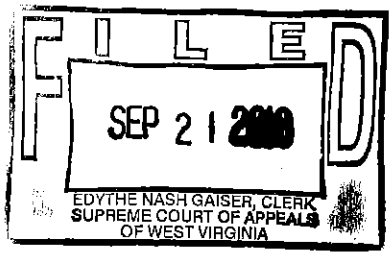
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE 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.

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

The Articles of Impeachment Violate the Doctrine of Separation of Powers

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. At least one is going blind, another

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

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 warmer 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 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

[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.

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 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

[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.

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.

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 staying

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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.

[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 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

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, 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.

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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.

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), *cert 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. Hechler*, 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 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

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[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.

[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.

Amendment expressly granted the Supreme Court of Appeals of West Virginia the "power 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

[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.

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 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 (1988), *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.

[11] Any doubt that the Senate is seeking to take 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.

Moreover, even if the Legislature did provide some modicum of notice to the 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 410. (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 194, 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. HR 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 HR 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 (1959); *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. 1, 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 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 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. 001–026. 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.

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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.

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.

Joan Mullins

NOTARY PUBLIC

NOTARY SEAL

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
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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.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served the foregoing ***Petition for Writ of Mandamus,*** and two ***Motions for Disqualification*** upon the following individuals via U.S. Mail on the 21st day of September, 2018 to:

Mitch Carmichael, as President of the Senate
Room 227M, Building 1
State Capitol Complex
Charleston, WV 25305

Donna J. Boley, as President Pro Tempore of the Senate
Room 206W, Building 1
State Capitol Complex
Charleston, WV 25305

Ryan Ferns, as Senate Majority Leader
Room 227M, Building 1
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Charleston, WV 25305

Lee Cassis, Clerk of the Senate
Room 211M, Bldg. 1
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