No. 18-____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Supreme Court of Appeals of West Virginia's decision in this case violates the Guarantee Clause of the United States Constitution.

2. Whether the Supreme Court of Appeals of West Virginia properly denied the Motion to Intervene of the Petitioner, the West Virginia House of Delegates.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Respondents are 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. Petitioner is the West Virginia House of Delegates as an indispensable and materially affected party who was wrongfully denied intervenor status. The West Virginia House of Delegates is not a corporation.

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OPINION AND ORDER BELOW

The subject decision is reported at *State ex rel. Workman v. Carmichael*, 819 S.E.2d 251 (W. Va. 2018).[1] The "return", or denial, of Petitioner's Motion to Intervene is unpublished.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1257. The opinion under review is from the Supreme Court of Appeals of West Virginia, a state court of last resort, and a Writ of Prohibition issued contemporaneously with the opinion on October 11, 2018 adjudicating the Petitioner's conduct and restraining it, along with a "return" of the Petitioner's Motion to Intervene issued on October 29, 2018. By enforcing the decision that is the subject of this Petition, the Supreme Court of Appeals has restricted the entire legislature's power as dictated by the Constitution of West Virginia, and therefore has inflicted an institutional injury. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663-66 (2015). The instant Petition is timely filed and appropriate notice has been made pursuant to Supreme Court Rule 29.4.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art. I, § 2-3. App. 97a-99a.

U.S. Const. art. IV, § 4. App. 100a.

W. Va. Const. art. III, § 10. App. 101a.

W. Va. Const. art. IV, § 9. App. 102a.

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[1] The Supreme Court of Appeals of West Virginia maintains an official reporter titled the West Virginia Reports. No citation to that reporter is available at this time.

W. Va. Const. art. VI, § 1-3. App. 103a.

W. Va. Const. art. VIII, § 8. App. 104a-105a.

Ariz. Const. art. VIII, pt. 2., § 1. App. 106a.

28 U.S.C. § 1254. App. 107a.

28 U.S.C. § 1257. App. 108a.

W. Va. Code § 53-1-1 (2017). App. 109a.

STATEMENT OF THE CASE

On August 13, 2018 the Petitioner voted to approve three Articles of Impeachment against the Respondent Margaret L. Workman as Chief Justice of the Supreme Court of Appeals of West Virginia. App. 12a. A court of impeachment for the Respondent Workman was set for October 15, 2018. App. 13a. On September 21, 2018 the Respondent Workman filed a Petition for Writ of Mandamus under the original jurisdiction of the Supreme Court of Appeals requesting the court to stay the Court of Impeachment in the West Virginia State Senate and thereafter issue a mandamus writ halting the impeachment proceedings. App. 163a. On October 11, 2018 the Supreme Court of Appeals issued its decision granting Respondent Workman a writ of prohibition prohibiting the State Senate from convening a court of impeachment and adjudicating the Petitioner's conduct in composing Articles of Impeachment as unconstitutional violations of the Respondent Workman's procedural due process rights. App. 74a-75a, 82a. The Court directed the Clerk of Court to issue the "mandate" of the Court "contemporaneously forthwith" its decision, and thus the mandate was issued on October 11, 2018 with the decision. App. 82a, 91a-92a.

On October 25, 2018 the Petitioner filed a motion to intervene with the Supreme Court of Appeals of West Virginia for the express purpose of filing a petition for rehearing to address the infringement on the State of West Virginia's guarantee to a republican form of government. App. 231a-234a. On October 29, 2018, the Clerk of Court "returned" the Petitioner's Motion to Intervene representing that the Supreme Court of Appeals no longer had jurisdiction of the case. App. 95a-96a.

The decision of the Supreme Court of Appeals of West Virginia violates the Guarantee Clause of the United States Constitution as it elevates itself to a supreme branch of government with authority to review the impeachment proceedings of the State Senate and House of Delegates and restrict the rights of both chambers thereby eviscerating the checks and balances of state government and the separation of powers doctrine. This decision thereby denies the State a republican form of government as guaranteed by the United States Constitution. Further, the Supreme Court of Appeals wrongly denied the Petitioner intervenor status by foreclosing any petition for rehearing or intervention for purposes of making such a petition by issuing its mandate contemporaneously forthwith its decision in violation of its own administrative rules, which require notice of any shortening of the period to file a petition for rehearing. Under the Supreme Court of Appeals' administrative rules, which provide a period of thirty days for a party (including an intervenor) to file a petition for rehearing, the Motion to Intervene of the Petitioner was timely as filed on October 25, 2018—only fourteen days after the entry of the decision.

ARGUMENT

I. THE DECISION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA VIOLATES THE GUARANTEE CLAUSE OF THE UNITED STATES CONSTITUTION BY EVISCERATING THE STATE'S REPUBLICAN FORM OF GOVERNMENT.

The subject decision of the Supreme Court of West Virginia eviscerates the State's right to a republican form of government by elevating the judicial branch to a supreme branch of government with the power to adjudicate and restrain the legislative branch in the exercise of its obligations regarding impeachment proceedings. Article IV of the United States Constitution states in relevant part: "The United States shall guarantee to every state in this union a republican form of government . . . ." U.S. Const. art. IV, § 4.

The Arizona Supreme Court, in a decision involving the state governor's request for an injunction to prohibit his impeachment trial based upon, *inter alia*, alleged intrusion upon his due process rights, recited the seminal interests of our founders in preserving separation of powers between the three branches of government by insulating political questions from judicial review.

> [S]tate constitutional provisions on impeachment generally follow the federal system adopted by the delegates to the Constitutional Convention of 1787. *Kinsella v. Jaekle*, 192 Conn. 704, 720, 475 A.2d 243, 252 (1984). The framers of our national Constitution considered and rejected a judicial role in the impeachment process, fearing that any judicial involvement would encroach upon the

legislative prerogative. THE FEDERALIST, No. 65 (A. Hamilton). Instead, the delegates decided that impeachment would be a method of "national inquest" into the actions of public officers. They concluded that the origination of the inquiry and its resolution should rest with the people's representatives. *Id.*; *see also* THE FEDERALIST, No. 81 (A. Hamilton). They therefore rejected any proposal that the articles of impeachment adopted by the house of representatives would be tried by the judicial branch of government and deliberately selected the senate as the tribunal to try impeachment charges. THE FEDERALIST, No. 65. *See also*, J. MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 279, 429, 449, 472, 535, 537, 561 (International ed. 1970) (most complete record of the genesis of the federal Constitution's impeachment provisions).

Alexander Hamilton was quite clear on the political nature of impeachment.

> [Impeachment charges] may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself. The prosecution of them, for this reason, will seldom fail to agitate the passions of the whole community, and to divide it into parties, more or less friendly or inimical, to the accused. In many cases, it will connect itself with the pre-existing factions, and will inlist all their animosities,

> partialities, influence and interest on one side, or on the other; and in such cases there will always be the greatest danger, that the decision will be regulated more by the comparative strength of parties than by the real demonstrations of innocence or guilt.
>
> THE FEDERALIST, No. 65. In this, as in many other matters, Hamilton was remarkably prescient.

Mecham v. Gordon, 751 P.2d 957, 961 (Ariz. 1988) (footnote omitted).

The Arizona Supreme Court concluded that the courts of Arizona, as well as the courts of the United States, should exercise no jurisdiction over impeachment proceedings. In doing so, it reasoned:

> We need not rely only on history or the expressed intent of the founders to determine the nature of impeachment proceedings. The text of the Arizona Constitution corresponds to the federal Constitution and is quite clear. The power of impeachment was not given to the judiciary. The House of Representatives has the "sole power of impeachment," and "[a]ll impeachments shall be tried by the Senate." Ariz. Const. art. 8, pt. 2, § 1. Such provisions were used "with the intention that no other tribunal should have any jurisdiction" of impeachment matters. *Ritter v. United States*, 84 Ct. Cl. 293, 296 (1936), *cert. denied*, 300 U.S. 668, 57 S. Ct. 513, 81 L.Ed. 875 (1937); *see also Kinsella*, 192 Conn. at 713, 475 A.2d at 248-49; *Ferguson v. Maddox*, 114 Tex. 85, 94, 263 S.W. 888, 890-91 (1924);

> *State ex rel. Trapp v. Chambers*, 96 Okla. 78, 80, 220 P. 890, 892 (1923) ("executive jurisdiction" in the legislature). Arizona has also recognized these principles. Removals from office are not acts within the judicial power. *Ahearn v. Bailey*, 104 Ariz. 250, 253, 451 P.2d 30, 33 (1969).
>
> Based upon the foregoing discussion and the history of our nation, we can only conclude that the power of impeachment is exclusively vested in the House of Representatives and the power of trial on articles of impeachment is exclusively vested in the House of Representatives and the power of trial on articles of impeachment belongs solely to the Senate. The Senate's task is to determine if the Governor should be removed from office. Aside from disqualification from holding any other state position of "honor, trust, or profit," the Senate can impose no greater or lesser penalty than removal and can impose no criminal punishment. Trial in the Senate is a uniquely legislative *and* political function. It is not judicial.

Id. at 961-62.[2]

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[2] The Supreme Court of Appeals of West Virginia wrote that the Arizona Supreme Court clearly determined the judiciary could intervene in an impeachment proceeding to protect the constitutional rights of an impeached official. App. 33a-34a. What the Arizona Supreme Court actually held was that "[it] does have power to ensure that the legislature follows the *constitutional* rules on impeachment," citing to *Powell v. McCormick*, 395 U.S. 486, 506 (1969), which held that the judiciary may determine in appropriate cases whether the legislature has exercised its power in conformity with the federal Constitution. *Mecham*, 751 P.2d at

In 1993 this Court confirmed the accuracy of the foregoing analysis by holding that federal impeachment proceedings were political in nature and therefore were not justiciable. *Nixon v. United States*, 506 U.S. 224 (1993). In *Nixon*, a federal district court judge was convicted of making false statements before a federal grand jury. *Id*. at 226. Nixon sought judicial review regarding whether a Senate rule employed in his impeachment trial was constitutional. *Id*. The district and circuit courts concluded Nixon's claim was nonjusticiable and this Court affirmed. *Id*. at 228.

This Court began by reciting the foundational standard for determining whether a controversy is justiciable. "A controversy is nonjusticiable – *i.e.*, involves a political question – where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and management standards for resolving it . . . .' " *Id*. (quoting *Baker v. Carr*, 369 U.S. 186 (1962)).

This Court then defined the scope of authority conferred upon the United States Senate to evaluate the constitutional commitment of that authority to a

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962 (emphasis added). By example, the Supreme Court of Appeals wrote: "[S]hould the Senate attempt to try a state officer without the House first voting articles of impeachment, we would not hesitate to invalidate the results." *Id*. There is no allegation or finding the Petitioner failed to vote the articles of impeachment at issue here. Rather, here the Supreme Court of Appeals found the Respondent Workman, and all public officers, were possessed with due process rights by virtue of holding public office which were violated. App. 77a-78a, 81a-82a. The *Mecham* court, by contrast, found public officials had no property, or other interest, in their office creating an entitlement to a due process right. *Mecham*, 751 P.2d at 962-63. As such, the Arizona Surpeme Court did not conclude that the judiciary could review due process interests which were asserted to be implicated in an impeachment proceeding.

coordinate political "department," or branch, of government.

> In this case, we must examine Art. I, § 3, cl. 6, to determine the scope of authority conferred upon the Senate by the Framers regarding impeachment. It provides:
>
> > "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."

Id. at 229.

Focusing upon the Framers' use of the word "sole" in the Constitution, this Court concluded the Constitution committed the authority to conduct a Court of Impeachment "solely" to a coordinate political department, the Legislature, and as such, the controversy advanced by Nixon was nonjusticable as a political question.

> We think that the word "sole" is of considerable significance. Indeed, the word "sole" appears only one other time in the Constitution – with respect to the House of Representatives' "*sole* Power of Impeachment." Art. 1, § 2, cl. 5 (emphasis added). The commonsense meaning of the word "sole" is that the Senate alone shall have authority to determine whether an individual should be acquitted or convicted. The dictionary definition bears this out. "Sole" is defined as "having no companion," "solitary," "being the only one," and "functioning . . .

> independently and without assistance or interference." Webster's Third New International Dictionary 2168 (1971). If the courts may review the actions of the Senate in order to determine whether that body "tried" an impeached official, it is difficult to see how the Senate would be "functioning . . . independently and without assistance or interference."

Id. at 230-31.

In reciting the Framers' reasons for rejection of the construct of judicial review of impeachment proceedings, this Court, critically, determined that to permit the courts to involve themselves in impeachments would "eviscerate" an important constitutional check.

> [J]udicial review would be inconsistent with the Framers' insistence that our system be one of checks and balances. In our constitutional system, impeachment was designed to be the *only* check on the Judicial Branch by the Legislature. On the topic of judicial accountability, Hamilton wrote:
>
> > "The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for a mal-conduct by the house of representatives, and tried by the senate, and if convicted, may be dismissed from office and disqualified for holding any other. *This is the only provision on the point, which is consistent with the necessary independence of the judicial character, and is the only one which we find in our*

> *own constitution in respect to our own judges*." *Id*., No. 79, at 532-533.
>
> Judicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counterintuitive because it would *eviscerate* the "important constitutional check" placed on the Judiciary by the Framers. See *id*., No. 81, at 545. Nixon's argument would place the final reviewing authority with respect to impeachments in the hands of the same body that the impeachment process is meant to regulate.

Id. at 234-35 (third emphasis added).

This Court concluded: "We agree with the Court of Appeals that opening the door of judicial review to the procedures used by the Senate in trying impeachments would 'expose the political life of the country to months, or perhaps years, of chaos.' " *Id*. at 236 (quoting *Nixon v. United States*, 938 F.2d 239, 246 (D.C. Cir. 1991)).

It is axiomatic that where the judicial branch empowers itself to adjudicate nonjusticable controversies, and thereby eviscerates an important check in a government's system of checks and balances by usurping authority committed to a coordinate branch of government, a republican form of government is no longer extant. While the majority below determined that Respondent Workman's petition was subject to its review by virtue of the "Law and Evidence Clause," Acting Justices Bloom and Reger, in their partial concurrence, astutely recognized that the "political question doctrine precluded the majority from addressing two procedural flaws in the impeachment proceeding." App. 86a. Those alleged "errors" involved the "House

of Delegate[s'] failure to include findings of fact in the Articles of Impeachment, and in failing to pass a resolution adopting the Articles of Impeachment." *Id*. But as observed by Acting Justices Bloom and Reger, "[t]he impact of both of those alleged errors in the impeachment proceedings was a matter for the House of Delegates to resolve and, in the absence of the matter being resolved by the House, it should have been presented to the Court of Impeachment for the Senate to resolve." App. 87a.

The observation is correct. The alleged flaws of the Petitioner found by the majority are neither justiciable nor, as a matter of law, errors at all. However, while Acting Justices Bloom and Reger are correct that the "advisory opinion [of the majority] on the two issues has a lethal consequence," the consequence is more profound than merely invalidating "the impeachment trials of the two remaining judicial officers" in the state. App. 89a. Rather, the decision of the majority has upset the foundational checks and balances of the state government that guarantee a republican form of government.

The Founders believed that the separation of powers and checks and balances are essential to a republican form of government. In *The Federalist No. 9*, Alexander Hamilton noted that the following principles are essential to a republican form of government in order for it to secure the rights of the people: separation of powers, checks and balances, an independent judiciary, and a representative elected legislature. The Federalist No. 9 (Alexander Hamilton). Similarly, in *The Federalist No. 51*, James Madison wrote that the separate and distinct exercise of different powers of government is "essential to the preservation of liberty." The

Federalist No. 51, at 318 (James Madison) (Clinton Rossiter ed., 2003).

In *The Federalist No. 47*, Madison discussed the doctrine of separation of powers and recognized Montesquieu as the political authority on the subject. Specifically, Madison wrote:

> One of the principal objections inculcated by the more respectable adversaries to the constitution is its supposed violation of the political maxim, that the legislative, executive, and judiciary departments, ought to be separate and distinct. . . . The oracle, who is always consulted and cited on this subject, is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind.

The Federalist No. 47, at 297-98 (James Madison) (Clinton Rossiter ed., 2003). Montesquieu discusses the doctrine of separation of powers in *The Spirit of the Laws* where he concludes that separation of powers is the cornerstone of a free republican government. Specifically, he stated: "There would be an end of every thing, were the same man, or the same body, whether of nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals." Montesquieu, *The Spirit of the Laws* (1748), Book XI, ch. VI, p. 181.

The Federalist Papers frequently reference the separation of powers doctrine as a fundamental concept within a free government. Our system of separation of powers through checks and balances reflects the

Founders' interpretation of the foundation of a republican form of government.

"[T]his Court has repeatedly invoked 'the separation of powers' and 'the constitutional system of checks and balances' as core principles of our constitutional design, essential to the protection of individual liberty." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1215 (2015). Lower courts have also held that "the doctrine of separation of powers is an inherent and integral element of the republican form of government, and separation of powers, as an element of the republican form of government, is expressly guaranteed to the states by Article IV, Section 4 of the Constitution of the United States." *Van Sickle v. Shanahan*, 511 P.2d 223, 241 (Kan. 1973); *see also Tucker v. State*, 35 N.E.2d 270, 279 (Ind. 1941) ("The same division of power exists in the federal Constitution, and in most, if not all, of the state constitutions, and is essential to the maintenance of the republican form of government."); *Agosto v. Barcelo*, 594 F. Supp. 1390, 1394 (D.P.R. 1984) (noting that the separation of powers among coordinate branches of government is "the hallmark" of a republican form of procedure).

The Petitioner acknowledges that many cases brought under Article IV of the United States Constitution have been dismissed as posing a nonjusticiable political question. *See, e.g.*, *City of Rome v. United States*, 446 U.S. 156 (1980) (challenging the preclearance requirements of the Voting Rights Act); *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912) (challenging initiative and referendum provisions of state constitution). However, more recently this Court has suggested that not all claims under the Guarantee Clause present nonjusticiable political questions. For example, in *New York v. United States*, 505

U.S. 144, 185 (1992), this Court specifically noted that "perhaps not all claims under the Guarantee Clause present nonjusticiable political questions." This Court went on to state that to violate the Guarantee Clause a state must pose some "realistic risk of altering the form or method of functioning of . . . government." *Id.* at 186.

This Court in *New York* further noted that before the general rule of nonjusticiability, it had addressed the merits of claims founded on the Guarantee Clause without any suggestion that the claims were not justiciable, citing to *Attorney General of Michigan ex rel. Kies v. Lowrey*, 199 U.S. 233 (1950); *Forsyth v. Hammond*, 166 U.S. 506 (1897); *In re Duncan*, 139 U.S. 449 (1891); and *Minor v. Happersett*, 88 U.S. 162 (1875).

Similarly, in *Baker v. Carr*, 369 U.S. 186 (1962), this Court noted in dicta that all issues raised under Article IV, Section 4 are not automatically barred as "political" in character, stating:

> But it is argued that this case shares the characteristics of decisions that constitute a category not yet considered, cases concerning the Constitution's guaranty, in Art. IV, § 4, of a republican form of government. A conclusion as to whether the case at bar does present a political question cannot be confidently reached until we have considered those cases with special care. We shall discover that Guaranty Clause claims involve those elements which define a "political question," and for that reason and no other, they are nonjusticiable.

Id. at 217–18. In *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court again recognized that some questions arising under the Guarantee Clause may not be "political" so as to preclude judicial enforcement specifically noting: "As we stated in *Baker v. Carr*, some questions raised under the Guaranty Clause are nonjusticiable, where 'political' in nature and where there is a clear absence of judicially manageable standards." *Id.* at 582.

In *Baker*, this Court set out the elements that would render an issue "political" in character and, therefore, unenforceable by the judiciary:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217.

Here, the Supreme Court of Appeals of West Virginia's holding violates the Guarantee Clause of

the United States Constitution. Importantly, that decision presents a justiciable question properly reviewable by this Court.

First, the decision clearly alters the form or method of functioning of the West Virginia government by overstepping the doctrine of separation of powers. The Supreme Court of Appeals of West Virginia overstepped its power and hindered the legislature's direct impeachment power and obligation. The Supreme Court of Appeals' actions altered the form or method of impeachments as prescribed by the Constitution of West Virginia. Thus, the Supreme Court of Appeals violated the Guarantee Clause by posing an impediment to, and continuing a realistic risk of, altering the form or method of functioning of state government in usurping the authority of the Petitioner in composing Articles of Impeachment.

Second, while the Petition for a Writ of Mandamus filed by the Respondent Workman with the Supreme Court of Appeals clearly presented a political issue, the issue here is no longer political in nature. To analyze whether the issue raises a political question, we look to the elements outlined in *Baker*. Here, there is no textually demonstrable constitutional commitment of the issue to a coordinate political department. The authority to prosecute and conduct courts of impeachment is reserved "solely" to the legislature. In addition, there is not a lack of judicially discoverable and manageable standards for resolving the issue. Again, the Constitution of West Virginia reserves the sole power of impeachment exclusively to the Petitioner. W. Va. Const. art. IV, § 9. Next, it is possible to decide this issue without an initial policy

determination of a kind clearly for nonjudicial discretion. It is also possible for this Court to undertake independent resolution without expressing lack of the respect due to coordinate branches of government. Moreover, this issue does not raise an unusual need for unquestioning adherence to a political decision already made. Rather, Petitioner asks this Court to prohibit a state court of last resort from asserting jurisdiction to review a political act, and from impeding the legislature from accomplishing the actions which it has "sole" jurisdiction to accomplish. And finally, this issue does not create the potential of embarrassment from multifarious pronouncements by various departments on one question. This Court has the final word.

As such, the Supreme Court of Appeals of West Virginia's decision does not raise a nonjusticiable political question that this Court cannot or should not resolve. Instead, it is within this Court's right and obligation to review the Supreme Court of Appeals' actions to ensure compliance with Article IV, Section 4 of the United States Constitution.

This Court has written that "[t]he guaranty" of republican government extended in Article IV "necessarily implies a duty on the part of the States themselves to provide [a republican form of] government." *Minor v. Happersett*, 88 U.S. 162, 175 (1875). As recently observed by Ryan Williams in his article *The "Guarantee" Clause,*

> [b]oth the Supreme Court and most modern commentators have read the Guarantee Clause as a restriction on the states. On this reading the Clause obligates states to provide their own citizens with a "republican form of government" and empowers the federal government

> to subject the states to any form of compulsion needed should they fail to meet that obligation.

Ryan C. Williams, *The "Guarantee" Clause,* 132 Harv. L. Rev. 602, 630 (2018).

While the author goes on to criticize this precedent and analysis, the propriety of the interpretations of the Guarantee Clause he identifies is buttressed by the Founders themselves in the Federalist Papers. Anticipating the enforcement of the Guarantee Clause, Alexander Hamilton wrote in *The Federalist No. 21* that "[t]he guaranty could only operate against changes to be effected by violence" or "usurpations of rulers" and could not be "impediments to reforms of [a] State constitution by a majority of the people in a legal and peaceable mode." The Federalist No. 21, at 135-36 (Alexander Hamilton) (Clinton Rossiter ed., 2003). In *The Federalist No. 43*, James Madison anticipated the clause would be a "harmless superfluity" but would have value in guarding against experiments "produced by the caprice of particular States, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers[.]" The Federalist No. 43, at 271 (James Madison) (Clinton Rossiter ed., 2003). Madison explained:

> [The guarantee] supposes a pre-existing government of the form which is to be guaranteed. As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so and to claim the federal guaranty for the latter. The only restriction imposed on them is that they shall not exchange republican for anti-republican Constitutions; a restriction

> which, it is presumed, will hardly be considered as a grievance.

Id. at 272.

Here, the Supreme Court of Appeals of West Virginia has interpreted the Constitution of West Virginia and determined that it empowers the courts to regulate and restrain the state legislature in the impeachment process when it plainly does not. This act reduces to jurisprudence a political act and it does so in a fashion that eviscerates the checks and balances of a state government. That act exchanges the republican form of government which preceded the decision with an anti-republican government over which the courts have unequal and supreme dominance over the other branches of government. Consistent with this Court's observation in *Minor v. Happersett*, this decision thereby deprives the state of a republican form of government, and as such, the decision may not stand under the Guarantee Clause.[3]

The Supreme Court of Appeals of West Virginia's actions unequivocally violated Article IV, Section 4 of the United States Constitution. Specifically, the Supreme Court of Appeals' decision in *Workman* violated the separation of powers clearly and specifically delineated in the Constitution of West Virginia. Per article IV, section 9, "[t]he House of Delegates shall have the sole power of impeachment. The Senate shall have the sole power to try impeachments and no person shall be convicted without the concurrence

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[3] In *Minor*, this Court affirmed the Supreme Court of Missouri's decision that the petitioner, a female citizen, was not possessed under state law or the United States Constitution with the right to vote. The United States Constitution has since been amended to guarantee women the right of suffrage. U.S. Const. amend XIX.

of two thirds of the members elected thereto." W. Va. Const. art. IV, § 9. Similarly, the United States Constitution provides that the House of Representatives shall have the sole power of impeachment and the Senate shall have the sole power to try all impeachments. U.S. Const. art. I, § 2-3. And, like the federal Constitution, the only means available to remove a member of the judiciary under the West Virginia Constitution is by impeachment. W. Va. Const. art. VIII, § 8.

This Court wrote in *Nixon* that "judicial review [of impeachments] would be inconsistent with the Framers' insistence that our system be one of checks and balances. In our constitutional system, impeachment was designed to be the *only* check on the Judicial Branch by the Legislature." *Nixon*, 506 U.S. at 235. Indeed, as explained by this Court, "[j]udicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counterintuitive because it would eviscerate the 'important constitutional check' placed on the Judiciary by the Framers" thereby "opening the door of judicial review to the procedures used by the Senate to try impeachments would 'expose the political life of the country to months, or perhaps years, of chaos.' " *Id.* at 235-36.

Importantly, the Supreme Court of Appeals of West Virginia itself has previously held 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." *State v. Clark*, 752 S.E.2d 907, 925 (W. Va. 2013).

By adjudicating the validity of the procedures used by the House of Delegates and restraining its conduct, the Supreme Court of Appeals of West Virginia clearly

affected the House of Delegates' inherent authority to "keep its own house in order" pursuant to the separation of powers doctrine.[4] In affecting the House of Delegates' authority under the Constitution of West Virginia and its authority under the separation of powers doctrine, the Supreme Court of Appeals also violated the Guarantee Clause of the United States Constitution.

The Supreme Court of Appeals of West Virginia should have resolved the instant case by concluding that the Petition brought by Respondent Workman was nonjusticiable. Instead, it parsed the language of the Constitution of West Virginia to recognize a "Law and Evidence Clause" that it concluded provided the court with authority to review the impeachment proceedings of the legislature. The Supreme Court of Appeals determined that this Court's decision in *Nixon* was not "controlling and is distinguishable" as the federal Constitution in Article I, Section 3 does not contain the Law and Evidence Clause present in article IV, section 9 of the Constitution of West Virginia. App. 27a-29a. In doing so, it reasoned:

> [W]e do find under the plain language of Section 9, the actions or inactions of the Court of Impeachment may be subject to a proceeding under the original jurisdiction of this Court. 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

[4] Such adjudication of this federal question is in direct conflict with *Nixon v. United States*, 506 U.S. 224 (1993), and its progeny, thus providing a "compelling reason" for review per Supreme Court Rule 10(c).

> evidence." . . . 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.

App. 18a (footnote omitted).

By footnote, the Supreme Court of Appeals of West Virginia then recognized that a "similar Law and Evidence Clause exists in the impeachment laws[5] of 11 states" including Arizona. App. 19a. However, the Supreme Court of Appeals commits two substantial errors in establishing its jurisdiction for adjudicating and restricting the Petitioner on the "Law and Evidence Clause." First, the clause applies exclusively to the State Senate and *not* the House of Delegates. Second, while the Arizona State Constitution contains the law and evidence language present in the Constitution of West Virginia, the Arizona court of last resort has expressly found that even with a Law and Evidence Clause in its impeachment article, the courts have no jurisdiction to review the impeachment proceedings by its legislature because those controversies are nonjusticiable political questions. *Mecham*, 751 P.2d at 962. Indeed, the Arizona Supreme Court wrote:

> Absent a clear constitutional mandate, we refuse to usurp the Senate's prerogatives in this area. Article 3 of the state Constitution prohibits judicial interference in the legitimate functions of the other branches of our

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[5] The Supreme Court of Appeals is apparently referring to constitutions, not laws.

> government. We will not tell the legislature when to meet, what its agenda should be, what it should submit to the people, what bills it may draft or what language it may use. The separation of powers required by our Constitution prohibits us from intervening in the legislative process.

Id.; *see also* App. 86a-89a.

This plain distinction between the West Virginia and Arizona courts of last resort highlight an important factor in this Court's decision to grant a petition. Namely, Supreme Court Rule 10(b) considers whether a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals. Here, the Arizona court of last resort interpreting its state's constitution, which vests "sole power of impeachment" in the legislature and obligates its "Senators . . . upon oath or affirmation to do justice according to law and evidence" in its impeachment article, concluded it had no judicial review over the legislature's impeachment proceedings because of the doctrine of separation of powers and the political controversy rendering the issue nonjusticiable. *Mecham*, 751 P.2d at 961. The West Virginia court of last resort, interpreting nearly identical language, concluded it did have jurisdiction to review by virtue of the "law and evidence" language directed exclusively to senators, and it thereby adjudicated the conduct of *both* chambers of the legislature and prohibited conduct by the entire legislature.[6]

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[6] As will be developed in more detail in the case on the merits, the Supreme Court of Arizona also found that the Governor had *no* due process rights in remaining Governor and therefore the

The Arizona Supreme Court's decision was compliant with the Guarantee Clause of the federal Constitution as it did not elevate itself to a supreme branch of the government and usurp the legislature's authority so as to deprive the state of a republican form of government. In contrast, the Supreme Court of Appeals of West Virginia interpreted the same language in its state constitution to review, adjudicate, and restrict the legislature thereby violating the federal Constitution.[7]

II. THE WEST VIRGINIA HOUSE OF DELEGATES HAS STANDING TO PETITION THIS COURT AS ITS RIGHTS HAVE BEEN MATERIALLY AFFECTED AND IT WAS WRONGFULLY DENIED INTERVENOR STATUS.

The Supreme Court of Appeals of West Virginia "returned", thereby denying, the motion of the Petitioner to obtain intervenor status. App. 95a-96a. This Court has found that a party may petition it for standing to seek review of a lower court's decision where its rights have been materially affected and a motion to intervene has been denied.

The Petitioner seeks review by this Court pursuant to 28 U.S.C. § 1257, which states:

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basis of his claim for an injunction had no merit. *Mecham*, 751 P.2d at 962-63.

[7] The Supreme Court of Appeals of West Virginia devoted one footnote to analyze whether the Guarantee Clause prohibited its decision. App. 34a. In that note, it simply pronounced the respondents' argument as "convoluted" and that no opinion by any court supports the proposition that issuance of a writ violates the Guarantee Clause. *Id.*

> (a) Final judgements or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a). While the statute does not require a litigant seeking review to have party status in the proceedings below, Supreme Court Rule 12.6 arguably anticipates such status.

If such status is required, it is clear that this Court will entertain a petition from a "party" who was wrongfully denied intervenor status by the lower court. *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 510 U.S. 27 (1993). In *Izumi*, the petitioner's motion to intervene was denied by the circuit court of appeals in a patent infringement case. *Id*. at 28-29. The petitioner then sought review by this Court pursuant to 28 U.S.C. § 1254(1), which permits review by this Court of judgments in the circuit courts. This Court concluded:

> Because the Court of Appeals denied petitioner's motion for intervention, Izumi is not a party to this particular civil case. 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.

Id. at 30.[8]

While the *Izumi* litigation sought review of a circuit court of appeals, the precept is applicable to a scenario where the petition originates from a state court of last resort under 28 U.S.C. § 1257. Indeed, the injustice is the same. Here, the Supreme Court of Appeals of West Virginia was plainly wrong in denying the Petitioner's Motion to Intervene.

First, the Respondent Workman did not name the Petitioner in her original Petition for a Writ of Mandamus and no party to that litigation sought to bring the Petitioner into the litigation.[9] App. 110a.

Second, the decision of the Supreme Court of Appeals of West Virginia unquestionably and materially affects the rights of the Petitioner. In its decision, it wrote:

> We are greatly concerned with the procedural flaws that occurred in the House of Delegates. Basic due process principles demand that governmental bodies follow the rules they enact for purpose of imposing sanctions against

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[8] In *Izumi*, this Court determined that its petition was flawed, however, because Izumi did not present this question in its petition and it was not "fairly included" in the scope of the single issue this Court asserted jurisdiction over. *Izumi*, 510 U.S. at 30-31. Here, the Petitioner squarely identifies this issue as a question presented.

[9] It is a fair question to inquire why the Petitioner did not seek to intervene in the case prior to October 25, 2018. It is relevant to note that no party to any litigation has the duty to presume a court will act contrary to its own precedent by unconstitutionally adjudicating a non-party's conduct and restricting its constitutional rights without being afforded the right to be heard and subsequently and artificially prohibiting its intervention and petition for rehearing.

> public officials. This right to due process is heightened when the Legislature attempts to impeach a public official.[10] Therefore, we hold in the strongest of terms, that the Due Process Clause of Art. III, § 10 of the Constitution of West Virginia requires the House of Delegates follow the procedure that it creates to impeach a public officer. Failure to follow such rules shall invalidate all Articles of Impeachment that it returns against a public officer.

App. 81a.

This holding unquestionably concludes the Respondent Workman was possessed of due process rights; that the Petitioner violated those rights, rendering the Articles of Impeachment against her null and void; that the Supreme Court of Appeals would and will continue to adjudicate challenges by any public official with regard to alleged due process violations by the Petitioner; and that the Supreme Court of Appeals will vigilantly invalidate "all" articles of impeachment, which in its opinion in overseeing the House of Delegates it concludes are faulty. That decision materially affects the Petitioner and violates the Guarantee Clause of Article IV of the United States Constitution.

Third, the Supreme Court of Appeals of West Virginia violated its own precedent by issuing a writ of prohibition against a non-party legislative body. First, as pointed out by the State Senate in its petition

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[10] Of course, the Supreme Court of Appeals erred as no politician enjoys due process rights with regard to impeachment proceedings as the "right" to an elected office does not constitute a property, liberty or life interest. *See Mecham*, 751 P.2d at 962-63 (citing *Snowden v. Hughes*, 321 U.S. 1, 7 (1944)).

for rehearing, the House of Delegates, in light of the Supreme Court of Appeals' decision, was an indispensable party to the litigation. App. 249a-250a. To be sure, binding precedent prohibited the Supreme Court of Appeals from issuing a decision materially affecting the rights of a non-party to the case. *State ex rel. One-Gateway v. Johnson*, 542 S.E.2d 894 (W. Va. 2000) ("Generally, 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 . . . ."); *see also State ex rel. Bd. of Education of Putnam v. Beane*, 680 S.E.2d 46 (W. Va. 2009) (holding a school board is entitled to party status prior to issuance of writ of prohibition affecting its rights).

Second, the Supreme Court of Appeals of West Virginia improperly issued a writ of prohibition against an entity that was, and is, not a judicial or quasi-judicial tribunal. The West Virginia House of Delegates is a constitutionally created body of elected delegates whose purpose is to, *inter alia*, create law and fulfill constitutional obligations. W. Va. Const. art. VI, § 1-3. Among those duties is the creation of articles of impeachment. W. Va. Const. art. IV, § 9. It does not adjudicate articles of impeachment, and as one-half of the legislature of the state, it is not a judicial or quasi-judicial tribunal. The Supreme Court of Appeals has acknowledged that pursuant to section 53-1-1 of the West Virginia Code, the writ of prohibition "lies to restrain both judicial and quasi-judicial administrative bodies." *Cowie v. Roberts*, 312 S.E.2d 35, 38 (W. Va. 1984). Put simply, a writ of prohibition may not lie against a legislative body such as the Petitioner here. Despite this, the Supreme Court of Appeals evidenced no hesitation in ignoring its own precedent and issuing a writ of prohibition against a non-party legislative body.

Fourth, the Supreme Court of Appeals of West Virginia violated its own rules by issuing its mandate contemporaneously with its decision without providing notice to the parties of its restriction of the period to file a petition for rehearing. To be sure, it directed the Clerk of Court to "issue the mandate contemporaneously forthwith" its decision on October 11, 2018.[11] App. 82a, 91a. Consistent with that direction, the Clerk of Court entered the mandate simultaneously with the decision on that date. App. 93a-94a.

By issuing the mandate contemporaneously with the opinion, the Supreme Court of Appeals of West Virginia violated the West Virginia Rules of Appellate Procedure. Rule 32 provides that "upon timely motion, anyone shall be permitted to intervene in an original jurisdiction proceeding pending in this Court . . . when . . . the representation of the applicant's interest by existing parties is or may be inadequate, and the applicant is or may be bound by judgment in the action." W. Va. R.A.P. 32. Here, the House of Delegates expressly sought to intervene so that it could file a petition for rehearing premised expressly upon the State's right to a republican form of government.

A petition for rehearing may be filed in accordance with Rule 25 of the West Virginia Rules of Appellate Procedure. 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(a)

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[11] Notably, the Respondent Workman prayed for a "stay" of the October 15, 2018 Court of Impeachment. App. 118a. The Supreme Court of Appeals could have opted to "stay" the impeachment trial, but instead it issued a final writ and foreclosed a petition for rehearing. App. 82a.

(emphasis added). Moreover, "[i]n instances when the Court shortens the time period for issuance of the mandate and directs the Clerk to issue the mandate in accordance with that time frame, *the Court shall set forth by order the deadline for filing*."[12] W. Va. R.A.P. 25(a) (emphasis added). The Rules of Appellate Procedure, therefore, contemplate a period of thirty days for filing a petition for rehearing. Should the Supreme Court of Appeals shorten that timeframe by directing the Clerk of Court to issue the mandate, the express language of Rule 25 dictates that "the Court *shall* set forth by order the deadline for filing" a petition for rehearing. W. Va. R.A.P. 25(a) (emphasis added).

Here, the Supreme Court of Appeals of West Virginia directed the Clerk of Court to issue the mandate contemporaneously with the opinion and failed to set forth by order a deadline for filing a petition for rehearing as provided by the Rules of Appellate Procedure. Because the Supreme Court of Appeals issued the mandate with the opinion in violation of the Rules of Appellate Procedure, it failed to provide the House of Delegates with any opportunity to intervene and be heard. The House of Delegates is fundamentally entitled to a right to be heard, and to party status, as it is materially interested in the subject matter of the litigation and its rights have be affected by the outcome of the Workman litigation. Thus, by

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[12] Rule 26 of the West Virginia Rules of Appellate Procedure provides that "the Clerk will issue the mandate as soon as practicable *after the passage of thirty days from the date the opinion or memorandum decision is released*, unless the time is shortened or enlarged by order." W. Va. R.A.P. 26 (emphasis added). The purpose of the delayed mandate is to allow parties to file a petition for rehearing.

adjudicating this action without the participation of the House of Delegates—an indispensable party—the Supreme Court of Appeals violated the House of Delegates' fundamental rights and the separation of powers doctrine.

Fifth, and finally, because the Supreme Court of Appeals of West Virginia wrongfully denied the Petitioner's Motion to Intervene, the Petitioner may seek review in this Court of the merits and impact of that decision. *Izumi*, 510 U.S. at 30; 28 U.S.C. § 1257.

CONCLUSION

The decision of the Supreme Court of Appeals of West Virginia is a continuing danger, as it made justiciable a nonjusticable controversy and elevated its authority to a supreme status over the legislature without any constitutional foundation. Consequently, its action has eviscerated an important constitutional check on the judiciary's authority permitting it to adjudicate the conduct of and restrain the legislature in fulfilling its constitutional obligations regarding impeachment of public officers. This Court has previously identified the inherent danger of permitting the judiciary to exercise oversight of the legislature's impeachment authority.

> We agree with the Court of Appeals that opening the door of judicial review to the procedures used by the Senate in trying impeachments would "expose the political life of the country to months, or perhaps years, of chaos." 290 U.S. App. D.C. at 427, 938 F.2d at 246. This lack of finality would manifest itself most dramatically if the President were impeached. The legitimacy of any successor, and hence his effectiveness, would be impaired

> severely, not merely while the judicial process was running its course, but during any retrial that a differently constituted Senate might conduct if its first judgment of conviction were invalidated. Equally uncertain is the question of what relief a court may give other than simply setting aside the judgment of conviction. Could it order the reinstatement of a convicted federal judge, or order Congress to create an additional judgeship if the seat had been filed in the interim?

Nixon, 506 U.S. at 236.

This Court was not exaggerating that danger. By allowing a state court of last resort to eviscerate the separation of powers doctrine and its foundational checks and balances a constitutional crisis may be invited and provoked. The State of West Virginia is entitled to a republican form of government by Article IV of the United States Constitution and this Court is the only entity that can assure the stability of that guarantee.

The Petitioner respectfully prays that this Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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January 8, 2019

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA

[Filed: October 11, 2018]

No. 18-0816

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

Petitioner,

v.

MITCH CARMICHAEL, as President of the Senate;
DONNA J. BOLEY, as President Pro Tempore of the
Senate; RYAN FERNS, as Senate Majority Leader,
LEE CASSIS, Clerk of the Senate; and the
WEST VIRGINIA SENATE,

Respondents.

September 2018 Term

WRIT OF PROHIBITION GRANTED

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Thomas M. Hancock
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ACTING CHIEF JUSTICE JAMES A. MATISH delivered the Opinion of the Court.

ACTING JUSTICE LOUIS H. BLOOM concurs in part and dissents in part and reserves the right to file a separate opinion.

ACTING JUSTICE JACOB E. REGER concurs in part and dissents in part and reserves the right to file a separate opinion.

CHIEF JUSTICE WORKMAN is disqualified.

JUSTICE ALLEN H. LOUGHRY II suspended, therefore not participating

JUSTICE ELIZABETH WALKER is disqualified.

JUSTICE PAUL T. FARRELL sitting by temporary assignment is disqualified.

JUSTICE TIM ARMSTEAD did not participate.

JUSTICE EVAN JENKINS did not participate.

ACTING JUSTICE RUDOLPH J. MURENSKY, II, and ACTING JUSTICE RONALD E. WILSON sitting by temporary assignment.

SYLLABUS BY THE COURT

1. In the absence of legislation providing for an appeal in an impeachment proceeding under Article IV, § 9 of the Constitution of West Virginia, this Court does not have jurisdiction over an appeal of a final decision by the Court of Impeachment.

2. An officer of the state who has been impeached under Article IV, § 9 of the Constitution of West Virginia, may seek redress for an alleged violation of his or her constitutional rights in the impeachment proceedings, by filing a petition for an extraordinary writ under the original jurisdiction of this Court.

3. To the extent that syllabus point 3 of *State ex rel. Holmes v. Clawges*, 226 W. Va. 479, 702 S.E.2d 611 (2010) may be interpreted as prohibiting this Court from exercising its constitutional authority to issue an extraordinary writ against the Legislature when the law requires, it is disapproved.

4. West Virginia Code § 51-9-10 (1991) violates the Separation of Powers Clause of Article V, § 1 of the West Virginia Constitution, insofar as that statute seeks to regulate judicial appointment matters that are regulated exclusively by this Court pursuant to Article VIII, § 3 and § 8 of the West Virginia Constitution. Consequently, W.Va. Code § 51-9-10, in its entirety, is unconstitutional and unenforceable.

5. This Court has exclusive authority and jurisdiction under Article VIII, § 8 of the West Virginia Constitution and the rules promulgated thereunder, to sanction a judicial officer for a violation of a Canon of the West Virginia Code of Judicial Conduct. Therefore, the Separation of Powers Clause of Article V, § 1 of the West Virginia Constitution prohibits the Court of

Impeachment from prosecuting a judicial officer for an alleged violation of the Code of Judicial Conduct.

6. The Due Process Clause of Article III, § 10 of the Constitution of West Virginia requires the House of Delegates follow the procedures that it creates to impeach a public officer. Failure to follow such rules will invalidate all Articles of Impeachment that it returns against a public officer.

Matish, Acting Chief Justice:

The Petitioner, the Honorable Margaret L. Workman, Chief Justice of the Supreme Court of Appeals of West Virginia, brought this proceeding under the original jurisdiction of this Court as a petition for a writ of mandamus that seeks to halt impeachment proceedings against her. The Respondents named in the petition are the Honorable Mitch Carmichael, President of the Senate; the Honorable Donna J. Boley, President Pro Tempore of the Senate; the Honorable Ryan Ferns, Senate Majority Leader; the Honorable Lee Cassis, Clerk of the Senate; and the West Virginia Senate.[1] The Petitioner seeks to have this Court

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[1] It will be noted that the Petitioner failed to name as a respondent the Acting Chief Justice, the Honorable Justice Paul T. Farrell, that is presiding over the impeachment proceeding that she seeks to halt. Ordinarily the judicial officer presiding over a proceeding that is being challenged is named as a party in a proceeding in this Court. However, the omission of Acting Chief Justice Farrell as a named party in this matter is not fatal to the relief that is being requested. Pursuant to rules adopted by the Senate to govern the impeachment proceedings, the Acting Chief Justice was stripped of his judicial authority over motions, objections and procedural questions. This authority was removed under Rule 23(a) of Senate Resolution 203 as follows:

> All motions, objections, and procedural questions made by the parties shall be addressed to the Presiding Officer [Acting Chief Justice], who shall decide the motion, objection, or procedural question: Provided, That a vote to overturn the Presiding Officer's decision on any motion, objection, or procedural question shall be taken, without debate, on the demand of any Senator sustained by one tenth of the Senators present, and an affirmative vote of a majority of the Senators present and voting shall overturn the Presiding Officer's decision on the motion, objection, or procedural question.

prohibit the Respondents from prosecuting her under three Articles of Impeachment returned against her by the West Virginia House of Delegates. The Petitioner has briefed the following issues to support her contention that she is entitled to the relief sought. The Petitioner has alleged several issues which we have distilled to the essence as alleging that the Articles of Impeachment against her violate the Constitution of West Virginia because (1) an administrative rule promulgated by the Supreme Court supersede statutes in conflict with them; (2) the determination of a violation of the West Virginia Code of Judicial Conduct rests exclusively with the Supreme Court; (3) the Articles of Impeachment were filed in violation of provisions of House Resolution 201. Upon careful review of the briefs, the appendix record, and the applicable legal authority, we grant relief as outlined in this opinion.[2]

INTRODUCTION

Although the Petitioner in this matter requested oral argument under Rule 20 of the Rules of Appellate Procedure, and even though this case presents issues of first impression, raises constitutional issues, and is of fundamental public importance, the Respondents, however, waived that right as follows:

As a result of Rule 23(a) Acting Chief Justice Farrell is not an indispensible party to this proceeding.

[2] We are compelled at the outset to note that this Court takes umbrage with the tone of the Respondents brief, insofar as it asserts "that a constitutional crisis over the separation of powers between the Legislature and Judicial Branches" would occur if this Court ruled against them. This Court is the arbiter of the law. Our function is to keep the scales of justice balanced, not tilted in favor of a party out of fear of retribution by that party. We resolve disputes based upon an unbiased application of the law.

> Oral argument is unnecessary because no rule to show cause is warranted. This case presents the straightforward application of unambiguous provisions of the Constitution of West Virginia that, under governing precedent of this Court, the Supreme Court of the United States and courts across the nation unquestionably affirm the West Virginia Senate's role as the Court of Impeachment.

This Court further notes that the Respondents declined to address the merits of the Petitioner's arguments. The Respondents stated the following:

> At the outset, it important to note that Respondents take no position with respect to facts as laid out by Petitioner, or the substantive merits of the legal arguments raised in the Petition. In fact, it is constitutionally impermissible for Respondents to do so, as they are currently sitting as a Court of Impeachment in judgment of Petitioner for the allegations made in the Articles adopted by the House.

The Respondents have not cited to any constitutional provision which prevents them from responding directly or through the Board of Managers (the prosecutors), to the merits of the Petitioner's arguments. It is expressly provided in Rule 16(g) of the Rules of Appellate Procedure that "[i]f the response does not contain an argument in response to a question presented by the petition, the Court will assume that the respondent agrees with the petitioner's view of the issue." In light of the Respondent's waiver of oral argument and refusal to address the merits of the Petitioner's arguments, this Court exercises its discretion to not

require oral argument and will rule upon the written Petition, Response, Reply, and various appendices.[3]

Our forefathers in establishing this Country, as well as the leaders who established the framework for our State, had the forethought to put a procedure in place to address issues that could arise in the future; in the ensuing years that system has served us well. What our forefathers did not envision is the fact that subsequent leaders would not have the ability or willingness to read, understand, or to follow those guidelines. The problem we have today is that people do not bother to read the rules, or if they read them, they decide the rules do not apply to them.

There is no question that a governor, if duly qualified and serving, can call a special session of the Legislature. There is no question that the House of Delegates has the right to adopt a Resolution and Articles of a Bill of Impeachment. There is no question that the Senate is the body which conducts the trial of impeachment and can establish its own rules for that trial and that it must be presided over by a member of this Court. This Court should not intervene with any of those proceedings because of the separation of powers doctrine, and no one branch may usurp the power of any other co-equal branch of government. However, when our constitutional process is violated, this Court must act when called upon.

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[3] This Court is aware that transparency is important. However, the Respondents have closed the door on themselves by declining to have oral arguments and taking the untenable position of not responding to the merits of the arguments. This Court would have appreciated well-researched arguments from the Respondents on the merits of the issues.

Fundamental fairness requires this Court to review what has happened in this state over the last several months when all of the procedural safeguards that are built into this system have not been followed. In this case, there has been a rush to judgment to get to a certain point without following all of the necessary rules. This case is not about whether or not a Justice of the Supreme Court of Appeals of West Virginia can or should be impeached; but rather it is about the fact that to do so, it must be done correctly and constitutionally with due process. We are a nation of laws and not of men, and the rule of law must be followed.

By the same token, the separation of powers doctrine works six ways. The Courts may not be involved in legislative or executive acts. The Executive may not interfere with judicial or legislative acts. So the Legislature should not be dealing with the Code of Judicial Conduct, which authority is limited to the Supreme Court of Appeals.

The greatest fear we should have in this country today is ourselves. If we do not stop the infighting, work together, and follow the rules; if we do not use social media for good rather than use it to destroy; then in the process, we will destroy ourselves.

I. FACTUAL AND PROCEDURAL HISTORY

The Petitioner was appointed as a judge to the Circuit Court of Kanawha County, by former Governor John D. Rockefeller, IV, on November 16, 1981. She was later elected in 1982 by the voters to fill out the remainder of the unexpired term of her appointment. She was subsequently elected again in 1984 for a full term. In 1988, the Petitioner was elected by the voters to fill a vacancy on the West Virginia Supreme Court

of Appeals. She served a full term and left office in 2000. The Petitioner ran again for a position on the Supreme Court in 2008 and won.

In late 2017, the local media began publicizing reports of their investigations into the costs for renovating the offices of the Supreme Court Justices. Those publicized reports led to an investigation by the Legislative Auditor into the spending practices of the Supreme Court in general. The Auditor's office issued a report in April of 2018. This report was focused on the conduct of Justice Allen Loughry and Justice Menis Ketchum. The report concluded that both Justices may have used state property for personal gain in violation of the state Ethics Act. The report indicated that the matter was referred to the West Virginia Ethics Commission for further investigation.[4] In June of 2018 the Judicial Investigation Commission charged Justice Loughry with 32 violations of the Code of Judicial Conduct and the Rules of Professional Conduct. Justice Loughry was subsequently indicted by the federal government on 22 charges.[5]

On June 25, 2018, Governor Jim Justice issued a Proclamation calling the Legislature to convene in a second extraordinary session to consider the following:

> First: Matters relating to the removal of one or more Justices of the Supreme Court of Appeals of West Virginia, including, but not

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[4] The Auditor's office issued a second report involving the Petitioner, Justice Robin Davis and Justice Elizabeth Walker. That report did not recommend an ethics investigation of those Justices.

[5] Additional charges were later brought against Justice Loughry. He was suspended from office.

> limited to, censure, impeachment, trial, conviction, and disqualification; and
>
> Second: Legislation authorizing and appropriating the expenditure of public funds to pay the expenses for the Extraordinary Session.

Pursuant to this Proclamation, the Legislature convened on June 26, 2018, to carry out the task outlined therein.

The record indicates that on June 26, 2018, the House of Delegates adopted House Resolution 201. This Resolution empowered the House Committee on the Judiciary to investigate impeachable offenses against the Petitioner and the other four Justices of the Supreme Court.[6] Under the Resolution, the Judiciary Committee was required to report to the House of Delegates its findings of facts and any recommendations consistent with those findings of fact; and, if the recommendation was that of impeachment of any of the Justices, the Committee had to present to the House of Delegates a proposed resolution of impeachment and proposed articles of impeachment. Upon receipt of a proposed Resolution of Impeachment and Articles of Impeachment by the House of Delegates, Resolution 201 authorized the House to adopt a Resolution of Impeachment and formal articles of impeachment as prepared by the Judiciary Committee, and deliver the same to the Senate for consideration.

The Judiciary Committee conducted impeachment hearings between July 12, 2018 and August 6, 2018. On August 7, 2018, the Judiciary Committee adopted

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[6] On July 11, 2018 Justice Ketchum resigned/retired effective July 27, 2018. As a result of his decision the Judiciary Committee did not consider impeachment offenses against him.

fourteen Articles of Impeachment. The Petitioner was named in four of the Articles of Impeachment. On August 13, 2013, the House of Delegates voted to approve only eleven of the Articles of Impeachment. The Petitioner was impeached on three of the Articles of Impeachment.[7] First, the Petitioner and Justice Davis were named in Article IV,[8] which alleged that they improperly authorized the overpayment of senior-status judges.[9] Second, the Petitioner was named exclusively in Article VI, which alleged that she improperly authorized the overpayment of senior-status judges.[10] Third, the Petitioner was named, along with three other justices, in Article XIV, which set out numerous allegations against them which included charges that they failed to implement various administrative policies and procedures.[11]

Subsequent to the House of Delegates' adoption of the Articles of Impeachment they were submitted to the Senate for the purpose of conducting a trial. On August 20, 2018 the Senate adopted Senate Resolution 203, which set forth the rules of procedure for the impeachment trial. A pre-trial conference was held on September 11, 2018. At that conference the Petitioner, Justice Walker, and the Board of Managers submitted a "Proposed Stipulation and Agreement of Parties"

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[7] Justice Walker was named in 1 Article; Justice Davis was named in 4 Articles; and Justice Loughry was named in 7 Articles.

[8] Justice Davis retired from office on August 13.

[9] The text of the Article is set out in the Discussion section of the opinion.

[10] The text of the Article is set out in the Discussion section of the opinion.

[11] The text of the Article is set out in the Discussion section of the opinion.

that would have required the charges against both of them be dismissed.[12] The Senate voted to reject the settlement offer. Thereafter Acting Chief Justice Farrell set a separate trial date for the Petitioner on October 15, 2018. The Petitioner subsequently filed this proceeding to have the Articles of Impeachment against her dismissed.

II. THIS COURT'S JURISDICTION TO ADDRESS CONSTITUTIONAL ISSUES ARISING FROM THE COURT OF IMPEACHMENT

Before we examine the merits of the issues presented we must first determine whether this Court has jurisdiction over issues arising out of a legislative impeachment proceeding. The Respondents contend that this Court does not have jurisdiction over the impeachment proceeding.[13] This is an issue of first impression for this Court.

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[12] The Board of Managers are "a group of members of the House of Delegates authorized by that body to serve as prosecutors before the Senate in a trial of impeachment." Rule 1, Senate Resolution 203.

[13] One of the arguments made by the Respondents is that this Court should not address the merits of the Petitioner's arguments, because she has raised a similar challenge to the Articles of Impeachment in the proceeding pending before them that has not been ruled upon. Ordinarily this Court would defer to a lower tribunals ruling on a matter before this Court will address it. However, we have carved out a narrow exception to this general rule. In this regard, we have held that "[a] constitutional issue that was not properly preserved at the trial court level may, in the discretion of this Court, be addressed on appeal when the constitutional issue is the controlling issue in the resolution of the case." Syl. pt. 2, *Louk v. Cormier*, 218 W.Va. 81, 622 S.E.2d 788 (2005). See *Simpson v. W. Virginia Office of Ins. Com'r*, 223 W. Va. 495, 504, 678 S.E.2d 1, 10 (2009) ("Nevertheless, we may consider this constitutional issue for the

Resolution of this issue requires an analysis of constitutional principles. In undertaking our analysis we are reminded that the United States Supreme Court stated in *Baker v. Carr*, 369 U.S. 186, 211, 82 S.Ct. 691, 706, 7 L.Ed.2d 663 (1962), that the determination of whether a matter is exclusively committed by the constitution to another branch of government "is itself a delicate exercise in constitutional interpretation and is a responsibility of this Court as ultimate interpreter of the Constitution." We are also guided by the principle that

> A constitution is the fundamental law by which all people of the state are governed. It is the very genesis of government. Unlike ordinary legislation, a constitution is enacted by the people themselves in their sovereign capacity and is therefore the paramount law.

State ex rel. Smith v. Gore, 150 W.Va. 71, 77, 143 S.E.2d 791, 795 (1965). Further,

> It is axiomatic that our Constitution is a living document that must be viewed in light of modern realities. Reasonable construction of our Constitution . . . permits evolution and adjustment to changing conditions as well as to a varied set of facts . . . . The solution [to

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first time on appeal because it is central to our resolution of this case."); *State v. Allen*, 208 W. Va. 144, 151 n.12, 539 S.E.2d 87, 94 n.12 (1999) ("this Court may, under the appropriate circumstances, consider an issue initially presented for consideration on appeal."). We exercise our discretion to address the merits of the constitutional issues presented in this matter. See also, *State ex rel. Bd. of Educ. of Kanawha Cty. v. Casey*, 176 W. Va. 733, 735, 349 S.E.2d 436, 438 (1986) (recognizing that exhaustion of an alternative remedy is not required "where resort to available procedures would be an exercise in futility.").

> problems of constitutional interpretation] must be found in a study of the specific provision of the Constitution and the best method [under current conditions] to further advance the goals of the framers in adopting such a provision.

State ex rel. McGraw v. Burton, 212 W. Va. 23, 36, 569 S.E.2d 99, 112 (2002) (internal quotation marks and citation omitted).

As an initial matter, we observe that "[q]uestions of constitutional construction are in the main governed by the same general rules applied in statutory construction." Syl. pt. 1, *Winkler v. State Sch. Bldg. Auth.*, 189 W.Va. 748, 434 S.E.2d 420 (1993). We have held that "[t]he object of construction, as applied to written constitutions, is to give effect to the intent of the people in adopting it." Syl. pt. 3, *Diamond v. Parkersburg—Aetna Corp.*, 146 W.Va. 543, 122 S.E.2d 436 (1961). This Court held in syllabus point 3 of *State ex rel. Smith v. Gore*, 150 W. Va. 71, 143 S.E.2d 791 (1965) that "[w]here a provision of a constitution is clear in its terms and of plain interpretation to any ordinary and reasonable mind, it should be applied and not construed." Therefore, "[i]f a constitutional provision is clear in its terms, and the intention of the electorate is clearly embraced in the language of the provision itself, this Court must apply and not interpret the provision." Syl. pt. 1, *State ex rel. Trent v. Sims*, 138 W.Va. 244, 77 S.E.2d 122 (1953). On the other hand, "if the language of the constitutional provision is ambiguous, then the ordinary principles employed in statutory construction must be applied to ascertain such intent." *State ex rel. Forbes v. Caperton*, 198 W.Va. 474, 480, 481 S.E.2d 780, 786 (1996) (internal quotations and citations omitted). An ambiguous provision in a constitution "requires interpretation

consistent with the intent of both the drafters and the electorate." *State ex rel. Brotherton v. Blankenship*, 157 W. Va. 100, 127, 207 S.E.2d 421, 436-437 (1973). Although we are empowered with the authority "to construe, interpret and apply provisions of the Constitution, . . . [we] may not add to, distort or ignore the plain mandates thereof." *State ex rel. Bagley v. Blankenship*, 161 W.Va. 630, 643, 246 S.E.2d 99, 107 (1978).

It is axiomatic that "in every case involving the application or interpretation of a constitutional provision, analysis must begin with the language of the constitutional provision itself." *State ex rel. Mountaineer Park*, *Inc. v. Polan*, 190 W.Va. 276, 283, 438 S.E.2d 308, 315 (1993). The framework for impeaching and removing an officer of the state is set out under Article IV, § 9 of the Constitution of West Virginia. The full text of Section 9 provides as follows:

> Any officer of the state may be impeached for maladministration, corruption, incompetency, gross immorality, neglect of duty, or any high crime or misdemeanor. The House of Delegates shall have the sole power of impeachment. 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, or, if from any cause it be improper for him to act, then any other judge of that court,[14] to be designated by

[14] "Prior to the Judicial Reorganization Amendment [of 1974], the Justices of the Court were referred to as 'Judges' and the

> it, shall preside; and the senators shall be on oath or affirmation, to do justice according to law and evidence. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold any office of honor, trust or profit, under the state; but the party convicted shall be liable to indictment, trial judgment, and punishment according to law. The Senate may sit during the recess of the Legislature, for the trial of impeachments.

Pursuant to Section 9 "[t]he House of Delegates has the sole power of impeachment, and the Senate the sole power to try impeachments." *Slack v. Jacob*, 1875 W.L. 3439, 8 W. Va. 612, 664 (1875). To facilitate the trial of an impeachment proceeding Section 9 created a Court of Impeachment.

It is clear from the text of Section 9 that it does not provide this Court with jurisdiction over an appeal of a final decision by the Court of Impeachment.[15] Consequently, and we so hold, in the absence of legislation providing for an appeal in an impeachment proceeding under Article IV, § 9 of the Constitution of West Virginia, this Court does not have jurisdiction over an appeal of a final decision by the Court of Impeachment.

Chief Justice was referred to as 'President.' *State v. McKinley*, 234 W. Va. 143, 150 n.3, 764 S.E.2d 303, 310 n.3 (2014).

[15] The Constitution of West Virginia grants authority to the Legislature to provide appellate jurisdiction to this Court for areas of law that are not set out in the constitution. See W.Va. Const. Art. VIII, § 3 ([The Supreme Court] "shall have such other appellate jurisdiction, in both civil and criminal cases, as may be prescribed by law.").

Although it is clear that an appeal is not authorized from a decision by the Court of Impeachment, we do find under the plain language of Section 9, the actions or inactions of the Court of Impeachment may be subject to a proceeding under the original jurisdiction of this Court.[16] 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. We have recognized that "[t]he word 'shall,' . . . should be afforded a mandatory connotation[,] and when used in constitutions and statutes, [it] leaves no way open for the substitution of discretion." *Silveti v. Ohio Valley Nursing Home*, *Inc.*, 240 W. Va. 468, 813 S.E.2d 121, 125 (2018) (internal quotation marks and citations omitted). See Syl. pt. 3, *State ex rel. Trent v. Sims*, 138 W.Va. 244, 77 S.E.2d 122 (1953) ("As used in constitutional provisions, the word 'shall' is generally used in the imperative or mandatory sense."). 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.[17]

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[16] Article VIII, § 3 of the Constitution of West Virginia provides that "[t]he supreme court of appeals shall have original jurisdiction of proceedings in habeas corpus, mandamus, prohibition and certiorari."

[17] It must be clearly understood that the Law and Evidence Clause is not superfluous language. Under the 1863 Constitution of West Virginia the impeachment provision was set out in Article III, § 10. The original version of the impeachment provision did

not contain a Law and Evidence Clause. The 1863 version of the impeachment provision read as follows:

> Any officer of the State may be impeached for maladministration, corruption, incompetence, neglect of duty, or any high crime or misdemeanor. The house of delegates shall have the sole power of impeachment. The senate shall have the sole power to try impeachments. When sitting for that purpose, the senators shall be on oath or affirmation; and no persons shall be convicted without the concurrence of two-thirds of the members present. Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold any office of honor, trust or profit, under the State; but the party convicted shall, nevertheless, be liable and subject to indictment, trial judgment, and punishment according to law. The Senate may sit during the recess of the legislature, for the trial of impeachments.

The Law and Evidence Clause was specifically added to the impeachment provision in the constitution of 1872. The affirmative creation and placement of the Law and Evidence Clause in the new constitution supports the significance this Court has given to that clause. A similar Law and Evidence Clause appears in the impeachment laws of 11 states. See Ariz. Const. Art. VIII, Pt. 2 § 1 (1910); Colo. Const. Art. XIII, § 1 (1876); Kan. Const. Art. II, § 27 (1861); Md. Const. Art. III, § 26 (1867); Miss. Const. Art. 4, § 49 (1890); Nev. Const. Art. VII, § 1 (1864); N.D. Cent. Code Ann. § 44-09-02 (1943); Ohio Const. Art. II, § 23 (1851); Utah Const. Art. VI, § 18 (1953); Wash. Const. Art. V, § 1 (1889); Wyo. Const. Art. III, § 17 (2016). There does not appear to be any judicial decisions from those jurisdictions addressing the application of the Law and Evidence Clause. It is also worth noting that under the 1863 Constitution of West Virginia there was no provision for a presiding judicial officer. The 1872 Constitution of West Virginia added the provision requiring a judicial officer preside over an impeachment proceeding. This requirement is further evidence that an impeachment proceeding was not beyond the jurisdiction of this Court, insofar as it solidified the quasi-judicial nature of the proceeding.

The implicit right of redress in the courts found in the Law and Evidence Clause, is expressly provided for in Article III, § 17 of the Constitution of West Virginia. Section 17 provides as follows:

> The courts of this state shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay.

The Certain Remedy Clause of Section 17 has been found to mean that "[t]he framers of the West Virginia Constitution provided citizens who have been wronged with rights to pursue a remedy for that wrong in the court system." *Bias v. E. Associated Coal Corp.*, 220 W. Va. 190, 204, 640 S.E.2d 540, 554 (2006) (Stancher, J., dissenting). See *O'Neil v. City of Parkersburg*, 160 W.Va. 694, 697, 237 S.E.2d 504, 506 (1977) ("[T]he concept of American justice . . . pronounces that for every wrong there is a remedy. It is incompatible with this concept to deprive a wrongfully injured party of a remedy[.]"); *Gardner v. Buckeye Say. & Loan Co.*, 108 W.Va. 673, 680, 152 S.E. 530, 533 (1930) ("It is the proud boast of all lovers of justice that for every wrong there is a remedy."); *Lambert v. Brewster*, 97 W.Va. 124, 138, 125 S.E. 244, 249 (1924) ("As for public policy, the strongest policy which appeals to us is that fundamental theory of the common law that for every wrong there should be a remedy."). In the leading treatise on the Constitution of West Virginia, the following is said,

> The second clause of section 17, providing that all persons "shall have remedy by due course of law" . . . limits . . . the ability of the government to constrict an individual's right to invoke the judicial process[.]

Robert M. Bastress, *The West Virginia State Constitution*, at 124 (2011).

This Court has held that "enforcement of rights secured by the Constitution of this great State is engrained in this Court's inherent duty to neutrally and impartially interpret and apply the law." *State ex rel. Biafore v. Tomblin*, 236 W. Va. 528, 544, 782 S.E.2d 223, 239 (2016). That is, "[c]ourts are not concerned with the wisdom or expediencies of constitutional provisions, and the duty of the judiciary is merely to carry out the provisions of the plain language stated in the constitution." Syl. pt. 3, *State ex rel. Casey v. Pauley*, 158 W.Va. 298, 210 S.E.2d 649 (1975).

Insofar as an officer of the state facing impeachment in the Court of Impeachment has a constitutional right to seek redress for an alleged violation of his or her rights by that court, we now hold that an officer of the state who has been impeached under Article IV, § 9 of the Constitution of West Virginia, may seek redress for an alleged violation of his or her constitutional rights in the impeachment proceedings, by filing a petition for an extraordinary writ under the original jurisdiction of this Court.[18] See *Kinsella v. Jaekle*, 192

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[18] The Respondents have argued in a footnote of their brief that "the Impeachment Clause vests absolute discretion in the context of impeachment in the Legislature." The Respondents cite to the decision in *Goff v. Wilson*, 32 W. Va. 393, 9 S.E. 26 (1889) as support for that proposition. *Golf* does not support the proposition and is not remotely relevant to this case. In *Goff the* petitioner wanted this Court to declare that he received the highest number of votes for the office of governor, before the Legislature carried out its duties in certifying the results of the election. We declined to intervene because no authority permitted this Court to intervene. Contrary to the Respondents' assertion, that the Legislature has absolute discretion in impeachment matters, the Law and

Conn. 704, 723, 475 A.2d 243, 253 (1984) ("A court acting under the judicial power of . . . the constitution may exercise jurisdiction over a controversy arising out of impeachment proceedings only if the legislature's action is clearly outside the confines of its constitutional jurisdiction to impeach any executive or judicial officer; or egregious and otherwise irreparable violations of state or federal constitutional guarantees are being or have been committed by such proceedings."); *Smith v. Brantley*, 400 So. 2d 443, 449 (Fla. 1981) ("The issue of subject matter jurisdiction for impeachment is properly determined by the judiciary, of course. Our conclusion on this question is that one must be such an officer to be impeachable."); *Dauphin County Grand Jury Investigation Proceedings*, 332 Pa. 342, 345, 2 A.2d 802, 803 (1938) ("the courts have no jurisdiction in impeachment proceedings, and no control over their conduct, *so long as actions taken are within constitutional lines.")* (emphasis added); *People ex rel. Robin v. Hayes*, 82 Misc. 165, 172-73, 143 N.Y.S. 325, 330 (Sup. Ct. 1913) ("[A court] has no jurisdiction to inquire into the sufficiency of charges for which a Governor may be impeached, nor, I take it, whether the proceedings looking to that end were properly conducted, *unless at their foundation*, *in their exercise*, *constitutional guaranties are broken down or limitations ignored.")* (emphasis added).[19]

Evidence Clause of the constitution strips the Legislature of "absolute" discretion in such matters.

[19] This is not the first time that we have permitted access to this Court, under our original jurisdiction, when no right of appeal existed from a quasi-judicial proceeding. For example, a litigant in the former Court of Claims had no right to appeal a decision from that tribunal. However, this Court found that con-

It will be noted that this Court held in syllabus point 3 of *State ex rel. Holmes v. Clawges*, 226 W. Va. 479, 702 S.E.2d 611 (2010) that "[u]nder the Separation of Powers doctrine, Article V, Section 1 of the Constitution of West Virginia, courts have no authority—by mandamus, prohibition, contempt or otherwise—to interfere with the proceedings of either house of the Legislature." This holding is not applicable to the issue under consideration in the instant matter.[20] In *Holmes* the Court was called upon to address the issue of a circuit court issuing an order that required the Clerk of the Senate and the Clerk of the House of Delegates remove references to a pardon by the Governor in the official journals of the Senate and the House of Delegates. When the Clerks refused to obey the order,

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stitutional principles permitted access to this Court under our original jurisdiction:

> [T]his Court obviously may review decisions of the court of claims under the original jurisdiction granted by article VIII, section 2 of our Constitution, through proceedings in mandamus, prohibition, or certiorari. Review in this fashion is necessary because the court of claims is not a judicial body, but an entity created by and otherwise accountable only to the Legislature, and judicial recourse must be available to protect basic principles of separation of powers.

G.M. McCrossin, Inc. v. W. Virginia Bd. of Regents, *177* W. Va. 539, 541 n.3, 355 S.E.2d 32, 33 n.3 (1987). See Syl. pt. 3, *City of Morgantown v. Ducker*, 153 W. Va. 121, 121, 168 S.E.2d 298, 299 (1969) ("Mandamus is the proper remedy to require the State Court of Claims to assume jurisdiction of a monetary claim against the Board of Governors of West Virginia University."). The Court of Claims was renamed in 2017 and is now called the "West Virginia Legislative Claims Commission." See W. Va. Code § 14-2-4 (2017).

[20] The Respondents cited to this case three times in their brief, but did not provide any discussion of the case.

the circuit court issued a rule to show cause as to why they should not be held in contempt. This Court determined that the judicial order encroached on the exclusive authority of the Legislature to maintain journals:

> [T]he Clerks argue that it is beyond the authority of a circuit court to compel them to alter the Journals, whether in their printed form or in their electronic form published on the internet. The Clerks generally assert that the circuit court exceeded its jurisdiction, because the Journals are a protected legislative function under the Constitution of West Virginia. The Constitution of West Virginia vests the State's legislative power in a Senate and a House of Delegates. W.Va. Const., Art. VI, § 1. Each house of the Legislature is charged with determining its own internal rules for its proceedings and with choosing its own officers. W.Va. Const., Art. VI, § 24.
>
> The Constitution mandates that each house must keep and publish a "journal of its proceedings." Article VI, Section 41 states:
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> > Each house shall keep a journal of its proceedings, and cause the same to be published from time to time, and all bills and joint resolutions shall be described therein, as well by their title as their number, and the yeas and nays on any question, if called for by one tenth of those present shall be entered on the journal.
>
> A variation of this mandate has been in our Constitution since the founding of our State in 1863. The founding fathers indicated dur-

> ing the constitutional convention that there are two goals underlying this provision: to ensure that the votes of legislators arc correctly recorded, and to make a public record of the actions of legislators.

Holmes, 226 W. Va. at 483-84, 702 S.E.2d at 615-16. The facts giving rise to syllabus point 3 in *Holmes* clearly establish the limitations of that syllabus point. That is, the facts of the case concerned a trial court interfering in legislative administrative matters when no legal authority permitted such interference. Neither the opinion nor syllabus point 3 were intended to limit the authority of this Court to entertain an extraordinary writ against the Legislature when the law permits. For example, the case of *State ex rel. Cooper v. Tennant*, 229 W. Va. 585, 730 S.E.2d 368 (2012) involved several consolidated actions for prohibition and mandamus against the Speaker of the House of Delegates and government officials concerning the constitutionality of redistricting. This Court denied the writs and in doing so held that

> In the absence of constitutional infirmity, as the precedent evaluated above irrefutably establishes, the development and implementation of a legislative redistricting plan in the State of West Virginia are entirely within the province of the Legislature. The role of this Court is limited to a determination of whether the Legislature's actions have violated the West Virginia Constitution.

Cooper, 229 W. Va. at 614, 730 S.E.2d at 397. See *State ex rel. W. Virginia Citizen Action Grp. v. Tomblin*, 227 W. Va. 687, 715 S.E.2d 36 (2011) (granting mandamus in part against the Governor, Speaker of the House of Delegates and other government officials requiring

a special election be called); *State ex rel. League of Women Voters of W. Virginia v. Tomblin*, 209 W. Va. 565, 578, 550 S.E.2d 355, 368 (2001) (finding that mandamus would be issued against the President of the Senate, Speaker of the House of Delegates and other government officials that required "the Legislature to only include as part of the budget digest information that has been the subject of discussion, debate, and decision prior to final legislative enactment of the budget bill."); *State ex rel. Meadows v. Hechler*, 195 W. Va. 11, 19, 462 S.E.2d 586, 594 (1995) granting mandamus against the President of the Senate and Speaker of the House of Delegates that required "the Legislature to promptly draft legislation to replace the unconstitutional section of article 29A and additionally, to consider passage of legislation that would exempt certain administrative regulations from conformance with APA implementation requirements, such as where compliance with federal law is mandated."). In view of the foregoing, we hold that to the extent that syllabus point 3 of *State ex rel. Holmes v. Clawges*, 226 W. Va. 479, 702 S.E.2d 611 (2010) may be interpreted as prohibiting this Court from exercising its constitutional authority to issue an extraordinary writ against the Legislature when the law requires, it is disapproved.

The Respondents have cited to the decision in *Nixon v. United States*, 506 U.S. 224, 113 S. Ct. 732, 122 L. Ed. 2d 1 (1993) as authority for the proposition that the judiciary does not have jurisdiction over impeachment proceedings. In *Nixon*, a federal district judge was impeached and removed from office, in a proceeding in which the United States Senate allowed a committee to take testimony and gather evidence. The former judge filed a declaratory judgment action in a district court seeking a ruling that the Senate's

failure to hold a full evidentiary hearing before the entire Senate violated its constitutional duty to "try" all impeachments. The District Court denied relief and dismissed the case. The Court of Appeals affirmed. The United States Supreme Court granted certiorari to determine whether the constitutional requirement that the Senate "try" cases of impeachment precludes the use of a committee to hear evidence. The opinion held that the issue presented could not be brought in federal court. The Court reasoned as follows:

> We agree with the Court of Appeals that opening the door of judicial review to the procedures used by the Senate in trying impeachments would "expose the political life of the country to months, or perhaps years, of chaos." This lack of finality would manifest itself most dramatically if the President were impeached. The legitimacy of any successor, and hence his effectiveness, would be impaired severely, not merely while the judicial process was running its course, but during any retrial that a differently constituted Senate might conduct if its first judgment of conviction were invalidated. Equally uncertain is the question of what relief a court may give other than simply setting aside the judgment of conviction. Could it order the reinstatement of a convicted federal judge, or order Congress to create an additional judgeship if the seat had been filled in the interim?

Nixon, 506 U.S. at 236, 113 S. Ct. at 739.

The decision in *Nixon* is not controlling and is distinguishable. See *Peters v. Narick*, 165 W. Va. 622, 628 n.13, 270 S.E.2d 760, 764 n.13 (1980), modified on other grounds by *Israel by Israel v. W. Virginia*

Secondary Sch. Activities Comm'n, 182 W. Va. 454, 388 S.E.2d 480 (1989) ("States have the power to interpret state constitutional guarantees in a manner different than the United States Supreme Court has interpreted comparable federal constitutional guarantees."). The narrowly crafted text of the impeachment provision found in the Constitution of the United States prevented the Supreme Court from finding a basis for allowing a constitutional challenge to the impeachment procedure adopted by the Senate. The text of the federal impeachment provision is found in Article I, § 3 of the Constitution of the United States and provides the following:

> 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.
>
> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

It is clear that Article 1, § 3 does not contain the Law and Evidence Clause that is found in Article IV, § 9 of the Constitution of West Virginia. Therefore, our constitution provides greater impeachment protections

than the Constitution of the United States.[21] See *State ex rel. KM v. W. Virginia Dept of Health & Human Res.*, 212 W. Va. 783, 794 n.15, 575 S.E.2d 393, 404 n.15 (2002) ("it is clear that our Constitution may offer greater protections than its federal counterpart"); *State ex rel. Carper v. W. Virginia Parole Bd.*, 2Q3 W. Va. 583, 590 n.6, 509 S.E.2d 864, 871 n.6 (1998) ("This Court has determined repeatedly that the West Virginia Constitution may be more protective of individual rights than its federal counterpart."); *State v. Bonham*, 173 W. Va. 416, 418, 317 S.E.2d 501, 503 (1984) ("[T]he United States Supreme Court has also recognized that a state supreme court may set its own constitutional protections at a higher level than that accorded by the federal constitution. There are a number of cases where state supreme courts have set a higher level of protection under their own constitutions."); Syl. pt.2, *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979) ("The provisions of the Constitution of the State of West Virginia may, in certain instances, require higher standards of protection than afforded by the Federal Constitution."). Moreover, *Nixon* was not called upon to address the substantive type of issues presented in this case. The case was focused upon the right of the Senate to craft rules of procedure for impeachment.

The Respondents have cited to the decision in *In re Judicial Conduct Comm.*, 145 N.H. 108, 111, 751 A.2d 514, 516 (2000). In that case the New Hampshire House Judiciary Committee began an impeachment investigation into conduct by the state Supreme Court chief justice and other members of that court. The

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[21] Even the Respondents have conceded in their brief that "West Virginia's Impeachment Clause is significantly broader than its counterpart in the United States Constitution."

state Supreme Court Committee on Judicial Conduct filed a motion seeking an order requiring the House Committee to allow it to attend any House Committee deposition of any Judicial Conduct member or employee. The state Supreme Court held that the issue presented was a nonjusticiable political question and therefore denied relief. However, the opinion was clear in holding that the judiciary had authority to intervene in an impeachment proceeding:

> The [House Judiciary Committee] first argues that the judicial branch lacks jurisdiction over any matter related to a legislative impeachment investigation. We disagree.
>
> > The investigative power of the Legislature, however penetrating and persuasive its scope, is not an absolute right but, like any right, is "limited by the neighborhood of principles of policy which are other than those on which [that] right is founded, and which become strong enough to hold their own when a certain point is reached." United States v. Rumely, 345 U.S. 41, 44 [73 S.Ct. 543, 97 L.Ed. 770]; Hudson Water Co. v. McCarter, 209 U.S. 349, 355 [28 S.Ct. 529, 52 L.Ed. 828]. The contending principles involved here are those underlying the power of the Legislature to investigate on the one hand and those upon which are based certain individual rights guaranteed to our citizens by the State and National Constitutions.
>
> *Nelson v. Wyman*, 99 N.H. 33, 41, 105 A.2d 756, 764 (1954).

* * *

> The court system is available for adjudication of issues of constitutional or other fundamental rights . . . . In such circumstances, Part I, Article 17 of the New Hampshire Constitution does not deprive persons whose rights are violated from seeking judicial redress simply because the violation occurs in the course of an impeachment investigation.
>
> * * *
>
> The constitutional authority of the House of Representatives to conduct impeachment proceedings without interference from the judicial branch is extensive, but not so extensive as to preclude this court's jurisdiction to hear matters arising from legislative impeachment proceedings. "It is the role of this court in our co-equal, tripartite form of government to interpret the Constitution and to resolve disputes arising under it." *Petition of Mone*, 143 N.H. at 133, 719 A.2d at 631 (quoting *Monier*, 122 N.H. at 476, 446 A.2d at 455; citing *Merrill v. Sherburne*, 1 N.H. 199, 201-02 (1818)). However, upon briefing and argument, it is apparent that the specific issue raised by the JCC is nonjusticiable. Accordingly, the JCC's request for its special counsel to attend HJC depositions of JCC members and employees is denied.

In re Judicial Conduct, 145 N.H. at 110-113, 751 A.2d at 515. Although the Respondents cited to the decision in *In re Judicial Conduct*, it is clear that the constitutional principles of law discussed in the case are consistent with this Court's ruling, i.e., the judiciary may intervene in an impeachment proceeding to protect constitutional rights.

The Respondents cited to the decision in *Larsen v. Senate of Pennsylvania*, 166 Pa. Cmwlth. 472, 646 A.2d 694 (1994) without any discussion. In *Larsen* a former justice on the state Supreme Court was sentenced to removal from office by a trial court after he was found guilty of an infamous crime. The former justice filed for a preliminary injunction to prevent a senate impeachment trial and asserted numerous grounds for relief, that included: (1) he was no longer in office and could not be removed by the senate, (2) senate rules were unconstitutional, (3) the senate could not permit a committee to hear the case, and (4) he was denied sufficient time to prepare. The court, relying on the decision in *Nixon*, found that the state's impeachment clause was similar to the federal clause and therefore denied relief. However, the opinion noted that the decision by the state Supreme Court decision in *Dauphin County Grand Jury Investigation Proceedings*, 332 Pa. 342, 345, 2 A.2d 802, 803 (1938) held that "the courts have no jurisdiction in impeachment proceedings and no control over their conduct, so long as actions taken are within constitutional lines . . ." *Larsen*, 166 Pa. Cmwlth. at 482, 646 A.2d at 699. The opinion limited *Dauphin's* qualification on judicial intervention to impeachment proceedings that had ended. The decision in *Larsen* is distinguishable because that state's impeachment clause was aligned with the federal impeachment clause, and did not have a Law and Evidence Clause like the Constitution of West Virginia. Moreover, Larsen recognized that it could not overrule the state Supreme Court's ruling in *Dauphin*, which left open the door for intervention in an impeachment proceeding for "actions [not] taken within constitutional lines." *Larsen* limited intervention to post-impeachment.

The Respondents have also cited to the decision in *Mecham v. Arizona House of Representatives*, 162 Ariz. 267, 782 P.2d 1160 (1989). In that case the state Governor filed a petition for injunctive relief with the state Supreme Court, to prevent the state senate from conducting an impeachment trial against him until his criminal trial was over. The Governor also challenged the impeachment procedures. The state Supreme Court denied relief as follows:

> [W]e can only conclude that the power of impeachment is exclusively vested in the House of Representatives and the power of trial on articles of impeachment belongs solely to the Senate. The Senate's task is to determine if the Governor should be removed from office. Aside from disqualification from holding any other state position of "honor, trust, or profit," the Senate can impose no greater or lesser penalty than removal and can impose no criminal punishment. Trial in the Senate is a uniquely legislative and political function. It is not judicial.

Mecham, 156 Ariz. at 302, 751 P.2d at 962. The decision in *Mecharn* is factually distinguishable because it did not involve allegations of a violation of substantive constitutional rights. More importantly, even though the court in *Mecham* denied the requested relief, it made clear that the judiciary could intervene in an impeachment proceeding to protect the constitutional rights of an impeached official:

> This Court does have power to ensure that the legislature follows the constitutional rules on impeachment. For instance, should the Senate attempt to try a state officer without the House

> first voting articles of impeachment, we would not hesitate to invalidate the results.

Mecham, 156 Ariz. at 302-303, 751 P.2d at 962-963. See *Mecham v. Gordon*, 162 Ariz. 267, 782 P.2d 1160 (1989) (declining to review impeachment of state Governor because constitutional requirements were met).

In the instant proceeding the Petitioner has alleged that the impeachment charges brought against her are unlawful and violate her constitutional rights. In view of the above analysis, we have jurisdiction to consider the validity of these allegations.[22]

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[22] The Respondents have argued that intervention in the impeachment proceeding violates the Guarantee Clause of the federal constitution. This clause provides as follows: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." U.S. Conts. Art. IV, § 4. The Respondents contend that the Guarantee Clause requires that a state have "separate and coequal branches" of government. In a convoluted manner the Respondents contend that this Court's intervention in this matter would destroy the "separate and coequal branches" of government. The Respondents have not cited to an opinion by any court in the country that supports the proposition that issuance of a writ against another branch of government violates the Guarantee Clause. See *New York v. United States*, 505 U.S. 144, 184, 112 S. Ct. 2408, 2432, 120 L. Ed. 2d 120 (1992) ("In 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 under the 'political question' doctrine."). We find no merit in the contention. Further, the issue of the separation of powers doctrine is fully addressed in the Discussion section of this opinion.

III. STANDARD OF REVIEW

The Petitioner filed this matter seeking a writ of mandamus to prohibit enforcement of the Articles of Impeachment filed against her. This Court has explained that the function of mandamus is "the enforcement of an established right and the enforcement of a corresponding imperative duty created or imposed by law." *State ex rel. Ball v. Cummings*, 208 W. Va. 393, 398, 540 S.E.2d 917, 922 (1999). It was held in syllabus point two of *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969) that

> A writ of mandamus will not issue unless three elements coexist—(l) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.

In our review of the type of relief the Petitioner seeks we do not believe that mandamus is the appropriate remedy. "In appropriate situations, this Court has chosen to treat petitions for extraordinary relief according to the nature of the relief sought rather than the type of writ pursued." *State ex rel. TermNet Merch. S'ervs., Inc. v. Jordan*, 217 W. Va. 696, 699, 619 S.E.2d 209, 212 (2005). See *State ex rel. Potter v. Office of Disciplinary Counsel of State*, 226 W. Va. 1, 2 n.1, 697 S.E.2d 37, 38 n.1 (2010) ("this Court has, in past cases, treated a request for relief in prohibition as a petition for writ of mandamus if so warranted by the facts. Accordingly, we consider the present petition as a request for mandamus relief."); *State ex rel. Beirne v. Smith*, 214 W. Va. 771, 774, 591 S.E.2d 329, 332 (2003) ("Although Mr. Bradley brought his case as a petition for a writ of prohibition, while Mr. Beirne requested a

writ of mandamus, we choose to treat each as a petition for a writ of mandamus, because both petitioners wish to compel the Commissioner to do an affirmative act, i.e., pay benefits."); *State ex rel. Wyant v. Brotherton*, 214 W. Va. 434, 437, 589 S.E.2d 812, 815 (2003) ("Because we find this case to be in the nature of prohibition as opposed to mandamus, we will henceforth treat it as a petition for writ of prohibition."); *State ex rel. Riley v. Rudloff*, 212 W. Va. 767, 771-72, 575 S.E.2d 377, 381-82 (2002) ("This case was initially brought as a petition for writ of habeas corpus and/or mandamus. We granted the writ of habeas corpus, leaving for resolution only issues related to mandamus. Upon further consideration of the issues herein raised, however, we choose (as we have done in many appropriate cases) to treat this matter as a writ of prohibition."); *State ex rel. Sandy v. Johnson*, 212 W. Va. 343, 346, 571 S.E.2d 333, 336 (2002) ("Although this case was brought and granted as a petition for a writ of prohibition, we choose to treat it as a writ of mandamus action."); *State ex rel. Conley v. Hill*, 199 W.Va. 686, 687 n. 1, 487 S.E.2d 344, 345 n. 1 (1997) ("Although this case was brought and granted as a petition for mandamus, we choose to treat this matter as a writ of prohibition.").

In light of the issues raised by the Petitioner, we find that the more appropriate relief lies in a writ of prohibition. As a quasi-judicial body the Court of Impeachment is subject to the writ of prohibition. See *State ex rel. York v. W. Virginia Office of Disciplinary Counsel*, 231 W. Va. 183, 187 n.5, 744 S.E.2d 293, 297 n.5 (2013) ("prohibition lies against only judicial and 'quasi-judicial tribunals'[.]"); *Lewis v. Ho-Chunk Nation Election Bd.*, No. CV 06-109, 2007 WL 5297075 (Ho-Chunk Trial Ct. Apr. 17, 2007) ("Therefore, the House may institute a case against a sitting president

after determining probable cause of official wrongdoing, and, through designated managers, present the matter before the Senate, which assumes a quasi-judicial role in hearing and deliberating the charges."); *Mayor & City Council of Baltimore ex rel. Bd. of Police of City of Baltimore*, 1860 WL 3363, 15 Md. 376, 459 (1860) ("the present Constitution, invested the Legislature with quasi judicial functions, in exercising the power of impeachment and punishment, as therein provided."). The purpose of the writ is "to restrain inferior courts *from proceeding in causes over which they have no jurisdiction[.]*" Syl. pt. 1, in part, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953) (emphasis added). "The writ [of prohibition] lies as a matter of right whenever the inferior court (a) has not jurisdiction or (b) has jurisdiction but exceeds its legitimate powers and it matters not if the aggrieved party has some other remedy adequate or inadequate." *State ex rel. Nelson v. Frye*, 221 W. Va. 391, 394, 655 S.E.2d 137, 140 (2007) (internal citation and quotation marks omitted). See W. Va. Code § 53-1-1 (1923) ("The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.").

In syllabus point 4 of *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996), we set forth the following guideline for issuance of a writ of prohibition that does not involve lack of jurisdiction:

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court

> will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

With the foregoing in mind, we turn to the merits of the case.

IV. DISCUSSION

The Petitioner has presented several issues that she contends ultimately require the dismissal of the impeachment charges against her.[23] All of the arguments presented by the Petitioner have one common thread: they expressly or implicitly contend that the

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[23] It was previously noted in this opinion that the Respondents chose not to address the merits of the issues presented. Even though the Respondents have not presented any sufficiently briefed legal arguments against the merits of Petitioner's arguments, they have referenced in general as to why certain claims by the Petitioner are not valid.

charges are brought in violation of the separation of powers doctrine. Because this common theme permeates all of her arguments, we will provide a separate discussion of that doctrine before we address the merits of each individual issue.

A. The Separation of Powers Doctrine

"[T]he separation of powers doctrine [is] set forth in our State Constitution." *Erie Ins. Prop. & Cas. Co. v. King*, 236 W. Va. 323, 329, 779 S.E.2d 591, 597 (2015). The doctrine is set out in Article V, § 1 of the Constitution of West Virginia as follows:

> The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the legislature.[24]

With regard to this provision, this Court has stated:

> The separation of these powers; the independence of one from the other; the requirement that one department shall not exercise or

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[24] Under the 1863 Constitution of West Virginia the separation of powers doctrine was found in Article I, § 4. The doctrine was worded slightly differently in its original form as follows:

> The legislative, executive and judicial departments of the government shall be separate and distinct. Neither shall exercise the powers properly belonging to either of the others. No person shall be invested with or exercise the powers of more than one of them at the same time.

The 1872 Constitution of West Virginia rewrote the separation of powers doctrine and placed it in its present location.

> encroach upon the powers of the other two, is fundamental in our system of Government, State and Federal. Each acts, and is intended to act, as a check upon the others, and thus a balanced system is maintained. No theory of government has been more loudly acclaimed.

State ex rel. W. Virginia Citizen Action Grp. v. Tomblin, 227 W. Va. 687, 695, 715 S.E.2d 36, 44 (2011), quoting *State v. Huber*, 129 W.Va. 198, 209, 40 S.E.2d 11, 18 (1946). It has been held that "Article V, section 1 of the Constitution . . . is not merely a suggestion; it is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed." Syl. pt. 1, in part, *State ex rel. Barker v. Manchin*, 167 W. Va. 155, 279 S.E.2d 622 (1981). We have observed 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.

State v. Clark, 232 W. Va. 480, 498, 752 S.E.2d 907, 925 (2013). Further, 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." *Simpson v. W. Virginia Office of Ins. Com'r*, 223 W. Va. 495, 505, 678 S.E.2d 1, 11 (2009). It has also been observed that

> The Separation of Powers Clause is not self-executing. Standing alone the doctrine has no force or effect. The Separation of Powers Clause is given life by each branch of government working exclusively within its constitutional domain and not encroaching upon the legitimate powers of any other branch of government. This is the essence and longevity of the doctrine.

State ex rel. Affiliated Constr. Trades Found. v. Vieweg, 205 W.Va. 687, 702, 520 S.E.2d 854, 869 (1999) (Davis, J., concurring). Professor Bastress has pointed out the purpose and application of the separation of powers doctrine as follows:

> A system of divided powers advances several purposes. First, it helps to prevent government tyranny. By allocating the powers among the three branches and establishing a system of checks and balances, the constitution ensures that no one person or institution will become too powerful and allow ambition to supersede the public good . . . .
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> * * *
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> Thus, under the current doctrine, the court's role is to apply Article V to ensure that the system of government in the state remains balanced and that no one branch assumes powers specifically delegated to another, or imposes burdens on another, or passes on its own responsibilities to another branch in such a manner as to threaten the balance of power, facilitate tyranny, or weaken the system of government.

Bastress, *West Virginia State Constitution*, at 141-144. See Syl. pt. 2, *Appalachian Power Co. v. Public Serv. Conmm'n of West Virginia*, 170 W.Va. 757, 296 S.E.2d 887 (1982) ("Where there is a direct and fundamental encroachment by one branch of government into the traditional powers of another branch of government, this violates the separation of powers doctrine contained in Section 1 of Article V of the West Virginia Constitution.").

The decision in *State ex rel. Brotherton v. Blankenship*, 157 W. Va. 100, 207 S.E.2d 421 (1973) summarized the development of the separation of powers doctrine as follows:

> From the time of its adherence to by Montesquieu, the author or at least an early supporter of the concept of separation of powers, the political merit of that design of government has not been seriously questioned. Hodges v. Public Service Commission, 110 W.Va. 649, 159 S.E. 834; Kilbourn v. Thompson, 103 U.S. 168, 26 L.Ed. 377. That concept was invoked in the early consideration of the formulation of our federal Constitution. Reflecting the import which he attributed to the concept of separation of powers in government, James Madison, in support of the proposed Constitution, wrote: 'The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. * * * where the Whole power of one department is exercised by the same hands which possess the Whole *114 power of

another department, the fundamental principles of a free constitution are subverted.' Speaking of the judiciary, Madison, quoting Montesquieu, wrote: "Were it (judicial power) joined to the executive power, The judge might behave with all the violence of An oppressor." The Federalist Papers, Hamilton, Madison and Jay (Rossiter, 1961). Commenting on the relationship between the three recognized branches of government and the urgency of maintaining a wholly independent judiciary, Alexander Hamilton, in Essay No. 78 of The Federalist Papers, noted: 'The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.' With the real affirmative powers of government reposing in the hands of the executive and legislative branches, it becomes urgent that the judiciary department, one function of which under our fundamental law is to prevent encroachment by the other two branches, remains free and completely independent. As noted by Montesquieu in Spirit of Laws, Vol. 1, page 181: '* * * there is no liberty if the power of judging be not separated from

> the legislative and executive powers.' Thus, judicial independence is essential to liberty—lest the executive sword become a 'Sword of Damocles', precariously and intimidatingly suspended over the judicial head and the legislative law making power be used to usurp the rights granted by the Constitution to the people.

Brotherton, 157 W. Va. at 113-14, 207 S.E.2d at 430.

We have recognized that "[t]he system of 'checks and balances' provided for in American state and federal constitutions and secured to each branch of government by `Separation of Powers' clauses theoretically and practically compels courts, when called upon, to thwart any unlawful actions of one branch of government which impair the constitutional responsibilities and functions of a coequal branch." Syl. pt. 1, *State ex rel. Frazier v. Meadows*, 193 W.Va. 20, 454 S.E.2d 65 (1994). We have also determined that "the role of this Court is vital to the preservation of the constitutional separation of powers of government where that separation, delicate under normal conditions, is jeopardized by the usurpatory actions of the executive or legislative branches of government." *State ex rel. Steele v. Kopp*, 172 W. Va. 329, 337, 305 S.E.2d 285, 293 (1983). See *State ex rel. W Virginia Citizens Action Grp. v. W. Virginia Econ. Dev. Grant Comm.*, 213 W. Va. 255, 264, 580 S.E.2d 869, 878 (2003) ("Underlying any encroachment of power by one branch of government is the paramount concern that such action will impermissibly foster[ ] . . . dominance and expansion of power."). Moreover, this Court has never "hesitated to utilize the doctrine where we felt there was a direct and fundamental encroachment by one branch of government into the traditional powers of another branch

of government." *Appalachian Power Co. v. PSC*, 170 W.Va. 757, 759, 296 S.E.2d 887, 889 (1982). See, e.g., *State ex rel. West Virginia Citizens Action Group v. West Virginia Economic Dev. Grant Comm.*, 213 W.Va. 255, 580 S.E.2d 869 (2003) (finding statute that gave legislature a role in appointing members of the West Virginia Economic Grant Committee violated Separation of Powers Clause); *State ex rel. Meadows v. Hechler*, 195 W.Va. 11, 462 S.E.2d 586 (1995) (finding statute which permitted administrative regulations to die if legislature failed to take action violated Separation of Powers Clause); *State ex rel. State Bldg. Comm'n v. Bailey*, 151 W.Va. 79, 150 S.E.2d 449 (1966) (finding statute naming legislative officers to State Building Commission violated Separation of Powers Clause).

The United States Supreme Court in *O'Donoghue v. United States*, 289 U.S. 516, 53 S.Ct. 740, 77 L.Ed. 1356 (1933) articulated the need for separating the powers of government into three distinct branches:

> The Constitution, in distributing the powers of government, creates three distinct and separate departments—the legislative, the executive, and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, *Springer v. Government of Philippine Islands*, 277 U.S. 189, 201, 48 S.Ct. 480, 72 L.Ed. 845; namely, to preclude a commingling of these essentially different powers of government in the same hands . . . .If it be important thus to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows, as a logical corollary, equally important, that each department should be kept completely

> independent of the others—independent not in the sense that they shall not cooperate to the common end of carrying into effect the purposes of the Constitution, *hut in the sense that the acts of each shall never be controlled by*, *or subjected*, *directly or indirectly*, *to*, *the coercive influence of either of the other departments.* James Wilson, one of the framers of the Constitution and a justice of this court, in one of his law lectures said that the independence of each department required that its proceedings "should be free from the remotest influence, direct or indirect, of either of the other two powers." 1 Andrews, The Works of James Wilson (1896), Vol. 1, p. 367. And the importance of such independence was similarly recognized by Mr. Justice Story when he said that in reference to each other, neither of the departments "ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers." 1 Story on the Constitution, 4th ed. s 530.

O'Donoghue, 289 U.S. at 530-31, 53 S.Ct. at 743 (emphasis added).[25]

It must also been understood that this Court "has long recognized that it is not possible that division of power among the three branches of government be so precise and exact that there is no overlapping whatsoever." *State ex rel. Sahley v. Thompson*, 151 W.Va. 336, 341, 151 S.E.2d 870, 873 (1966), overruled

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[25] Although federal courts recognize the separation of powers doctrine, "the federal Constitution has no specific provision analogous to [Article V, § I]." Bastress, *West Virginia State Constitution*, at 141.

in part by *State ex rel. Hill y. Smith*, 172 W. Va. 413, 305 S.E.2d 771 (1983). See *Appalachian Power Co. v. Public Serv. Comm'n of West Virginia*, 170 W. Va. 757, 759, 296 S.E.2d 887, 889 (1982) ("we have recognized the need for some flexibility in interpreting the separation of powers doctrine in order to meet the realities of modern day government[.]"). "While the Constitution contemplates the independent operation of the three fields of government as to all matters within their respective fields, there can be no doubt that the people, through their Constitution, may authorize one of the departments to exercise powers otherwise rightfully belonging to another department." *State ex rel. Thompson v. Morton*, 140 W.Va. 207, 223, 84 S.E.2d 791, 800-801 (1954).

With these general principles of the separation of powers doctrine guiding our analysis, we now turn to the merits of the issues presented.

B. An Administrative Rule Promulgated by the Supreme Court Supersede Statutes in Conflict with Them

The first issue we address is the Petitioner's contention that two of the Articles of Impeachment against her are invalid, because they can only be maintained by violating the constitutional authority of the Supreme Court to promulgate rules that have the force of law and supersede any statute that conflicts with them. The two Articles of Impeachment in question are

Article IV[26] and Article VI.[27] Both of those Articles charge the Petitioner with improperly overpaying

[26] The text of Article IV was set out as follows:

> That the said Chief Justice Margaret Workman, and Justice Robin Davis, being at all times relevant Justices of the Supreme Court of Appeals of West Virginia, and at various relevant times individually each Chief Justice of the Supreme Court of Appeals of West Virginia unmindful of the duties of their high offices, and contrary to the oaths taken by them to support the Constitution of the State of West Virginia and faithfully discharge the duties of their offices as such Justices, while in the exercise of the functions of the office of Justices, in violation of their oaths of office, then and there, with regard to the discharge of the duties of their offices, commencing in or about 2012, did knowingly and intentionally act, and each subsequently oversee in their capacity as Chief Justice, and did in that capacity as Chief Justice severally sign and approve the contracts necessary to facilitate, at each such relevant time, to overpay certain Senior Status Judges in violation of the statutory limited maximum salary for such Judges, which overpayment is a violation of Article VIII, §7 of the West Virginia Constitution, stating that Judges "shall receive the salaries fixed by law" and the provisions of W.Va. Code §51-2-13 and W.Va. Code §51-9-1 0, and, in violation of an Administrative Order of the Supreme Court of Appeals, in potential violation of 15 the provisions of W.Va. Code §61-3-22, relating to the crime of falsification of accounts with intent to enable or assist any person to obtain money to which he was not entitled, and, in potential violation of the provisions set forth in W.Va. Code §61-3-24, relating to the crime of obtaining money, property and services by false pretenses, and, all of the above are in violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

[27] The text of Article VI was set out as follows:

> That the said Justice Margaret Workman, being at all times relevant a Justice of the Supreme Court of

senior-status judges. The Petitioner argues that the statute relied upon by Article IV and Article VI is in conflict with an administrative order promulgated by the Chief Justice.

We begin by observing that the 1974 Judicial Reorganization Amendment of the Constitution of

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Appeals of West Virginia, and at certain relevant times individually Chief Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of her high offices, and contrary to the oaths taken by her to support the Constitution of the State of West Virginia and faithfully discharge the duties of her office as such Justice, while in the exercise of the functions of the office of Justice, in violation of her oath of office, then and there, with regard to the discharge of the duties of her office, did in the year 2015, did in her capacity as Chief Justice, sign certain Forms WV 48, to retain and compensate certain Senior Status Judges the execution of which forms allowed the Supreme Court of Appeals to overpay those certain Senior Status Judges in violation of the statutorily limited maximum salary for such Judges, which overpayment is a violation of Article VIII, § 7 of the West Virginia Constitution, stating that Judges "shall receive the salaries fixed by law" and the provisions of W.Va. Code §51-2-13 and W.Va. Code §51-9-10; her authorization of such overpayments was a violation of the clear statutory law of the state of West Virginia, as set forth in those relevant Code sections, and, was an act in potential violation of the provisions set forth in W.Va. Code §61-3-22, relating to the crime of falsification of accounts with intent to enable or assist any person to obtain money to which he was not entitled, and, in potential violation of the provisions set forth in W.Va. Code §61-3-24, relating to the crime of obtaining money, property and services by false pretenses, and all of the above are in violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

West Virginia centralized the administration of the state's judicial system and placed the administrative authority of the courts in the hands of this Court.[28] See *State ex rel. Casey v. Pauley*, 158 W. Va. 298, 300, 210 S.E.2d 649, 651 (1975) ("The Judicial Reorganization Amendment was ratified by a large majority throughout the state."). The Amendment rewrote Article VIII, substituting §§ 1 to 15 for former §§ 1 to 30, amended § 13 of Article III, and added §§ 9 to 13 to Article IX. Justice Cleckley made the following observations regarding the changes:

> These changes include the entirety of the Reorganization Amendment and its concept of a unified court system administered by this Court and not the legislature. More specifically, that same amendment altered Section 1 of Article VIII to provide that the judicial power of the State "shall be vested solely" in this Court and its inferior courts. The predecessor provision to Section 1, though similarly worded, did not include the limiting adverb "solely." In addition, the Modern Budget Amendment insulated the judiciary from political retaliation by preventing the governor and legislature from reducing the judiciary's budget submissions. W.Va. Const., art. V, § 51; *State ex rel. Bagley v. Blankenship*, 161 W.Va. 630, 246 S.E.2d 99 (1978); *State ex rel. Brotherton v. Blankenship*, 157 W.Va. 100, 207 S.E.2d 421 (1973). Taken together, these amendments create a strong and independent judiciary that can concentrate on delivering a

[28] "The Judicial Reorganization Amendment was ratified on November 5, 1974." *State ex rel. Dunbar v. Stone*, 159 W. Va. 331, 333, 221 S.E.2d 791, 792 (1976).

high quality, fair, and efficient system of justice to the citizens of West Virginia. Such measures are particularly useful in a State such as ours that continues, and appropriately so, to elect judges to fixed terms of office. That is, because judges remain ultimately beholden to the electorate, the need is even greater to insulate the judiciary from the more routine politics of the annual budget process and legislative or executive manipulation.

* * *

[A]ltering the administrative structure did not negate all prior laws that are tangentially related to administrative matters. To the contrary, the Reorganization Amendment provides us with a hierarchy to be used in resolving administrative conflicts and problems. As we explained in *Rutledge*, this Court's "exclusive authority over the administration, and primary responsibility for establishing rules of practice and procedure, secures businesslike management for the courts and promotes simplified and more economical judicial procedures." 175 W.Va. at 379, 332 S.E.2d at 834. Under the Amendment, the Judiciary, not the executive branch, is vested with the authority to resolve any substantial, genuine, and irreconcilable administrative conflicts regarding court personnel. The judicial system was revised, among other things, to simplify the administrative process and to complement prior nonconflicting statutory and case law. Clearly, the administrative structure requires that if there is a conflict, we must not only consider the concerns of the parties, but also

> look at the hierarchy of the court system. The administration of the court is very important to the unobstructed flow of court proceedings and business. Court actions are complicated enough without adding to their complexity a struggle over every administrative decision to be made. The purpose of judicial administrative authority is to enhance and simplify our court system and not to burden it.

State ex rel. Frazier v. Meadows, 193 W. Va. 20, 26-28, 454 S.E.2d 65, 71-73 (1994). Professor Bastress has compared the general authority of the Supreme Court before and after the Reorganization Amendment as follows:

> The third and fourth paragraphs, added by the Judicial Reorganization Amendment of 1974, establish the unitary judicial system in West Virginia. The first of those grants the court the power to promulgate rules of procedure relating to all aspects of judicial proceedings in the state. Although the court had previously asserted that as an inherent power, it also conceded that the legislature retained the ultimate authority. After the 1974 amendment, however, the court has ruled, in justifiable reliance on the language of section 3, that the court's rules supersede any legislation in conflict with a court-promulgated rule.

Bastress, *West Virginia State Constitution*, at 227. See *Foster v. Sakhai*, 210 W. Va. 716, 724 n.3, 559 S.E.2d 53, 61 n.3 (2001) ("the constitutional power and inherent power of the judiciary prevent another branch of government from usurping the Court's authority.").

One of the most important changes that the Reorganization Amendment made was to provide this Court with the exclusive constitutional authority to promulgate administrative rules for the effective management of the judicial system, that "have the force and effect of statutory law and operate to supersede any law that is in conflict with them." Syl. pt. 1, in part, *Stern Brothers*, *Inc. v. McClure*, 160 W.Va. 567, 236 S.E.2d 222 (1977). This authority is found in Article VIII, § 3 of the Constitution of West Virginia. We will address the relevant text of both provisions separately.[29]

To begin, we will look at the Rule-Making Clause of Section 3. The relevant text of the Rule-Making Clause of Section 3 provides as follows:

> The 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 shall have the force and effect of law.

Section 3 unquestionably provides this Court with the sole constitutional authority to promulgate rules for the judicial system, and demands that those rules have the force of law. See Syl. pt. 5, *State v. Wallace*, 205 W. Va. 155, 517 S.E.2d 20 (1999) ("The West Virginia Rules of Criminal Procedure are the paramount authority controlling criminal proceedings before the circuit courts of this jurisdiction; any statutory or common-law procedural rule that conflicts with these Rules is presumptively without force or effect."); Syl.

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[29] The authority of the Court to promulgate rules is also contained in Article VIII, § 8. This provision is discussed in the next section of this opinion.

pt. 10, *Teter v. Old Colony Co.*, 190 W. Va. 711, 714, 441 S.E.2d 728, 731 (1994) "Under Article VIII, . . . Section 3 of the Constitution of West Virginia (commonly known as the Judicial Reorganization Amendment), administrative rules promulgated by the Supreme Court of Appeals of West Virginia have the force and effect of statutory law and operate to supersede any law that is in conflict with them."); Syl. pt. 1, *Bennett v. Warner*, 179 W. Va. 742, 372 S.E.2d 920 (1988), superseded by statute as stated in *Miller v. Allman*, 240 W. Va. 438, 813 S.E.2d 91 (2018) ("Under article eight, section three of our Constitution, the Supreme Court of Appeals shall have the power to promulgate rules for all of the courts of the State related to process, practice, and procedure, which shall have the force and effect of law.").

The responsibility imposed on this Court by Section 3 was articulated in *State ex rel. Bagley v. Blankenship*, 161 W.Va. 630, 246 S.E.2d 99 (1978):

> The Judicial Reorganization Amendment, Article VIII, Section 3, of the Constitution, placed heavy responsibilities on this Court for administration of the state's entire court system. The mandate of the people, so expressed, commands the members of the Court to be alert to the needs and requirements of the court system throughout the state.

Bagley, 161 W.Va. at 644-45, 246 S.E.2d at 107. "Not only does our Constitution explicitly vest the judiciary with the control over its own administrative business, but it is a fortiori that the judiciary must have such control in order to maintain its independence." Syl. pt. 2, *State ex rel. Lambert v. Stephens*, 200 W.Va. 802, 490 S.E.2d 891 (1997).

In carrying out the responsibility imposed by Section 3, this Court has not been hesitant in finding statutes void when they were in conflict with any rule promulgated by this Court. See Syl. pt. 1, *Witten v. Butcher*, 238 W. Va. 323, 794 S.E.2d 587 (2016) ("The provision in W. Va. Code § 3-7-3 (1963) requiring oral argument to be held in an appeal of a contested election, is invalid because it is in conflict with the oral argument criteria of Rule 18 of the West Virginia Rules of Appellate Procedure."); Syl. pt. 6, *State Farm Fire & Cas. Co. v. Prinz*, 231 W. Va. 96, 743 S.E.2d 907 (2013) ("Because it addresses evidentiary matters that are reserved to and regulated by this Court pursuant to the Rule—Making Clause, Article VIII, § 3 of the West Virginia Constitution, West Virginia Code § 57-3-1 (1937), commonly referred to as the Dead Man's Statute, is invalid, as it conflicts with the paramount authority of the West Virginia Rules of Evidence."); Syl. pt. 3, *Louk v. Cormier*, 218 W. Va. 81, 622 S.E.2d 788 (2005) ("The provisions contained in W. Va. Code § 55-7B-6d (2001) were enacted in violation of the Separation of Powers Clause, Article V, § 1 of the West Virginia Constitution, insofar as the statute addresses procedural litigation matters that are regulated exclusively by this Court pursuant to the Rule—Making Clause, Article VIII, § 3 of the West Virginia Constitution. Consequently, W. Va. Code § 55-7B-6d, in its entirety, is unconstitutional and unenforceable."); *Games-Neely ex rel. W. Virginia State Police v. Real Property*, 211 W. Va. 236, 245, 565 S.E.2d 358, 367 (2002) ("Rule 60(b) has the force and effect of law; applies to forfeiture proceedings under the Forfeiture Act; and supersedes West Virginia Code § 60A-7-705(d) to the extent that Section 705(d) can be read to deprive a circuit court of its grant of discretion to review a default judgment order."); *Oak Cas. Ins. Co.*

v. Lechliter, 206 W. Va. 349, 351 n.3, 524 S.E.2d 704, 706 n.3 (1999) ("We note, however, that to any extent that W. Va. Code § 56-10-1 may be in conflict with W. Va. R. Civ. P. Rule 22, it has been superseded."); W. *Virginia Div. of Highways v. Butler*, 205 W. Va. 146, 150, 516 S.E.2d 769, 773 (1999) ("if W.Va. Code § 37-14-1 et seq., unambiguously prohibited anyone but a licensed or certified appraiser from testifying with regard to the value of real estate in a court proceeding, this prohibition would be contrary to the Rules of Evidence promulgated by this Court, pursuant to article eight, section three of our Constitution, and, thus, the prohibition would be void."); *State v. Jenkins*, 195 W. Va. 620, 625 n.5, 466 S.E.2d 471, 476 n.5 (1995) (finding W.Va. R. Evid. Rule 901 superseded W.Va. Code § 57-2-1); Syl. pt. 2, *Williams v. Cummings*, 191 W. Va. 370, 445 S.E.2d 757 (1994) ("West Virginia Code § 56-1-1(a)(7) provides that venue may be obtained in an adjoining county '[i]f a judge of a circuit be interested in a case which, but for such interest, would be proper for the jurisdiction of his court . . . .' This statute refers to a situation under which a judge might be disqualified, and therefore it is in conflict with and superseded by Trial Court Rule XVII, which addresses the disqualification and temporary assignment of judges."); *Mayhorn v. Logan Med. Found.*, 193 W. Va. 42, 454 S.E.2d 87 (1994) (finding W.Va. Code, 55-7B-7, which outlined the qualifications of an expert in a medical malpractice case, was superseded by W.Va. R. Evid. 702); *Teter v. Old Colony Co.*, 190 W. Va. 711, 726, 441 S.E.2d 728, 743 (1994) ("a legislative enactment which is substantially contrary to provisions in our Rules of Evidence would be invalid."); Syl. pt. 2, *State ex rel. Gains v. Bradley*, 199 W. Va. 412, 484 S.E.2d 921 (1997) ("Rule 1B of the Administrative Rules for Magistrate Courts super-

sedes W.Va. Code § 50-4-7 (1992), and prospectively provides there is no automatic mandatory right of a party to have a magistrate disqualified."); *Gilman v. Choi*, 185 W. Va. 177, 178, 406 S.E.2d 200, 201 (1990), overruled on other grounds by *Mayhorn v. Logan Med. Found.*, 193 W. Va. 42, 454 S.E.2d 87 (1994) ("W.Va. Code, 55–7B-7 [1986], being concerned primarily with the competency of expert testimony in a medical malpractice action, is valid under Rule 601 of the West Virginia Rules of Evidence."); Syl. pt. 2, *State v. Davis*, 178 W. Va. 87, 88, 357 S.E.2d 769, 770 (1987), overruled on other grounds *State ex rel. R.L. v. Bedell*, 192 W. Va. 435, 452 S.E.2d 893 (1994) ("Rule 7(c)(1) of the West Virginia Rules of Criminal Procedure supersedes the provisions of W.Va. Code, 62-9-1, to the extent that the indorsement of the grand jury foreman and attestation of the prosecutor are no longer required to be placed on the reverse side of the indictment. Such indorsement and attestation are sufficient if they appear on the face of the indictment."); *Hechler v. Casey*, 175 W.Va. 434, 333 S.E.2d 799 (1985) (invalidating a statute in part that was in conflict with W. Va. R.App. P., Rule 23); *State ex rel. Quelch v. Daugherty*, 172 W. Va. 422, 425, 306 S.E.2d 233, 236 (1983) ("W.Va. Code, 30-2-1, as amended, is an unconstitutional usurpation of this Court's exclusive authority to regulate admission to the practice of law in this State."); Syl. pt. 2, in part, *Carey v. Dostert*, 170 W. Va. 334, 294 S.E.2d 137 (1982) "(West Virginia Code, 30-2-7 and a circuit court's common-law power to disbar are obsolete and have been superseded by . . . the Judicial Reorganization Amendment of our Constitution, Article VIII."); *State ex rel. Askin v. Dostert*, 170 W. Va. 562, 567, 295 S.E.2d 271, 276 (1982) (holding that to the extent W.Va. Code § 30-2-1 required security from attorneys to insure their good behavior,

it "conflicts with the rules promulgated by this Court [and] must fall.").

Before we address the issue of overpayment of senior-status judges, we must examine the text of the Senior-Status Clause found in Article VIII, § 8 of the Constitution of West Virginia provides as follows:

> A retired justice or judge may, with his permission and with the approval of the supreme court of appeals, be recalled by the chief justice of the supreme court of appeals for temporary assignment as a justice of the supreme court of appeals, or judge of an intermediate appellate court, a circuit court or a magistrate court.

The issue of the authority of the Chief Justice to appoint judges for temporary service has been addressed in two cases by this Court. First, in *State ex rel. Crabtree v. Hash*, 180 W. Va. 425, 376 S.E.2d 631 (1988) the judge for the Fifth Judicial Circuit (consisting of Calhoun, Jackson and Roane counties) retired from office. A special judge was elected and appointed to fill the vacancy by several members of the Jackson County Bar Association, pursuant to W.Va. Code § 51-2-10.[30] The Administrative Director of this Court filed a writ of prohibition to prevent the newly appointed judge from holding office. The opinion succinctly held that the statute was void as follows:

> W.Va. Const. art. VIII, §§ 3 and 8, and all administrative rules made pursuant to the powers derived from article VIII, supersede W.Va. Code, 51-2-10 [1931] and vest the Chief Justice of the Supreme Court of Appeals with

[30] This statute was subsequently repealed.

> the sole power to appoint a judge for temporary service in any situation which requires such an appointment.
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> * * *
>
> Any election conducted pursuant to W.Va. Code, 51-2-10 [1931] is void as the constitutional power to assign judges for temporary service rests with the Chief Justice of the West Virginia Supreme Court of Appeals.

Crabtree, 180 W. Va. at 428, 376 S.E.2d at 634. In a footnote in *Crabtree* this Court made further observations relevant to this proceeding:

> W.Va. Const. art. VIII, governing the judiciary, has only been amended twice in the State's history, in 1880 and 1974. Prior to 1974, the Supreme Court of Appeals had no constitutionally derived administrative authority over the lower tribunals of the State. Instead, the legislature had substantial authority, including the power to create laws concerning special judges.
>
> W.Va. Const. art. VIII, § 15 (repealed) stated: "The legislature shall provide by law for holding regular and special terms of the circuit courts, where from any cause the judge shall fail to attend, or, if in attendance, cannot properly preside."
>
> The upshot of this authority was W.Va. Code, 51-2-10 [1931]. By virtue of former art. VIII, § 15, this Court had no constitutional authority to act in such matters.
>
> However, as a result of the Judicial Reorganization Amendment of 1974, the legislature

> was divested of all administrative powers over state court judges. No provision similar to former art. VIII, § 15 exists. Instead, this Court was given "general supervisory control over all intermediate appellate courts, circuit courts and magistrate courts," and the Chief Justice, as "administrative head of all the courts," was specifically given the power of temporary assignment of circuit judges.

Crabtree, 180 W. Va. at 427 n.3, 376 S.E.2d at 633 n.3 (internal citations omitted).

The decision in *Stern Bros. v. McClure*, 160 W. Va. 567, 236 S.E.2d 222 (1977) addressed the issue of statutes that attempted to control assignments of judges, but were in conflict with an administrative rule of this Court. In *Stern* the defendants filed a writ of prohibition with this Court to have a substitute trial judge removed from their case. The trial judge was appointed by the Chief Justice of this Court because the original judge was disqualified. The defendants argued that the manner in which the substitute judge was appointed was inconsistent with the statutory scheme for appointing a substitute judge when the original judge is disqualified. This Court found that the administrative rule adopted by this Court for the appointment of a substitute judge invalidated the statutes. The opinion reasoned as follows:

> Procedures for appointment of a substitute judge were promulgated by this Court on May 29, 1975, in an administrative rule dealing with the temporary assignment of circuit court judges where a particular judge is disqualified from handling a case....

The power to promulgate administrative rules is expressly conferred upon this Court under the Judicial Reorganization Amendment, and under Section 8 explicit recognition is made of the inherent rulemaking power of the Court, which prior to the Judicial Reorganization Amendment had been utilized by this Court to adopt judicial rules.

Such rules have the force and effect of statutory law by virtue of Article VIII, Section 8 of the Judicial Reorganization Amendment.... Prior to the adoption of the Judicial Reorganization Amendment, there may have been some question as to this Court's supervisory powers over lower courts. It is now quite clear under the Judicial Reorganization Amendment that considerable supervisory powers have been conferred upon this Court. There was also some confusion prior to the Judicial Reorganization Amendment as to what further action a disqualified judge could take in the case. This arose partly out of the fact that there was no clear authority in the Supreme Court to temporarily assign judges in such situations.

Consequently, the disqualified judge had either to initiate the election of a special judge pursuant to W.Va. Code, 51-2-10, or to attempt to transfer the case to another circuit court in accordance with W.Va. Code, 56-9-2. The statute relating to disqualification of judges contained a proviso permitting the judge ". . . to enter a formal order designed merely to advance the cause towards a final hearing and not requiring judicial action

> involving the merits of the case." W.Va. Code, 51-2-8....
>
> Undoubtedly, one of the reasons behind the Judicial Reorganization Amendment was to provide a more simplified system of handling the problem of securing a replacement judge where the original judge is disqualified. The former procedures were cumbersome at best. Special judge elections were constantly attacked and in many instances overturned because of some technical failure to follow W.Va. Code, 51-2-10.
>
> The administrative rule promulgated by this Court now controls the procedure for selection of a temporary judge where a disqualification exists as to a circuit court judge. Under Article VIII, Section 8 of the West Virginia Constitution, it operates to supersede the existing statutory provisions found in W.Va. Code, 51-2-9 and -10, and W.Va. Code, 56-9-2, insofar as they relate to the selection of special judges or the assignment of the case to another circuit judge when a circuit judge is disqualified.

Stern, 160 W. Va. at 572-575, 236 S.E.2d at 225-227.[31]

In the final analysis, the foregoing discussion instructs this Court that statutory laws that are repugnant to the constitutionally promulgated rules of

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[31] It will be noted that the Legislature repealed W.Va. Code §§ 51-2-9 and 10 in 1992. Although W.Va. Code § 56-9-2, which was enacted in 1868 and last amended 1923, was invalidated by *Stern* the Legislature has not repealed it.

this Court are void. With these legal principles in full view, we turn to the merits of the issue presented.

Two of the Articles of Impeachment brought against the Petitioner, Article IV and Article VI, charge her with overpaying senior-status judges in violation of the maximum payment allowed under W.Va. Code § 51-9-10. The Articles of Impeachment also state that the overpayments violated W.Va. Code § 51-2-13, W.Va. Const. Art. VIII, § 7, an administrative order of the Supreme Court and Canon I and II of the West Virginia Code of Judicial Conduct. The Articles also allege that the overpayments "potentially" violate two criminal statutes: W.Va. Code § 61-3-22 (falsification of accounts) and W.Va. Code § 61-3-24 (obtaining money by false pretenses).[32] The viability of all of the alleged violations in the two Articles hinge upon whether the Petitioner overpaid senior-status judges. The determination of overpayment is controlled by W.Va. Code § 51-9-10, which limits the payment to senior-status judges. The full text of W.Va. Code § 51-9-10 provides as follows:

> The West Virginia supreme court of appeals is authorized and empowered to create a panel of senior judges to utilize the talent and experience of former circuit court judges and supreme court justices of this state. The supreme court of appeals shall promulgate rules providing for said judges and justices to be assigned duties as needed and as feasible toward the objective of reducing caseloads

[32] We must note that "potentially" violating a criminal statute is not wrongful impeachable conduct. Therefore the language in the Articles of Impeachment that state that W.Va. Code § 61-3-22 and W.Va. Code § 61-3-24 were "potentially" violated are meaningless allegations.

> and providing speedier trials to litigants throughout the state: Provided, That reasonable payment shall be made to said judges and justices on a per diem basis: Provided, however, That *the per diem and retirement compensation of a senior*, *judge shall not exceed the salary of a sitting judge*, and allowances shall also be made for necessary expenses as provided for special judges under articles two and nine of this chapter.[33] (Emphasis added.)

The Petitioner does not dispute that she authorized the payment of senior-status judges, when necessary, in excess of the limitation imposed by the statute. Although the Petitioner has advanced several arguments as to why her conduct was valid, we need or address one of her arguments. That argument centers on an administrative order promulgated by the Chief Justice on May 17, 2017.[34] The order expressly authorized the payment of senior-status judges in excess of the limitation imposed by W.Va. Code § 5 9-10. The order stated that it was being promulgated under the authority of Article III, 3, 8, and 17. The order also stated the reason for the decision to authorize payment in excess of the statutory limitation:

> In the vast majority of instances, the statutory proviso [W.Va. Code § 51-9-10] does not interfere with providing essential services. However, in certain exigent circumstances involving protracted illness, lengthy suspensions due to ethical violations, or other extraordinary circumstances, it is impossible

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[33] This statute was originally enacted in 1949 and was amended in 1975 and 1991.

[34] The Chief Justice at that time was Justice Loughry.

> to assure statewide continuity of judicial services without exceeding the payment limitation imposed by the statutory proviso.

The Petitioner provided an illustration of a situation where it was necessary to pay a senior-status judge in excess of the statutory limitation:

> For example, in 2017, the Supreme Court of Appeals suspended a newly elected circuit court judge of Nicholas County for two years because of violations of the code of judicial ethics in certain campaign advertisements. *In re Callaghan*, 238 W.Va. 495, 503, 796 S.E.2d 604, 612, cert. denied sub. nom., *Callaghan v. W. Virginia Judicial Investigation Comm'n*, 138 S.Ct. 211, 199 L.Ed.2d 118 (2017). Because the newly elected Judge was suspended for two years, and because Nicholas County is a single judge judicial circuit, an extraordinary need for temporary judicial services arose in order to provide the people of Nicholas County with court services and to avoid the unconstitutional denial of access to the speedy administration of justice. The Chief Justice appointed senior status Judge James J. Rowe to serve as the temporary circuit judge of Nicholas County. Judge Rowe travels from his home in Lewisburg each day to perform this service. Judge Rowe serves the people of Nicholas County effectively, attending to the cases on the circuit court's docket. Using one senior status judge, rather than parading multiple judges through the courthouse, allows for the efficient and consistent adjudication of the matters pending in Nicholas County.

Prior to the Reorganization Amendment, "the Supreme Court of Appeals had no constitutionally derived administrative authority over the lower tribunals of the State. Instead, the Legislature had substantial authority, including the power to create laws concerning special judges." *State ex rel. Crabtree v. Hash*, 180 W. Va. 425, 427, 376 S.E.2d 631, 633 (1988). This authority is evident in W.Va. Code § 51-9-10 which, as noted, was enacted in 1949. We have observed as a general matter that "[t]he 1974 Judicial Reorganization Amendment to our State Constitution also recognized that previously enacted laws repugnant to it were voided." *Carey v. Dostert*, 170 W. Va. 334, 336, 294 S.E.2d 137, 139 (1982). See W.Va. Const. Art. VIII, § 13 ("Except as otherwise provided in this article, such parts of the common law, and of the laws of this state as are in force on the effective date of this article *and are not repugnant thereto*, shall be and continue the law of this state until altered or repealed by the Legislature.") (emphasis added). West Virginia Code § 51-9-10, in its entirety, is repugnant to Article VIII, § 3 and § 8. The statute seeks to control a function of the judicial system, appointing senior-status judges for temporary service, when Article VIII, § 8 has expressly given that function exclusively to the Supreme Court. Moreover, the statute's limitation on payment to senior-status judges is void and unenforceable, because of the administrative order promulgated on May 17, 2017.[35] See Syl. pt. 4, *State ex rel. Brotherton v. Blankenship*, 157 W.Va. 100, 207 S.E.2d 421 (1973) ("The judiciary department has the inherent power to

[35] It is not relevant that the administrative order was entered several years after the Petitioner's authorized payments. The statute was void at the time in which the Respondents sought to impeach her.

determine what funds are necessary for its efficient and effective operation."). Finally, as we have long held, "[l]egislative enactments which are not compatible with those prescribed by the judiciary or with its goals are unconstitutional violations of the separation of powers." *State ex rel. Quelch v. Daugherty*, 172 W. Va. 422, 424, 306 S.E.2d 233, 235 (1983). To be clear, and we so hold, West Virginia Code § 51-9-10 (1991) violates the Separation of Powers Clause of Article V, § 1 of the West Virginia Constitution, insofar as that statute seeks to regulate judicial appointment matters that are regulated exclusively by this Court pursuant to Article VIII, § 3 and § 8 of the West Virginia Constitution. Consequently, W.Va. Code § 51-9-10, in its entirety, is unconstitutional and unenforceable.[36]

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[36] We summarily dispense with the Articles of Impeachment's reference to the Salary Clause of Article VIII, § 7 as a source of legislative authority for regulating payments to senior-status judges. This clause does not provide such authority. The Salary Clause provides as follows:

> Justices, judges and magistrates shall receive the salaries fixed by law, which shall be paid entirely out of the state treasury, and which may be increased but shall not be diminished during their term of office, and they shall receive expenses as provided by law. The salary of a circuit judge shall also not be diminished during his term of office by virtue of the statutory courts of record of limited jurisdiction of his circuit becoming a part of such circuit as provided in section five of this article.

It is clear from the plain text of the Salary Clause that it only applies to salaries of judges "during their term of office." See Syl. pt. 1, *State ex rel. Trent v. Sims*, 138 W.Va. 244, 77 S.E.2d 122 (1953) ("If a constitutional provision is clear in its terms, and the intention of the electorate is clearly embraced in the language of the provision itself, this Court must apply and not interpret the provision."). Senior-status judges are retired judges and do not

In light of our holding, the Petitioner did not overpay any senior-status judge as alleged in Article IV and Article VI of the Articles of Impeachment, therefore the Respondents are prohibited from further prosecution of the Petitioner under those Articles.

C. The Supreme Court has Exclusive Jurisdiction to Determine whether a Judicial Officer's Conduct Violates a Canon of the Code of Judicial Conduct

The Petitioner next contends that Article XIV of the Impeachment Articles is invalid because it is based upon alleged violations of the West Virginia Code of Judicial Conduct, which, she contends, is constitutionally regulated by the Supreme Court.[37] To be blunt,

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hold an office. Therefore, the Salary Clause does not provide the Legislature with authority to regulate the per diem payment of senior-status judges.

[37] The text of Article XIV was set out as follows:

> That the said Chief Justice Margaret Workman, Justice Allen Loughry, Justice Robin Davis, and Justice Elizabeth Walker, being at all times relevant Justices of the Supreme Court of Appeals of West Virginia, unmindful of the duties of their high offices, and contrary to the oaths taken by them to support the Constitution of the State of West Virginia and faithfully discharge the duties of their offices as such Justices, while in the exercise of the functions of the office of Justices, in violation of their oaths of office, then and there, with regard to the discharge of the duties of their offices, did, in the absence of any policy to prevent or control expenditure, waste state funds with little or no concern for the costs to be borne by the tax payers for unnecessary and lavish spending for various purposes including, but without limitation, to certain examples, such as: to remodel state offices, for large increases in travel budgets-including unaccountable personal use of state vehicles, for unneeded

computers for home use, for regular lunches from restaurants, and for framing of personal items and other such wasteful expenditure not necessary for the administration of justice and the execution of the duties of the Court; and, did fail to provide or prepare reasonable and proper supervisory oversight of the operations of the Court and the subordinate courts by failing to carry out one or more of the following necessary and proper administrative activities:

A) To prepare and adopt sufficient and effective travel policies prior to October of 2016, and failed thereafter to properly effectuate such policy by excepting the Justices from said policies, and subjected subordinates and employees to a greater burden than the Justices;

B) To report taxable fringe benefits, such as car use and regular lunches, on Federal W-2s, despite full knowledge of the Internal Revenue Service Regulations, and further subjected subordinates and employees to a greater burden than the Justices, in this regard, and upon notification of such violation, failed to speedily comply with requests to make such reporting consistent with applicable law;

C) To provide proper supervision, control, and auditing of the use of state purchasing cards leading to multiple violations of state statutes and policies regulating the proper use of such cards, including failing to obtain proper prior approval for large purchases;

D) To prepare and adopt sufficient and effective home office policies which would govern the Justices' home computer use, and which led to a lack of oversight which encouraged the conversion of property;

E) To provide effective supervision and control over record keeping with respect to the use of state automobiles, which has already resulted in

Article XIV is an unwieldy compilation of allegations that culminate with the accusation that the Petitioner's conduct, with respect to the allegations, violated Canon I[38] and Canon II[39] of the Code of Judicial Conduct.[40] We agree with the Petitioner that this Court has exclusive constitutional jurisdiction over

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> an executed information upon one former Justice and the indictment of another Justice.
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> F) To provide effective supervision and control over inventories of state property owned by the Court and subordinate courts, which led directly to the undetected absence of valuable state property, including, but not limited to, a state-owned desk and a state owned computer;
>
> G) To provide effective supervision and control over purchasing procedures which directly led to inadequate cost containment methods, including the rebidding of the purchases of goods and services utilizing a system of large unsupervised change orders, all of which encouraged waste of taxpayer funds.
>
> The failure by the Justices, individually and collectively, to carry out these necessary and proper administrative activities constitute a violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

[38] Canon I states the following:

> A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

[39] Canon II states the following:

> A judge shall perform the duties of judicial office impartially, competently, and diligently.

[40] We will note that Article IV and Article VI of the Articles of Impeachment also contained allegations that Canon I and Canon II were violated.

conduct alleged to be in violation of the Code of Judicial Conduct.

The controlling constitutional authority is set out under Article VIII, § 8 of the Constitution of West Virginia. We have held that "[p]ursuant to article VIII, section 8 of the West Virginia Constitution, this Court has the inherent and express authority to `prescribe, adopt, promulgate and amend rules prescribing a judicial code of ethics, and a code of regulations and standards of conduct and performances for justices, judges and magistrates, along with sanctions and penalties for any violation thereof [.]'" Syl. pt. 5, *Committee on Legal Ethics v. Karl*, 192 W.Va. 23, 449 S.E.2d 277 (1994). The relevant text of Section 8 provides as follows:

> Under its inherent rule-making power, which is hereby declared, the supreme court of appeals shall, from time to time, prescribe, adopt, promulgate and amend rules prescribing a judicial code of ethics, and a code of regulations and standards of conduct and performances for justices, judges and magistrates, along with sanctions and penalties for any violation thereof, and the supreme court of appeals is authorized to censure or temporarily suspend any justice, judge or magistrate having the judicial power of the state, including one of its own members, for any violation of any such code of ethics, code of regulations and standards, or to retire any such justice, judge or magistrate who is eligible for retirement under the West Virginia judges' retirement system (or any successor or substituted retirement system for justices, judges and magistrates of this state) and who,

> because of advancing years and attendant physical or mental incapacity, should not, in the opinion of the supreme court of appeals, continue to serve as a justice, judge or magistrate.
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> * * *
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> When rules herein authorized are prescribed, adopted and promulgated, they shall supersede all laws and parts of laws in conflict therewith, and such laws shall be and become of no further force or effect to the extent of such conflict.

This Court's express constitutional authority to adopt rules of judicial conduct and discipline is obvious from the language of Section 8. Pursuant to this express authority, we have adopted the Code of Judicial Conduct and the Rules of Judicial Disciplinary Procedure. Under Rule 4.10 and Rule 4.11 of the Rules of Judicial Disciplinary Procedure, this Court has the exclusive authority to determine whether a justice, judge, or magistrate violated the Code of Judicial Conduct. The record does not disclose that this Court has found that the Petitioner violated Canon I or Canon II, based upon the allegations alleged in Article XIV of the Articles of Impeachment. Moreover, even if the record had disclosed that the Petitioner was previously found to have violated the Canons in question, those violations could not have formed the basis of an impeachment charge. This is because of the limitations imposed upon the scope of a Canon violation that is found by this Court. The following is provided in Item 7 of the Scope of the Code of Judicial Conduct:

> The Code is not designed or intended as a basis for civil or criminal liability. Neither is it intended to be the basis for litigants to seek collateral remedies against each other or to obtain tactical advantages in proceedings before a court.

It is quite clear that Item 7 prohibits a Canon violation from being used as the "basis" of a civil or criminal charge and, thus, could not be used as a basis for impeaching the Petitioner.[41] This Court observed in *In re Watkins*, 233 W. Va. 170, 757 S.E.2d 594 (2013):

> Just as the legislative branch has the power to examine the qualifications of its own members and to discipline them, this Court has the implicit power to discipline members of the judicial branch. The Court has this power because it is solely responsible for the protection of the judicial branch, and because the power has not been constitutionally granted to either of the other two branches.

Watkins, 233 W. Va. at 177, 757 S.E.2d at 601.

It is quite evident to this Court that the impeachment proceedings under Article XIV of the Articles of Impeachment requires the Court of Impeachment to make a determination that the Petitioner violated Canon I and Canon II. Such a determination in that

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[41] It has long been recognized that an impeachment proceeding is civil in nature. See *Skeen v. Craig*, 31 Utah 20, 86 P. 487, 487-488 (1906) ("The question as to whether [impeachment] proceedings of this kind to remove from office a public official are civil or criminal has been before the courts of other states, and, while the decisions are not harmonious, yet the great weight of authority, and as we think the better reasoned cases hold that such actions are civil.").

forum violates the separation of powers doctrine, because pursuant to Article VIII, § 8 of the Constitution of West Virginia, this Court has the exclusive authority to determine whether the Petitioner violated either of those Canons. In other words, and we so hold, this Court has exclusive authority and jurisdiction under Article VIII, § 8 of the West Virginia Constitution and the rules promulgated thereunder, to sanction a judicial officer for a violation of a Canon of the West Virginia Code of Judicial Conduct. Therefore, the Separation of Powers Clause of Article V, § 1 of the West Virginia Constitution prohibits the Court of Impeachment from prosecuting a judicial officer for an alleged violation of the Code of Judicial Conduct.

The Respondents have argued that "to hold that the Legislature cannot consider the Code of Judicial Conduct in its deliberation of impeachment proceedings against a judicial officer would have the absurd result of prohibiting removal from office for any violations of the Code of Judicial Conduct." This argument misses the point. Unquestionably, the Legislature can consider in its deliberations whether there was evidence showing that this Court found a judicial officer violated a Canon. However, the Canon violation itself cannot be the basis of the impeachment charge– at most it could only act as further evidence for removal based upon other valid charges of wrongful conduct.

In light of our holding, the Court of Impeachment does not have jurisdiction over the alleged violations set out in Article XIV of the Articles of Impeachment, therefore the Respondents are prohibited from further

prosecution of the Petitioner under that Article as written.[42]

D. The Articles of Impeachment were Filed in Violation of Provisions of House Resolution 201

Although we have determined that the Petitioner is entitled to relief based upon the foregoing, we believe that the remaining issues involving the failure to comply with two provisions of House Resolution 201 are not moot. This Court set forth a three-prong test to determine whether we should rule on the merits of technically moot issues in syllabus point 1 *of Israel by Israel v. West Virginia Secondary Schools Activitles Commission*, 182 W.Va. 454, 388 S.E.2d 480 (1989):

> Three factors to be considered in deciding whether to address technically moot issues are as follows: first, the court will determine whether sufficient collateral consequences will result from determination of the ques-

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[42] We must also note that even if Article XIV of the Articles of Impeachment had set out a valid basis for impeachment, it would still not pass constitutional muster on due process grounds, because it is vague and ambiguous. See *State v. Bull*, 204 W. Va. 255, 261, 512 S.E.2d 177, 183 (1998) ("Claims of unconstitutional vagueness in [charging instruments] are grounded in the constitutional due process clauses, U.S. Const. amend. XIV, Sec. 1, and W.Va. Const. art. III, Sec. 10."). As drafted, the Article failed to specify which Justice committed any of the myriad of conduct allegations. The Petitioner had a constitutional right to be "adequately informed of the nature of the charge[.]" *State* v. *Hall*, 172 W. Va. 138, 144, 304 S.E.2d 43, 48 (1983). See Single Syllabus, *Myers v. Nichols*, 98 W. Va. 37, 126 S.E. 351 (1925) ("While charges for the removal of a public officer need not be set out in the strict form of an indictment, they should be sufficiently explicit to give the defendant notice of what he is required to answer.").

> tions presented so as to justify relief; second, while technically moot in the immediate context, questions of great public interest may nevertheless be addressed for the future guidance of the bar and of the public; and third, issues which may be repeatedly presented to the trial court, yet escape review at the appellate level because of their fleeting and determinate nature, may appropriately be decided.

We believe that there may be collateral consequences in failing to address the issues, the issues are of great public importance, and the issues may present themselves again. *State ex rel. McKenzie v. Smith*, 212 W. Va. 288, 297, 569 S.E.2d 809, 818 (2002) ("Because of the possibility that the Division's continued utilization of this system may escape review at the appellate level, we address the merits of this case under the . . . exception to the mootness doctrine.").

The Petitioner has argued that House Resolution 201 required the House Committee on the Judiciary to set out findings of fact in the Articles of Impeachment and required the House of Delegates adopt a resolution of impeachment. The Petitioner contends that neither of these required tasks were performed and that her right to due process was violated as a consequence. We agree.

We begin by noting that "[t]he threshold question in any inquiry into a claim that an individual has been denied procedural due process is whether the interest asserted by the individual rises to the level of a 'property' or 'liberty' interest protected by Article III, Section 10 of our constitution." *Clarke v. West Virginia Board of Regents*, 166 W.Va. 702, 709, 279 S.E.2d 169,

175 (1981).[43] See Syl. Pt. 1, *Waite v. Civ. Serv. Comm'n*, 161 W.Va. 154, 241 S.E.2d 164 (1977), overruled on other grounds *West Virginia Dept of Educ. v. McGraw*, 239 W. Va. 192, 800 S.E.2d 230 (2017) ("The Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against state action which affects a liberty or property interest."). We have held as a general matter that [a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." *State ex rel. Wilson v. Truby*, 167 W. Va. 179, 188, 281 S.E.2d 231, 236 (1981). The Petitioner has both a liberty[44] and property[45] interest in having the impeachment rules followed. The Petitioner has a

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[43] Article III, § 10 of the Constitution of West Virginia provides as follows:

> No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers.

[44] See Syl. pt. 2, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 154, 241 S.E.2d 164, 165 (1977), overruled on other grounds *West Virginia Dep't of Educ. v. McGraw*, 239 W. Va. 192, 800 S.E.2d 230 (2017) ("The 'liberty interest' includes an individual's right to freely move about, live and work at his chosen vocation, without the burden of an unjustified label of infamy. A liberty interest is implicated when the State makes a charge against an individual that might seriously damage his standing and associations in his community or places a stigma or other disability on him that forecloses future employment opportunities.").

[45] See Syl. pt. 3, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 154, 241 S.E.2d 164, 165 (1977), overruled on other grounds *West Virginia Dep't of Educ. v. McGraw*, 239 W. Va. 192, 800 S.E.2d 230 (2017) ("A 'property interest' includes not only the traditional notions of real and personal property, but also extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings.").

liberty interest in not having her reputation destroyed in the legal community and public at-large by being impeached and removed from office; and she has a property interest in obtaining her pension when she chooses to retire.

We begin by noting the record supports the Petitioner's contention that House Resolution 201 required the Judiciary Committee to set out findings of fact, and that this was not done. Rule 3 and 4 of Resolution 201 required the Judiciary Committee to do the following:

> 3. To make findings of fact based upon such investigation and hearing(s);
>
> 4. To report to the House of Delegates its findings of facts and any recommendations consistent with those findings of fact which the Committee may deem proper.

The record demonstrates that the Judiciary Committee was aware that it failed to carry out the above duties, but refused to correct the error. The following exchange occurred during the proceedings in the House regarding the failure to follow Rules 3 and 4:

> MINORITY VICE CHAIR FLUHARTY: Thank you, Mr. Chairman. Counsel, I was going through these Articles. Where are the findings of fact? MR. CASTO: Well, there– there are no findings of fact there. The Committee–
>
> MINORITY VICE CHAIR FLUHARTY: Where?
>
> MR. CASTO: I said, sir, there are no findings of fact.

MINORITY VICE CHAIR FLUHARTY: There are no findings of fact? All right. Have you read House Resolution 201?

MR. CASTO: I have sir, but I have not read it today.

MINORITY VICE CHAIR FLUHARTY: Well, do you know that we're required to have findings of fact?

MR. CASTO: I think, sir, that my understanding is–based upon the Manchin Articles–that the term "findings of fact" which was used at the same time, that the profferment of these Articles is indeed equivalent to a findings of fact. The–but that, again, is your interpretation, sir.

MINORITY VICE CHAIR FLUHARTY: So based upon the clear wording of House Resolution 201, it says we're "To make findings of fact based upon such investigation and hearings;" and "To report to the Legislature its findings of facts and any recommendations consistent with those findings of facts which the Committee may deem proper." I mean, you're–you're aware how this works in the legal system. You draft separate findings of fact. I'm just wondering why we haven't done that.

MR. CASTO: Because, sir, that is not the manner in which impeachment is done.

MINORITY VICE CHAIR FLUHARTY: Well, findings of fact in House Resolution 201 are referenced separate from proposed Articles of

> Impeachment. Am I wrong in that observation?
>
> MR. CASTO. I don't believe that you're wrong in that.

The record also discloses that the Judiciary Committee was warned by one of its members of the consequences of its failure to follow its own rules:

> MINORITY CHAIR FLEISCHAUER: Thank you, Mr.–thank you, Mr. Chairman. I think the gentleman has raised a valid point. If we look at the Resolution that empowers this Committee to act, it–it says that we are to make findings of fact based upon such investigation and hearing and to report to the House of Delegates its findings of fact and any recommendations consistent with those findings, of which the Committee may deem proper.
>
> * * *
>
> And I'm just a little concerned that if we don't have findings of fact that there could be some flaw that could mean that the final Resolution by the House would be deemed to be not valid.
>
> * * *
>
> So I think we–if there–there would be some wisdom in trying to track the language of the Resolution, and it would be consistent with any other proceeding that we have in West Virginia that when there are requirements of findings of fact and–in this case, it's not conclusions of law, but it's recommendations–that we should follow that.

As previously stated, the Petitioner has also asserted that the House of Delegates failed to adopt a

resolution of impeachment. Rule 2 of the last Further Resolved section of Resolution 201 provides as follows:

> Further resolved . . . that the House of Delegates adopt a resolution of impeachment and formal articles of impeachment as prepared by the Committee; and that the House of Delegates deliver the same to the Senate in accordance with the procedures of the House of Delegates, for consideration by the Senate according to law.

A review of the Articles of Impeachment that were submitted to the Senate unquestionably shows that the House of Delegates failed to include language indicating that the Articles were adopted by the House.

We are gravely concerned with the procedural flaws that occurred in the House of Delegates. Basic due process principles demand that governmental bodies follow the rules they enact for the purpose of imposing sanctions against public officials. This right to due process is heightened when the Legislature attempts to impeach a public official. Therefore we hold, in the strongest of terms, that the Due Process Clause of Article III, § 10 of the Constitution of West Virginia requires the House of Delegates follow the procedures that it creates to impeach a public officer. Failure to follow such rules will invalidate all Articles of Impeachment that it returns against a public officer.

We must also point out that the Petitioner was denied due process because none of the Articles of Impeachment returned against her contained a statement that her alleged wrongful conduct amounted to maladministration, corruption, incompetency, gross immorality, neglect of duty, or any high crime or

misdemeanor, as required by Article IV, § 9 of the Constitution of West Virginia. This is the equivalent of an indictment failing to allege the essential elements of wrongful conduct. See Syl. pt. 1, *State ex rel. Combs v. Boles*, 151 W. Va. 194, 151 S.E.2d 115 (1966) ("In order to lawfully charge an accused with a particular crime it is imperative that the essential elements of that crime be alleged in the indictment.").

V. CONCLUSION

We have determined that prosecution of Petitioner for the allegations set out in Article IV, Article VI and Article XIV of the Articles of Impeachment violates the separation of powers doctrine. The Respondents do not have jurisdiction over the alleged violations in Article IV and Article VI. The Respondents also do not have jurisdiction over the alleged violation in Article XIV as drafted. In addition, we have determined that the failure to set out findings of fact, and to pass a resolution adopting the Articles of Impeachment violated due process principles. Consequently, the Respondents are prohibited from proceeding against the Petitioner for the conduct alleged in Article IV and Article VI, and in Article XIV as drafted. The Writ of Prohibition is granted. The Clerk is hereby directed to issue the mandate contemporaneously forthwith.

Writ granted.

Bloom, J. and Reger, J., concurring in part and dissenting in part:

In this proceeding the Court was called upon to decide whether three Articles of Impeachment against the Petitioner, Article IV, Article VI, and Article XIV, were constitutionally valid. The majority opinion concluded that all three Articles of Impeachment were constitutionally invalid and therefore prohibited the Respondents from prosecuting the Petitioner on those charges. We concur in the resolution of those three Articles of Impeachment. Even though the dispositive issues in this case were resolved when it was determined that all three Articles of Impeachment were invalid, the majority opinion chose to address another issue that was not necessary for the resolution of the case. For the reasons set out below, we dissent from the majority decision to address that issue).[1]

Prefatory Remarks

Before we address the substantive issues of our concurring opinion, we feel that it is imperative that we make clear that it is our belief that the Legislature has absolute authority to impeach a judicial officer or any State public officer for wrongful conduct.

Through the State Constitution the people of West Virginia provided that "[t]he legislative, executive and

[1] It will also be noted that we believe the Court should have exercised its authority and set the case for oral argument, even though the Respondents waived oral argument. Many of the issues presented are related to transparency. Not having oral argument eliminates the opportunity for a more thoughtful discussion with the parties and perhaps greater illumination of the issues for the Court. Also in a case both constitutionally and politically charged, transparency better serves the parties, the court and the public interest.

judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others . . . ." W.Va. Const. Art. 5, § 1. It has been observed that "[t]he doctrine of separation of powers 'is at the heart of our Constitution.' *Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm'n*, 673 F.2d 425, 471 (D.C. Cir. 1982). The objective of that doctrine has been eloquently and concisely stated as follows:

> The doctrine of the separation of powers was adopted . . . not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy.

Myers v. United States, 272 U.S. 52, 293, 47 S.Ct. 21, 84, 71 L.Ed. 160 (1926) (Brandeis, J., dissenting).

The State Constitution, Article IV, § 9, invests absolute authority in the Legislature to bring impeachment charges against a public officer and to prosecute those charges. Pursuant to Article IV, § 9 "[t]he House of Delegates has the sole power of impeachment, and the Senate the sole power to try impeachments." *Slack v. Jacob*, 1875 W.L. 3439, 8 W. Va. 612, 664 (1875). Courts around the country have long recognized that the Legislature has "exclusive jurisdiction in impeachment matters or matters pertaining to impeachment of impeachable officers[.]" *State v. Chambers*, 220 P. 890, 892 (Okla. 1923). Of course "that authority is not unbounded and legislative encroachment upon other constitutional principles may, in an appropriate case, be subject to judicial review." *Office of Governor v. Select Comm. of Inquiry*, 271 Conn. 540, 574, 858 A.2d 709, 730 (2004). Even so, judicial intervention in an

impeachment proceeding should be extremely rare, and only in the limited situation where an impeachment charge is prohibited by the Constitution.

Courts have observed that the "political question doctrine" is part of the separation of powers doctrine. "[T]he political question doctrine is essentially a function of the separation of powers, . . . existing to restrain courts from inappropriate interference in the business of the other branches of Government, . . . and deriving in large part from prudential concerns about the respect we owe the political departments." *Nixon v. United States*, 506 U.S. 224, 252-253, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993) (Souter, J., concurring) (internal quotation marks and citations omitted). The United States Supreme Court has summarized the political question doctrine as follows:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217, 82 S. Ct. 691, 710, 7 L. Ed. 2d 663 (1962). In the final analysis, "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." *Horton v. McLaughlin*, 149 N.H. 141, 143, 821 A.2d 947, 949 (2003). See *Smith v. Reagan*, 637 F. Supp. 964, 968 (E.D.N.C. 1986), rev'd on other grounds, 844 F.2d 195 (4th Cir. 1988) ("The courts have often recognized that this doctrine calls for the exercise of judicial restraint when the issues involve the resolution of questions committed by the text of the Constitution to a coordinate branch of government.").

As we demonstrate below, the political question doctrine precluded the majority from addressing two procedural flaws in the impeachment proceeding.

1. Resolution of the Procedural Flaws in the Impeachment Proceeding Should have been Resolved by the Court of Impeachment

The majority opinion correctly determined that the judiciary has a limited role in impeachment proceedings, that extend to protecting the constitutional rights of an impeached official. However, the majority opinion went beyond that limited role. Specifically, the majority opinion determined that it had authority to decide that two alleged procedural errors invalidated the entire impeachment proceedings. Those alleged errors involved the House of Delegates failure to include findings of fact in the Articles of Impeachment, and in failing to pass a resolution adopting the Articles of Impeachment.

The United States Supreme Court has observed, and we agree, that there should not be "judicial review to the procedures used by the [Legislature] in trying impeachments[.]" *Nixon v. United States*, 506 U.S. 224, 236, 113 S. Ct. 732, 739, 122 L. Ed. 2d 1 (1993). It

is the exclusive province of the Legislature to determine what, if any, consequences should follow from its failure to adhere to an impeachment procedure. In this case, as we mentioned, the House of Delegates are alleged to have failed to make findings of facts and to adopt a resolution of impeachment. The impact of both of those alleged errors on the impeachment proceedings was a matter for the House of Delegates to resolve and, in the absence of the matter being resolved by the House, it should have been presented to the Court of Impeachment for the Senate to resolve. See *Hastings v. United States*, 837 F. Supp. 3, 5 (D.D.C. 1993) ("Thus, the Senate's procedures for trying an impeached individual cannot be subject to review by the judiciary."); *Alabama House of Representatives Judiciary Comm. v. Office of the Governor of Alabama*, 213 So. 3d 579 (Ala. 2017) ("[T]he method of impeachment of the governor rests in the legislature, courts are required to refrain from exercising judicial power over this matter. The exercise of such power would infringe upon the exercise of clearly defined legislative power."); *Mecham v. Gordon*, 156 Ariz. 297, 303, 751 P.2d 957, 963 (1988) ("[T]he Constitution gives the Senate, rather than this Court, the power to determine what rules and procedures should be followed in the impeachment trial."). Ultimately, the House or the Senate could have determined that the alleged errors were harmless and did not affect the substantial rights of the Petitioner. See *State v. Swims*, 212 W.Va. 263, 270, 569 S.E.2d 784, 791 (2002) ("Error is harmless when it is trivial, formal, or merely academic, and not prejudicial to the substantial rights of the party assigning it, and where it in no way affects the outcome of the trial."); Syl. pt. 14, *State v. Salmons*, 203 W.Va. 561, 509 S.E.2d 842 (1998) ("Failure to observe a constitutional right constitutes reversible error unless

it can be shown that the error was harmless beyond a reasonable doubt.").

Even if we agreed that the procedural issues were properly before this Court, the longstanding practice of this Court is not to address an issue that is not necessary in order to grant the litigant the relief he or she seeks. See *State ex rel. Am. Elec. Power Co. v. Swope*, 239 W. Va. 470, 476 n.9, 801 S.E.2d 485, 491 n.9 (2017) ("Because this case can be resolved on the first issue presented, the applicability of the public policy exception, we need not address the remaining issues presented by Petitioners."); *Littell v. Mullins*, No. 15-0364, 2016 WL 1735234, at *5 n.6 (W. Va. 2016) ("Because our resolution of the first issue raised by Mr. Littell is dispositive of the case sub judice, we need not address his remaining assignments of error[.]"); *State v. Stewart*, 228 W. Va. 406, 419 n.13, 719 S.E.2d 876, 889 n.13 (2011) ("Because we have found the issues discussed dispositive, we need not address the defendant's remaining assignments of error."); *Gibson v. McBride*, 222 W. Va. 194, 199 n.17, 663 S.E.2d 648, 653 n.17 (2008) ("Because we affirm the granting of the writ on the issue of prison garb and shackles, we need not address the remaining issues[.]"); State ex rel. Pritt v. Vickers, 214 W. Va. 221, 227 n.21, 588 S.E.2d 210, 216 n.21 (2003) ("Because of our resolution of the scheduling order motion, we need not address the remaining issues presented by Ms. Pritt."); *Am. Tower Corp. v. Common Council of City of Beckley*, 210 W. Va. 345, 350 n.14, 557 S.E.2d 752, 757 n.14 (2001) ("As a result of our resolution of this issue, we need not address further the Council's remaining assignments of error."). It is clear that when the majority opinion resolved the substantive issues in Article IV, Article VI, and Article XIV, the Petitioner had obtained the relief she sought. Thus, there was no need to address the remaining issues raised.

By addressing the non-dispositive procedural issues, the majority decision is rendering an advisory opinion on those issues. It is a fundamental principle that "this Court is not authorized to issue advisory opinions[.]" *State ex rel. City of Charleston v. Coghill*, 156 W.Va. 877, 891, 207 S.E.2d 113, 122 (1973) (Haden, J., dissenting). The Court has observed that "[s]ince President Washington, in 1793, sought and was refused legal advice from the Justices of the United States Supreme Court, courts—state and federal—have continuously maintained that they will not give 'advisory opinions.' *Harshbarger v. Gainer*, 184 W.Va. 656, 659, 403 S.E.2d 399, 402 (1991). See *Mainella v. Bd. of Trustees of Policemen's Pension or Relief Fund of City of Fairmont*, 126 W. Va. 183, 185, 27 S.E.2d 486, 487-488 (1943) ("Courts are not constituted for the purpose of making advisory decrees or resolving academic disputes."). Specifically, this Court has expressly held "that the writ of prohibition cannot be invoked[ ] to secure from th[is] Court . . . an advisory opinion [.]" *F.S.T., Inc. v. Hancock Cty. Common*, No. 17-0016, 2017 WL 4711427, at *3 (W. Va. 2017) (internal quotation marks and citation omitted). More importantly, the advisory opinion on the two issues has a lethal consequence–it has invalidated the impeachment trials of the two remaining judicial officers.

2. The Legislature May Seek to Impeach the Petitioner again Based upon Some of the Allegations in Article XIV of the Articles of Impeachment

It is clear that the Legislature cannot seek to impeach the Petitioner once again on the charges set out in Article IV and Article VI. However, we believe the Legislature has the right to seek to institute new impeachment proceedings to craft a constitutionally

acceptable impeachment charge based upon the allegations set out in Article XIV.

It has been recognized that "[i]mpeachment is in the nature of an indictment by a grand jury." *State v. Leese*, 55 N.W. 798, 799 (Neb. 1893). See *Brumbaugh v. Rehnquist*, 2001 WL 376477, at *1 (N.D. Tex. Apr. 13, 2001) ("This process produces articles of impeachment resembling an indictment which trigger the 'sole Power' of the Senate to 'try all Impeachments.'"); *Ferguson v. Wilcox*, 119 Tex. 280, 297, 28 S.W.2d 526, 534 (Tex. 1930) ("The House of Representatives first acts in the capacity of a grand jury, and it must, in effect, return the indictment, to wit, the articles of impeachment."); *State v. Buckley*, 54 Ala. 599, 618 (1875) (recognizing "articles of impeachment are a kind of bill of indictment."). The law in this State is clear in holding that a defective indictment may be amended by a court in limited circumstances, and may be resubmitted to a grand jury to correct a defect. This principle of law was set out in syllabus point 3 of *State v. Adams*, 193 W.Va. 277, 456 S.E.2d 4 (1995) as follows:

> Any substantial amendment, direct or indirect, of an indictment must be resubmitted to the grand jury. An "amendment of form" which does not require resubmission of an indictment to the grand jury occurs when the defendant is not misled in any sense, is not subjected to any added burden of proof, and is not otherwise prejudiced.

Consistent with *Adams*, we believe that the Legislature has absolute discretion in seeking to re-impeach the Petitioner on the allegations contained in Article XIV.

In view of the foregoing, we concur in part and dissent in part.

APPENDIX B

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on the 11th day of October, 2018, the following order was made and entered:

No. 18-0816

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

Petitioner,

v.

MITCH CARMICHAEL, President of the West Virginia Senate; DONNA J. FOLEY, 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.

ORDER

On this day the Court issued a prepared opinion in the above-captioned case and directed that the mandate in this action issue forthwith, thereby shortening the time for issuance of the mandate in accordance with Rule 26(b) of the Rules of Appellate Procedure. Accordingly the Court does hereby order the Clerk to issue the mandate in this action forthwith.

Chief Justice Margaret Workman disqualified. Justice Elizabeth Walker disqualified. Justice Allen H. Loughry

II suspended, therefore not participating, and Justice Paul T. Farrell, sitting by temporary assignment is disqualified. Justice Tim Armstead and Justice Evan Jenkins did not participate. Acting Chief Justice James A. Matish, acting Justice Ronald E. Wilson, acting Justice Rudolph J. Murensky, II, acting Justice Louis H. Bloom, and acting Justice Jacob E. Reger sitting by temporary assignment.

A True Copy

Attest: /s/ Edythe Nash Gaiser [SEAL]
Clerk of Court

APPENDIX C

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on the 11th day of October, 2018, the following order was made and entered:

No. 18-0816

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

Petitioner,

v.

MITCH CARMICHAEL, President of the West Virginia Senate; DONNA J. FOLEY, 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.

MANDATE

Pursuant to Rule 26 of the Rules of Appellate Procedure, the opinion issued in the above-captioned case is now final and is hereby certified to the parties. A writ of prohibition as set forth in the opinion is granted. The Clerk is directed to remove this action from the docket of this Court.

Chief Justice Margaret Workman disqualified. Justice Elizabeth Walker disqualified. Justice Allen H. Loughry II suspended, therefore not participating, and

Justice Paul T. Farrell, sitting by temporary assignment is disqualified. Justice Tim Armstead and Justice Evan Jenkins did not participate. Acting Chief Justice James A. Matish, acting Justice Ronald E. Wilson, acting justice Rudolph J. Murensky, II, acting Justice Louis H. Bloom, and acting Justice Jacob E. Reger sitting by temporary assignment.

A True Copy

Attest: /s/ Edythe Nash Gaiser [SEAL]
Clerk of Court

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APPENDIX D

OFFICE OF THE CLERK

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C. Casey Forbes

October 29, 2018

Marsha W. Kauffman
House of Delegates - West Virginia Legislature
212-M State Capitol
1900 Kanawha Blvd., East
Charleston, WV 25305-0470

Re: *SER Workman v. Carmichael,* No. 18-0816

Ms. Kauffman,

The Motion to Intervene received from you on October 25, 2018, is being returned under cover of this letter. The mandate in this case was issued with the Court's opinion on October 11, 2018. Therefore, this Court no longer has jurisdiction.

As a courtesy, please see the enclosed copy of the October 25, 2018 order entered in this matter.

Regards,

/s/ Edythe Nash Gaiser
Edythe Nash Gaiser
Clerk of Court

Enclosures

cc: Mark Williams, Esq. (without encl.)
J. Mark Adkins, Esq. (without encl.)
Lonnie C. Simmons, Esq. (without encl.)
John A. Carr, Esq. (without encl.)

APPENDIX E

United States Constitution, Article I

Section 2.

The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

No person shall be a Representative who shall not have attained to the age of twenty five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each state shall have at least one Representative; and until such enumeration shall be made, the state of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

The House of Representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

Section 3.

The Senate of the United States shall be composed of two Senators from each state, chosen by the legislature thereof, for six years; and each Senator shall have one vote.

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and the third class at the expiration of the sixth year, so that one third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

The Senate shall choose their other officers, and also a President pro tempore, in the absence of the Vice

President, or when he shall exercise the office of President of the United States.

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.

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

APPENDIX F

United States Constitution, Article IV

Section 4.

The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

APPENDIX G

West Virginia Constitution, Article III

Section 10. Safeguards for life, liberty and property.

No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers.

APPENDIX H

West Virginia Constitution, Article IV

Section 9. Impeachment of officials.

Any officer of the state may be impeached for maladministration, corruption, incompetency, gross immorality, neglect of duty, or any high crime or misdemeanor. The House of Delegates shall have the sole power of impeachment. 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, or, if from any cause it be improper for him to act, then any other judge of that court, to be designated by it, shall preside; and the senators shall be on oath or affirmation, to do justice according to law and evidence. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold any office of honor, trust or profit, under the state; but the party convicted shall be liable to indictment, trial, judgment, and punishment according to law. The Senate may sit during the recess of the Legislature for the trial of impeachments.

APPENDIX I

West Virginia Constitution, Article VI

Section 1. The Legislature.

The legislative power shall be vested in a Senate and House of Delegates. The style of their acts shall be, "Be it enacted by the Legislature of West Virginia."

Section 2. Composition of Senate and House of Delegates.

The Senate shall be composed of twenty-four, and the House of Delegates of sixty-five members, subject to be increased according to the provisions hereinafter contained.

Section 3. Senators and delegates – Terms of office.

Senators shall be elected for the term of four years, and delegates for the term of two years. The senators first elected, shall divide themselves into two classes, one senator from every district being assigned to each class; and of these classes, the first to be designated by lot in such manner as the Senate may determine, shall hold their seats for two years and the second for four years, so that after the first election, one half of the senators shall be elected biennially.

APPENDIX J

West Virginia Constitution, Article VIII

Section 8. Censure, temporary suspension and retirement of justices, judges and magistrates; removal.

Under its inherent rule-making power, which is hereby declared, the supreme court of appeals shall, from time to time, prescribe, adopt, promulgate and amend rules prescribing a judicial code of ethics, and a code of regulations and standards of conduct and performances for justices, judges and magistrates, along with sanctions and penalties for any violation thereof, and the supreme court of appeals is authorized to censure or temporarily suspend any justice, judge or magistrate having the judicial power of the state, including one of its own members, for any violation of any such code of ethics, code of regulations and standards, or to retire any such justice, judge or magistrate who is eligible for retirement under the West Virginia judges' retirement system (or any successor or substituted retirement system for justices, judges and magistrates of this state) and who, because of advancing years and attendant physical or mental incapacity, should not, in the opinion of the supreme court of appeals, continue to serve as a justice, judge or magistrate.

No justice, judge or magistrate shall be censured, temporarily suspended or retired under the provisions of this section unless he shall have been afforded the right to have a hearing before the supreme court of appeals, nor unless he shall have received notice of the proceedings, with a statement of the cause or causes alleged for his censure, temporary suspension or retirement, at least twenty days before the day on

which the proceeding is to commence. No justice of the supreme court of appeals may be temporarily suspended or retired unless all of the other justices concur in such temporary suspension or retirement. When rules herein authorized are prescribed, adopted and promulgated, they shall supersede all laws and parts of laws in conflict therewith, and such laws shall be and become of no further force or effect to the extent of such conflict.

A retired justice or judge may, with his permission and with the approval of the supreme court of appeals, be recalled by the chief justice of the supreme court of appeals for temporary assignment as a justice of the supreme court of appeals, or judge of an intermediate appellate court, a circuit court or a magistrate court.

A justice or judge may be removed only by impeachment in accordance with the provisions of section nine, article four of this constitution. A magistrate may be removed from office in the manner provided by law for the removal of county officers.

APPENDIX K

Arizona Constitution, Article VIII

Part 2. Impeachment

Section 1. Power of impeachment in house of representatives; trial by senate

The house of representatives shall have the sole power of impeachment. The concurrence of a majority of all the members shall be necessary to an impeachment. All impeachments shall be tried by the senate, and, when sitting for that purpose, the senators shall be upon oath or affirmation to do justice according to law and evidence, and shall be presided over by the chief justice of the supreme court. Should the chief justice be on trial, or otherwise disqualified, the senate shall elect a judge of the supreme court to preside.

APPENDIX L

28 U.S.C. § 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

APPENDIX M

28 U.S.C. § 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

APPENDIX N

W. Va. Code § 53-1-1. When writ of prohibition lies as matter of right.

The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.

APPENDIX O

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Case No. __

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

Petitioner,

v.

MITCH CARMICHAEL, as President of the Senate; DONNA J. BOLEY, as President Pro Tempore of the Senate; RYAN FERNS, as Senate Majority Leader; LEE CASSIS, Clerk of the Senate; and the WEST VIRGINIA SENATE,

Respondents.

PETITION FOR A WRIT OF MANDAMUS

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INTRODUCTION

On August 13, 2018, the West Virginia House of Delegates ("the House") broke the law. On that day, the House adopted numerous Articles of Impeachment ("Articles") setting the Petitioner to stand trial before the West Virginia Senate ("the Senate"). What nefarious deeds of the Petitioner served as the basis for these Articles? The Petitioner had the audacity to fulfill her constitutional mandate of ensuring that West Virginia courts efficiently serve West Virginia citizens by appointing senior status judges to fill judicial vacancies. She had the audacity to exercise her constitutional authority to pass and utilize a budget for the State's judicial branch. In short, she had the audacity to perform the duties and exercise the powers mandated to her by the West Virginia Constitution. Despite the clear edicts of the West Virginia Constitution, the House overstepped the bounds of its constitutionally-apportioned power and initiated proceedings to punish the Petitioner for exercising the powers explicitly provided to the judicial branch by the West Virginia Constitution. This cannot stand. This Court must order the Senate to halt proceedings that undermine the separation of powers principles enshrined in the West Virginia Constitution.

Not only, however, do the House's Articles violate the separation of powers principles by seeking to punish the Petitioner for performing duties explicitly reserved for the judicial branch, the House's procedures in promulgating those Articles are equally repugnant to the West Virginia Constitution. The House's purported basis for Article XIV—that the Petitioner's conduct violated Canon I and II of the West Virginia Code of Judicial Conduct—is a matter reserved solely for the judicial branch. Put simply, the

judicial branch alone has the power to regulate the conduct of judges. Article XIV usurps that power, attempting to shift the interpretation and enforcement of the Judicial Canons of Conduct to the Legislature. Again, this is anathema to the separation of powers principles embodied in the West Virginia Constitution.

Perhaps more troubling than the House's abject failure to respect the separation of powers, however, is the House's failure to afford the Petitioner the due process every West. Virginia citizen is due. Because the Petitioner is a lifelong public servant, the impeachment proceedings threaten the very pension that she has worked her whole career to attain. Therefore, the Articles enacted by the Senate must afford the Petitioner due process; indeed, this Court recognized that "the realization and protection of public employees' pension property rights is a *constitutional obligation of the State." Dadisman v. Moore*, 181 W. Va. 779, 791-92, 384 S.E.2d 816, 828 (1988), *holding modified by Benedict v. Polan*, 186 W. Va. 452, 413 S.E.2d 107 (1991) (emphasis added). In adopting their Articles, however, the House utterly failed to afford the Petitioner the due process she must be afforded under the West Virginia Constitution. Not only do the Articles provide the Petitioner absolutely no notice of the case the Legislature intends to bring against her, the Articles were promulgated in direct, knowing contravention of the procedures the House created to govern the adoption of the Impeachment resolution.

Furthermore, the plain language of the resolutions and the analysis of a noted parliamentarian agree that the House of Delegates never adopted the necessary language to proceed with impeachment. Accordingly, because the House violated the edicts of separation of powers and due process enshrined in the West

Virginia Constitution and never adopted the effectuating resolution, the Petitioner requests that this Court grant her Petition for Mandamus and order the Senate to halt impeachment proceedings premised on unconstitutional Articles of Impeachment. Petitioner further requests that this Court stay the Senate's proceedings until it can rule on the Constitutional deficiencies in the House's Articles.

RELIEF REQUESTED

Certainly, the Legislature possesses the sole power of impeachment under the West Virginia Constitution. W. VA. CONST. art. IV, § 9 ("the Impeachment Clause"). However, even the sweeping authority granted to the Legislature through the Impeachment Clause is limited by the requirement that impeachment proceedings comply with the law. *Nixon v. United States*, 506 U.S. 224, 237-38, 113 S. Ct. 732, 740, 122 L. Ed. 2d 1 (1993) (holding that, although some impeachment issues are a political question, "courts possess power to review either legislative or executive action that transgresses identifiable textual limits."). This Petition for a Writ of Mandamus seeks expedited relief in the form of an order staying the impeachment proceedings until these constitutional issues are resolved, and further ordering the Senate to perform its nondiscretionary duty under the Constitution to halt the impeachment proceedings because they are premised on unconstitutional articles.

QUESTIONS PRESENTED

<u>The Articles of Impeachment Violate the Doctrine of Separation of Powers</u>

1. The West Virginia Constitution provides that "[t]he legislative, executive and judicial departments shall be separate and distinct, so that neither shall

exercise the powers properly belonging to either of the others." *See* W. VA. CONST. art. V, § 1. It also grants the Judicial Branch plenary power to create and use its budget and to regulate ethical conduct and actions of judicial officers. *Id.* at art. VI, § 51; art. VIII, §§ 1, 3. In the Articles of Impeachment, the Legislature seeks to impeach members of the Supreme Court of Appeals of West Virginia for exercising its plenary authority in expending its budget. Moreover, many of the Legislature's Articles of Impeachment are premised on alleged violations of the Judicial Canons of Conduct—a system of rules created and enforced solely by the Judicial Branch using its plenary power to regulate the conduct of judicial officers. Do the Articles of Impeachment violate the doctrine of separation of powers?

The Articles of Impeachment Violate West Virginia Constitutional Precedent Regarding the Appointment of Senior Status Judges

2. Under the West Virginia Constitution, the Judicial Branch is given power to create and maintain an efficient judiciary. *See* W. VA. CONST. art. VIII, §§ 3, 8. It is fundamental that the courts are to be open to all people and must provide a remedy of due course of law to those who have suffered injuries. W. VA. CONST. art. III, § 17. To do so, the Judicial Branch is empowered to obtain the resources necessary to maintain the judicial system. *See*, *e.g.*, *State ex rel. Lambert v. Stephens*, 200 W. Va. 802, 811, 490 S.E.2d 891, 900 (1997). In some of the Articles of Impeachment, the Legislature seeks to impeach members of the Supreme Court of Appeals for appointing Senior Status Judges to fulfill the Court's constitutional obligation to maintain open courts. Is West Virginia Code § 51-9-10 unconstitutional to the extent it is

inconsistent with the open courts provision and other provisions of the West Virginia Constitution?

The Articles of Impeachment Violate the Petitioner's Due Process Rights

3. Article III, Section 10 of the West Virginia Constitution provides that individuals must be provided with due process of law. This Court recognized that individuals must be afforded substantial due process when their state pension rights are at issue. *Dadisman v. Moore*, 181 W. Va. 779, 791-92, 384 S.E.2d 816, 828 (1988). Impeachment proceedings place an individual's pension rights at issue. *In re Watkins*, 233 W. Va. 170, 175, 757 S.E.2d 594, 599 (2013). Article of Impeachment XIV treats the Justices collectively, and does not provide notice of the enumerated acts to which each Justice is charged. Furthermore, per House Resolution 201, the Legislature created a procedure designed to guarantee the fairness of the process, then ignored those fairness guarantees. For example, the House stated forthcoming Articles of Impeachment would contain findings of fact. The Articles of Impeachment actually adopted by the House did not contain any Findings of Fact as required by House Resolution 201. Does Article of Impeachment XIV violate the Petitioner's due process rights because the House failed to follow procedures it created to ensure the fairness of the impeachment proceedings and the impeachment proceedings implicate the Petitioner's pension?

The Resolution Authorizing the Articles of Impeachment Was Never Adopted, Rendering the Articles of Impeachment Null and Void

4. Under the West Virginia Constitution, the Senate may only proceed with an impeachment trial after the

House impeaches a public official. See W. VA. CONST. art. IV, § 9. Here, certain Articles of Impeachment were adopted, but no resolution was adopted authorizing impeachment. Nor was a resolution adopted exhibiting the articles to the Senate as required by House Resolution 201. Does the West Virginia House of Delegates' failure to adopt the enabling Resolution render the Articles of Impeachment null and void and, standing alone, meaningless?

STATEMENT OF THE CASE

Factual Background

The Petitioner, Margaret L. Workman, was appointed to the Circuit Court of Kanawha County on November 16, 1981 by Governor John D. Rockefeller, IV. She ran for the remainder of the unexpired term in 1982 and a full term in 1984. In 1988, she was elected to the Supreme Court of Appeals of West Virginia, serving a full term until 2000. After a brief return to private practice, she ran again for the Court in 2008, and was again elected to a twelve year term. Thus, she has served in the state judiciary for almost thirty years.

The West Virginia Constitution requires that "[t]here shall be at least one judge for each circuit court and as many more as may be necessary to transact the business of such court." W. VA. CONST. art. VIII, § 5. The Supreme Court of Appeals is tasked with administering the courts and must keep the court system open to the people. In fulfillment of that duty, when exigent circumstances arise, the Chief Justice has appointed senior status judges in order to preserve the fundamental right of the people to open courts, pursuant to the mandate in the West Virginia Constitution.

In numerous instances, the Chief Justice found it necessary to appoint senior status judges to serve at the circuit court level as a result of protracted illnesses, judicial suspensions, or 'other extraordinary circumstances. The Governor sometimes does not appoint judges to fill vacancies, requiring the Chief Justice to appoint a senior status judge to keep the Courts open.

For example, in 2017, the Supreme Court of Appeals suspended a newly elected circuit judge of Nicholas County for two years because of violations of the code of judicial ethics in certain campaign advertisements. *In re Callaghan*, 238 W. Va. 495, 503, 796 S.E.2d 604, 612, *cert. denied sub. nom.*, *Callaghan v. W Virginia Judicial Investigation Comm'n*, 138 S. Ct. 211, 199 L. Ed. 2d 118 (2017). Because the newly elected Judge was suspended for two years, and because Nicholas County is a single judge judicial circuit, an extraordinary need for temporary judicial services arose in order to provide the people of Nicholas County with court services and to avoid the unconstitutional denial of access to the speedy administration of justice. The Chief Justice appointed senior status judge James J. Rowe to serve as the temporary circuit judge of Nicholas County. Judge Rowe travels from his home in Lewisburg each day to perform this service. Judge Rowe serves the people of Nicholas County effectively, attending to the cases on the circuit court's docket. Using one senior status judge, rather than parading multiple judges through the courthouse, allows for the efficient and consistent adjudication of the matters pending in Nicholas County.

At that time, the Supreme Court of Appeals' then-Chief Justice Allen Loughry issued an administrative order, stating that "the chief justice has authority to

determine in certain exigent circumstances that a senior judicial officer may continue in an appointment beyond the limitations set forth in W. VA. CODE § 51-9-10, to avoid the interruption in statewide continuity of judicial services." *See* App. 043-044. The Chief Justice recognized that continuity in the sitting circuit judge was vital to maintaining the efficient and fair administration of justice and meeting the Court's constitutional obligation to keep the Courts open.

Furthermore, this Court can take judicial notice of the fact that continuity of a sitting circuit judge is vital to fair and full operation of the courts. W. VA. R. EVID. 201. This is especially true for child abuse and neglect cases or complex civil litigation, just two examples of many where shuttling in different judges every few weeks would destroy the continuity necessary for a full and fair adjudication of the matter. Continuity is vital to the adjudication of certain matters. The case load of a sitting circuit judge cannot be managed by committee.

Additionally, this Court can take judicial notice that the supply of available senior status judges is not unlimited. Without going into detail about any individual senior status judge, there are numerous reasons why some senior status judges may not be available for, or want to take,[1] lengthy appointments far from home. Many of West Virginia's senior status judges have significant health issues. Some have informed the Supreme Court of Appeals that they can no longer take appointments due to their health. Some wish to be listed as senior status judges, but have expressed a lack of interest in accepting appointments.

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[1] Senior Status Judges, as retired, are not required to accept an appointment and may decline an appointment for any reason.

At least one is going blind, another is a resident of a nursing home, and some are physically unable to travel. Others do work for the executive branch, precluding their appointment. Even among those that are healthy, some have personal commitments, like wintering in wanner climates, or other travel plans, which prevent them from accepting longer appointments. Often, these personal issues, whether health related or otherwise, are what led to the judge to retire in the first place.[2]

In addressing this issue, the House of Delegates did not consider how difficult it is to fill an appointment with a senior status judge in a rural part of West Virginia for six months, a year, or two years. As a result, the Supreme Court of Appeals' constitutional duty to maintain open courts is not as simple as counting the number of senior status judges and counting the number of days that they are available for appointment. It is far more complex, mandating a case by case analysis. The Court's Administrative Order recognized as much. *See* App. 043-044. Indeed, the then-Chief Justice recognized that, to the extent West Virginia Code conflicted with the Court's constitutional authority, the constitutional authority takes precedence.

Procedural Background

On August 7, 2018, the House Judiciary Committee considered recommendation of a resolution to the House of Delegates containing language adopting Articles of Impeachment and stating that the Articles

[2] The Court can take judicial notice of these facts pursuant to Rule 201 of the West Virginia Rules of Evidence. If any of these facts are disputed, Petitioner can provide supporting affidavits establishing these facts.

be exhibited to the Senate. App. 001 to 014. That resolution was never adopted. On August 13, 2018, after a motion to divide the question, the West Virginia House of Delegates voted on numerous individual Articles of Impeachment against the Justices of the Supreme Court of Appeals of West Virginia. *See* App. 015-026. Those articles did not contain any language stating that any Justice should be impeached, and contained no language stating that the Articles should be exhibited to the Senate. *Id.* Despite those infirmities, the individual Articles, but not the full language of the resolution, were adopted on the same day. *Id.*

The Petitioner is implicated in three of the Articles. First, Article IV seeks to impeach the Petitioner for paying senior status judges in excess of a statutory limit set by Legislature despite the fact that those senior status judges were needed to maintain the efficient functioning of the West Virginia judiciary. *Id.* at 018. Next, Article VI largely echoes Article IV. *Id.* at 020. Finally, Article XIV lumps all of the Justices together and charges them with a bevy of conduct that the House purported violated Canons I and II of the West Virginia Code of Judicial Conduct. *Id.* at 025-026.

After the House adopted the Articles, they moved to the. Senate. On August 20, 2018, Senate Resolution 203 was adopted, setting forth duties and adopting rules of procedure to apply to the impeachment proceedings. *See* App. 027-039. A Pre-Trial Conference occurred on Tuesday, September 11, 2018. *See* App. 029. The trials are set to begin on October 1, 2018, and the Petitioner's trial is set for October 15, 2018. Given the pendency of those proceedings, Petitioner requests

that this Court stay them until it resolves the issues raised in this Petition.

JURISDICTION AND STANDING

"Mandamus is a proper remedy to require the performance of a nondiscretionary duty by various governmental agencies or bodies." Syl. Pt. *1*, *State ex rel. Allstate Ins. Co. v. Union Pub. Serv. Dist.*, 151 W.Va. 207, 151 S.E.2d 102 (1966). "This Court's original jurisdiction in mandamus proceedings derives from Art. VIII, § 3, of the Constitution of West Virginia. Its jurisdiction is also recognized in Rule 14 of the West Virginia Rules of Appellate Procedure and W. Va. Code § 53-1-2 (1933)." *State ex rel. Potter v. Office of Disciplinary Counsel*, 226 W.Va. 1, 4, 697 S.E.2d 37, 40 (2010). Writs of mandamus have been used to nullify and prevent the commission of an unlawful and unconstitutional act by the Legislature. *See*, *e.g.*, *State ex rel. Bagley v. Blankenship*, 161 W. Va. 630, 650-51, 246 S.E.2d 99, 110 (1978).

Before this Court may properly issue a writ of mandamus, three elements must coexist: (1) the existence of a clear right in the petitioner to the relief sought; (2) the existence of a legal duty on the part of the respondent to do the thing the petitioner seeks to compel; and (3) the absence of another adequate remedy at law. Syl. Pt. 3, *Cooper v. Gwinn*, 171 W.Va. 245, 298 S.E.2d 781 (1981).

The first element, existence of a clear legal right to the relief sought, is generally a question of standing. Thus, where the individual has a special interest in that she is part of the class that is being affected by the action, then she ordinarily is found to have a clear legal right. *Walls v. Miller*, 162 W.Va. 563, 251 S.E.2d 491 (1978). Moreover, where the right sought to be

enforced is a public one in that it is based upon a general statute or affects the public at large, the mandamus proceeding can be brought by any citizen, taxpayer, or voter. *Smith v. W Va. State Bd. of Educ.*, 170 W. Va. 593, 596, 295 S.E.2d 680, 683 (1982), citing *State ex rel. Brotherton v. Moore*, 159 W.Va. 934, 230 S.E.2d 638 (1976); *State ex rel. W Va. Lodge*, *Fraternal Order of Police v. City of Charleston*, 133 W.Va. 420, 56 S.E.2d 763 (1949); *Prichard v. DeVan*, 114 W.Va. 509, 172 S.E. 711 (1934); *State ex rel. Matheny v. Cty. Court of Wyoming Cty.*, 47 W.Va. 672, 35 S.E..959 (1900).

The Petitioner is a citizen, taxpayer, and voter in the State of West Virginia. The Petitioner is granted under the West Virginia Constitution a right to open courts, a right to an elected judiciary, and a right to a legislative branch that follows the law. The Petitioner unequivocally has a special interest in these proceedings, as the Petitioner is an individual named in the Articles of Impeachment. The Petitioner's position as Chief Justice of the Supreme Court of Appeals of West Virginia, her livelihood, and her judicial pension, earned through a lifetime of public service, are all at risk.

In regard to the second element, the legal duties of Respondents, the members of the West Virginia Legislature took an oath of office to uphold the Constitution of the State of West Virginia. *See*, *e.g.*, W. VA. CONST. art. VI, § 16 (setting forth the oath of senators and delegates). Further, the Clerk of the Senate has certain legal duties prescribed by statute and Senate Resolutions. Whether a legal duty exists on the part of the Respondents to follow the Constitution, the Legislature's own resolutions, and the law will be discussed in more detail herein.

The third element is also met. "While it is true that mandamus is not available where another specific and adequate remedy exists, if such other remedy is not equally as beneficial, convenient, and effective, mandamus will lie." *Cooper*, *supra*, at Syl. Pt. 4, 298 S.E.2d 781. There is no question that no other adequate remedy is available, other than a Writ of Mandamus, to request an Order holding that the Legislature must follow the law and their constitutional duties. None of the issues herein can be resolved by the impeachment proceedings alone. Even a ruling by the Presiding Officer of the impeachment proceedings can be overruled by a majority vote of the Senators present. App. 36. A Writ of Mandamus is the most beneficial, convenient, and effective method to obtain a ruling on the issues described herein. No other remedy exists.

SUMMARY OF ARGUMENT

In making the law, the Legislature is also charged with following the law. However, the Legislature's impeachment efforts run afoul of the edicts of the West Virginia Constitution.

First, the Legislature's impeachment efforts violate the separation of powers principles enshrined in the West Virginia Constitution. Specifically, Articles IV, VI, and XIV of the Articles of Impeachment infringe on the Judicial Branch's sole power to control its budget. Additionally, the Articles of Impeachment repeatedly violate the separation of powers principles by alleging Justices violated the Judicial Canons of Conduct which regulate judicial conduct, an obligation solely within the province of the Judicial Branch. Therefore, the above-referenced Articles must be stricken as unlawful, and the Senate's impeachment proceedings based on those unlawful Articles must be halted.

Further, the Legislature seeks to impeach the Petitioner for complying with her constitutional duty to ensure that West Virginia Courts remain open and accessible for all West Virginians. The Supreme Court of Appeals of West Virginia has fulfilled this duty, at times, by appointing senior status judges. However, the Articles of Impeachment concerning the appointment of senior status judges cite to an inapplicable statute which, if applied as the Legislature directs, would be unconstitutional on its face because it is inconsistent with the Court's constitutional duties. Not only do these Articles seek to impeach the Justices for complying with their constitutional duties—these Articles are also entirely baseless under established West Virginia case law. Therefore, they must be stricken, and the Senate's impeachment proceedings based on those unlawful Articles must be halted.

Moreover, the Legislature's impeachment efforts run afoul of sacrosanct principles of due process. Due process is implicated here, as the Petitioner's rights to her livelihood and pension are at issue. The Petitioner's right to due process is violated because the Petitioner has not been afforded adequate notice of the charges against her. Specifically, under Article XIV, several justices are charged collectively for a series of acts that are attributable to some but not all of them. Accordingly, the Legislature failed to comport with due process because it failed to provide the Petitioner with notice of the charges against her.

Finally, the House never adopted the operative, effectuating language regarding the Articles of Impeachment. That language was present in the original resolution drafted by the House Judiciary Committee, but not in the Articles of Impeachment

ultimately adopted. This procedural flaw renders the articles null and void.

In sum, the Senate is charged with complying with the Constitution when conducting impeachment proceedings. If it proceeds on the Articles brought by the House against the Petitioner, it fails to abide by the Constitution because the Articles are constitutionally deficient. Therefore, the instant proceedings must be halted.

STATEMENT REGARDING ORAL ARGUMENT

Oral Argument is necessary, expedited relief is requested, and the Court's decisional process would be significantly aided by oral argument. Full oral argument pursuant to Rule 20 is appropriate, because this Petition presents issues of first impression before the Supreme Court of Appeals of West Virginia, issues of fundamental public importance related to the function of government, and issues of constitutional interpretation. Therefore, the Petitioner respectfully requests Rule 20 oral argument.

ARGUMENT

I. The Articles of Impeachment violate the principles of separation of powers enshrined within the West Virginia Constitution by usurping powers explicitly reserved for the Judicial Branch.

West Virginia's Constitution, like that of the United States and its forty nine sister states, provides for a system of separate and co-equal branches of government. Under Article V, § 1 of the West Virginia Constitution, "The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to

either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the Legislature." Based on that provision, the Supreme Court of Appeals of West Virginia has long held that "[t]he legislative, executive and judicial departments of the government must be kept separate and distinct, and each in its legitimate sphere must be protected." *State v. Buchanan*, 24 W. Va. 362, 1884 WL 2784 (1884). This edict is strictly enforced, "Article V, section 1 of the Constitution of West Virginia which prohibits any one department of our state government from exercising the powers of the others, is not merely a suggestion; it is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed." Syl. Pt. 1, *State ex rel. Barker v. Manchin*, 167 W.Va. 155, 279 S.E.2d. 622 (1981). To that end, the Court has determined, "Legislative enactments which are not compatible with those prescribed by the judiciary or with its goals are unconstitutional violations of the separation of powers." *State ex rel. Quelch v. Daugherty*, 172 W. Va. 422, 424, 306 S.E.2d 233, 235 (1983). Accordingly, when one branch of government oversteps the bounds of its constitutionally-granted power, the overreach "practically compels courts, when called upon, to thwart any unlawful actions of one branch of government which impair the constitutional responsibilities and functions of a coequal branch." *State ex rel. Brotherton v. Blankenship*, 158 W. Va. 390, 402, 214 S.E.2d 467, 477 (1975).

For example, the Supreme Court of Appeals of West Virginia struck legislation that limited its ability to control the process and standards for the admission to practice law. *See State ex rel. Quelch*, 172 W. Va. 422, 306 S.E.2d 233 (1983). In *Quelch*, the Legislature

passed a bill that eliminated the "diploma privilege" allowing graduates of the West Virginia University College of Law to practice in West Virginia without taking the bar exam. *Id.* However, under Article VIII, Sections 1 and 3 of the West Virginia Constitution, the Judicial Branch has plenary power to regulate admission to the practice of law. *Id. at* 423. Because the Judicial Branch is constitutionally vested with the power to control admission to the practice of law, this Court determined, "[a]ny legislatively-enacted provision regarding bar admissions that conflicts with or is repugnant to a Supreme Court rule must fall." *Id.* at 424. Therefore, the Court struck the law because it determined that, under separation of powers principles, the law constituted "an unconstitutional usurpation of this Court's exclusive authority to regulate admission to the practice of law in this State." *Id.* at 425.

Similarly, the Legislature's impeachment efforts run afoul of the Separation of Powers principles enshrined in the West Virginia Constitution in two ways. First, the Legislature's efforts[3] are an attempt to use punitive measures to police the Judiciary's budget. This is impermissible where the West Virginia Constitution grants the Judiciary the sole power to create and use its budget. Second, many of the Legislature's impeachment articles are premised on alleged violations of the Canons of Judicial Conduct (particularly Article XIV); however, the Judicial branch—not the Legislative branch—is imbued with

[3] Certainly, some of the Articles of Impeachment against Justice Loughry involve using public resources for private gain, have nothing to do with legitimate budgetary decisions, and the Petitioner is not arguing that those Articles of Impeachment are unconstitutional under the budget provisions.

plenary power to regulate judicial conduct. The Legislature may not usurp the Judiciary's role and judge otherwise legal judicial conduct where that function falls squarely within the powers and obligations of the Judicial Branch. The Petitioner will explain each of the Legislature's usurpations in turn.

a. The Articles of Impeachment violate the West Virginia Constitution by exerting Legislative control over the Judicial Branch's exclusive budget powers.

The West Virginia Constitution provides the Judicial Branch the sole power to control its budget. The Judicial Branch is charged with creating and enforcing its own budget. *See* W.VA. CONST. art. VIII, § 3 ("The court shall appoint an administrative director to serve at its pleasure at a salary to be fixed by the court. The administrative director shall, under the direction of the chief justice, prepare and submit a budget for the court."). The West Virginia Constitution limits other branches of government from controlling the Judicial Branch's budget. Under Article VI, § 51, Provision 5, "The Legislature shall not amend the budget bill so as to create a deficit but may amend the bill by increasing or decreasing any item therein: Provided, that no item relating to the judiciary shall be decreased."

The Supreme Court of Appeals of West Virginia has interpreted this provision broadly, holding, "The judiciary department has the inherent power to determine what funds are necessary, for its efficient and effective operation" and "Article VI, Section 51 of the West Virginia Constitution, when read in its entirety, shows a clear intent on the part of the framers thereof and the people who adopted it to preclude both the Legislature and the Governor from

altering the budget of the judiciary department as submitted by that department to the Auditor." Syl. Pts. 1 & 3, *State ex rel. Bagley v. Blankenship*, 161 W. Va. 630, 630, 246 S.E.2d 99, 101 (1978); *see also State ex rel. Brotherton v. Blankenship*, 157 W. Va. 100, 116, 207 S.E.2d 421, 431 (1973) (finding that Article 6, § 51 of the West Virginia Constitution evinces a clear intent to preclude both the Legislature and the Governor from altering the budget of the Judicial Branch). This interpretation makes sense—the plain intent of Article VI, § 51, Provision 5 is to "insulate[] the judiciary from political retaliation by preventing the governor and legislature from reducing the judiciary's budget submissions." *State ex rel. Frazier v. Meadows*, 193 W. Va. 20, 26, 454 S.E.2d 65, 71 (1994).

Despite the Judicial Branch's broad power to control its budget, the Legislature, through the impeachment trial, is attempting—in direct contravention of its constitutionally-limited powers—to infringe upon the Judicial Branch's constitutional power to control its budget. Importantly, the Articles related to the Judicial Branch's use of its budget do not allege that the Justices failed to comply with their budget as provided to them.[4] Rather, those Articles criticize how duly procured budgetary funds are used. In essence, the impeachment seeks to alter the Judicial Branch's budget by punishing Justices for using duly procured funds after the fact.

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[4] As discussed below, Articles IV, VI and XIV accuse the Justices of misusing funds to pay senior status judges, however, established West Virginia case law shows that the Supreme Court of Appeals may use Administrative Orders to procure payment to ensure that the West Virginia courts run properly—and that those Administrative Orders trump legislation to the contrary. *See infra*, at Argument section II.

In so doing, the Legislature oversteps the bounds of its constitutionally-defined role. It is undisputed the judicial branch has plenary constitutional authority to control its budget, and there is further no dispute that the expenditures that serve as the basis for the Petitioner's impeachment fall squarely within the Court's plenary power to control its budget. Basically, the Legislature is attempting to punish the Petitioner for using her unquestionable legal and constitutional authority to promulgate and use the judicial budget. This is impermissible. If the Legislature seeks a greater role in controlling the Judicial Branch's budget, the proper method of gaining that control is through a constitutional amendment[5]—not punitive measures intended to coerce the Judiciary from using its duly enacted budget. Accordingly, because the Legislature is attempting to use punitive measures in an attempt to police the Judicial Branch's budget, the Legislature is overstepping its constitutionally-defined role.[6] Therefore, the Petitioner seeks an Order

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[5] Indeed, Amendment Question 2, a provision aimed at re-distributing the Judicial Branch's power to control its Budget, is on the ballot for consideration in the upcoming general election.

[6] In addition to violating Article V, Section 1 of the West Virginia Constitution, the Articles of Impeachment violate Article VI, Section 51, Provision 13: Per that Provision, "In the event of any inconsistency between any of the provisions of this section and any of the other provisions of the constitution, the provisions of this section shall prevail." W. VA. CONST. art. VI, § 51. Importantly, Article 6, Section 51 gives the Judiciary broad power to control its budget, prohibiting the Legislature from altering the Judiciary's budgetary items.

Here, the Legislature is attempting to impeach with the authority vested in it by Article IV, Section 9, which states, "Any officer of the state may be impeached for maladministration, corruption, incompetency, gross immorality, neglect of duty, or any high crime or misdemeanor." Although this provision is

staying and ultimately halting the Senate's impeachment proceedings premised on the unconstitutional Articles of Impeachment.

b. The Articles of Impeachment violate the West Virginia Constitution by appropriating the Judicial Branch's exclusive power to regulate judicial conduct.

The Supreme Court of Appeals of West Virginia has plenary authority to promulgate rules governing judicial conduct, and the rules it adopts have the force and effect of a statute. *See* W.VA. CONST., art. VIII, §§ 3 and 8. Additionally, when a rule adopted by the Court conflicts with another statute or law, the rule supersedes the conflicting statute or law. *See* W.VA. CONST., art. VIII, § 8. The Court has "general supervisory control over all intermediate appellate courts, circuit courts and magistrate courts," and "[t]he chief justice shall be the administrative head of all the courts." *See* W.VA. CONST. art. VIII, § 3. Accordingly,

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not facially inconsistent with Article VI, Section 51, Provision 13, the Legislature's application of Article IV, Section 9 renders it in opposition to Article VI, Section 51. Article VI, Section 51 gives the Judiciary broad power to control their budget; however, the Legislature seeks to rein in that broad power using Article IV, Section 9 to punish the Court for using duly procured budgetary funds. Simply put, the Legislature is attempting to use Article IV, Section 9 to punitively narrow the Judiciary's ability to control its budget, an act which is elsewhere prohibited. If the Legislature seeks the ability to exert greater control over the Judiciary's budget, constitutional reform—not punitive impeachment hearings—is the proper way to exert that control. Because the impeachment clause creates an inconsistency with the budget clause, the budget clause must prevail. W. VA. CONST. art. VI, § 51. Therefore, the Legislature's use of Article IV, Section 9 is unconstitutional because it runs afoul of Article VI, Section 51, Provision 13.

the Court also has the authority to "use its inherent rule-making power" to "prescribe, adopt, promulgate, and amend rules prescribing a judicial code of ethics, and a code of regulations and standards of conduct and performances for justices, judges and magistrates, along with sanctions and penalties for any violation thereof." *See* W.VA. CONST. art. VIII, § 8.

> Under this constitutional authority, the Court can:
>
> Censure or temporarily suspend any justice, judge or magistrate having the judicial power of the State, including one of its own members, for any violation of any such code of ethics, code of regulations and standards, or to retire any such justice, judge or magistrate who is eligible for retirement under the West Virginia judges' retirement system (or any successor or substituted retirement system for justices, judges, and magistrates of this State) and who, because of advancing years and attendant physical or mental incapacity, should not, in the opinion of the Supreme Court of Appeals, continue to serve as a justice, judge or magistrate.

Id.

As a result, the investigations of any perceived or complained of violations of the provisions of the West Virginia Code of Judicial Conduct, including violations of Canons I and II, remain the exclusive province of the Judicial Branch. The Judicial Investigation Commission is the only governmental entity in West Virginia vested with power to investigate violations of the West Virginia Code of Judicial Conduct.

This structure aligns perfectly with the West Virginia Constitution. "The judicial power of the state shall be vested solely in a supreme court of appeals." *See* W. VA. CONST. art. VIII, § 1. Specifically, with respect to discipline for violations of the West Virginia Code of Judicial Conduct, "[t]he Supreme Court of Appeals will make an independent evaluation of the record and recommendations of the Judicial [Hearing] Board in disciplinary proceedings." Syl. Pt. 1, *W Va. Judicial Inquiry Comm'n v. Dostert*, 165 W. Va. 233, 271 S.E.2d 427 (1980); Syl. Pt., *In re Hey*, 193 W.Va. 572, 457 S.E.2d 509 (1995); *In re Callaghan*, 238 W.Va. 495, 796 S.E.2d 604 (2017). "This Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law." Syl. Pt. 3, *Comm. on Legal. Ethics v. Blair*, 174 W. Va. 494, 327 S.E.2d 671 (1984), *cent denied*, 470 U.S. 1028, 105 S.Ct. 139 (1985). Further, "[t]he West Virginia Constitution confers on the West Virginia Supreme Court of Appeals, both expressly and by necessary implication, the power to protect the integrity of the judicial branch of government and the duty to regulate the political activities of all judicial officers." Syl. Pt. 6, *State ex rel. Carenbauer v. Hechier*, 208 W.Va. 584, 542 S.E.2d 405 (2000)

Article of Impeachment XIV states that: "The failure by the Justices, individually and collectively, to carry out these necessary and proper administrative activities constitute a violation of the provision of Canon I and Canon II of the West Virginia Code of Judicial Conduct." App. 026. Canon I states that *"A Judge shall uphold and promote the Independence, Integrity, and Impartiality of the Judiciary, and shall avoid Impropriety and the Appearance of Impropriety."* Canon II

states that *"A Judge shall perform the Duties of Judicial Office Impartially, Competently, and Diligently."*

The Legislature has neither the authority to attempt to interpret, enforce, or construe the Canons of Judicial Conduct, nor the authority to revisit rulings interpreting those Canons. Any impeachment proceeding which relies upon an interpretation by the Legislature of the Canons of Judicial Conduct is unconstitutional because the judicial branch—not the Legislature—is vested with the sole authority to regulate judicial conduct under the West Virginia Constitution. Therefore, this Court should stay the impeachment proceedings in the pendency of its ruling and issue a mandamus requiring the Senate to halt the impeachment proceedings because they are premised on unconstitutional Articles.

II. The Articles of Impeachment violate West Virginia Constitutional precedent regarding the appointment of senior status judges.

The State Constitution requires the Supreme Court of Appeals to keep the courts open and provide access to all. Specifically, West Virginia Constitution, Article III, Section 17 states:

> The courts of this state shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay.

The State Constitution also establishes that individuals have the right to trial by jury in certain actions. *See*, *e.g.*, W. VA. CONST. art. III, §§ 13-14. "The right of access to our courts is one of the basic and fundamental principles of jurisprudence in West Virginia." *Mathena v. Haines*, 219 W. Va. 417, 422, 633

S.E.2d 771, 776 (2006) (recognizing access to courts as a fundamental constitutional right).

In furtherance of the right of access to the courts, the Judicial Reorganization Amendment established a procedure for utilizing senior status judges for temporary assignment:

> A retired justice or judge may, with his permission and with the approval of the supreme court of appeals, be recalled by the chief justice of the supreme court of appeals for temporary assignment as a justice of the supreme court of appeals, or judge of an intermediate appellate court, a circuit court or a magistrate court.

W. VA. CONST. art. VIII, § 8. The Judiciary also has inherent power to obtain necessary resources and defend constitutional interests. *See*, *e.g.*, *State ex rel. Lambert v. Stephens*, 200 W. Va. 802, 811, 490 S.E.2d 891, 900 (1997). "Prior to the adoption of the *Judicial Reorganization Amendment*, there may have been some question as to this Court's supervisory powers over lower courts. *See Fahey v. Brennan*, 136 W. Va. 666, 68 S.E.2d 1 (1951). It is now quite clear under the *Judicial Reorganization Amendment* that considerable supervisory powers have been conferred upon this Court." *Stern Bros. v. McClure*, 160 W.Va. 567, 573, 236 S.E.2d 222, 226 (1977).

The Supreme Court of Appeals has relied upon its constitutional authority to supervise lower courts and recall senior status judges for temporary assignments from time to time, often in cases of exigent circumstances. When a judge is absent from performing his or her duties for a significant length of time, but his or her position is not vacant, the Governor is prevented

from appointing a replacement for such judge. *See* App. 043--044. For example, judges can be absent from the bench for protracted health problems, suspensions due to ethical violations, or other extraordinary circumstances. The appointment by the Chief Justice of the Supreme Court of Appeals of senior status judges to serve in such circumstances is therefore permissible under its explicit and inherent powers.

West Virginia Code § 51-9-10 does not prohibit the Chief Justice from appointing a senior status judge to fill a vacancy on a temporary basis in the face of exigent circumstances. That statute purports to prohibit paying senior status judges more than a sitting judge's salary. *See*, *e.g.*, W. VA. CODE § 51-9-10.[7] Generally, that code section states that per diem payments and retirement payments to a senior status judge appointed from a panel "as needed and feasible

[7] W. VA. CODE § 51-9-10, entitled "Services of senior judges" states:

The West Virginia Supreme Court of Appeals is authorized and empowered to create a panel of senior judges to utilize the talent and experience of former circuit court judges and supreme court justices of this state. The Supreme Court of Appeals shall promulgate rules providing for said judges and justices to be assigned duties as needed and as feasible toward the objective of reducing caseloads and providing speedier trials to litigants throughout the state: Provided, That reasonable payment shall be made to said judges and justices on a per diem basis: Provided, however, That the per diem and retirement compensation of a senior judge shall not exceed the salary of a sitting judge, and allowances shall also be made for necessary expenses as provided for special judges under articles two and nine of this chapter.

toward the objective of reducing caseloads and providing speedier trials" cannot exceed the salary[8] for a sitting circuit judge. Constitutional provisions, however, cannot be superseded by a statutory provision of the legislature, such as W. VA. CODE § 51-9-10.[9]

Moreover, there is substantial authority supporting the position that the Supreme Court of Appeals can establish rules that take precedence over statutes. The Constitution states that "The 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 shall have the force and effect of law." W. VA. CONST. art. VIII, § 3; see also *id.* art. VIII, § 8 (noting the Supreme Court's "inherent rule-making power" and granting it authority to adopt ethical rules and rules of conduct for judges). Furthermore, the Judicial Reorganization Amendment expressly granted the Supreme Court of Appeals of West Virginia the "power

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[8] W. VA. CODE § 51-2-13, entitled "Salaries of judges of circuit courts," states that "beginning July 1, 2011, the annual salary of a circuit court judge shall be $126,000."

[9] In the House of Delegates, during the debate on the Articles of Impeachment, the suggestion was raised that Senior Status judges simply work for free after reaching the maximum salary under § 51-9-10. Of course, any judge placed in such a situation could continue to work for free, or could simply inform the Supreme Court of Appeals they are no longer interested in continuing on that appointment and aren't interested in any more appointments until the following year. As contract employees, the Supreme Court of Appeals of West Virginia would have no authority to compel the Senior Status Judges to work for free, and indeed, as the Court knows, a senior status judge can refuse an appointment for any reason. The absurd nature of the House's proposed solution demonstrates that these Articles of Impeachment were adopted without any consideration of the obligations imposed on the judiciary by the West Virginia Constitution.

to promulgate administrative rules." *Stern Bros. v. McClure*, 160 W. Va. 567, 573, 236 S.E.2d 222, 226 (1977). Article VIII, Section 8 of the Judicial Reorganization Amendment recognized the inherent rulemaking power which this Court previously used to adopt judicial rules and gave such rules "the force and effect of statutory law" by amending Article VIII, Section 8 of the West Virginia Constitution to read:

> When rules herein authorized are prescribed, adopted and promulgated, they shall supersede all laws and parts of laws in conflict therewith, and such laws shall be and become of no further force or effect to the extent of such conflict.

Id. (citing W. VA: CONST. art. VIII, § 8); *see also* Syl. Pt. 2, *Bennett v. Warner*, 179 W. Va. 742, 743, 372 S.E.2d 920, 921 (1988) ("Under article eight, section three of our Constitution, the Supreme Court of Appeals shall have the power to promulgate rules for all of the courts of the State related to process, practice, and procedure, which shall have the force and effect of law."; *State v. Davis*, 178 W. Va. 87, 91, 357 S.E.2d 769, 772 (1987) (overturned on other grounds); *State ex rel. Kenamond v. Warmuth*, 179 W. Va. 230, 232, 366 S.E.2d 738, 740 (1988); *Teter v. Old Colony Co.*, 190 W. Va. 711, 724-25, 441 S.E.2d 728, 741 42 (1994); *Williams v. Cummings*, 191 W. Va. 370, 372, 445 S.E.2d 757, 759 (1994).

The Supreme Court of Appeals "has not hesitated to invalidate a statute that conflicts with our inherent rule-making authority." *State Farm Fire & Cas. Co. v. Prinz*, 231 W. Va. 96, 105, 743 S.E.2d 907, 916 (2013) (noting "this Court's longstanding position that the legislative branch of government cannot abridge the

rule-making power of this Court"). In *Stern Brothers*, the Court held that:

> The administrative rule promulgated by the Supreme Court of Appeals of West Virginia, setting out a procedure for the temporary assignment of a circuit judge in the event of a disqualification of a particular circuit judge, operates to supersede the existing statutory provisions found in W. Va. Code, 51-2-9 and -10 and W. Va. Code, 56-9-2, insofar as such provisions relate to the .selection of special judges and to the assignment of a case to another circuit judge when a particular circuit judge is disqualified.

Syl. Pt. 2, 160 W. Va. 567, 567, 236 S.E.2d 222, 223 (1977).

On May 19, 2017, pursuant to its rule-making authority, then-Chief Justice Loughry issued an administrative order, which stated that the constitutional administrative authority of the Court to keep the courts of the state open trumps W. VA. CODE § 51-9-10 "in certain exigent situations involving protracted illness, lengthy suspensions due to ethical violations, or other extraordinary circumstances...," and that "the chief justice has authority to determine in certain exigent circumstances that a senior judicial officer may continue in an appointment beyond the limitations set forth in W. VA. CODE § 51-9-10, to avoid the interruption in statewide continuity of judicial services." *See* App. 043-044. To the extent a possible conflict existed between § 51- 9-10 and the Judicial Reorganization Amendment, this Administrative Order superseded the statute, eliminating that possibility.

This Administrative Order arose, in part from Judge Callaghan of Nicholas County's suspension from the practice of law due to violations of the code of judicial ethics in relation to certain campaign advertisements he ran against his political opponent. Because the newly elected Judge was suspended for two years, and no other judge sits in that circuit, an extraordinary need for temporary judicial services arose in order to provide the people of Nicholas County with court services and to avoid the unconstitutional denial of access to the speedy administration of justice.[10]

Although the Administrative Order does not explicitly reference and overrule § 51-9-10, it does state that where that statute comes into conflict with the Court's inherent duties under the Constitution, the Administrative Order and the Constitution take precedence over the statute. Furthermore, the statement in the Administrative Order must be applied retroactively, as it addresses "matters that are regulated exclusively by this Court pursuant to the Rule-Making Clause, Article VIII, § 3 of the West Virginia. Constitution." *Richmond v. Levin*, 219 W. Va. 512, 514, 637 S.E.2d 610, 612 (2006). Therefore, the Administrative Order of the Supreme Court of Appeals of West Virginia, Article VIII, § 3, and Article VIII, § 8 of the West Virginia Constitution, supersedes W. VA. CODE §51-9-10. *See* App. 043-044.

Moreover, the Legislature's proclamation in W. VA. CODE § 51-9-10 cannot limit the constitutional authority of the Supreme Court of Appeals set forth in the *Judicial Reorganization Amendment.* A judge

[10] Litigants would not be served by sending a different senior status judge every week, and there was no such surplus of senior status judges to send. Judge Rowe commutes several hours a day for this appointment.

appointed based on exigent circumstances is not simply providing daily stand-in duties to reduce caseloads and provide speedier trials, which are the two reasons listed in W. VA. CODE § 51-9-10. Instead, such a judge is temporarily assigned to deal with "exigent circumstances" that left a court without a judge, but did not constitute a vacancy which the governor could fill. *Id.* Because these judges were appointed under a different authority altogether—the Supreme Court of Appeals of West Virginia's administrative rules and inherent duty and constitutional authority to keep the Courts open, which supersede the West Virginia Code, and which cannot be limited by an act of the Legislature absent a constitutional amendment—these senior status judges' salaries are not governed by W. VA. CODE § 51-9-10.

As a result, the Articles of Impeachment relying on that section of the Code are unconstitutional because they infringe upon the Chief Justice's stated authority under the *Judicial Reorganization Amendment*, to promulgate rules and administer the Judiciary branch pursuant to West Virginia Constitution Article VIII, § 3.

Therefore, this Court should stay the proceedings in the pendency of its ruling and issue a mandamus requiring the Senate to halt the impeachment proceedings because they are premised on unconstitutional Articles of Impeachment.

III. The Articles of Impeachment violate the Petitioner's constitutional right to due process.

Finally, the Articles of Impeachment violate the Petitioner's constitutional right to due process. Although the West Virginia Constitution vests in the Legislature the "sole power of impeachment," the

Legislature may not wantonly use that power in a manner that violates the due process the Petitioner is due under Article III, Section 10 of the West Virginia Constitution. *See*, *e.g.*, *Fraley v. Civil Serv. Comm'n*, 177 W. Va. 729, 733, 356 S.E.2d 483, 487 (1987) ("The Legislature 'may not constitutionally authorize the deprivation of such [a property] interest, once conferred, without appropriate procedural safeguards.'"). Here, they seek not only to remove the Petitioner from her duly elected office, but to take her livelihood. More specifically, because impeachment implicates the Petitioner's vested right in a state pension,[11] the Legislature must afford the Petitioner due process during the impeachment process. *See In re Watkins*, 233 W. Va. 170, 175, 757 S.E.2d 594, 599 (2013) ("[A] state official who is impeached forfeits all rights to a state pension."); *Dadisman v. Moore*, 181 W. Va. 779, 791-92, 384 S.E.2d 816, 828 (I988), *holding modified by Benedict v. Polan*, 186 W. Va. 452, 413 S.E.2d 107 (1991) ("[T]he realization and protection of public employees' pension property rights is a constitutional obligation of the State. The State cannot divest the plan participants of their rights except by due process."). Here, the Legislature failed to afford the Petitioner notice of the claims asserted against her; therefore, the Legislature's actions fail to meet the requirements of due process. Moreover, even if the Legislature did provide some modicum of notice to the

[11] Any doubt that the Senate is seeking to tale Petitioner's pension was removed at the Pre-Trial Conference on September 11, 2018. At that conference, the Senate heard debate on a resolution to dismiss the impeachment against Justice Robin Jean Davis. One of the arguments raised in opposition to that resolution was that, even though Justice Davis had resigned, she still was eligible to receive a pension, and thus must be impeached.

Petitioner, that notice falls well short of process she is due under the United States and West Virginia Constitution. The Petitioner will detail each of these failures in turn.

a. The Senate's impeachment proceedings fail to afford the Petitioner adequate due process because she received no specific notice of the charges asserted against her.

Although due process is a fluid concept, it is universally accepted that due process requires proper notice and a meaningful opportunity to be heard. *Fraley*, 177 W. Va. at 732, 356 S.E.2d at 486 (stating that the essential requirements of due process are "notice and an opportunity to respond"). Notice encompasses more than merely providing the Petitioner acknowledgement of the proceedings against her—courts have routinely held that notice is insufficient where it fails to provide individuals of the basis of the charges asserted against them. *See Bd. of Educ. of Cty. of Mercer v. Wirt*, 192 W. Va. 568, 576, 453 S.E.2d 402, 410 (1994) (determining that an individual did not receive notice adequate for due process where he was not "provided adequate written notice of the charges against him and an explanation of the evidence prior to the Board of Education's meeting"); *Fraley*, 177 W. Va. at 732, 356 S.E.2d at 486 (determining that due process in the civil employment context required "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story prior to termination" (citation omitted)). For example, in *Wirt*, this Court determined that a party did not receive adequate notice where an individual was provided written notice that failed to describe the basis for charges leveled against the defendant. *Wirt*, 192 W.

Va. at 576, 453 S.E.2d at 410. Specifically, the Court noted that "without sufficient notice of the charges against him, his opportunity to address the Board was meaningless." *Id.*

Similarly, the Articles at issue in this case afford the Petitioner insufficient notice of the charges against her and severely hinder her defense of her case. Specifically, in the Articles, the House took a catch-all, shotgun approach in Article of Impeachment XIV. That Article lists every Justice, and lists numerous allegations, without specifying which Justice is accused of which of the allegations. App. 025-26. This is a significant and clear violation of the notice requirements of due process, which require an individual be apprised of the charges against him or her, and be given adequate notice of the offense charged and for which he or she is to be tried. *Rabe v. Washington*, 405 U.S. 313 S.Ct. 993 (1972) (other citations omitted). Instead of placing the Justices on specific notice, Article XIV refers to the Justices "individually and collectively" refers to behavior "including, but without limitation" and accuses the Justices of failing to do "one or more of the following," noticeably violating due process and making it completely impossible for an accused Justice to determine what portion of Article XIV he or she is accused of. Absent notice of the foregoing, there is no due process for the accused. *See*, *e.g.*, *Wirt*, 192 W. Va. at 576, 453 S.E.2d at 4I0. (determining that an individual's ability to appear before a board was meaningless where that individual was not afforded notice of the charges against him and the basis for those charges, and accordingly, the individual was not afforded the notice he was due under the due process guarantee).

In addition to leaving it completely unclear which Justice is being charged with which allegation, Article XIV fails to realize that absent a majority of three of the five justices, no policies can be adopted at the Supreme Court of Appeals of West Virginia. Therefore, even if the Petitioner had drafted and proposed a policy that would have prevented the allegedly improper conduct, she would have needed a majority to adopt such a policy. Absent an allegation of individual conduct, the Articles lack due process. *See United States v. Thomas*, 367 F.3d I94, 187 (4th Cir. 2004) (dismissal for failure to state an offense). The Senate Rules, enacted through Senate Resolution 203 (App. 027, *et. seq.)* require separate trials, though this Article treats the five Justices as if they were one and the same. Put simply, the Petitioner is being forced to defend herself against a charge that lumps her together with the other Justices and utterly fails to describe the basis for her impeachment. This utterly fails to meet due process notice requirements.

b. The Senate's impeachment proceedings pose a substantial risk of erroneously depriving the Petitioner of her pension rights because the House knowingly ignored the procedures it adopted to govern the impeachment process when attempting to adopt its flawed Articles of Impeachment.

Even assuming, however, that Article XIV provided the Petitioner some miniscule amount of notice of the charges leveled against her, the Articles nevertheless fail to afford the Petitioner sufficient due process. This Court determined, "[t]he extent of due process protection affordable for a property interest requires consideration of three distinct factors: first, the private interests that will be affected by the official

action; second, the risk of an erroneous deprivation of a property interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Syl. Pt. 5, *Waite v. Civil Service Comm'n*, 161 W.Va. 154, 241 S.E.2d 164 (1977). In this case, the Court must consider the due process that must be afforded the Petitioner to ensure the protection of her property interest in her pension. Therefore, as shown above, the first factor weighs conclusively in favor of the Petitioner because "the realization and protection of public employees' pension property rights is a *constitutional obligation of the State." Dadisman*, 181 W. Va. at 791 92, 384 S.E.2d at 828 (emphasis added).

Furthermore, the second factor weighs in favor of the Petitioner—the Resolutions at issue in this case pose an immensely high risk of erroneously depriving the Petitioner of her due process right to her pension. To fully understand the risk that the House's conduct posed to the Petitioner's property rights, it is crucial to understand the Resolution at issue. DR 201 empowered the House Committee on the Judiciary to investigate allegations of impeachable offenses against the Justices of the Supreme Court of Appeals of West Virginia. *See* App. 040-042. HR 201 set forth five duties of the Judiciary Committee:

> (1) To investigate, or cause to be investigated, any allegations or charges related to the maladministration, corruption, incompetency, gross immorality, or high crimes or misdemeanors committed by any Justice of the West Virginia Supreme Court of Appeals;

> (2) To meet during the adjournment of the House of Delegates and to hold a hearing or hearings thereon if deemed necessary in the course of its investigation;
>
> (3) To make findings of fact based upon such investigation and hearing(s);
>
> (4) To report to the House of Delegates its findings of facts and any recommendations consistent with those findings of fact which the Committee may deem proper; and
>
> (5) If the recommendation of the Committee be to impeach any or all of the five members of the West Virginia Supreme Court of Appeals, then to present to the House of Delegates a proposed resolution of impeachment and proposed articles of impeachment;

App. 040 (House Resolution 201 (2018)). Furthermore, the Judiciary Committee, through FIR 201 goes on to characterize these five items as "its duties pursuant to this resolution." *Id.* The Judiciary Committee refers to this list as "its duties." *Id.* It is uncontroverted that duties (3) and (4) the House imposed on itself (making findings of fact and reporting them to the House) were never fulfilled.

Instead, the House Judiciary Committee presented recommended articles of impeachment without ever issuing the aforesaid report to the Legislature, and without ever making any findings of fact as referenced in HR 201. The Articles of Impeachment consist solely of accusations without any findings of fact, and contain no report to the House regarding those findings. Despite the binding nature of HR 201, it was not followed here, and therefore the Articles of Impeachment recommended to the House violate the House

Judiciary Committee's own resolution regarding the impeachment process. Courts examining whether or not a government body must follow its own rules and regulations, even if it has the authority to change them, have uniformly held they must. *Vitarelli v. Seaton*, 359 U.S. 535 (I959); *Service v. Dulles*, 354 U.S. 363 (1957); *U.S. ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *State ex rel. Wilson v. Truby*, 167 W. Va. 179, 281 S.E.2d 231 (1981); *Accardi v. Bd. of Educ.*, Syl. Pt. 1, 163 W. Va. I, 254 S.E.2d 561 (1979). The House's failure to follow its procedures poses a severe risk to the Petitioner's property rights because she was not afforded the Due Process that the House resolved to provide her.

Troublingly, the Judiciary Committee's failure to fulfill the duties it placed on itself was not an oversight. This issue was raised repeatedly during the impeachment proceedings when it could have been corrected, but the Judiciary Committee intentionally chose not to correct the deficiency. The House Judiciary Committee was made aware of this deficiency during the impeachment proceedings by various members of the Legislature:

> MINORITY VICE CHAIR FLUHARTY: Thank you, Mr. Chairman. Counsel, I was going through these Articles. Where are the findings of fact?
>
> MR. CASTO: Well, there – there are no findings of fact there. The Committee –
>
> MINORITY VICE CHAIR FLUHARTY: Where?
>
> MR. CASTO: I said, sir, there are no findings of fact.

MINORITY VICE CHAIR FLUHARTY: There are no findings of fact? All right. Have you read House Resolution 201?

MR. CASTO: I have, sir, but I have not read it today.

MINORITY VICE CHAIR FLUHARTY: Well, do you know that were required to have findings of fact?

MR. CASTO: I think, sir, that my understanding is – based upon the Manchin Articles – that the term "findings of fact" which was used at the same time, that the profferment of these Articles is indeed equivalent to a finding of fact. The – but that, again, is your interpretation, sir.

MINORITY VICE CHAIR FLUHARTY: So based upon the clear wording of House Resolution 201, it says we're "To make findings of fact based upon such investigations and hearings;" and "To report to the Legislature its findings of facts and any recommendations consistent with those findings of facts which the Committee may deem proper." I mean, you're – you're aware how this works in the legal system. You draft separate findings of fact. I'm just wondering why we haven't done that.

MR. CASTO: Because, sir, that is not the manner in which impeachment is done.

MINORITY VICE CHAIR FLUHARTY: Well, the findings of fact in House Resolution 201 are referenced separate from proposed

> Articles of Impeachment. Am I wrong in that observation?
>
> MR. CASTO: I don't believe that you're wrong in that.

App. 046-047 (Tr. of Impeachment Hearing 2013:3 to 2014:19). Furthermore, members of the House Judiciary Committee pointed out to the committee chair that failing to follow HR 201 could mean that the House's actions would be deemed invalid:

> MINORITY CHAIR FLEISCHAUER: Thank you, Mr. – thank you, Mr. Chairman. I think the gentleman has raised a valid point. If we look at the Resolution that empowers this Committee to act, it – it says that we are to make findings of fact based upon such investigation and hearing and to report to the House of Delegates its findings of fact and any recommendations consistent with those findings, of which the Committee may deem proper.
>
> And normally -- I know a lot of people say in here, "We're not lawyers," but many of us are; and I think it's Rule 52 that requires Courts to make findings of fact and also that their recommendations for any Resolution has to be consistent with those findings of fact.
>
> And I'm just a little concerned that if we don't have findings of fact that there could be some flaw that could mean that the final Resolution by the House would be deemed to be not valid.
>
> And I don't think it would be that hard to make findings of facts, but I think that would be consistent with the -- with the Resolution,

> and I think that's what authorizes us to act at all, is the Resolution.
>
> So I think we – if there – there would be some wisdom in trying to track the language of the Resolution, and it would be consistent with any other proceeding that we have in West Virginia that when there are requirements of findings of fact and – in this case, it's not conclusions of law, but it's recommendations – that we should follow that.

App. 048-049 (Tr. of Impeachment Hearing 2016:10 to 2017:16)(emphasis added). Just as Minority Chair Fleischauer stated, absent findings of fact, and absent reporting of the findings of fact to the House as a whole the Judiciary Committee has not followed its own procedures as set forth in HR 201. This is anathema to due process. The West Virginia State Constitution affords individuals due process where their property rights are at issue, and in lieu of providing the Petitioner her due process, the Legislature repeatedly and blatantly turned a blind eye to the obligations it imposed on itself. Therefore, the second factor of the due process test—the risk of erroneous deprivation—overwhelmingly weighs in favor of the Petitioner based on the procedural flaws present in the House's processes.

Finally, the third due process factor, the government's interest and burdens, weighs in favor of the Petitioner. It is not unduly burdensome to require the body tasked with making the laws to follow the procedures it creates to govern its conduct. It is absurd to suggest that requiring the Legislature to follow the very rules it created is unduly burdensome. Indeed, as the body tasked with creating' laws, it must be held to the procedures that it creates to govern its conduct.

Accordingly, because the Petitioner was not afforded the due process she must be afforded under the West Virginia Constitution, this Court must stay the proceedings in the pendency of its decision in this case and ultimately order the Senate to halt the impeachment proceedings.

IV. The House never voted on the resolution authorizing the Articles of Impeachment, and therefore the trial is illegitimate and unconstitutional.

The West Virginia House of Delegates is a deliberative body fashioned after the United States House of Representatives, and therefore, bases its procedures and House Rules upon parliamentary practice. See House Rule 135. The power to make its rules of procedure is given to the House under Sec. 24, Art. VI of the West Virginia Constitution W. VA. CONST. art. VI, § 24. On June 26, 2018, the House, pursuant to the Proclamation of the Governor, convened in Extraordinary Session and adopted HR 201, which set forth rules and procedures for the impeachment proceeding at bar. See App. 040-042.

Among other things, HR 201 Resolved as follows:

> (5) If the recommendation of the Committee be to impeach any or all of the five members of the West Virginia Supreme Court of Appeals [sic], then to present to the House of Delegates a proposed resolution of impeachment and proposed articles of impeachment";... and Further Resolved that if the Committee recommends that any or all of the Justices be impeached, that the House of Delegates adopt a resolution of impeachment

> and formal articles of impeachment as prepared by the Committee ...

App. 40.

Following the adoption of HR 201 on June 26, 2018, the Committee proceeded to investigate, issue summonses and subpoenas, call witnesses and take testimony. At the conclusion of their investigation and pursuant to HR 201, the Committee prepared HR 202 for presentation to the full body. However, the Committee never voted to send the resolution to the floor of the House for a vote. On August 13, 2018, Delegate Shott introduced in the House HR 202, which recommended impeachment of Petitioner and Justices Loughry, Davis and Walker, contained fourteen Articles of Impeachment, and stated that the same be exhibited to the Senate. Journal of the House of Delegates (2018) pages 1964-1971; see also App. 1-14.

Next, the Journal of the House, at page 1971, reflects the following action: "At the respective requests [sic] of Delegate Cowles, and by unanimous consent, the report of the Committee on the Judiciary preparing [sic] Articles of Impeachment and the resolution effectuating the same were taken up for immediate consideration." Importantly, this language confirms that the resolution "effectuates" the Articles of Impeachment. *Id.* at 1971.

What happened next is the genesis of the fatal omission by the House. "Delegate Cowles asked and obtained unanimous consent that the question be divided and that each Article be voted upon separately." Journal of the House (2018) at 1971. A division of the question is permitted by House Rule 44, which states in part as follows:

> Any member may move for a division of any question other than passage of a bill before the vote thereon is taken, if it comprehend propositions in substance so distinct that, one being taken away, a substantive proposition will remain for the decision of the House, but the member moving for the division of a question shall state in what manner he proposes it shall be divided...

House Rule 44.

Delegate Cowles' motion was proper; he moved for a division of the question and stated the manner in which he proposed it be divided (by Article). Then, the House proceeded to take up each Article of Impeachment as divided by. the House. When the deliberations were concluded on each of the fourteen articles, an additional article (XV) was moved for adoption from the floor but was rejected by the House. At that point, individual Articles I through X and XIV had been adopted. Various other matters were attended to, but the House failed to take up the Resolution that had been divided from the Articles of Impeachment.

Comparing the proposed language from the House Judiciary Committee's suggested resolution, with the actually adopted portions demonstrates the lack of language authorizing action by the Senate. See App. 00I-026. The proposed Judiciary Committee version of the resolution states

> THAT, pursuant to the authority granted to the House of Delegates in Section 9, Article IV of the Constitution of the State of West Virginia, that Chief Justice Margaret Workman, Justice Allen Loughry, Justice Robin Davis, and Justice Elizabeth Walker,

> Justices of the Supreme Court of Appeals of West Virginia, be impeached for maladministration, corruption, incompetency, neglect of duty, and certain high crimes and misdemeanors committed in their capacity and by virtue of their offices as Justices of the Supreme Court of Appeals of West Virginia, and that said Articles of impeachment, being fourteen in number, be and are hereby adopted by the House of Delegates, and that the same shall be exhibited to the Senate in the following words and figures, to wit:

App. 1. (emphasis added).

The version actually adopted by the House is totally devoid of this vital language. *See*, *e.g.*, App. 015-026. The language bolded in the quote above was never voted on by the House of Delegates. Absent the language actually authorizing the impeachment, there can be no proceedings in the Senate as the Senate is without authority to move forward without this language.

Indeed, local news media reported on this issue. See App. 051-054. A Charleston Gazette-Mail article reported that the House of Delegates told the news media the following:

> While the question of adopting House Resolution 202 has been divided to allow Delegates to adopt each article individually, the House will still have to come back and vote to adopt House Resolution 202 in its entirety once Delegates have voted on each article and the amendments to them.
>
> So while the House is considering each individual article of impeachment right now, the

> resolution formally containing all the articles of impeachment will not be adopted and sent to the Senate until the final vote on the resolution in its totality.

Id. The House clearly (and correctly) explained the process to the news media, stating that the requisite final vote on the entire resolution would be held later. *Id.*

But, the Gazette Article went on to state that the House Spokesman reversed course, stating that no such vote would take place. *Id.* In fact, that is what happened, and the House has never actually adopted any resolution adopting impeachment, making their process fatally defective.

According to the Journal of the House, by unanimous consent the report of the Committee on the Judiciary containing the Articles of Impeachment and the resolution effectuating the same were taken up for immediate consideration. Effectuate means to bring to pass, carry into effect, cause to happen, put in force. That is precisely what the full resolution does for the Articles of Impeachment—carries them into effect, puts them in force. Without the resolution, exhibiting the articles to the Senate is like sending over amendments to a bill but not the bill. There is no starting point. The Articles of Impeachment, standing alone, are just pieces of paper without any statement of the resolve of the House or even that the House voted to impeach. Further, the House's own rules contained in HR 201 require, in two separate places, the passage of a resolution *and* articles of impeachment. Once the question was divided pursuant to House Rule 44, the resolution portion was left behind, only the individual Articles were adopted and the Senate therefore has no authority to conduct a trial.

In support of this analysis, noted former House parliamentarian Gregory M. Gray has opined that the House never adopted the operative, necessary, vital language to move forward with the impeachment. See App. 055-057. Mr. Gray, a renowned expert in the parliamentary rules applicable to the West Virginia House of Delegates, concurs with the obvious conclusion to be drawn from the language of the adopted resolutions the House never voted on the necessary language. Furthermore, Mr. Gray opines that HR 202 was never properly before the House for consideration, and that none of the subsequent resolutions adopted by the House cured any of these deficiencies. All of these defects render the Articles without force.

Without any enabling, effectuating language, without any clause actually enacting the impeachment and resolving to provide it to the Senate in an adopted resolution, the current proceedings in the Senate are fatally flawed because the Senate is proceeding without the authority necessary for it to conduct the impeachment proceedings. W. VA. CONST. art. IV, § 9. For these reasons, Petitioner prays that the Articles of Impeachment be declared null and void, the Senate ordered to proceed no further, and the impeachment proceedings stayed in the pendency of this Court's ruling.

CONCLUSION

This writ is not intended to *provoke* a constitutional crisis; it is intended to *prevent* one. Our Constitution assigns to the Legislature the sole power to impeach and convict public officials, including Justices of this Court. Indeed, the Legislature's power to impeach is an essential check and balance on executive and judicial power. At the Pre-Trial Conference before the Senate, several legislators referenced the public's lack

of trust in the judiciary as a result of the spending reported in the news media. Similarly, to have trust in the impeachment process, the public needs the Legislature to follow the law. The impeachment provision of the Constitution is simply but one component of our constitutional structure, which establishes three separate and equal branches of government and empowers the judicial branch to ensure the rule of law. Each branch of our constitutional government must respect the balance our Founders wrought in order to preserve our collective liberty for the benefit of the people of West Virginia. Each branch must conform its conduct to our Constitution. Otherwise, West Virginia does not have a government of laws, but only one of individuals.

Accordingly, because the House's Articles of Impeachment clearly violate the West Virginia Constitution, the Petitioner requests that this Court stay the impeachment proceedings in the pendency of its decision and ultimately issue a mandamus halting the Senate's impeachment proceedings based on the unconstitutional Articles.

MARGARET L. WORKMAN
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VERIFICATION

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

I, Margaret L. Workman, after being first duly sworn, depose and say that the facts contained in the foregoing *Petition for a Writ of Mandamus* are true, except insofar as they are therein stated to be upon information and belief, and that as they are therein stated to be upon information and belief, I believe them to be true.

/s/ Margaret L. Workman
Chief Justice Margaret L. Workman

Taken, subscribed and sworn to before me, the undersigned Notary Public, this 20 day of September, 2018.

My commission expires December 14, 2022.

/s/ Joan Mullins
NOTARY PUBLIC

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
JOAN MULLINS
WV Supreme Court of Appeals
1900 Kanawha Blvd E
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Charleston, WV 25305
My Commission Expires December 14, 2022

IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA

Case No. ___

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

Petitioner,

v.

MITCH CARMICHAEL, as President of the
Senate; DONNA J. BOLEY, as President
Pro Tempore of the Senate; RYAN FERNS,
as Senate Majority Leader; LEE CASSIS,
Clerk of the Senate; and the
WEST VIRGINIA SENATE,

Respondents.

APPENDIX

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As Adopted by Judiciary Committee, Aug. 7 *(Articles may be renumbered, but content will not change.)*

ARTICLES OF IMPEACHMENT FOR THE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Resolved by the House of Delegates:

BE IT RESOLVED, That, pursuant to tile authority granted by the House of Delegates of West Virginia to the House Committee on the Judiciary in House Resolution 201, dated June 26, 2018, the Committee on the Judiciary recommends to the House of Delegates of West Virginia:

THAT, pursuant to the authority granted to the House of Delegates in Section 9, Article IV of the Constitution of the State of West Virginia, that Chief Justice Margaret Workman, Justice Allen Loughry, Justice Robin Davis, and Justice Elizabeth Walker Justices Of the Supreme Court of Appeals of West Virginia, be impeached for maladministration, corruption; incompetency, neglect of duty, and certain high crimes and misdemeanors committed in their capacity and by virtue of their offices as Justices, of the Supreme Court of Appeals. of West Virginia, and that said Articles of Impeachment, being fourteen in number, be and are hereby adopted by the House of Delegates, and that th[e] same shall be exhibited to the Senate in the following words and figures, to wit

ARTICLES exhibited by the House of Delegates of the State of West Virginia in the name of themselves and all of the people of the State of West Virginia against:

> Margaret Workman, who was at the general election held in November 2008, duly elected

to the office of Justice of the Supreme Court of Appeals of West Virginia and on the 29th day of December 2008, after having duly qualified ash a Justice by taking the required oath to support the Constitution of the United States and the Constitution of the State of West Virginia and faithfully discharge the duties of that office to the best of her skill and judgment, entered upon the discharge of the duties thereof; and on the 16th day of February 2018, was elevated to the position of Chief Justice and entered upon the discharge of the duties thereof; and

Allen Loughry, who was at the general election held in November 2012, duly elected to the office of Justice of the Supreme Court of Appeals of West Virginia and on the 14th day of December 2012; after having duly qualified as a Justice by taking the required Oath to support the Constitution of the United States and the Constitution of the State of West Virginia and faithfully discharge the duties of that office to the best of her skill and judgment, entered upon the discharge of the duties thereof; and

Robin Davis, who was at the general election held in November 2012 duly elected to the office of Justice of the Supreme Court of Appeals of West Virginia and on the 13th day of January 2013, after having duly qualified as a Justice by taking the required oath to support the Constitution of the United States and the Constitution of the State of West Virginia and faithfully discharge the duties of that office to the best of her skill and

judgment, entered upon the discharge of the duties thereof; and

Elizabeth Walker, who was at the general election held in November 2016 duly elected to the Office of Justice of the Supreme Court of Appeals of West Virginia and on the 6th day of December 2016, after having duly qualified as a Justice by taking the required oath to support the Constitution of the United States and the Constitution of the State of West Virginia and faithfully discharge the duties of that Office to the best of her Skill and judgment, entered upon the discharge of the duties thereof; and

In maintenance and support of their impeachment against them. Margaret Workman, Allen Loughry, Robin Davis, and Elizabeth Walker for maladministration, corruption, incompetency, neglect of duly; and certain high crimes and misdemeanors.

Article I

That the said Chief Justice Margaret Workman, and Justice Robin Davis, being at all times relevant Justices of the Supreme Court of Appeals of West Virginia, and at various relevant times individually each Chief Justice of the Supreme Court of Appeals of West Virginia unmindful of the duties of their high offices, and contrary to the oaths taken by them to support the Constitution of the State of West Virginia and faithfully discharge the duties of their offices as such Justices, while in the exercise of the functions of the office of Justices, in violation of their oaths, of office, then and there, with regard to the discharge of the duties of their offices, commencing in of about

2012, did knowingly and intentionally act, and each subsequently oversee in their capacity as Chief Justice, and did in that capacity as Chief Justice severally sign and approve the contracts necessary to facilitate, at each such relevant time, to overpay certain Senior Status Judges in violation of the statutory limited maximum salary for such Judges, which overpayment is a violation of the provisions of W. Va. Code §51-2-13 and W.Va. Code §51-9-10, and, in violation of an Administrative Order of the Supreme Court of Appeals, in potential violation of the provisions of W.Va. Code §61-3-22, relating to the crime of falsification of accounts with intent to enable or assist any person to obtain money to which he was not entitled, and in potential violation of the provisions of W.Va. Code §5-10-45, relating to the crime of fraud against the West Virginia Public Employees Retirement System, and, in potential violation of the provisions set forth in W.Va. Code §61-3-24, relating to the crime of obtaining money, property and services by false 'pretenses, and, all of the above are in violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

Article II

That the said Chief Justice Margaret Workman, Justice Allen Loughry, Justice Robin Davis, and Justice Elizabeth Walker, being at all times relevant Justices of the Supreme Court of Appeals of West Virginia, unmindful of the duties of their high offices, and Contrary to the oaths taken by them to support the Constitution of the State of West Virginia and faithfully discharge the duties of their offices ac such Justices, while in the exercise of the functions of the office of Justices, in violation of their oaths of office, then and there, with regard to the discharge of the

duties of their offices, did, in the absence of any policy to prevent or control expenditure, waste state funds with little or no concern for the costs to be borne by the tax payers for unnecessary and lavish spending for various purposes including, but without limitation, to certain examples, such as: to remodel state offices, for large increases in travel budgets—including unaccountable personal use of state vehicles, for unneeded computers for home use, for regular lunches from restaurants, and for framing of personal items and other Such wasteful expenditure net necessary for the administration of justice and the execution of the duties of the Court; and, did fail to provide or prepare reasonable and proper supervisory oversight of the operations of the Court and the subordinate courts by filings to carry out one or more of the following necessary and proper administrative activities:

A) To prepare and adopt sufficient and effective travel policies prior to October of 2016, and failed thereafter to properly effectuate such policy by excepting the Justices from said policies, and subjected subordinates and employees, to a greater burden than the Justices.;

B) To report taxable fringe benefits, such as car use and regular lunches, on Federal W-2s, despite full knowledge of the Internal Revenue Service Regulations, and fur subjected Subordinates and employees to a greater burden than the Justices, in this regard, and upon notification of such violation, failed to speedily comply with requests to make such reporting consistent with applicable law;

C) To provide proper supervision, control, and auditing of the use of state purchasing cards

leading to multiple violations of state statutes and policies regulating the proper use of such cards, including failing to obtain proper prior approval for large purchases;

D) To prepare and adopt sufficient and effective home Office policies which would govern the Justices' home computer use, and which led to a lack of oversight which encouraged the Conversion of property;

E) To provide effective supervision and control over record keeping with respect to the use of state automobiles, which has already resulted in an executed Information upon one former Justice and the indictment of another Justice.

F) To provide effective supervision and control over inventories of state property owned by the Court and subordinate courts, which led directly to the undetected absence of valuable state property, including, but not limited to, a state-owned desk and a state-owned computer;

G) To provide effective supervision and control over purchasing procedures which directly lead to inadequate cost containment methods, including the rebidding of the purchases of goods and services utilizing a system of large unsupervised change orders, all of which encouraged waste of taxpayer funds.

The failure by the Justices, individually and collectively, to carry out these necessary and proper administrative activities constitute a violation of the provisions of Canon I and Canon II of the West Virginia, Code of Judicial Conduct.

Article III

That the said Justice Allen Loughry, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high office, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, did on or about June 20, 2013, cause a certain desk, of a type colloquially known as a "Cass Gilbert" desk, to the transported from the State Capitol to his home, and did Maintain possession of such desk in his home, where it remained throughout his term as Justice for approximately four and one-half years, in violation of the provisions of W.Va. Code §29-1-7 (b), prohibiting the removal of original furnishing of the state capitol from the premises; further, the expenditure of state funds to transport the desk to his home, and refusal to return the desk to the state, constitute the use of state resources and property for personal gain' in violation of the provisions of W.Va. Code §6B-2-5, the provisions of the West Virginia State Ethics Act, and constitute a violation of the provisions of Canon I of the West Virginia Code of Judicial Conduct.

Article IV

That the said Justice Allen Loughry, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high office, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice; while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with

regard to the discharge of the duties of his office, did beginning in or about December 2012, intentionally acquired and used state government computer equipment and hardware for predominately personal use—including a computer not intended to be connected to the court's network, utilized state resources to install computer access services at his home for predominately personal use, and utilized state resources to provide maintenance and repair of computer Services for his residence resulting from predominately personal use; all of which acts constitute the use of state resources end property for personal gain in Violation of the provisions of W.Va. Code §6B-2-5, the provisions of the West Virginia State Ethics Act, and constitute a violation of the provisions of Canon I of the West Virginia Code of Judicial Conduct.

Article V

That the said Justice Allen Loughry, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high office, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then end theta, with regard to the discharge of the duties. of his office, did beginning in or about December 2012, and continuing for a period of year& intentionally acquire and use state government vehicles for personal use; including, but not limited to, using a state vehicle and gasoline purchased utilizing a State issued fuel purchase bard to travel to the Greenbrier on one or more occasions for book signings and sales, which Such acts enriched his family and which acts constitute the use of state resources and property for personal gain in violation

of the provisions of W.Va. Code §6B-2-5, the provisions Of the West Virginia State Ethics Act, and constitute a violation of the provisions of Canon I of the West Virginia Code of judicial conduct.

Article VI

That the said Justice Allen Loughry, being at all times relevant a Justice of the Supreme Court of Appeals of West Virginia, and at that relevant time individually Chief Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high offices, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justices, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, did on or about May 19, 2017, did In his capacity as Chief Justice, draft an Administrative Order of the Supreme Court of Appeals, bearing his signature, authorizing the Supreme Court of Appeals to overpay certain Senior Status Judges in violation of the statutorily limited maximum salary for such Judges, which overpayment is a violation of the provisions of W.Va. Code §51-2-13 and W.Va. Code §51-9-10; his authorization of such overpayments Was a violation of the clear statutory law of the state of West Virginia, as set forth in those relevant Code sections, and, was an act in potential violation of the provisions set forth in W.Va. Code §61-3-22, relating to the crime of falsification of accounts with intent to enable or assist any person to obtain money to Which he was not entitled, and in potential violation of the provisions of W.Va. Code §5-10-45, relating to the crime of fraud against the West Virginia Public Employees Retirement System, and, in potential

violation of the provisions set forth in W.Va. Code §61-3-24, relating to the crime of obtaining money, property and services by false pretenses, and all of the above are in violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

Article VII

That the said Justice Allen Loughry, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high office, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the Office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, did waste state funds with little or no concern for the costs to be borne by the tax payer for unnecessary and lavish spending in the renovation and remodeling of his personal office, to the sum of approximately $30,000, which sum included the purchase of a $31,924 couch, a $33,750 floor, and other such wasteful expenditure not necessary for the administration of justice and the execution of the duties of the Court, which represents a waste of state funds.

Article VIII

That the said Justice Elizabeth Walker, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of her high office, and contrary to the oaths taken by her to support the Constitution of the State of West Virginia and faithfully discharge the duties of her office as such Justice, while in the exercise of the functions of the office of Justice, in violation of her oath of office, then and

there, with regard to the discharge of the duties of her office, did waste state funds with little or no concern for the costs to be borne by the tax payer for unnecessary and lavish spending in the renovation and remodeling of her personal office, which had been largely remodeled less than seven years prior, to the sum of approximately $131,000, which sum included, but is not limited to, the purchase of approximately $27,000 in items listed as office furnishings and wallpaper, and other such wasteful expenditure not necessary for the administration of justice and the execution of the duties of the Court, which represents a waste of state funds.

Article IX

That the said Justice Robin Davis, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of her high office, and contrary to the oaths taken by her to support the Constitution of the State of West Virginia and faithfully discharge the duties of her office as such Justice, while in the exercise of the functions of the office of Justice, in violation of her oath of office, then and there, with regard to the discharge of the duties of her office, did waste state funds with little or no concern for the costs to be borne by the tax payer for unnecessary and lavish spending in the renovation and remodeling of her personal office, to the sum of approximately $500,000, which sum included, but is not limited to, the purchase of an oval rug tag that cost approximately $20,500, a desk chair that cost approximately $8,000 and over $23,000 in design services, and other such wasteful expenditure not necessary for the administration of justice and the execution of the duties of the Court, which represents a waste of state funds.

Article X

That the said Justice Robin Davis, being at all tines relevant a Justice of the Supreme Court of Appeals of West Virginia, and et certain relevant times individually Chief Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of her high offices, and contrary to the Oath taken by her to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of her oath of office, then' and there, with regard to the discharge of the duties of her office, did in the year 2014, did in her capacity as Chief Justice, sign certain Forms WV 48, to retain and compensate certain Senior Status Judges the execution of which forms allowed the Supreme Court of Appeals to overpay those certain Senior Status Judges in Violation of the statutorily limited maximum salary for such Judges, Which overpayment is a violation of the provisions of W.Va. Code §51-2-13 end W.Va. Code §51-9-10, her authorization of such overpayments was a violation of the clear statutory law of the state of West Virginia, as set forth in those relevant Code sections, and was an act in potential violation of the provisions set forth in W.Va. Code §61-3-22, relating to the crime of falsification of accounts with intent to enable or assist any person to obtain money to which he was not entitled, and in potential violation Of the provisions of Ma. Code §5-10-45, relating to the crime of fraud against the West Virginia Public Employees Retirement System, and, in potential violation of the provisions set forth in W.Va. Code §61-3-24, relating to the crime of obtaining money, property and services by false pretenses, and all of the above are in violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

Article XI

That the said Chief Justice Margaret Workman, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of her high office, and contrary to the oaths taken by her to support the Constitution of the State of West Virginia and faithfully discharge the duties of her office as such Justice, while in the exercise of the functions of the office of Justice, in violation of her oath of office, then, and there, with regard to the discharge of the dirties of her office, did waste state funds with little or no concern for the costs to be borne by the tax payer for unnecessary and lavish spending in the renovation and remodeling of her personal office, to the sum of approximately $111,000, which sum included, but is not limited to, the purchase of wide plank cherry flooring, and other such wasteful expenditure not necessary for the administration of justice and the execution of the duties of the Court, which represents a waste of state funds.

Article XII

That the said Justice Margaret Workman, being at all times relevant a Justice of the Supreme Court of Appeals of West Virginia, and at certain relevant times individually Chief Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of her high offices, and contrary to the oaths taken by her to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of her oath of office, then and there, with regard to the discharge of the duties of her office, did in the year 2015, did in her capacity as Chief Justice, sign certain Forms WV 48, to retain and compensate certain Senior

Status Judges the execution of which forms allowed the Supreme Court of Appeals to overpay those certain Senior Status Judges in violation of the statutorily limited maximum salary for such Judges, which overpayment is a violation of the provisions of W.Va. Code §51-2-13 and W.Va. Code §51-9-10; her authorization of such overpayments was a violation of the clear statutory law of the state of West Virginia, as set forth in those relevant Code sections, and, Was an act in potential violation of the provisions set forth in W.Va. Code §61-3-22, relating to the crime of falsification of accounts with intent to enable or assist any person to obtain money to which he was not entitled; and in potential violation of the provisions of W.Va. Code §5-10-45, relating to the clime of fraud against the West Virginia Public Employees Retirement System, and, in potential violation of the provisions set forth in W.Va. Code §61.3-24, relating to the crime of obtaining money, property and services by false pretenses, and all of the above are in violation of the provisions of Canon 1 and Canon all of the West Virginia Code of Judicial Conduct.

Article XIII

That the said Justice Allen Loughry, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high office, and contrary to the baths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, With regard to the discharge of the duties of his office, made statements while under oath before the West Virginia House of Delegates Finance Committee, with deliberate intent to deceive, regarding renovations and

purchases for his office, asserting that he had no knowledge and involvement in these renovations, where evidence presented clearly demonstrated his in-depth knowledge and participation in those renovations, and, his intentional efforts to deceive members of the Legislature about his participation and knowledge of these acts, while under oath.

Article XIV

That the said Justice Allen Loughry, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high office, end contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, direct that personal pictures and items be placed in customized picture frames and be paid for by state monies, and these items were subsequently removed from his State office and converted to his personal use and benefit, which acts constitute the use of state resources and property for personal gain in violation of the provisions of W.Va. Code §6B-2-5.

WHEREFORE, the said Chief Justice Margaret Workman, Justice Allen Loughry, Justice Robin Davis, and Justice Elizabeth Walker, Justices of the Supreme Court of Appeals of West Virginia, failed to discharge the duties of their offices, and were and are guilty of maladministration, corruption, incompetency, neglect of duty, and certain high crimes and misdemeanors.

And the House of Delegates of West Virginia, saving to themselves the liberty and rights of exhibiting at

any time hereafter any further Articles of Impeachment against the said Chief Justice Margaret Workman, Justice Allen Loughry, Justice Robin Davis, and Justice Elizabeth Walker, Justices of the Supreme Court of Appeals of West Virginia, individually and collectively, as aforesaid, and also of replying to their answers which they may make unto the Articles herein proffered against them, and of offering proof to any all of the Articles herein contained, and every part thereof; and to all an every other Article, accusation, or impeachment, which shall be exhibited by the said House of Delegates as the case may require, do demand that the said Chief Justice Margaret Workman, Justice Allen Loughry, Justice Robin Davis, and Justice Elizabeth Walker, Justices of the Supreme Court of Appeals of West Virginia, individually and collectively, as aforesaid, may be put to answer the of maladministration, corruption, incompetency, neglect of duty, and certain high crimes and misdemeanors herein charged against them, and that such proceedings, examinations, trials, and judgments, may be thereupon had, given and taken, as may be agreeable to the Constitution and the laws of the State of West Virginia, and as justice may require.

We, John Overington, Speaker Pro Tempore of the House of Delegates of West Virginia, and Stephen J. Harrison, Clerk thereof, do certify that the above and foregoing Articles of Impeachment proffered by said House of Delegates against Chief Justice Margaret Workman, Justice Allen Loughry, Justice Robin Davis, and Justice Elizabeth Walker, Justices of the Supreme Court of Appeals of West Virginia, individually and collectively, as aforesaid, were adopted by the House of Delegates on the ––– day of ––––– 2018,

In Testimony Whereof, we have signed our names hereunto, this the ––– day of ––––– 2018.

Article I

That the said Justice Allen Loughry, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high office, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, did waste state funds with little or no concern for the costs to be borne by the tax payer for unnecessary and lavish spending in the renovation and remodeling of his personal office, to the sum of approximately $363,000, which sum included the purchase of a $31,924 couch, a $33,750 floor with medallion, and other such wasteful expenditure not necessary for the administration of justice and the execution of the duties of the Court, which represents a waste of state funds.

Article II

That the said Justice Robin Davis, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of her high office, and contrary to the oaths taken by her to support the Constitution of the State of West Virginia and faithfully discharge the duties of her office as such Justice, while in the exercise of the functions of the office of Justice, in violation of her oath of office, then and there, with regard to the discharge of the duties of her office, did waste state funds with little or no concern for the costs to be borne by the tax payer for unnecessary and lavish spending in the renovation and remodeling of her

personal office, to the sum of approximately $500,000, which sum included, but is not limited to, the purchase of an oval rug that cost approximately $20,500, a desk chair that cost approximately $8,000 and over $23,000 in design services, and other such wasteful expenditure not necessary for the administration of justice and the execution of the duties of the Court, which represents a waste of state funds.

Article III

That the said Justice Allen Loughry, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high office, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, did on or about June 20, 2013, cause a certain desk, of a type colloquially known as a "Cass Gilbert" desk, to be transported from the State Capitol to his home, and did maintain possession of such desk in his home, where it remained throughout his term as Justice for approximately four and one-half years, in violation of the provisions of W.Va. Code §29-1-7 (b), prohibiting the removal of original furnishings of the state capitol from the premises; further, the expenditure of state funds to transport the desk to his home, and refusal to return the desk to the state, constitute the use of state resources and property for personal gain in violation of the provisions of W.Va. Code §6B-2-5, the provisions of the West Virginia State Ethics Act, and constitute a violation of the provisions of Canon I of the West Virginia Code of Judicial Conduct.

Article IV

That the said Chief Justice Margaret Workman, and Justice Robin Davis, being at all times relevant Justices of the Supreme Court of Appeals of West Virginia, and at various relevant times individually each Chief Justice of the Supreme Court of Appeals of West Virginia unmindful of the duties of their high offices, and contrary to the oaths taken by them to support the Constitution of the State of West Virginia and faithfully discharge the duties of their offices as such Justices, while in the exercise of the functions of the office of Justices, in violation of their oaths of office, then and there, with regard to the discharge of the duties of their offices, commencing in or about 2012, did knowingly and intentionally act, and each subsequently oversee in their capacity as Chief Justice, and did in that capacity as Chief Justice severally sign and approve the contracts necessary to facilitate, at each such relevant time, to overpay certain Senior Status Judges in violation of the statutory limited maximum salary for such Judges, which overpayment is a violation of Article VIII, §7 of the West Virginia Constitution, stating that Judges "shall receive the salaries fixed by law" and the provisions of W.Va. Code §51-2-1.3 and W.Va. Code §51-9-10, and, in violation of an Administrative Order of the Supreme Court of Appeals, in potential violation of the provisions of W.Va. Code §61-3-22, relating to the crime of falsification of accounts with Intent to enable or assist any person to obtain money to which he was not entitled, and, in potential violation of the provisions set forth in W.Va. Code §61-3-24, relating to the crime of obtaining money, property and services by false pretenses, and, all of the above are in violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

Article V

That the said Justice Robin Davis, being at all times relevant a Justice of the Supreme Court of Appeals of West Virginia, and at certain relevant times individually Chief Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of her high offices, and contrary to the oaths taken by her to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of her oath of office, then and there, with regard to the discharge of the duties of her office, did in the year 2014, did in her capacity as Chief Justice, sign certain Forms WV 48, to retain and compensate certain Senior Status Judges the execution of which forms allowed the Supreme Court of Appeals to overpay those certain Senior Status Judges in violation of Article VIII, § 7 of the West Virginia Constitution, stating that Judges "shall receive the salaries fixed by law" and the statutorily limited maximum salary for such Judges, which overpayment is a violation of the provisions of W.Va, Code §51-2-13 and W.Va. Code §51-9-10; her authorization of such overpayments was a violation of the clear statutory law of the state of West Virginia, as set forth in those relevant Code sections, and, was an act in potential violation of the provisions set forth in W.Va. Code §61-3-22, relating to the crime of falsification of accounts with intent to enable or assist any person to obtain money to which he was not entitled, and, in potential violation of the provisions set forth in W.Va. Code §61-3-24, relating to the crime of obtaining money, property and services by false pretenses, and all of the above are in violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

Article VI

That the said Justice Margaret Workman, being at all times relevant a Justice of the Supreme Court of Appeals of West Virginia, and at certain relevant times individually Chief Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of her high offices, and contrary to the oaths taken by her to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of her oath of office, then and there, there, with regard to the discharge of the duties of her office, did in the year 2015, did in her capacity as Chief Justice, sign certain Forms WV 48, to retain and compensate certain Senior Status Judges the execution of which forms allowed the Supreme Court of Appeals to overpay those certain Senior Status Judges in violation of the statutorily limited maximum salary for such. Judges, which overpayment is a violation of Article VIII, § 7 of the West Virginia Constitution, stating that Judges "shall receive the salaries fixed by law" and the provisions of W.Va. Code §51-2-13 and Ma, Code §51-9-10; her authorization of such overpayments was a violation of the clear statutory law of the state of West Virginia, as set forth in those relevant Code sections, and, was an act in potential violation of the provisions set forth in W.Va. Code §61-3-22, relating to the crime of falsification of accounts with intent to enable or assist any person to obtain money to which he was not entitled, and, in potential violation of the provisions set forth in W.Va. Code §61-3-24, relating to the crime of obtaining money, property and services by false pretenses, and all of the above are in violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

Article VII

That the said Justice Allen Loughry, being at, all times relevant a Justice of the Supreme Court of Appeals of West Virginia, and at that relevant time individually Chief Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high offices, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justices, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, did on or about May 19, 2017, did in his capacity as Chief Justice, draft an Administrative Order of the Supreme Court of Appeals, bearing his signature, authorizing the Supreme Court of Appeals to overpay certain Senior Status Judges in violation of the statutorily limited maximum salary for such Judges, which overpayment is a violation of Article VIII, § 7 of the West Virginia Constitution, stating that Judges "shall receive the salaries fixed by law" and the provisions of W.Va. Code §51-2-13 and W.Va. Code §51-9-10; his authorization of such overpayments was a violation of the clear statutory law of the state of West Virginia, as set forth in those relevant Code sections, and, was an act in potential violation of the provisions set forth in W.Va. Code §61-3-22, relating to the crime of falsification of accounts with intent to enable or assist any person to obtain money to which he was not entitled, and, in potential violation of the provisions set forth in W.Va. Code §61-3-24, relating to the crime of obtaining money, property and services by false pretenses, and all of the above are in violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

Article VIII

That the said Justice Allen Loughry, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high office, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, did beginning in or about December 2012, and continuing thereafter for a period of years, intentionally acquire and use state government vehicles for personal use; including, but not limited to, using a state vehicle and gasoline purchased utilizing a state issued fuel purchase card to travel to the Greenbrier on one or more occasions for book signings and sales, which such acts enriched his family and which acts constitute the use of state resources and property for personal gain in violation of the provisions of W.Va. Code §6B-2-5, the provisions of the West Virginia State Ethics Act, and constitute a violation of the provisions of Canon l of the West Virginia Code of Judicial Conduct.

Article IX

That the said Justice Allen Loughry, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high office, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, did beginning in or about December 2012, intentionally

acquired and used state government computer equipment and hardware for predominately personal use—including a computer not intended to be connected to the court's network, utilized state resources to install computer access services at his home for predominately personal use, and utilized state resources to provide maintenance and repair of computer services for his residence resulting from predominately personal use; all of which acts constitute the use of state resources and property for personal gain in violation of the provisions of W.Va. Code §6B-2-5, the provisions of the West Virginia State Ethics Act, and constitute a violation of the provisions of Canon I of the West Virginia Code of Judicial Conduct.

Article X

That the said Justice Allen Loughry, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high office, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, made statements while under oath before the West Virginia House of Delegates Finance Committee, with deliberate intent to deceive, regarding renovations and purchases for his office, asserting that he had no knowledge and involvement in these renovations, where evidence presented clearly demonstrated his in-depth knowledge and participation in those renovations, and, his intentional efforts to deceive members of the Legislature about his participation and knowledge of these acts, while under oath.

Article XIV

That the said Chief Justice Margaret Workman, Justice Allen Loughry, Justice Robin Davis, and Justice Elizabeth Walker, being at all times relevant Justices of the Supreme Court of Appeals of West Virginia, unmindful of the duties of their high offices, and contrary to the oaths taken by them to support the Constitution of the State of West Virginia and faithfully discharge the duties of their offices as such Justices, while in the exercise of the functions of the office of Justices, in violation of their oaths of office, then and there, with regard to the discharge of the duties of their offices, did, in the absence of any policy to prevent or control expenditure, waste state funds with little or no concern for the costs to be borne by the tax payers for unnecessary and lavish spending for various purposes including, but without limitation, to certain examples, such as to remodel state offices, for large increases in travel budgets—including unaccountable personal use of state vehicles, for unneeded computers for home use, for regular lunches from restaurants, and for framing of personal items and other such wasteful expenditure not necessary for the administration of justice and the execution of the duties of the Court; and, did fail to provide or prepare reasonable and proper supervisory oversight of the operations of the Court and the subordinate courts by failing to carry out one or more of the following necessary and proper administrative activities:

A) To prepare and adopt sufficient and effective travel policies prior to October of 2016, and failed thereafter to properly effectuate such policy by excepting the Justices from said policies, and subjected subordinates and employees to a greater burden than the Justices;

B) To report taxable fringe benefits, such as car use and regular lunches, on Federal W-2s, despite full knowledge of the Internal Revenue Service Regulations, and further subjected subordinates and employees to a greater burden than the Justices, in this regard, and upon notification of such violation, failed to speedily comply with requests to make such reporting consistent with applicable law;

C) To provide proper supervision, control, and auditing of the use of state purchasing cards leading to multiple violations of state statutes and policies regulating the proper use of such cards, including failing to obtain proper prior approval for large purchases;

D) To prepare and adopt sufficient and effective home office policies which would govern the Justices' home computer use, and which led to a lack of oversight which encouraged the conversion of property;

E) To provide effective supervision and control over record keeping with respect to the use of state automobiles, which has already resulted in an executed information upon one former Justice and the indictment of another Justice.

F) To provide effective supervision and control over inventories of state property owned by the Court and subordinate courts, which led directly to the undetected absence of valuable state property, including, but not limited to, a state-owned desk and a state-owned computer;

G) To provide effective supervision and control over purchasing procedures which directly led to inadequate cost containment methods,

including the rebidding of the purchases of goods and services utilizing a system of large unsupervised change orders, all of which encouraged waste of taxpayer funds.

The failure by the Justices, individually and collectively, to carry out these necessary and proper administrative activities constitute a violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

We, John Overington, Speaker Pro Tempore of the House of Delegates of West Virginia, and Stephen J. Harrison, Clerk thereof, do certify that the above and foregoing Articles of Impeachment against Justices of the Supreme Court of Appeals of West Virginia, were adopted by the House of Delegates on the Thirteenth day of August, 2018.

In Testimony Whereof, we have signed our names hereunto this Fourteenth day of August, 2018.

/s/ John Overington
John Overington,
Speaker Pro Tempore of the House of Delegates

/s/ Stephen J. Harrison
Stephen J. Harrison,
Clerk of the House of Delegates

SENATE RESOLUTION 203

(By Senator Trump)

[Introduced August 20, 2018]

Adopting rules of the Senate while sitting as a court of impeachment.

Resolved by the Senate:

That the following rules be adopted to govern the proceedings of the Senate while sitting as a court of impeachment during the Eighty-Third Legislature:

RULES OF THE WEST VIRGINIA SENATE WHILE SITTING AS A COURT OF IMPEACHMENT DURING THE EIGHTY-THIRD LEGISLATURE

1. Definitions

(a) "Articles of Impeachment" or "Articles" means one or more charges adopted by the House of Delegates against a public official and communicated to the Senate to initiate a trial of impeachment pursuant to Article IV, Section 9 of the Constitution of West Virginia.

(b) "Board of Managers" or "Managers" means a group of members of the House of Delegates authorized by that body to serve as prosecutors before the Senate in a trial of impeachment.

(c) "Conference of Senators" means a private meeting of the Court of Impeachment, including an executive session authorized by W. Va. Code §6-9A-4.

(d) "Counsel" means a member of the Board of Managers or an attorney, licensed to practice law in this state, representing the Board of Managers or a Respondent in a trial of impeachment.

(e) "Court of Impeachment" or "Court" means all Senators participating in a trial of impeachment.

(f) "Parties' means the Board of Managers and its counsel and the Respondent and his or her counsel.

(g) "Presiding Officer" means the Chief Justice of the West Virginia Supreme Court of Appeals or other Justice, pursuant to the provisions of Article IV, Section 9 or Article VIII, Section 8 of the Constitution of West Virginia.

(h) "Respondent" means a person against whom the House of Delegates has adopted and communicated Articles of Impeachment to the Senate.

(i) "Trial" means the trial of impeachment.

(j) "Two thirds of the Senators elected" means at least 23 Senators.

2. Pre-Trial Proceedings

(a) Whenever the Senate receives notice from the House of Delegates that Managers have been appointed by the House of Delegates to prosecute a trial of impeachment against a person or persons and are directed to carry Articles of Impeachment to the Senate, the Clerk of the Senate shall immediately inform the House of Delegates that the Senate is ready to receive the Managers for the reporting of such Articles.

(b) When the Board of Managers for the House of Delegates is introduced at the bar of the Senate and signifies that the Managers are ready to communicate Articles of Impeachment, the President of the Senate shall direct the Sergeant at Arms to make the following proclamation: "All persons are commanded to keep silence, on pain of imprisonment, while the House of Delegates is reporting to the Senate Articles

of Impeachment"; after which the Board of Managers shall report the Articles. Thereupon, the President of the Senate shall inform the Managers that the Senate will notify the House of Delegates of the date and time on which the Senate will proceed to consider the Articles.

(c) Upon the reporting of Articles of Impeachment to the Senate, the Senate shall adjourn until a date and time directed by the President of the Senate when the Senate will proceed to consider the Articles and shall notify the House of Delegates and the Supreme Court of Appeals of the same. Before proceeding to consider evidence, the Clerk shall administer the oaths provided in these Rules to the Presiding Officer; to the members of the Senate then present; and to any other members of the Senate as they shall appear.

(d) If the Board of Managers reports Articles of Impeachment against more than one person, the Senate shall conduct a separate trial of each Respondent individually as required by Rule 19 of these Rules.

3. Pre-Trial Conference

The Presiding Officer shall hold a pre-trial conference with the parties in the presence of the Court to stipulate to facts and exhibits and address procedural issues.

4. Clerk of the Court of Impeachment; Duties

The Clerk of the Senate, or his or her designee, shall serve as the Clerk of the Court of Impeachment, administer all oaths, keep the Journal of the Court of Impeachment, and perform all other duties usually performed by the clerk of a court of record in this state, The Clerk of the Senate may designate other Senate personnel to assist in carrying out the Clerk's duties.

The Clerk shall promulgate all forms necessary to carry out the requirements of these Rules.

5. Marshal of the Court of Impeachment; Duties

The Sergeant at Arms of the Senate, or other person designated by the President of the Senate, shall serve as the Marshal of the Court of Impeachment. The Marshal of the Court of Impeachment shall keep order in accordance with these Rules under the direction of the Presiding Officer.

6. Trial to be Recorded in Journal of the Court of Impeachment

(a) All trial proceedings, not including transcripts of the trial and copies of documentary evidence required to be appended to the bound Journal of the Court of Impeachment by section (c) of this Rule, shall be recorded in the Journal of the Court of Impeachment. The Journal of the Court of Impeachment shall be read, corrected, and approved the succeeding day. It shall be published under the supervision of the Clerk and made available to the members without undue delay.

(b) After the Journal of the Court of Impeachment has been approved and fully marked for corrections, the Journal of the Court of Impeachment so corrected shall be bound in the Journal of the Senate. The bound volume shall, in addition to the imprint required by Rule 49 of the Rules of the Senate, 2017, reflect the inclusion of the official Journal of the Court of Impeachment.

(c) When available, transcripts of the trial and copies of any documentary evidence presented therein shall be printed and bound as an appendix to the Journal of the Court of Impeachment.

7. Site of Trial

The trial shall be held in the Senate Chamber of the West Virginia State Capitol Complex. All necessary preparations in the Senate Chamber shall be made under the direction of the President of the Senate.

8. Floor Privileges

Only the following persons may enter the floor of the Senate Chamber during the trial: Members of the Court of Impeachment; designated personnel of the Court of Impeachment; the parties; the Presiding Officer; a law clerk of the Presiding Officer; witnesses and their counsel while testifying; and authorized media, who shall be located in an area of the chamber designated by the Clerk.

9. Representation of Parties

The House of Delegates shall be represented by its Board of Managers and its counsel. The Respondent may appear in person or by counsel.

10. Method of Address

Senators shall address the Presiding Officer as "Madam (or Mr.) Chief Justice" or "Madam (or Mr.) Justice".

11. Oaths

(a) The following oath, or affirmation, shall be taken and subscribed by the Presiding Officer: "Do you solemnly swear [or affirm] that you will support the Constitution of the United States and the Constitution of the State of West Virginia and that you will faithfully discharge the duties of Presiding Officer of the Court of Impeachment in all matters that come before this Court to the best of your skill and judgment?"

(b) The following oath, or affirmation, shall be taken and subscribed by every Senator before sitting as a Court of Impeachment: "Do each of you solemnly swear [or affirm] that you will do justice according to law and evidence while sitting as a Court of Impeachment?"

(c) The following oath, or affirmation, shall be taken and subscribed by every witness before providing testimony: "Do you solemnly swear [or affirm] that the testimony you shall give shall be the truth, the whole truth, and nothing but the truth?"

12. Service of Process

(a) The Respondent shall be served with a summons for the appearance of the Respondent or his or her counsel before the Court of Impeachment and provided with a copy of the Articles of Impeachment and a copy of these Rules. The summons shall be signed by the Clerk of the Court of Impeachment, bear the Seal of the Senate, identify the nature of proceedings and the parties, and be directed to the Respondent. It shall also state the date and time at which the Respondent shall appear to answer the Articles of Impeachment and notify the Respondent that if he or she fails to appear without good cause, the allegations 'contained in the Articles of Impeachment shall be uncontested and that the Senate shall proceed to vote on whether to sustain such Articles pursuant to Rule 15 of these Rules.

(b) The notice required by this Rule shall be served on the Respondent in the manner required by Rule 4 of the West Virginia Rules of Civil Procedure. All process shall be served by the Sergeant at Arms of the Senate, unless otherwise ordered by the President of the Senate. A copy of the summons to the Respondent,

upon its issuance, along with a copy of the Articles of Impeachment and a copy of these Rules, shall be provided by the Clerk of the Court of Impeachment to the Clerk of the West Virginia House of Delegates. Upon service of the same upon the Respondent, a copy of the return of service shall be provided by the Clerk of the Court of Impeachment to the Clerk of the West Virginia House of Delegates.

13. Dismissal of Articles Upon Resignation of Respondent; Termination of Trial

(a) Any Senator may move to dismiss the Articles of Impeachment against a Respondent if at any time before the presentation of evidence commences in his or her trial of impeachment the Respondent has resigned or retired from his or her public office. Upon motion of any Senator to dismiss the Articles pursuant to this Rule, all Senators not excused shall vote on the question of whether to dismiss the Articles against the Respondent. If a majority of Senators elected vote to dismiss the Articles against the Respondent, a judgment of dismissal shall be pronounced and entered upon the Journal of the Court of Impeachment or the Journal of the Senate, whichever is convened at the time such vote is taken.

(b) A vote pursuant to this Rule shall be taken by yeas and nays.

(c) Upon dismissal of the Articles of Impeachment against a Respondent pursuant to this Rule, all pretrial and trial proceedings regarding said Respondent shall immediately cease.

(d) If the House of Delegates adopts and communicates Articles of Impeachment that name more than one Respondent in one or more of the Articles, a dismissal pursuant to this Rule shall not dismiss the

articles as to any Respondent who has not resigned or retired.

14. Commencement of Trial; Answer to Articles of Impeachment

At the time and date fixed and upon proof of service of the summons directed to the Respondent, the Respondent shall be called to answer the Articles of Impeachment. If the Respondent appears in person or by counsel, the appearance shall be recorded. If the Respondent does not appear, either personally or by counsel, then the failure of the Respondent to appear shall be recorded. While the Court of Impeachment is in session, the business of the Senate shall be suspended except as otherwise ordered by the President of the Senate.

15. Failure of Respondent to Appear and Contest

(a) If the Respondent fails to appear personally or by counsel without good cause at the time and date specified in the notice required by Rule 12 of these Rules, the allegations contained in the Articles of Impeachment shall be uncontested.

(b) If the allegations contained in the Articles of Impeachment are determined to be uncontested under section (a) of this Rule, the Presiding Officer shall then call upon the Board of Managers to deliver a summary of the evidence of the allegations contained in such Articles.

(c) After the summary of evidence delivered by the Managers, the Court of Impeachment shall vote on the question of whether to sustain one or more of the Articles of Impeachment in accordance with the requirements of Rule 31 of these Rules.

16. Entry of Plea or Pleas; Procedures Based on Plea or Pleas

If the Respondent appears and pleads not guilty to each article; the trial shall proceed. If the Respondent appears and pleads 'guilty to one or more articles, the Court of Impeachment shall immediately vote on the question of whether to sustain the Articles of Impeachment to which a plea of guilty has been entered in accordance with the requirements of Rule 31 of these Rules.

17. Subpoenas

A subpoena shall be issued by the Clerk of the Court of Impeachment for a witness on application of a party.

18. Procedure in a Contested Matter

(a) After preliminary motions are heard and decided, the Board of Managers or its counsel may make an opening statement. Following the opening statement by the Managers, the Respondent or his or her counsel may then make an opening statement.

(b) The trial shall be a daily special order of business following the Third Order of Business of the Senate, unless otherwise ordered by the President of the Senate. When the hour shall arrive for the special order of business, the President of the Senate shall so announce. The Presiding Officer shall cause proclamation to be made, and the business of the trial shall proceed. The trial may be recessed or adjourned and continued from day to day, or to specific dates and times, by majority vote of the Senators present and voting. The adjournment of the trial shall not operate as an adjournment of the Senate, but upon such adjournment, the Senate shall resume.

(c) After the presentation of all evidence to the Court of Impeachment, the Board of Managers shall present a closing argument, after which the Respondent shall present a closing argument. Following the Respondent's closing argument, the Board of Managers may offer a rebuttal.

(d) The Board of Managers shall have the burden of proof as to all factual allegations. The Presiding Officer shall direct the order of the presentation of evidence.

19. Separate Trials of Multiple Respondents; Order of Trials

(a) If the House of Delegates communicates Articles of Impeachment against more than one Respondent, the Senate shall schedule and conduct a separate trial of each Respondent.

(b) The Presiding Officer, in consultation with the parties, shall determine the order in which multiple Respondents shall be tried.

20. Witnesses

(a) All witnesses shall be examined by the party producing them and shall be subject to cross-examination by the opposing party. Only one designee of each party may examine each witness. The Presiding Officer may permit redirect examination and recross-examination.

(b) After completion of questioning by the parties, any Senator desiring to question a witness shall reduce his or her question to writing and present it to the Presiding Officer who shall pose the question to the witness without indicating the name of the Senator presenting the question. If objection to a Senator's question is raised by a party, the objection

shall be decided in the manner provided in Rule 23 of these Rules.

(c) It shall not be in order for any Senator to directly question a witness.

21. Discovery Procedures

(a) Within five days after service upon the Respondent of the Articles of Impeachment, the Respondent may request, and the Board of Managers shall disclose to the Respondent and make available for inspection, copy, or photograph, the following:

(1) Any written or recorded statement of the Respondent in the Managers' possession which the Managers intend to introduce into evidence in their case-in-chief during the trial;

(2) Any books, papers, documents, data, photographs, tangible objects, buildings or places, or copies of portions of such items in the Managers' possession that the Managers intend to use in their case-in-chief as to one or more Articles of Impeachment;

(3) A list of the persons the Board of Managers intends to call as witnesses in its case-in-chief during the trial; and

(4) A written summary of any expert testimony the Managers intend to use during their case-in-chief. Any summary provided must describe the witness' opinions, the bases and reasons for the opinions, and the witness's qualifications.

(b) The Board of Managers shall make its response to the Respondent's written requests within 10 days of service of the requests.

(c) If the Respondent makes a request pursuant to this Rule, he or she shall be required to provide the

same information to the Managers, reciprocally, within 10 days following his or her request.

(d) A copy of all requests pursuant to this section shall be provided to the Clerk. The parties shall provide to the Clerk, in a format or in formats directed by the Clerk, copies of all items disclosed pursuant to this Rule.

(e) The Clerk may require parties to number or Bates stamp any trial exhibits or other information provided to the Clerk. The Clerk may hold a meeting with the parties to organize trial exhibits.

22. Court Reporters; Transcripts

(a) All proceedings shall be reported by an official court reporter or certified court reporter: *Provided*, that if the services of an official court reporter or certified court reporter are unavailable on one or more days of the trial, the proceedings shall be digitally recorded and copies of the recording made available to the parties.

(b) Upon request of a party, the Presiding Officer, or any Senator, the Clerk shall provide a copy of the transcript of any portion of the trial, when such transcripts are available.

23. Motions, Objections, and Procedural Questions

(a) All motions, objections, and procedural questions made by the parties shall be addressed to the Presiding Officer, who shall decide the motion, objection, or procedural question: *Provided*, That a vote to overturn the Presiding Officer's decision on any motion, objection, or procedural question shall be taken, without debate, on the demand of any Senator sustained by one tenth of the Senators present, and an affirmative vote of a majority of the Senators present

and voting shall overturn the Presiding Officer's decision on the motion, objection, or procedural question.

(b) On the demand of any Senator or at the direction of the Presiding Officer, the movant shall reduce the motion to writing.

24. Qualification to Sit as Court of Impeachment

Every Senator is qualified to participate on the Court of Impeachment, unless he or she has been excused pursuant to Rule 43 of the Rules of the Senate, 2017.

25. Members as Witnesses

The parties may not call as witnesses, nor subpoena the personal records of, the Senators, members of the Board of Managers, personnel of the Court of Impeachment, the Presiding Officer, or counsel for the parties.

26. Attendance of Members

Every Senator is required to attend the trial unless he or she has been granted a leave of absence, pursuant to Rule 50 of the Rules of the Senate, 2017, or has been excused from voting on the Articles, pursuant to Rule 43 of the Rules of the Senate, 2017. Any Senator who has been granted a leave of absence shall be provided an opportunity to review the exhibits, video or audio recordings, and transcripts for the date or dates he or she is absent and may participate in the vote on verdict and judgment as provided in Rule 31 of these Rules.

27. Notetaking

Senators may take notes during the trial and such notes are not subject to the provisions of W. Va. Code §29B-1-1 *at seq.*

28. Applicability of Rules of the Senate

Except as otherwise provided herein, the Rules of the Senate shall apply to proceedings of the trial and the President of the Senate retains the authority to invoke such rules.

29. Applicability of Rules of Evidence

When not in conflict with these Rules or the Rules of the Senate, the Presiding Officer shall rule on the admissibility of evidence in accordance with West Virginia Rules of Evidence: *Provided*, That a vote to overturn the Presiding Officer's ruling on the admissibility of evidence shall be taken, without debate, on demand of any Senator sustained by one tenth of the members present, and an affirmative vote of the majority of Senators present shall overturn the ruling.

30. Instruction

At any time, the Presiding Officer may, sua sponte, or on motion of a party or upon request of a Senator, instruct the Senators on procedural or legal matters.

31. Verdict and Judgment

(a) After closing arguments, the Court may enter into a Conference of Senators for deliberation. After conclusion of said conference and return to open proceedings, or pursuant to Rule 15 or Rule 16 of these Rules, all Senators not excused shall vote on the question of whether to sustain one or more Articles of Impeachment: *Provided*, That any vote of the Senators on the question of whether or not to sustain an Article of Impeachment shall decide only that Article, and no single vote of the Senate shall sustain more than one Article of Impeachment. The Presiding Officer shall have no vote in the verdict or judgment of the Court of Impeachment.

(b) If two thirds of the Senators elected vote to sustain one or more Articles of Impeachment, a judgment of conviction and removal from office shall be pronounced and entered upon the Journal of the Court of Impeachment. If the Respondent is acquitted of any Article of Impeachment, a judgment of acquittal as to such Article or Articles shall be pronounced and entered upon the Journal.

(c) If two thirds of the Senators elected vote to sustain one or more Article of Impeachment, a vote shall then be taken on the question of whether the Respondent shall also be disqualified to hold any office of honor, trust, or profit under the state. If two thirds of the Senators elected vote to disqualify, a judgment of disqualification to hold any office of honor; trust, or profit under the state shall be pronounced and entered upon the Journal of the Court of. Impeachment.

(d) Each vote pursuant to this Rule shall be taken by yeas and nays.

(e) A copy of all judgments entered shall be deposited in the office of the Secretary of State.

32. Conference of Senators

(a) On motion of any Senator and by a vote of the majority of the members present and voting, there shall be an immediate Conference of Senators. No Senator or any other person may photograph, record, or broadcast a Conference of Senators. Any motion made pursuant to this Rule shall be nondebatable,

(b) The President of the Senate, or his or her designee, shall preside over a Conference of Senators and the Rules of the Senate shall apply during said conference except as otherwise provided herein.

33. Contempt; Powers of Presiding Officer

The following powers shall be exercised by the Presiding Officer:

(1) The power to compel the attendance of witnesses subpoenaed by the parties;

(2) The power to enforce obedience to the Court's orders;

(3) The power to preserve order;

(4) The power to punish contempt of the Court's authority; and

(5) The power to make all orders that may be necessary and that are not inconsistent with these Rules or the laws of this state.

34. Prohibited Conduct; Sanctions

The Court of Impeachment shall have the power to provide for its own safety and the undisturbed transaction of its business, as provided in Article VI, Section 26 of the Constitution of West Virginia.

HOUSE RESOLUTION 201

(By Delegate Overington)

[Introduced June 26, 2018.]

Relating to empowering the House Committee on the Judiciary to investigate allegations of impeachable offenses against the Chief Justice and Justices of the West Virginia Supreme Court of Appeals.

Whereas, The West Virginia Supreme Court of Appeals is composed of one Chief Justice and four Justices. Those positions are currently occupied by the Honorable Chief Justice Margaret L. Workman, the Honorable Justice Robin Jean Davis, the Honorable Justice Allen H. Loughry II, the Honorable Justice Menis E. Ketchum II, and the Honorable Justice Elizabeth D. Walker; and

Whereas, On or about April 16, 2018, a Legislative Audit Report regarding the Supreme Court of Appeals of West Virginia was issued. The initial focus of the report concerned the use of state vehicles and other employer-provided benefits that may have not been treated properly for state and federal tax purposes. The issues discussed in the report raise serious questions about the administration of the Court and the conduct of the Justices; and

Whereas, On or about May 20, 2018, a Legislative Audit Report - Report 2 - regarding the Supreme Court of Appeals of West Virginia was issued. This report focused on the use of state vehicles and purchases of gift cards, the issues discussed in the report raise serious questions about the administration of the Court and the conduct of the Justices; and

Whereas, On June 6, 2018, the West Virginia Judicial Investigation Commission ("Commission")

filed a Formal Statement of Charges against Justice Allen H. Loughry II alleging that probable cause exists to faunally charge him with violations of the Code of Judicial Conduct. The Formal Statement of Charges contains thirty-two charges against Justice Loughry that raises serious questions about the administration of the Court and the conduct of Justice Loughry;

Whereas, On June 19, 2018, Justice Loughry was indicted in the United States District Court for the Southern District of West Virginia. The indictment contains twenty-two counts against Justice Loughry that raise serious questions about the administration of the Court and the conduct of Justice Loughry; and

Whereas, The Court's actions and/or inactions have raised concerns that require further consideration and investigation by this body. Some or all of the five members of the Court may he guilty of maladministration, corruption, incompetency, gross immorality, or high crimes or misdemeanors, and may be unfit to serve as Chief Justice or as Justices of the West Virginia Supreme Court of Appeals; therefore, be it

Resolved by the House of Delegates:

That the House Committee on the Judiciary be, and it is by this resolution, empowered:

(1) To investigate, or cause to be investigated, any allegations or charges related to the maladministration, corruption, incompetency, gross immorality, or high crimes or misdemeanors committed by any Justice of the West Virginia Supreme Court of Appeals;

(2) To meet during the adjournment of the House and to hold a hearing or hearings thereon if deemed necessary in the course of its investigation;

(3) To make findings of fact based upon such investigation and hearing(s);

(4) To report to the House of Delegates its findings of facts and any recommendations consistent with those findings of fact which the Committee may deem proper; and

(5) If the recommendation of the Committee be to impeach any or all of the five members of the West Virginia Supreme Court of Appeals, then to present to the House of Delegates a proposed resolution of impeachment and proposed articles of impeachment; and, be it

Further Resolved, that in carrying out its duties pursuant to this resolution, the House Committee on the Judiciary is authorized:

(1) To examine witnesses, to send for persons, papers, documents, and other physical or electronic evidence, to order the attendance of any witness(es) or the production of any paper, document, and any other physical or electronic evidence along with any witness(es) necessary to supervise, maintain, or explain that evidence, and to exercise all other powers described under the provisions of §4-1-5 of the Code of West Virginia;

(2) To issue summonses and subpoenas, including subpoenas duces tecum, and to enforce obedience to its summonses and subpoenas in accordance with the provisions of §4-1-5 of the Code of West Virginia or by invoking the aid of the courts of this state;

(3) To determine whether all or any portion of any meeting(s) or hearing(s) should be held in executive session, pursuant to the provisions of the House Rules; and, be it

Further Resolved, that in carrying out his duties pursuant to this resolution, the Chairman of the House Committee on the Judiciary is authorized:

(1) To establish or define rules of procedure for the conduct of any meeting(s) or hearing(s) held pursuant to this resolution;

(2) To issue summonses and subpoenas to accomplish the purpose of this Resolution;

(3) To employ, with the prior approval of the Speaker of the House or the Speaker Pro Tempore of the House, a court reporter or stenographer and such other professional or clerical employees as may be reasonably required;

(4) To designate any subcommittee(s) of the House Committee on the Judiciary to assist the Chairman or Committee in performing their duties pursuant to this resolution; and

(5) To determine the time and place of any meeting(s) or hearing(s) of the Committee and its designated subcommittee(s); and, be it

Further Resolved, That the House Committee on the Judiciary during its inquiry may entertain such procedural and dispositive motions as may be made in the case of any other bill or resolution referred to that Committee, or, in making its recommendations, if any, pursuant to this resolution, may include:

(1) A recommendation that the any or all of the five members of the West Virginia Supreme Court of Appeals not be impeached; or

(2) A recommendation that any or all of the five members of the West Virginia Supreme Court of Appeals be impeached for maladministration, corruption, incompetence, gross immorality, neglect of duty,

and/or high crimes or misdemeanors, as set forth in Section 9, Article IV of the West Virginia Constitution; that those members subject to impeachment be removed from office and be thereafter disqualified from holding any office of public trust, honor, or profit in this State; that the House of Delegates adopt a resolution of impeachment and formal articles of impeachment as prepared by the Committee; and that the House of Delegates deliver the same to the Senate in accordance with the procedures of the House of Delegates, for consideration by the Senate according to law; and/or

(3) A recommendation of proposed legislation to correct any perceived statutory or constitutional deficiencies found by the Committee.

ADMINISTRATIVE ORDER

SUPREME COURT OF WEST VIRGINIA

RE: PAYMENT OF SENIOR JUDICIAL OFFICERS WHO PERFORM ESSENTIAL SERVICES

Pursuant to Article VII, § 3 of the West Virginia Constitution, the Supreme Court has general supervisory control over all counts in the state, and the chief justice "shall be the administrative head of all court." This administrative authority includes the ability to assign judges for temporary service, including retired judges and magistrates. *See* W. VA. CONST. Article VIII, § 8. It is constitutionally required that the "courts of this State shall open… and justice shall be administered without sale, denial or delay. W. VA. CONST. Art. III, § 17. Accordingly, it is paramount that the chief justice has the ongoing ability to assign judges for temporary service in such a manner that there is no interruption in essential services of the litigants of this state.

Although the Governor has the authority to fill a judicial vacancy, W. VA. CONST. Art. VIII, § 7, this authority does not apply to instances in which a judicial officer may be absent from duty due to a protracted illness, or because of a suspension due to ethical violations. In these circumstances the chief justice exercises the constitutional authority to assign judges to temporary service, including retire judges. This authority is recognized by W. Va. Code § 51-9-10, which further provides that "reasonable payment shall be made to such judges . . . on a per diem basis: Provided, however, That the per diem and retirement compensation of a senior judge shall not exceed the salary of a sitting judge [.]" In the vast majority of instances, the statutory proviso does not interfere

with providing essential services. However, in certain exigent situations involving protracted illness, lengthy suspensions due to ethical violations, or other extraordinary circumstances, it is impossible to assure statewide continuity of judicial services without exceeding the payment limitation by the statutory proviso.

Accordingly, in light of the administrative authority vested in the chief justice, it is hereby ORDERED that the chief justice has authority to determine in certain exigent circumstances that a senior judicial officer may continue in an appointment beyond the limitations set forth in W. Va. Code § 51-9-10, to avoid the interruption in statewide continuity of judicial services.

ENTERED: May 19, 2017

/s/ Allen H. Loughry II
ALLEN H. LOUGHRY II
Chief Justice

Attest: /s/ Gary L. Johnson
GARY L. JOHNSON
Administrative Director

IN THE WEST VIRGINIA LEGISLATURE HOUSE OF DELEGATES JUDICIARY COMMITTEE

IN RE:
House Judiciary Committee Proceeding Regarding the Impeachment of West Virginia Supreme Court Justices Pursuant to House Resolution 201 Passed During the Second Extended Session of 2018.

VOLUME VIII

Hearing held on August 7, 2018, before the House Judiciary Committee of the West Virginia Legislature.

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* * *

[2013] CHAIRMAN SHOTT: Are there questions? Delegate Fluharty.

MINORITY VICE CHAIR FLUHARTY: Thank you, Mr. Chairman.

Counsel, I was going through these Articles. Where are the findings of fact?

MR. CASTO: Well, there – there are no findings of fact there. The Committee –

MINORITY VICE CHAIR FLUHARTY: Where?

MR. CASTO: I said, sir, there are no findings of fact.

MINORITY VICE CHAIR FLUHARTY: There are no findings of fact?

All right. Have you read House Resolution 201?

MR. CASTO: I have, sir, but I have not read it today.

MINORITY VICE CHAIR FLUHARTY: Well, do you know that we're required to have findings of fact?

MR. CASTO: I think, sir, that my understanding is – based upon the Manchin Articles – that the term "findings of fact" which was used at the same time, that the profferment of these Articles is indeed equivalent to a finding of fact. The – but [2014] that, again, is your interpretation, sir.

MINORITY VICE CHAIR FLUHARTY: So based upon the clear wording of House Resolution 201, it says we're "To make findings of fact based upon such investigations and hearings;" and "To report to the House of Delegates its findings of facts and any recommendations consistent with those findings of facts which the Committee may deem proper."

I mean, you're – you're aware how this works in the legal system. You draft separate findings of fact. I'm just wondering why we haven't done that.

MR. CASTO: Because, sir, that is not the manner in which impeachment is done.

MINORITY VICE CHAIR FLUHARTY: Well, the findings of fact in House Resolution 201 are referenced separate from proposed Articles of Impeachment. Am I wrong in that observation?

MR. CASTO: I don't believe that you're wrong in that.

MINORITY VICE CHAIR FLUHARTY: Okay. So my question is: Why are there not separate findings of fact? Could – maybe the Chairman could enlighten us.

CHAIRMAN SHOTT: Yeah, the finding of

* * *

[2016] MINORITY VICE CHAIR FLUHARTY: Would you agree with me we are to follow House Resolution 201?

CHAIRMAN SHOTT: I believe we are following House Resolution 201.

MINORITY VICE CHAIR FLUHARTY: That's all I have.

CHAIRMAN SHOTT: Further questions? Pardon. Delegate Fleischauer.

MINORITY CHAIR FLEISCHAUER: Thank you, Mr. – thank you, Mr. Chairman. I think the gentleman has raised a valid point. If we look at the Resolution that empowers this Committee to act, it – it says that we are to make findings of fact based upon such investigation and hearing and to report to the House of Delegates its findings of fact and any recommendations consistent with those findings, of which the Committee may deem proper.

And normally – I know a lot of people say in here, "We're not. lawyers," but many of us are, and I think its Rule 52 that requires Courts to make findings of fact and also that their recommendations for any Resolution has to be consistent, with those findings of fact.

[2017] And I'm just a little concerned that if we don't have findings of fact that there could be some flaw that

could mean that the final Resolution by the House would be deemed to be not valid.

And I don't think it would .be that hard to make findings of facts, but I think that would be consistent with the – with the Resolution, and I think. that's what authorizes us to act at all, is the Resolution.

So I think we – if there – there would. be some wisdom in trying to track the language of the Resolution, and it would be consistent with any other proceeding that we have in West Virginia that when there are requirements of findings of fact and – in this case, it's not conclusions of law, but it's recommendations – that we should follow that.

CHAIRMAN SHOTT: And to the – to the gentlelady, I appreciate your expression of concern, but I also note that the proposed Articles that were circulated with the press release did not contain any findings of fact, so it seems a little bit disingenuous at this point that Articles that were proposed by the minority party now apparently are considered insufficient because it did not include findings of.

* * *

US NEWS

https://www.usnews.com/news/best-states/west-virginia/articles/2018-07-23/panel-clears-3...
9/11/2018

US NEWS (/news/best-states) BEST STATES

A ranking from U.S. News & World Report (/)

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Panel Clears 3 West Virginia Justices in Ethics Cases

The West Virginia Judicial investigation Commission says It has closed ethics investigations involving three state Supreme Court Justices without disciplinary action.

July 23, 2018, at 5:23 p.m.

AP

CHARLESTON, W.Va. (AP) – The West Virginia (/news/best-states/virginia) Judicial Investigation Commission says it has closed ethics investigations involving three state Supreme Court justices without disciplinary action.

The commission issued letters Monday to Justices Robin Jean Davis and Beth Walker and Chief Justice

Margaret L. Workman closing all outstanding complaints against them.

The commission said in a news release that the complaints filed by the Judicial Disciplinary Counsel alleged the justices violated the Code of Judicial Conduct by using state funds to pay for lunches for themselves, their administrative assistants and court security officers while they were discussing cases and administrative matters in conference.

But the commission found the lunches made the court more efficient.

The commission investigated allegations against Justice Alien Loughry and filed a 32-count statement of charges against him on June 6.

https://www.wvgazettemail.cominews/politics/amid-proceedings-wv-house-neyer-yoted-on-impeachmentresolution/article_c93b2a9c-ilef0-5bf6-bbd7-9e8697dcbablhtml

Amid proceedings, WV House never voted on impeachment resolution

By Phil Kabler Staff writer Aug 21, 2018

As the House of Delegates and Senate move forward with impeachment proceedings against Supreme Court justices, some observers believe one important element is missing: The House Judiciary Committee and the full House have never voted to adopt the House resolution authorizing the articles of impeachment (HR 202).

"They're in deep doo-doo, just to be quite honest about it," said Greg Gray, former longtime House clerk and parliamentarian, known nationally for his expertise on parliamentary procedure.

"If they didn't vote on the resolution, but simply voted on the articles of impeachment, they have got a problem on their hands," Gray said.

He believes it's as if the House voted on amendments to a bill, but never voted to pass the bill itself, and sent the Senate the series of amendments rather than the actual legislation.

According to the Legislature's website, the current status of the impeachment resolution is that it is still in House Judiciary with the designation of DP, which refers to the pending recommendation that the resolution "do pass."

Gray said failure to vote on the impeachment resolution violates precedent set in the 1989 impeachment of then-Treasurer A. James Manchin, as well as the rules for the impeachment proceedings that the House adopted on June 26 at the start of the impeachment process.

"My position is that the process is defective," Gray said. "The House has fallen short of addressing the formal question, which is the resolution adopting impeachment."

Current House Clerk Steve Harrison said he believes the House acted properly, since members voted on each individual article of impeachment.

"Impeachment has been done in different ways in the history of the state," Harrison said. "The House divided the articles and voted on them individually, and the articles which we adopted is what was presented to the Senate."

However, Gray noted that in the 1989 impeachment, House Judiciary members and the full House also voted individually on each article of impeachment, through a process known as seriatim consideration, and then voted to formally adopt the impeachment resolution.

"The proper procedure is to vote each motion of impeachment up or down, and then you vote on the total package," he said. "The current precedent we're following is 1989."

Harrison argued that the House was relying on records of impeachment proceedings from 1875, when the House did not use a formal impeachment resolution.

The failure to vote on the resolution also is at odds with the resolution the House adopted on June 26 setting ground rules for the impeachment hearings (HR 201).

Those rules state that if House Judiciary recommends impeachment of any or all justices, it is to "present to the House of Delegates a proposed resolution of impeachment and articles of impeachment," and that if the full House adopts the impeachment resolution, the House is to deliver the resolution to the Senate "for consideration by the Senate according to the law."

During the floor session that spanned nearly 14 hours on Aug. 13 into Aug. 14, there was confusion about whether the full House would vote on the impeachment resolution.

At about 6:30 p.m. on Aug. 13, House spokesman Jared Hunt sent an email to media covering the proceedings, stating:

"While the question of adopting House Resolution 202 has been divided to allow Delegates to adopt each article individually, the House will still have to come back and vote to adopt House Resolution 202 in its entirety once Delegates have voted on each article and the amendments to them.

"So while the House is considering each individual article of impeachment right now, the resolution formally containing all the articles of impeachment will not be adopted and sent to the Senate until the final vote on the resolution in its totality "(after each individual article has been either adopted or rejected)."

However, after the House reconvened about 9:15 p.m. from a dinner break recess, Hunt sent a second email advising:

"After further discussion and research on parliamentary procedures, it has been determined that it is not necessary to come back and vote to adopt House Resolution 202 in totality. The division of the original question before the House – which was to adopt House Resolution 202 – into separate consideration of the individual articles within that resolution, and the separate votes on each part, is all that is required. So there will be no overall vote on House Resolution 202 at the conclusion of consideration of the individual articles and amendments. Apologies for the confusion."

Hunt said Tuesday that. House leaders, with the exception of then-Speaker Tim Armstead, along with Harrison, staff attorneys and the House parliamentarian signed off on the decision, prior to his issuing the 9:15 p.m. email. Arm[s]tead on Tuesday resigned from

the House, officially announcing his candidacy to run for a vacated seat on the state Supreme Court.

Sources close to the House indicate that the initial omission occurred on Aug. 7, when after a long day of debating and voting on articles of impeachment, the House Judiciary Committee adjourned without voting on the impeachment resolution.

That would have put the full House in the posture on Aug. 13-14 of having to take another recess in order to call a Judiciary Committee meeting to allow a committee vote to advance the resolution to the full House.

House Judiciary Chairman John Shott, R-Mercer, did not immediately respond to requests for comment, and Hunt said he had not heard of that being an issue in the House decision to not vote on the resolution.

Gray, who was not retained as House clerk when Republicans took control of the House in 2015, said if there was doubt about the need to vote on the resolution, the House should have erred on the side of caution.

"One of the mantras we follow in interpreting parliamentary law is that surpluses are always. OK," he said. "It's better to vote twice on one issue than to not have a vote on it at all."

Reach Phil Kabler at philk@wvgazettemail.com, 304-348-1220 or follow @PhilKabler on Twitter.

Phil Kabler

Statehouse Reporter

AFFIDAVIT

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, TO-WIT:

Gregory M. Gray, being first duly sworn, deposes and says that:

- I am a retired Clerk of the House and Parliamentarian of the West Virginia House of Delegates.

- I was first employed by the Clerk of the House of Delegates in January 1973 when I served for five years as the understudy to then-House Parliamentarian Oshel Parsons, who served the House for 51 years, from 1927 until his death in 1978.

- I was appointed Parliamentarian and Assistant Clerk of the House of Delegates on February 15, 1978.

- I was initially elected by the House of Delegates as its Clerk on January 10, 1996 and was reelected at the beginning of each new Legislature until retirement.

- I continued to serve as both Clerk and Parliamentarian of the House of Delegates until I retired on December 31, 2014, with forty-two years of service to the West Virginia House of Delegates.

- While serving as House Clerk and Parliamentarian, I served as President of the American. Society of Legislative Clerks and Secretaries ("ASLCS"), and under the auspices of the ASLCS served as Vice Chair of Mason's Manual Revision Commission to revise and update Mason's Manual, a parliamentary procedure manual used by State Legislatures throughout the United States as parliamentary authority.

- Under the auspices of the United States Department of State, I served as a parliamentary advisor

to the African countries Burkina Faso and Benin to assist them in rewriting procedural rules, developing constitutional changes, and revamping the structures of their parliaments.

- The opinions on parliamentary procedure that I am offering through this affidavit are made to a reasonable degree of certainty in my field of expertise based on the information available to me, my training, and expertise.

- The West Virginia House of Delegates uses Resolutions to express its will or to issue directives, to communicate with the Senate and other branches of government; these documents are an important part of the legislative process. The House speaks through its Resolutions.

- The recent impeachment proceedings in the West Virginia House of Delegates were procedurally flawed.

- The impeachment proceedings are fatally flawed due to the failure of the Committee on the Judiciary to vote to report House Resolution 202 to the full House of Delegates, so that House Resolution 202 was never properly before the House for consideration. Technically, the resolution is still in possession of the House Committee on the Judiciary.

- When the full House of Delegates improperly received House Resolution 202, it divided House Resolution 202 into component parts by considering and voting separately on each Article of Impeachment.

- Such a division requires that each of the component parts be able to stand alone, but the separated Articles did not contain all of the effectuating language from House Resolution 202.

- The House of Delegates failed to consider all the remaining critical language of the resolution, including the operative language of House Resolution 202 directing impeachment.

- Because of this, the House of Delegates never properly voted to impeach the justices of the Supreme Court of Appeals of West Virginia.

- I have also examined House Resolution 205 in detail. The sole purpose of House Resolution 205 is to appoint Managers on behalf of the House of Delegates and direct them to appear before the Senate and inform the Senate what the House has done, and to perform other duties relative to the impeachment process.

- House Resolution 205 is a procedural housekeeping resolution, and as such its contents are directive only.

- House Resolution 205 does not, either directly or indirectly, declare impeachment by the House of Delegates.

AND FURTHER, THIS AFFIANT SAITH NAUGHT.

Dated this 20th day of September, 2018.

/s/ Gregory M. Gray
Gregory M. Gray

Taken, subscribed and sworn to before me, a Notary Public, in and for the aforesaid County and State, this 20th day of September, 2018.

My commission expires: March 31, 2021.

/s/ Donna M. Harper
Notary Public

APPENDIX P

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 18-0816

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

Petitioner,

v.

MITCH CARMICHAEL, as President of the Senate;
DONNA J. BOLEY, as President Pro Tempore of the Senate; RYAN FERNS, as Senate Majority Leader;
LEE CASSIS, Clerk of the Senate; and the
WEST VIRGINIA SENATE,

Respondents.

MOTION TO INTERVENE

Now comes the WEST VIRGINIA HOUSE OF DELEGATES (the "House"), a constitutional body of the West Virginia Legislature, and makes its Motion to Intervene in the above-referenced action pursuant to West Virginia Rule of Appellate Procedure 32. In support of this motion, the House states the following:

1. The House is a Constitutional body created by Art. VI of the West Virginia Constitution and is composed of Delegates elected throughout the State for the purpose of creating law and the fulfillment of express Constitutional obligations.

2. Among the Constitutional obligations of the House is its role to have the "sole power of impeachment". Art. IV § 9 of the Constitution of West Virginia,

3. On October 11, 2018, this Court issued a decision styled "Writ of Prohibition Granted" in *State ex rel. Margaret L. Workman v. Mitch Carmichael, as President of the Senate, et al.,* Docket No. 18-0816 (2018).

4. The House was not a party to the *Workman* litigation prior to the issuance of the decision, and it seeks to intervene today.

5, West Virginia Rule of Appellate Procedure 32 provides:

> Upon timely motion, anyone shall be permitted to intervene in an original jurisdiction proceeding pending in this Court or in a case pending before this Court on a direct appeal from an administrative agency, but only when (1) a statute of this State confers an unconditional right to intervene; or (2) the representation of the applicant's interest by existing parties is or may be inadequate, and the applicant is or may be bound by judgment in the action. Intervention may be permitted in other cases in the discretion of the Supreme Court, A party to the case may respond to a motion to intervene within ten days of the date the motion was filed.

6. The instant motion is timely. The Court's decision was issued on October 11, 2018, upon information and belief, no mandate has issued from the Court, and indeed, 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. *See* West

Virginia Rule of Appellate Procedure 26(b). As such, the Court retains jurisdiction and the instant motion is timely.

7. The House will file a Petition for Rehearing with the Court pursuant to West Virginia Rule of Appellate Procedure 25 as further discussed *infra*.

8. The instant litigation was pursued pursuant to the original jurisdiction of this Court to entertain extraordinary legal remedies, See W.Va. Code § 53-1-1, *et seq*.

9. The representation of the interests of the House is inadequate amongst the existing parties. While the Petitioner did make the West Virginia Senate a party to the litigation, the House is charged with separate and distinct obligations in the impeachment process as articulated in the Constitution of West Virginia. As such, it is incumbent upon, and the desire of, the House to fully apprise this Court of its position on several aspects of the decision including but not limited to:

a) The merits of any claim regarding the House as a party to this litigation before a mandate impacts the rights and obligations of the House;

b) The justiciability of the instant writ impacting the House given the application of the "Law and Evidence" clause of the West Virginia Constitution exclusively to the Senate;

c) The propriety of the issuance of a Writ of Prohibition to restrict the House as a non-judicial tribunal; and

d) The impact upon the constitutional framework of checks and balances amongst the three separate and equal branches of the West Virginia govern-

ment, and, most importantly, the guarantee of our citizens to a Republican form of government.

10. The House may be bound by the judgment in this action. As observed by the Petitioner on October 24, 2018:

> In the Opinion, this Court held that the House of Delegates' failure to follow its own rules invalidated all Articles of Impeachment that it retains against a public office. *State ex rel. Workman v. Carmichael, et* at, No. 18-0816 (October 11, 2018) at 64.

Petitioner's Response to Respondents' Response to Motion by Retired Justice Robin J. Davis, p. 1., fin 1,

It is self-evident that in its decision 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, and the Court has done so expressly.

11. As such, the House has met the elements established by West Virginia Rule of Appellate Procedure 32 to intervene in the instant litigation.

WHEREFORE, the House respectfully requests that the Court grant its motion to Intervene without delay.

Respectfully submitted,

/s/ Marsha W. Kauffman
Marsha W. Kauffman (WVSB #6979)
West Virginia House of Delegates
1900 Kanawha Boulevard, East
Building 1, Room 400-M
Charleston, WV 25305-0470
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APPENDIX Q

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 18-0816

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.

RESPONDENTS' PETITION FOR REHEARING

J. Mark Adkins (WVSB #7414)
Floyd E. Boone Jr. (WVSB #8784)
Richard R. Heath, Jr. (WVSB #9067)
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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

[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.

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.

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 ill 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

[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 a. U.S. Civil Service Commission*, 191 F. Supp. 495, 510 (1961) (emphasis added).

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.

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 Dials 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:

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

> [B]efore consideration of the articles, each senator must swear a special oath: 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 swearing 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, 5 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 a 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]

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[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,

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*, 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

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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).

[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.

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 a Clangs*, 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.

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[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 ofpower 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.*, 232W. 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 practice, 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*

[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.

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

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[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 Bahr Malting Ca*, 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 a 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 a 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 a Probate Court of Columbiana Co.*, 61 N.E.2d 889 (1945) *("A* Court of *superior* jurisdiction may grant a writ of prohibition to prevent the attempted exercise of ultra vices jurisdiction by a court of *inferior jurisdiction.")* (emphasis added).

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 intended 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.

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

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 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 administra-*

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[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.

tive 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. Constitution, where due process *requires* judicial recusal, including when a judge has a conflict arising "from his participation in an earlier proceeding." *See*, *Caperton v. AT. 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

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

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 Court in *New York* did reach the merits of New York's

[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).

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

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[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).

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