

**IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

No. _____

STATE OF WEST VIRGINIA, ex rel.,

G. ISAAC SPONAUGLE, III,
West Virginia citizen and taxpayer,
Petitioner,

v.

JAMES CONLEY JUSTICE, II,
Governor of the State of West Virginia,
Respondent.

PETITION FOR WRIT OF MANDAMUS

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QUESTION PRESENTED

This petition presents the question whether Section 1 of Article VII of the West Virginia Constitution and W.Va. Code § 6-5-4 are mandatory nondiscretionary requirements that the officeholder of Governor shall reside at the seat of government during the terms of office, and keep there the public records, books and papers pertaining to that office.

STATEMENT OF CASE

HISTORY OF SECTION 1 OF ARTICLE VII OF THE WEST VIRGINIA CONSTITUTION

West Virginia has had two constitutions. The first ratified in 1863 and a second in 1872. The West Virginia Constitution of 1872 was ratified by the voters on August 22, 1872, which is the same constitution that governs the State of West Virginia today subject to certain amendments to it. Section 1 of Article VII of the West Virginia Constitution of 1872 provided the following:

The Executive department shall consist of a Governor, Secretary of State, State Superintendent of Free Schools, Auditor, Treasurer and Attorney General, who shall be *ex officio* reporter of the Court of Appeals. They shall, except the attorney General, reside at the seat of government during their terms of office, and keep there the public records, books and papers, pertaining to their respective offices, and shall perform such duties as may be prescribed by the fifth section of same article declares that "the chief executive power shall be vested in the Governor, who shall take care that the laws be faithfully executed.

“A 1934 amendment added the commissioner of agriculture to the list, and a 1958 amendment deleted the state superintendent of schools. The first of those amendments also changed the inauguration date from March to January, in order to shorten an outgoing administration’s lame-duck period, and dropped an exception for the attorney general from the residency requirement.” Bastress, Robert M. Jr., The West Virginia State Constitution (Oxford Commentaries on the State Constitutions of the United States) (pp. 219 of 381). Oxford University Press. Kindle Edition.

In 1876, three years after the voters of the State of West Virginia ratified the West Virginia Constitution, the Supreme Court of Appeals of West Virginia distinguished between nondiscretionary duties and discretionary duties in a case that centered around a legal fight over legislation that moved the seat of government from the city of Charleston to the city of Wheeling. The Supreme Court set forth that the state constitution unequivocally requires that the Governor shall reside at the seat of government during his term of office and keep there the public records of his office, was a nondiscretionary duty. 'It was his duty to do so, in fidelity to his oath of office to support the constitution of the State; and the constitution of the State unequivocally requires that he shall reside at the seat of government during his term of office, and keep there the public records of his office, and commands him, as the chief executive officer, in whom is vested the chief executive power, to "take care that the laws be faithfully executed.'" *Slack v. Jacob*, 8 W.Va.612, 657 (1875).

The 1875 language of Section 1 of Article VII of the West Virginia Constitution only granted discretion to the Attorney General regarding the place of residency of the officeholder. All other members of the executive department were constitutionally bound by the nondiscretionary (mandatory) requirement that they shall reside at the seat of government. The discretion granted the Attorney General as to his place of residence was amended by the voters in 1934 and it is now a nondiscretionary (mandatory) constitutional requirement that the Attorney General also reside at the seat of government.

RESPONDENT WAS ELECTED GOVERNOR & SWORE AN OATH TO OFFICE

On November 8, 2016, Respondent was elected Governor by the citizens of the State of West Virginia. On January 16, 2017, his Inauguration took place at 1:00 p.m. at the West Virginia

State Capitol, the seat of state government. Chief Justice Allen H. Loughry, II, administered the oath or affirmation of Office for Governor to the Respondent, wherein he swore the following:

“I, James Conley Justice, II, do solemnly swear that I will support the constitution of the United States of America, and the constitution of the State of West Virginia, and that I will faithfully discharge the duties of the office of Governor of the State of West Virginia to the best of my skill and judgment, so help me God.”

RESPONDENT FAILS TO COMPLY WITH
NONDISCRETIONARY REQUIREMENT OF GOVERNOR

Respondent has not resided at the seat of government during his term of office from January 16, 2017 through the filing of this Petition for Writ of Mandamus. Respondent, based on his own public admissions, has not spent more than a handful of nights, if any, at the West Virginia Governor’s Mansion located at 1716 Kanawha Blvd E, Charleston, West Virginia, since January 16, 2017 or at any other residence located within the seat of government, Charleston. In fact, Respondent continues to reside in Greenbrier County, West Virginia. When he decides to go to work, which is not a regular occurrence, at the seat of government he drives himself to and from Greenbrier County. Respondent has made consistent and repeated public remarks that he has not, is not and will not reside at the seat of government.¹

Members of the West Virginia Legislature have publicly raised concerns about the chronic absenteeism of Respondent and its effect on the productivity of state government that was a major cause of the various scandals by way of a press release.²

Respondent has held press conferences publicly declared that he would not move into the Governor’s Mansion nor would he be reporting to work daily at the seat of government. Respondent further advised the public that he works from his residence in Greenbrier County,

¹ App: EX 1;

² App: EX 2; EX 4

West Virginia. It was implied by the Respondent that most of his records, books and papers pertaining to the office of West Virginia Governor are scattered between Greenbrier County and Kanawha County. Specifically, Respondent stated in regards where he works, “It doesn’t matter whether I do it in the back of a Suburban or from the top of the dome.”³

Respondent further advised the public at a press conference that he doesn’t reside in Charleston, West Virginia, and “I’ll only stay at the Mansion when it’s convenient to me.”⁴

Certain scandals, mismanagement of public monies, no communication with cabinet secretaries and a decrease in productivity of state government has occurred under the Respondent’s tenure as Governor.⁵

Respondent has and continues at the time of the filing of this Petition, to violate his oath of office and the nondiscretionary (mandatory) requirement that he shall reside and keep his records, books and papers pertaining to the office of West Virginia Governor at the seat of government pursuant to Section 1 of Article VII of the West Virginia Constitution and W.Va. Code § 6-5-4. Respondent’s refusal to perform his nondiscretionary (mandatory) duties violates his oath of office that he will support the constitution of the State of West Virginia and will faithfully discharge the duties of the office of Governor of the State of West Virginia.

As a result, Petitioner, as a West Virginia citizen and taxpayer, has been and continues to be injured by Respondent's poor job performance due to habitual absenteeism. Lacking any other means of compelling Respondent to comply with his duties under the West Virginia Constitution, Petitioner now files this petition for a writ of mandamus to compel Respondent to perform his constitutional nondiscretionary duty that he resides West Virginia

³ App: EX 3, EX 5, EX 6

⁴ App: EX 14

⁵ App: EX 7; EX 8; EX 9; EX 10; EX 11; EX 12, EX 15

at the seat of government and keep all his records, books and papers pertaining to the office of West Virginia Governor there, rather than Greenbrier County.

SUMMARY OF ARGUMENT

Petitioner is a citizen and taxpayer of the State of West Virginia, more particularly Pendleton County. “A citizen and taxpayer of this State has a right to maintain a mandamus proceeding in order to compel a public official to perform a nondiscretionary constitutional duty.” Syl. Pt. 1, *State ex rel. Brotherton v. Moore*, 159 W.Va. 934, 230 S.E.2d 638 (1976).

Section 1 of Article VII of the West Virginia Constitution and W.Va. Code § 6-5-4 impose nondiscretionary duties on Respondent to reside at the seat of government during his term of office, keep there the public records, books and papers pertaining to his respective office, and shall perform such duties as may be prescribed by law. Respondent began his four-year term of office on January 16, 2017 and has not complied with this constitutional and statutory nondiscretionary mandatory duties.

For these reasons, this Court should order Respondent to reside at the seat of government during his term of office, AND keep there the public records, books and papers pertaining to his respective office during his term of office.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Jurisdiction and venue are proper in the West Virginia Supreme Court of Appeals, which has original jurisdiction over mandamus proceedings pursuant to Section 3 of Article VIII of the West Virginia Constitution.

Petitioner states that any evidence needed to decide this matter would be very limited, if any is required at all, based upon the public statements made by Respondent, as reported by various news agencies, that he does not reside at the seat of government, will not move to the

seat of government and will continue to work from his residence located in Greenbrier County, West Virginia.

Oral argument is necessary pursuant to the criteria in Rule 18(a) of the Rules of Appellant Procedure. Petitioner is requesting a Rule 20 oral argument. This matter is suitable for a Rule 20 argument due to it being a case of first impression; issues of fundamental public importance; and constitutional questions regarding nondiscretionary duties of an elected official.

ARGUMENT

THE REQUIRED ELEMENTS FOR A WRIT OF MANDAMUS ARE SATISFIED

"Mandamus lies to require the discharge by a public officer of a nondiscretionary duty." Syl. Pt. 3, *State ex rel. Greenbrier County Airport Authority v. Hanna*, 151 W.Va 479, 153 S.E.2d 284 (1967); Syl. Pt. 1, *State ex rel. West Virginia Housing Development Fund v. Copenhaver*, 153 W.Va. 636, 171 S.E.2d 545 (1969). Syl. Pt. 1, *State ex rel. Williams v. Department of Mil. Aff.*, 212 W.Va. 407, 573 S.E.2d 1 (2002). It is well-established that a writ of mandamus requires three elements:

(1) 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.

Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969); accord Syl. Pt. 2, *State ex rel. Blankenship v. Richardson*, 196 W.Va. 726, 474 S.E.2d 906 (1996); Syl. Pt. 1, *Hickman v. Epstein*, 192 W.Va. 42, 450 S.E.2d 406 (1994); Syl. Pt. 1, *State ex rel. McGraw v. West Virginia Ethics Comm'n*, 200 W.Va. 723, 490 S.E.2d 812 (1997).

A. Petitioner possesses a clear legal right to the relief sought

Petitioner is a citizen and taxpayer of the State of West Virginia, more particularly Pendleton County. "A citizen and taxpayer of this State has a right to maintain a mandamus

proceeding in order to compel a public official to perform a nondiscretionary constitutional duty.” Syl. Pt. 1, *State ex rel. Brotherton v. Moore*, 159 W.Va. 934, 230 S.E.2d 638 (1976); *State ex rel. Brotherton v. Blankenship*, W.Va., 214 S.E.2d 467 (1975); *Delardas v. County Court*, 155 W.Va. 776, 186 S.E.2d 847 (1972). No special or pecuniary interest must be shown by individuals who sue in this capacity. *Frantz v. County Court*, 69 W.Va. 734, 73 S.E. 328 (1911).

The Governor during his term of office is to reside and keep there the public records of his office at the seat of government is a nondiscretionary constitutional duty pursuant to Section 1 of Article VII of the West Virginia Constitution and W.Va. Code § 6-5-4. ‘It was his duty to do so, in fidelity to his oath of office to support the constitution of the State; and the constitution of the State unequivocally requires that he shall reside at the seat of government during his term of office, and keep there the public records of his office, and commands him, as the chief executive officer, in whom is vested the chief executive power, to “take care that the laws be faithfully executed.”’ *Slack v. Jacob*, 8 W.Va.612, 657 (1875).

All the conditions have been satisfied and Petitioner has a clear legal right to the relief sought in this petition.

B. Respondent, during his term of office, has a nondiscretionary constitutional duty to reside and keep the public records, books and papers pertaining to his public office at the seat of government.

Section 20 of Article VI of the West Virginia Constitution provides as follows:

6-20. Seat of government.

The seat of government shall be at Charleston, until otherwise provided by law.

Section 1 of Article VII of the West Virginia Constitution provides as follows:

7-1 Executive department.

The executive department shall consist of a governor, secretary of state, auditor, treasurer, commissioner of agriculture and attorney general, who shall be ex officio reporter of the court of appeals. Their terms of office shall be four years, and shall commence on the first Monday after the second Wednesday of January next after

their election. They shall reside at the seat of government during their terms of office, keep there the public records, books and papers pertaining to their respective offices, and shall perform such duties as may be prescribed by law.

W.Va. Code § 6-5-4 provides as follows:

§6-5-4. Residence of officers.

The Governor, Secretary of State, state superintendent of free schools, Auditor, Treasurer, Attorney General and Commissioner of Agriculture, shall reside at the seat of government during their term of office, and keep there the public records, books and papers pertaining to their respective offices. Every judge of a circuit court shall, during his continuance in office, reside in the circuit for which he was chosen. Every county and district officer, except the prosecuting attorney, shall, during his continuance in office, reside in the county or district for which he was elected. And the removal by any such officer from the state, circuit, county or district for which he was elected or chosen shall vacate his office.

The constitution and statutory language are explicit, in plain ordinary clear English, in setting forth unequivocally that residing at the seat of government during the term of office, and keeping there the public records, books and papers pertaining to that office is a nondiscretionary duty of holding the office of Governor. "Where 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." Syl. Pt. 3, *State ex rel. Smith v. Gore*, 150 W. Va. 71, 143 S.E.2d 791 (1965). "Words used in a state constitution, as distinguished from any other written law, should be taken in their general and ordinary sense." Syl. Pt. 6, *State ex rel. Trent v. Sims*, 138 W. Va. 244, 77 S.E.2d 122 (1953). "Questions of constitutional construction are in the main governed by the same general rules applied in statutory construction." Syl. pt. 1, *Winkler v. State School Building Authority*, 189 W.Va. 748, 434 S.E.2d 420 (1993). "The provisions of the Constitution, the organic and fundamental law of the land, stand upon a higher plane than statutes, and they will as a rule be held mandatory in prescribing the exact and exclusive methods of performing the acts permitted or required." Syl. Pt. 2, *Simms v. Sawyers*, 85 W. Va. 245, 101 S.E. 467 (1919).

Section 1 of Article VII of the West Virginia Constitution uses the word "shall" reside at

the seat of government during their terms of office, keep there the public records, books and papers pertaining to their respective offices. The word shall when used in constitutional provisions has been determined to be used in the mandatory sense and not discretionary sense. "As used in constitutional provisions, the word 'shall' is generally used in the imperative or mandatory sense." Syl. Pt. 3, *State ex rel. Trent v. Sims*, 138 W. Va. 244, 77 S.E.2d 122 (1953). "Courts 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).

The Supreme Court of Appeals of West Virginia has interpreted Section 1 of Article VII of the West Virginia Constitution to be nondiscretionary constitutional duty of the executive department. This has been the rule of law for over 140 years in this state. 'It was his duty to do so, in fidelity to his oath of office to support the constitution of the State; and the constitution of the State unequivocally requires that he shall reside at the seat of government during his term of office, and keep there the public records of his office, and commands him, as the chief executive officer, in whom is vested the chief executive power, to "take care that the laws be faithfully executed.'" *Slack v. Jacob*, 8 W.Va.612, 657 (1875).

On November 8, 2016, Respondent was elected Governor by the citizens of the State of West Virginia. On January 16, 2017, his Inauguration took place at 1:00 p.m. at the West Virginia State Capitol, the seat of state government. Chief Justice Allen H. Loughry, II, administered the oath or affirmation of Office for Governor to the Respondent at the Inauguration. Respondent has not resided at the seat of government, will not move to the seat of government and continues to work from his residence located in Greenbrier County, West Virginia. Respondent is violating nondiscretionary duties of holding the office of Governor by

refusing to reside at the seat of government during his term of office and keep there the public records, books and papers pertaining to his respective office, as mandated by Section 1 of Article VII of the West Virginia Constitution and W.Va. Code § 6-5-4.

All the conditions have been satisfied and Respondent is violating a nondiscretionary duty of holding the office of Governor.

C. Petitioner possesses no other adequate remedy

Petitioner lacks any adequate alternative remedy, and the writ should issue. The existence of *any* remedy will not suffice. "Mandamus will lie, notwithstanding the existence of another remedy, if such other remedy is inadequate or is not equally beneficial, convenient and effective." *State ex rel. Wheeling Downs Racing Ass 'n v. Perry*, 148 W. Va. 68, 73, 132 S.E. 2d 922 (1963). "A remedy cannot be said to be fully adequate to meet the justice and necessities of a case, unless it reaches the end intended, and actually compels a performance of the duty in question." *State ex rel. Bronaugh v. Parkersburg*, 148 W. Va. 568, 573, 136 S.E. 2d 783, 786 (1964).

"Mandamus will lie against a State official to adjust prospectively his or her conduct to bring it into compliance with any statutory or constitutional standard." Syl. Pt. 2, *Gribben v. Kirk*, 466 S.E.2d 147, 195 W.Va. 488 (W. Va., 1995).

Petitioner is concerned about Respondent's habitual absenteeism and its effect on the poor productivity of state government and declining morale among many state workers due to it. Petitioner strongly believes that the recent scandals that appear in the daily newspapers on a regular occurrence are due to Respondent neglect of his constitutional duties and the office of Governor is not in proper order.

Petitioner is further concerned about the inability of citizens and taxpayers of West

Virginia having access to the Governor of the State of West Virginia due to his habitual absenteeism.

Section 16 of Article III of the West Virginia Constitution provides as follows:

3-16. Right of public assembly held inviolate.

The right of the people to assemble in a peaceable manner, to consult for the common good, to instruct their representatives, or to apply for redress of grievances, shall be held inviolate.

Citizens have the right to assemble in a peaceable manner, to consult for the common good, to instruct their representative, or to apply for redress of grievances. In short, the right to speak with elected officials while they are performing their elected governmental functions is a constitutional right. To deny this accessibility hurts citizens and taxpayers' confidence in state government. An example would be the teacher and school service personal 9-day work stoppage earlier this year. Thousands of citizens came to the Capitol to assemble in a peaceable manner, to consult for the common good of their class, request change to their elected representatives and applied for relief over numerous grievances with their livelihoods. They wanted to address Respondent who had made several unpopular policy decisions with PEIA and pay increases that triggered the work stoppage. These citizens were disappointed daily due to Respondent not appearing at the seat of government on a regular basis during the work stoppage. No citizen, or legislator for that matter, knew the whereabouts of Respondent during that time. Petitioner believes that Respondent's regular attendance at the seat of government would provide a greater confidence in state government to the public and show empathy rather than the appearance of indifference or "no one cares" image presented by Respondent. If Respondent is not present and does not reside at the seat of government then he is violating every West Virginia citizen and taxpayer's constitutional rights. An individual cannot instruct and apply for a redress of grievances to an empty chair. This is not allowed under the West Virginia Constitution and

every West Virginia citizen and taxpayer's rights are being violated by Respondent.

Petitioner is further concerned about who is providing Respondent with his daily reports of state government since he is not present to witness it first hand and may be only getting reports from one or two individuals that may have a desire to not keep him properly inform for other reasons. One of the individuals is a controversial adviser with ties to the Oil and Gas Industry, among other industries, that Respondent relies on significantly, and possibly exclusively, to provide him with an update on state government.⁶ There has been a gag order placed on state government, so all information must go through one or two individuals before it reaches Respondent according to news reports.

Habitual absenteeism and keeping one's public records, books and papers pertaining to the respective office scattered across several counties in a disorganized manner is fret with problems that should be avoid. The West Virginia Constitution and W.Va. Code have safeguards built into it to avoid these basic problems in the form of mandatory attendance of officeholders of the executive department when they hold that office. Respondent has not and refuses to address his habitual absenteeism and chaotic book keeping of his records.

If a writ of mandamus is issued against Respondent to adjust prospectively his conduct to bring it into compliance with the constitutional and statutory standards, then the aforesaid concerns regarding state government will be remedied.

For the aforesaid reasons, Petitioner lacks any other adequate remedy. The writ of mandamus should be issued.

⁶ App: EX 13

CONCLUSION

Petitioner respectfully requests that the Court grant a rule to show cause, enter an expedited briefing schedule, and after due consideration, grant Petitioner a writ of mandamus. Petitioner believes that the writ should compel Respondent to meet his nondiscretionary mandatory constitutional duty pursuant to Section 1 of Article VII of the West Virginia Constitution and W.Va. Code § 6-5-4 that he reside at the seat of government during his terms of office, and keep there the public records, books and papers pertaining to his respective office; award court costs and grant such other relief as the Court deems equitable.

Given under my hand this 18th day of September 2018.

G. Isaac Sponaugle, III
Petitioner

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G. Isaac Sponaugle III
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Petitioner

STATE OF WEST VIRGINIA

COUNTY OF PENDLETON, to-wit:

G. Isaac Sponaugle, III, Petitioner named in the foregoing *Petition for Writ of Mandamus*, being first duly sworn, say that the facts and allegations set forth therein are true and correct, except insofar as they are therein stated to be upon information and belief, and insofar as therein stated to be upon information and belief, they believe them to be true and correct.

G. Isaac Sponaugle, III

Taken, sworn to and subscribed before me, a Notary Public in and for the county and state aforesaid, this the 18th day of September 2018.

My commission expires March 1, 2024.

NOTARY PUBLIC



CERTIFICATE OF SERVICE

I, G. Isaac Sponaugle III, Petitioner, do certify that a true copy of the foregoing *Petition for Writ of Mandamus* was served upon Respondent and the West Virginia Attorney General, as required by Rule 37 of the Revised Rules of Appellate Procedure, by hand delivering true copies to them on this the 18th day of September 2018.

Petitioner