the case was resolved, and never had its motion to intervene denied, *Izumi v. U.S. Phillips Corp.*[7] is inapposite and this Court has no jurisdiction to issue a writ of certiorari pursuant to 28 U.S.C. § 1257. Resp't's. Br. in Opp'n at 34-36. Accepting the potential that this Court will reject that argument, Respondent further contends there is not a sufficient split of authority between the opinion of Supreme Court of Appeals and the Arizona Supreme Court to warrant a grant of review. *Id.* at 36. Respondent is wrong.

The grant of review by this Court plainly extends to the decisions of state courts of last resort. 28 U.S.C. § 1257(a). Here, Respondent initiated the litigation below by filing a petition for writ of mandamus in the Supreme Court of Appeals on September 20, 2018. House Pet. at 110a-164a. Respondent neither named

[7] 510 U.S. 27 (1993).

nor sought relief against Petitioner. *Id.* The decision of the Supreme Court of Appeals was issued on October 11, 2018. *Id.* at 1a. Importantly, the Supreme Court of Appeals ordered that its mandate issue "contemporaneously forthwith" the decision. *Id.* at 82a. Consequently, on October 11, 2018 the Clerk issued the mandate removing the action from the docket of the Supreme Court of Appeals simultaneously with the entry of the decision. *Id.* at 93a. On October 25, 2018, two weeks after the decision, Petitioner filed its motion to intervene. *Id.* at 231a. While Petitioner cited its belief that no mandate had issued, a presumption later discovered to be incorrect, it also averred "no mandate should issue from the Court prior to the passage of thirty (30) days from the issuance of the decision so as to permit parties and/or intervenors to timely file a Petition for Rehearing." *Id.* at 232a-233a; W. Va. R.A.P 26(b). Petitioner argued in its motion to intervene that it desired to file a petition for rehearing so that it could address "most importantly, the guarantee of our citizens to a republican form of government." House Pet. at 233a-234a.

On October 29, 2018 the Supreme Court of Appeals "returned" Petitioner's motion, acknowledging it was filed on October 25, 2018 and announcing the mandate was filed on October 11, 2018 and the Court no longer had jurisdiction. *Id.* at 95a. There is no record that the Decision, Order, or Mandate of the Supreme Court of Appeals—which directly regulates Petitioner's conduct—was ever served on Petitioner by the Court or Respondent at any time for the simple reason that service never occurred.

As pointed out in the Petition, 28 U.S.C. § 1257(a) does not require a petitioner be a "party" in the prior proceedings for this Court to assert jurisdiction where

the final judgment of a state's highest court has infringed upon a right guaranteed by the United States Constitution. *Id.* at 26. Furthermore, this Court has recognized that a "party" who seeks and is denied intervention in the proceedings below may petition for writ of certiorari for a review of the lower court's ruling. As stated by this Court in *Izumi*: "One who has been denied the right to intervene in a case in a court of appeals may petition for certiorari to review that ruling." *Izumi*, 510 U.S. at 30.

Respondent seeks to distinguish *Izumi* as it involved an appeal from a federal court of appeals, involved a motion to intervene under the federal rules, and was a case where the court of appeals retained jurisdiction. While these distinctions are present, Respondent fails to address **why the distinctions matter**. The plain fact is that nothing in *Izumi* limits its application to appeals from the circuit courts as per state courts, motions to intervene premised on federal rules versus state rules, or motions filed while a case was in litigation or was artificially curtailed as demonstrated *infra.* This Court simply held that "[o]ne who has been denied the right to intervene in a case in a court of appeals may petition for certiorari to review that ruling." *Id.* The Supreme Court of Appeals is unquestionably a "court of appeals".

Respondent argues that Petitioner had no "right" to intervene for two reasons: (1) the Supreme Court of Appeals had already released its jurisdiction when Petitioner filed its motion to intervene, and (2) Petitioner's motion was not "denied" but rather "returned." A motion that is not "granted" is "denied". It was "returned" because the Court held it had no jurisdiction. When a movant has a motion returned as

a court has no jurisdiction, it places form over substance to suggest the motion was not "denied".

Moreover, while the Supreme Court of Appeals did not have jurisdiction two weeks after it filed its decision, it should have. Rule 26 of the West Virginia Rules of Appellate Procedure provides that the Clerk "will issue the mandate as soon as practical **after** the passage of thirty days from the date the opinion or memorandum decision is released, unless the time shortened or enlarged by order." W. Va. R.A.P. 26 (emphasis added). Petitioner presumed the thirty day period announced in the rule was complied with. More importantly, Rule 25 provides that "[a] petition for rehearing may be filed within thirty days of release of any . . . opinion of this Court that passes upon the merits of an action, unless the time for filing is shortened or enlarged by order." W. Va. R.A.P. 25. The Supreme Court of Appeals had authority to permit a petition for rehearing **after** the mandate issued but chose not to nor did it provide the parties an opportunity for a stay pending petition to this Court. W. Va. R.A.P. 26 (a),(c); *see also* Senate Pet. at 101a-102a, *Carmichael v. Workman*, No. 18-1189 (March 11, 2019). No order issued from the Supreme Court of Appeals shortening the period for the filing of a Petition for Rehearing. Accordingly, Petitioner had every reason to conclude it was filing its motion to intervene two weeks **before** it was required and that it would be permitted to file a timely petition for rehearing. Instead, the Supreme Court of Appeals ignored the requirement of Rule 25 and "returned" the Motion to Intervene. Tellingly, weeks after returning Petitioner's Motion to Intervene for lack of jurisdiction, the Supreme Court of Appeals issued an "order" on November 19, 2018 effectively exercising its jurisdiction to conclude it had no jurisdiction to entertain the

state senate's petition for rehearing. Senate Pet. at 101a-102a, *Carmichael v. Workman*, No. 18-1189 (March 11, 2019).

There are three relevant issues to this argument. First, had the Petitioner's motion to intervene been denied in the federal circuit court, it would plainly have standing. Second, *Izumi* has not been applied to a case arising out of a state court of last resort. Third, is there a rational reason to conclude parties denied the right to intervene in a state court of last resort are any less deserving of the right to petition this Court than had their right been denied in a federal circuit court?

By refusing to consider Petitioner's Motion to Intervene under these facts and in contravention of its own rules, it is inescapable that Petitioner had its right to intervene denied in a case in a court of appeals and, therefore, may petition for certiorari to review that ruling.

CONCLUSION

There are two ultimate questions at this stage. Should this Court permit a state court of last resort to eviscerate the separation of powers doctrine and afford the judiciary the power to review the legislature's impeachment proceeding despite the guarantee of Article IV to every state to a republican form of government? Second, should this Court artificially limit the application of the law articulated in *Izumi* to federal circuits and prohibit parties denied the right to intervene in a state court standing to petition this Court? Both questions should be answered by this Court. The writ should be granted.

Respectfully submitted,

MARK A. CARTER
Counsel of Record
DINSMORE & SHOHL LLP
707 Virginia Street, East
Chase Tower, Suite 1300
Charleston, WV 25301
(304) 357-0900
mark.carter@dinsmore.com

Counsel for Petitioner

June 6, 2019