IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

NO. 18-0810

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.

RESPONDENT, JAMES CONLEY JUSTICE, II'S, RESPONSE TO PETITIONER'S PETITION FOR WRIT OF MANDAMUS

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JAMES CONLEY JUSTICE, II,
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QUESTION PRESENTED

Does mandamus lie to compel the Governor of the State of West Virginia to "reside" at the seat of government, where (a) there is no clear definition of "reside," (b) decisions as to how and where the Governor spends his time necessarily involve elements of discretion, (c) the writ requested would render this Court the supervisor of the Governor's course of conduct on a continuing basis, and (d) other remedies exist with respect to the alleged deficiencies in the Governor's performance?

STATEMENT OF THE CASE

On June 19, 2018, Petitioner G. Isaac Sponaugle, III filed a Petition for Writ of Mandamus against Respondent James Conley Justice, II, in his official capacity as Governor of the State of West Virginia, in the Circuit Court of Kanawha County, West Virginia. The petition asked the circuit court to 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[.]" R. App. at 3.[1] The petition was based on Section I, Article VII of the West Virginia Constitution, which states as follows:

> 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. Const. art. VII, § 1.

Neither the Constitution, nor the corresponding statutory provision codified at W. Va. Code § 6-5-4, contains any specific guidance as to the meaning of the term "reside" in this context. When the circuit court questioned Petitioner as to what exactly he wanted the court to order Respondent

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[1] Citations to Respondent's Appendix will be made herein as "R. App. at __."

to do, and what exactly he meant by "reside," Respondent struggled to answer. *See* R. App. at 33-39. First, Petitioner indicated that he wanted the circuit court to order Respondent to "live" in Charleston, though not necessarily at the Governor's Mansion. Id. at 33-34. When asked how many days of the week or month Respondent needed to "live" in Charleston, Petitioner merely guessed, stating that "I would suspect it would be more than half the year to reside." Id. at 17. When probed further, Petitioner offered to brief the issue. Id. at 35-36. The circuit court ultimately dismissed the petition based on Petitioner's failure to comply with the pre-suit notice procedures set forth in W. Va. Code § 55-17-3(a)(1).

Following the dismissal of his circuit court petition, Petitioner filed the instant Petition for Writ of Mandamus before this Court, again seeking a writ directing Respondent to "reside" at the seat of government without even attempting to offer a definition of "reside" or explain what exactly he wants this Court to direct Respondent to do.[2] The factual allegations in the Petition provide no clarity. At certain points in his Petition, Petitioner complains that Respondent has allegedly not spent more than a "handful of nights" at the Governor's Mansion. *See* Petition at p. 3. At other points, Petitioner complains that Respondent allegedly does not report for work at the Capitol as often as Petitioner would like. *See* Petition at pp. 3, 10-11. It is thus entirely unclear how Petitioner defines "reside," and what threshhold of time Petitioner believes Respondent is required to spend at the Governor's Mansion and/or the Governor's Office at the Capitol.

In addition, the only support that Petitioner offers for his assertions regarding Respondent's

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[2] Notably, the Petition fails to comply with W.Va. R. App. P. 16(d)(7), which states that a petitioner "must explain why the original jurisdiction relief sought is not available in any other court or cannot be had through any other process." W. Va. R. App. P. 16. Petitioner has not even attempted to explain why he could not seek relief in circuit court after complying with the applicable pre-suit notice procedures. Nevertheless, Respondent does not object to this Court deciding the Petition, as the interests of judicial economy are better served thereby at this point.

purported "absenteeism" are hearsay statements from online news articles, and in many instances those articles do not support Petitioner's assertions. For example, Petitioner asserts that "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[.]" *See* Petition at p. 3. However, nowhere in Petitioner's appendix is there any purported statement by Respondent regarding the number of nights that he has spent at the Governor's Mansion. As another example, Petitioner asserts that "[i]t 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." *See* Petition at p. 4. However, there are no statements in Petitioner's appendix regarding the location of the public books, records and papers pertaining to the Office of Governor.[3]

Moreover, the articles that Petitioner has chosen to place in his appendix do not paint an accurate picture of the Respondent's public presence in Charleston and travels throughout the state. A log of Respondent's public appearances shows that Respondent has made 167 public appearances in Charleston during the past two years, and those are just his public appearances. *See* R. App. at 45-52. These 167 public appearances belie Petitioner's characterization of an absentee governor who is never present at the seat of government. The log further demonstrates that Respondent has appeared at well over 100 additional public events in 28 different counties throughout the State, thus eviscerating Petitioner's portrait of a governor who has been holed up in some remote location, inaccessible to the people. Regardless, even if the Petition were properly supported by compelling evidence, and its factual allegations were accurate, the Petition must still be denied for the reasons set forth below.

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[3] Respondent vehemently denies that he keeps such public records outside of Charleston. *See* Affidavit of Brian Abraham, General Counsel to the Governor, R. App. at 45.

SUMMARY OF ARGUMENT

Mandamus relief is unavailable in this case for several reasons. First, mandamus only lies to require a public officer to perform a nondiscretionary duty, and this Court has held that a nondiscretionary duty, for purposes of a mandamus action, is one that is so plain in point of law and so clear in matter of fact that no element of discretion is left as to the precise mode of its performance. The duty to "reside" at the seat of government is neither plain in point of law nor clear in matter of fact, and necessarily involves discretion in the mode of its performance. Indeed, this Court has recognized that the word "reside" is "chameleon-like" and "like a slippery eel," with no clear, rigid definition, and Petitioner has not even attempted to offer a definition or explain the precise parameters of the duty he seeks to enforce. Moreover, decisions as to where and how the Chief Executive of this State spends his time on any given day unquestionably involve the exercise of discretion.

Second, numerous authorities have held that mandamus is not available to compel a general course of conduct to be performed over a long period of time, as opposed to a discrete act. This is because issuing a writ of mandamus directing a public official to adopt an ongoing course of action would require the issuing court to monitor and supervise the official's conduct on a continuing basis. It would also subject the official to politically-motivated contempt actions, and hamper the official's discretion to act as he deems appropriate in any given set of circumstances. These concerns are magnified where, as here, the official involved is the Governor and the duty sought to be enforced relates to where and how the Governor spends his time. As the Chief Executive of the State of West Virginia, the Governor's duties are both enormous and multifaceted, and he must be afforded the autonomy to determine where and how he will allocate his time on any given day under any given set of circumstances. Thus, not only is it impractical for this Court to monitor the Governor's

whereabouts and activities on a ongoing basis, but the Governor's autonomy and discretion cannot be curtailed by an order directing him to spend some arbitrary, pre-determined portion of his time in Charleston throughout his term.

Lastly, mandamus is unavailable where other adequate remedies exist. Here, there are other adequate remedies available to Petitioner. If Petitioner is truly dissatisfied with the manner in which Respondent is performing his duties, then he (and any other citizen of this State) has the ability to vote him out of office at the next gubernatorial election. Furthermore, as a member of the Legislature, Petitioner also has the ability to initiate impeachment proceedings if he deems them warranted. However, Petitioner is not entitled to a writ of mandamus controlling the manner in which Respondent apportions his time and presence.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, Governor Justice submits that oral argument is unnecessary because the petition is frivolous and should be dismissed outright.

ARGUMENT

Petitioner is not entitled to a writ of mandamus as a matter of law. This Court has long held that "[a] writ of mandamus will not issue unless three elements coexist - (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). The burden of proof as to these elements is on the party seeking the relief, and "failure to meet any one of them is fatal." State ex rel. Richey v. Hill, 216 W. Va. 155, 160, 603 S.E.2d 177, 182 (2004).

As demonstrated below, Petitioner cannot satisfy the first two elements because the nebulous

duty to "reside" at the seat of government is not the type of discrete, nondiscretionary duty that can be compelled through mandamus. In addition, Petitioner cannot satisfy the third element because there are other avenues through which Petitioner (and the citizens of this state in general) can redress any perceived deficiencies in the Governor's performance.

I. MANDAMUS DOES NOT LIE TO COMPEL THE GOVERNOR TO "RESIDE" AT THE SEAT OF GOVERNMENT.

It is well-settled that mandamus only lies to require a public officer to perform a *nondiscretionary* duty. Nobles v. Duncil, 202 W. Va. 523, 534, 505 S.E.2d 442, 453 (1998). As explained below, the requirement that the Governor "reside" at the seat of government is not the type of discrete, ministerial act that can be compelled through mandamus.

A. Mandamus is inappropriate in this case because the requirement that the Governor "reside" at the seat of government is unspecific and necessarily involves elements of discretion.

This Court has explained that "[a] non-discretionary or ministerial duty in the context of a mandamus action is one that *is so plain in point of law and so clear in matter of fact that no element of discretion is left as to the precise mode of its performance.*" Syl. Pt. 7, Nobles, 202 W. Va. 523, 505 S.E.2d 442 (emphasis added). The duty to "reside" at the seat of government, as set forth in Section I, Article VII of the West Virginia Constitution and W. Va. Code § 6-5-4, plainly falls short of this standard.

Indeed, this Court has recognized that the meaning of the word "reside" is anything but plain and clear. In the words of the Court,

> [t]he verb "'[t]o reside' and its corresponding noun residence are chameleon-like expressions, which take their color of meaning from the context in which they are found. The word 'residence' has been described as being 'like a slippery eel, and the definition which fits one situation will wriggle out of our hands when used in another context or in a different sense.'"

Brooke B. v. Ray, 230 W. Va. 355, 364, 738 S.E.2d 21, 30 (2013). This raises the question, what does the word "reside" mean in Section I, Article VII of our Constitution? Does it mean "domicile"? Surely not. This Court has explained that a "[d]omicile is a place a person intends to retain as a permanent residence and go back to ultimately after moving away." Id. at 364, 738 S.E.2d at 30. It would be absurd to read Section I, Article VII as requiring anyone who is elected Governor to make Charleston his permanent home where he intends to remain even after his term has expired.

At times, this Court has defined the term "domicile" by stating that it is "a combination of residence *(or presence)* and an intention of remaining." *See* State ex rel. Sandy v. Johnson, 212 W. Va. 343, 349, 571 S.E.2d 333, 339 (2002)(emphasis added); State v. Stalnaker, 186 W. Va. 233, 235, 412 S.E.2d 231, 233 (1991)(emphasis added). If residence merely means "presence," then the duty to "reside" at the seat of government necessarily involves elements of discretion.[4] There are no specific legal requirements as to how much time the Governor is to spend in any particular locale, and it is axiomatic that the Governor must be afforded the discretion to travel about the State and govern as he sees fit. Thus, to the extent that the word "reside" merely refers to presence, the duty to "reside" at the seat of government cannot be enforced through mandamus because it is not "so plain in point of law and so clear in matter of fact that no element of discretion is left as to the precise mode of its performance." Syl. Pt. 7, Nobles, *supra*.

In truth, the importance of allowing the governor to exercise his discretion to determine

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[4] "Presence" appears to be the meaning that Petitioner attaches to the word "reside," even though he does not attempt to define the term. Throughout his Petition, he complains about the Governor's purported failure to report on a daily basis to his office at the Capitol, where he would allegedly be more accessible to state workers and members of the public. Thus, Petitioner's gripe is not really that the Governor does not "live" or sleep at the seat of government, but that he is allegedly not "present" at the seat of government often enough during working hours. Indeed, if the Governor "lived" or slept just outside the city limits of the seat of government, and commuted from there to his office at the Capitol, it is highly unlikely that Petitioner would be complaining that the Governor was not "residing" at the seat of government.

where he is "present" on any given day and under any given set of circumstances cannot be overstated. The duties of the Governor, as the Chief Executive of the State, are enormous. Ultimately, he must oversee the operation of the entire executive branch whose duties and responsibilities are myriad and complex. To do so, the Governor must appoint people to literally hundreds of offices. It is his duty to establish policies and goals for the operation of government. He must propose legislation to accomplish those goals. He must prepare, propose and seek passage of a multi-billion dollar budget annually to fund the operation of government. He often confers with the public, and attends important events throughout the State. He further meets with legislative leaders and executive branch officials, meets with a multitude of stakeholders, responds as needed to press and public inquiries and, when he can, spends some time with his family. Quite simply, the tasks to be fulfilled are endless and the demands on his time are substantial. Whether he is meeting with the public, having discussions with staff and others in the confines of his office or the mansion, reading material information, or talking on the phone, it must be left to the Governor's discretion how to allocate his time.

At other instances, in explaining the difference between "residence" and "domicile," this Court has stated that a person may have several residences but only one domicile. Brooke B., 230 W. Va. at 364, 738 S.E.2d at 30. Thus, to the extent that the word "reside" simply means to maintain a residence in a particular locale, the Petition fails on its face, because Petitioner does not dispute that Respondent has a residence (the Governor's Mansion) available to him in Charleston, and Petitioner's own exhibits indicate that Respondent has furniture and other belongings there. P. App. at 13, 19.[5] But if "reside" is defined to mean that Respondent must be "present" at the seat of

[5] Citations to Petitioner's Appendix will be made herein as "P. App. at __."

government, the log of Respondent's public appearances in Respondent's appendix demonstrates compliance. *See* R. App. at 46-52. The log illustrates the significant number and various locations where the Governor has made public appearances since his inauguration. In this regard, the log reflects that he has made 167 public appearances in Charleston for a multitude of purposes. These include the announcement of his education plan to school leaders, multiple updates on budgets, press conferences with coal leaders, press conferences on hardwood manufacturing, press conferences with China Energy, meeting with the County Commissioners Association, announcement of a new director of DHHR Drug Control Policy, speaking to the PEIA Task Force, and many others.

On the other hand, Governor Justice made over 100 public appearances outside of Charleston. He has made appearances throughout the state from McDowell County in the south, to the northern and eastern panhandles. These appearances include many stops on his Save Our State tour, welcoming Boy Scouts to the National Jamboree in Fayette County, visiting flood sites in Marshall and Marion Counties, visiting several counties in support of his Roads to Prosperity campaign, attending the Governor's Conference on Tourism in Morgantown, presenting Community Corrections funds in Wheeling, and speaking to teachers concerning their pay and PEIA in Ohio, Berkeley and Monongalia Counties. As the log details, the Governor is often "present" in Charleston but also throughout the state.

In any event, given the uncertainty over the meaning of the word "reside," it is difficult to imagine how anyone could meritoriously contend that the bald directive to "reside" at the seat of government, without any further elaboration, is "so plain in point of law and so clear in matter of fact that no element of discretion is left as to the precise mode of its performance." *See* Syl. Pt. 7,

Nobles, *supra*. Nevertheless, Petitioner insists that this directive is explicit, plain, and clear.[6] However, Petitioner's position is belied by the fact that nowhere in his Petition does he even attempt to offer a definition of the word "reside." Does it mean that Respondent has to sleep at the Governor's Mansion (or somewhere else in Charleston)? If so, how many nights per week or per month must he sleep there before he is deemed to be "residing" there? Is he "residing" in Charleston if he sleeps there but departs in the morning and spends his waking hours in Wheeling, Martinsburg, Welch, or elsewhere? If so, then how would compelling Respondent to "reside" in Charleston address any of the purported "absenteeism" problems that Petitioner alleges exist due to Respondent's failure to report daily to his office at the Capitol? Petitioner does not even attempt to answer these questions in his Petition.

As it happens, the circuit court specifically confronted Petitioner with these very issues, and Petitioner could not provide concrete answers. *See* R. App. at 33-39. At first, Petitioner indicated that he wanted the circuit court to order Respondent to "live" in Charleston, though not necessarily

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[6] Petitioner cites Slack v. Jacob, 8 W. Va. 612 (1875) in support of his assertion that this Court has "interpreted Section 1 of Article VII of the West Virginia Constitution to be [a] nondiscretionary duty of the executive department." *See* Petition at p. 9. However, this Court did not "interpret"Section I, Article VII in Slack. That case presented the questions of whether an act of the Legislature moving the seat of government from Charleston to Wheeling was constitutional, and whether a circuit court injunction restraining the Governor from moving government property from Charleston to Wheeling was valid. *See* Slack, 8 W. Va. at 615-623. As to the first question, the Court ultimately determined that the act was constitutional. Id. at 654. In addressing the second question, the Court noted that upon the passage of the act purporting to move the seat of government, it became the Governor's duty to determine for himself whether the act was valid and where the seat of Government was, because "the constitution of the State unequivocally requires that he shall reside at the seat of government . . . and keep there the public records of his office[.]" Id. at 657. The Court ultimately concluded that the injunction was improper because the "the power and duty" at issue in the case were "clearly executive, requiring the exercise of discretion and judgment, on his part." Id. at 657-58. The Court at no point addressed the meaning of the term "reside," nor determined that the duty to "reside" could be enforced through mandamus. To the contrary, the fact that the Court dissolved the injunction because it involved duties "requiring the exercise of discretion and judgement" weighs against mandamus in this case, because the nebulous duty to "reside" at the seat of government necessarily requires discretion and judgment.

at the Governor's Mansion. R. App. at 33-34. When asked how many nights per week or month Respondent needed to "live" in Charleston, Petitioner guesstimated, without citing anything, that "I would suspect it would be more than half the year to reside." Id. at 35. When questioned further about the meaning of "reside" and precisely how much time Petitioner was asking the court to order Respondent to spend in Charleston, Petitioner could not provide an answer, and instead offered to brief the issue. Id. at 35-36. If the duty to "reside" at the seat of government were "so plain in point of law and so clear in matter of fact that no element of discretion is left as to the precise mode of its performance," as is required for mandamus to issue, then Petitioner would not need to submit a subsequent brief to explain its meaning. *See* Syl. Pt. 7, Nobles, *supra*.[7]

What *is* plain and clear in this case is that Petitioner's nebulous request for an order directing Respondent to spend more time in Charleston, if granted, would exceed the proper scope of mandamus relief. As this Court has held, "[m]andamus is a proper remedy to compel tribunals and officers exercising discretionary and judicial powers to act, when they refuse so to do, in violation of their duty, *but it is never employed to prescribe in what manner they shall act*, or to correct errors they have made." Syl. Pt. 8, Nobles, 202 W. Va. 523, 505 S.E.2d 442 (emphasis added); *see also* Ney v. W. Virginia Workers' Comp. Fund, 186 W. Va. 180, 182, 411 S.E.2d 699, 701 (1991).[8] In

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[7] Notably, after the circuit court challenged Petitioner on the precise meaning of "reside," Petitioner has had ample opportunity to address this issue in his Petition to this Court, yet made no attempt to do so. Thus, apparently Petitioner could not define the precise contours of the duty to "reside" at the seat of government even in a subsequent written submission.

[8] It is true that this Court has held that mandamus lies to control an officer's discretion where there is a clear showing that the officer's action is fraudulent, capricious, arbitrary, and/or a palpable abuse of discretion. *See* State ex rel. Lambert v. Cortellessi, 182 W. Va. 142, 148, 386 S.E.2d 640, 646 (1989). However, even in that situation, the Court can only direct the officer to revisit his/her decision, and cannot prescribe the precise manner in which the official is to exercise his/her discretion. Id. at 149-150, 386 S.E.2d at 647-48. For example, in Lambert, this Court held that mandamus was available to compel the McDowell County Commission to give due consideration to certain statutorily-mandated factors when setting the budget of a county officer, where the county commission had acted arbitrarily by

the absence of specific guidance in the Constitution as to precisely what is meant by "reside" and/or how much time the Governor is required to spend at the seat of government, the writ Petitioner seeks would necessarily involve prescribing the manner in which Respondent is to act, and is therefore improper.[9]

In summary, the Petition utterly fails to define the contours of the directive to "reside" at the seat of government, and ultimately raises issues regarding where and how the Governor performs his job on a daily basis, which necessarily involve the exercise of discretion. Because the duty that Petitioner seeks to enforce is not "so plain in point of law and so clear in matter of fact that no element of discretion is left as to the precise mode of its performance," and any writ granted would

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fixing the budget of the county officer without even consulting with the officer as to the amount of funds necessary for the performance of the statutory duties of his office. Id. at 148, 386 S.E.2d at 646. However, this Court held that the circuit court erred in ordering that the budgets at issue be restored to the level of the preceding fiscal year, because mandamus does not lie to compel officials to act in a particular manner. Id. at 149-150, 386 S.E.2d at 647-48. Instead, this Court observed that the proper relief was to order the commission to reconvene and reconsider the budgets at issue after consulting with the subject officers and taking their workloads and operating needs into account. Id.

[9] Indeed, a writ prescribing the amount of time the Governor must spend in Charleston, and/or restraining his discretion to determine where he will be present on any given day under any given set of circumstances, would likely run afoul of the political question doctrine and corresponding separation of powers principles. As two acting Justices of this Court recently observed, "[t]he political question doctrine is essentially a function of the separation of powers, . . . existing to restrain courts from inappropriate interference in the business of the other branches of Government, . . . and deriving in large part from prudential concerns about the respect we owe the political departments." State ex rel. Workman v. Carmichael, 2018 WL 4941057, at *1 (W. Va. Oct. 11, 2018)(J. Bloom and J. Reger, concurring in part and dissenting in part). Under the political question doctrine, a court should decline to adjudicate an issue where it involves, *inter alia*, "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government[.]" Id. Here, restraining the governor's discretion to allocate his time and presence would interfere in the business of the executive branch of government. In addition, there are no judicially manageable standards for dictating the allocation of the Governor's time and presence; deciding where and how the Governor is to spend his time necessarily requires making a policy determination of a kind clearly meant for nonjudicial discretion; and undertaking to restrain the Governor's autonomy would express lack of respect due the State's Chief Executive.

necessarily involve prescribing the manner in which Respondent performs his job, mandamus relief is not appropriate and the Petition should be denied.

B. Mandamus is inappropriate to control the performance of continuing duties, as opposed to discrete acts.

Although this Court has not squarely addressed the issue, numerous courts have held that mandamus is not an appropriate remedy to compel a general course of official conduct to be performed over a long period of time. *See e.g.* Rocky Mountain Animal Def. v. Colorado Div. of Wildlife, 100 P.3d 508, 517 (Colo. App. 2004)("[M]andamus will not lie to enforce duties generally, or to control and regulate a general course of official conduct for a long series of continuous acts to be performed under varying conditions."); Stone v. Ward, 752 So. 2d 100, 101 (Fla. Dist. Ct. App. 2000)("It is well-settled that mandamus is not appropriate to control or regulate a general course of conduct for an unspecified period of time."); Frank H. Hiscock Legal Aid Soc. v. City of Syracuse, 391 N.Y.S.2d 787, 788 (Sup. Ct. 1977)("[M]andamus is not available 'to compel a general course of official conduct or a long series of continuous acts', performance of which it would be impossible for a court to oversee," and "is particularly inappropriate where a relevant statutory duty involves the exercise of judgment and discretion ."); Lakeland Joint Sch. Dist. Auth. v. Sch. Dist. of Scott Twp., 200 A.2d 748, 752 (Pa. 1964)("Mandamus will not lie since mandamus is not available to enforce a general course of official conduct or the performance of continuing duties[.]"); State ex rel. Patterson v. Bd. of Sup'rs of Warren Cty., 125 So. 2d 91, 92 (Miss. 1960)(Mandamus "contemplates the necessity of indicating the precise thing to be done, and so is not an appropriate remedy for the enforcement of duties generally, or to control and regulate a general course of official conduct for a long series of continuous acts to be performed under varying conditions."); State ex rel. Bd. of Pub. Ed. for City of Savannah & Chatham Cty. v. Johnson,106 S.E.2d 353, 356 (Ga.

1958)("While mandamus will lie to compel performance of specific acts, where the duty to discharge them is clear, it is not an appropriate remedy to compel a general course of official conduct for a long series of continuous acts to be performed under varying conditions.")

This Court should join those listed above, and hold that mandamus is not available where, as here, a petitioner seeks to compel a course of conduct to be performed over a long period of time, as opposed to a discrete act to be performed in a specific instance. As one court explained,

> [w]here the court is asked to require the defendant to adopt a course of official action, although it is a course required by statute and imposed on the official by law, it would be necessary for the court to supervise, generally, his official conduct, and to determine in numerous instances whether he has, to the extent of his power, carried out the mandate of the court. It would in effect render the court a supervising and managerial body over the operation and conduct of the activity to which the writ pertains, and so keep the case open for an indefinite time to superintend the continuous performance of the duties by the respondent. Accordingly, the writ will not issue to compel performance of acts of a continuous nature.

Stone, 752 So. 2d at101–02; *see also* Dorris v. Lloyd, 100 A.2d 924, 927 (Pa. 1953).

The Circuit Court of Kanawha County identified these very problems with respect to the Petition in the case at bar. *See* R. App. at 38-39. The circuit court queried as to how it would know whether Respondent was complying with a hypothetical order directing Respondent to "reside" at the seat of government. Id. In response, Respondent seemed to contend that it would be the circuit court's job to monitor "security logs" recording Respondent's attendance at the Governor's Mansion, and hold Respondent in contempt if he does not show up often enough. Id. However, this suggestion is absurd. Not only would Petitioner's suggestion place this Court in charge of supervising and managing the Governor of the State of West Virginia on an ongoing basis, but it would also open the doors of this Court to politically-motivated contempt proceedings. Indeed, given the nebulous nature of the term "reside," Petitioner could harass Respondent with motions to hold him in contempt any time Petitioner subjectively feels (or professes to feel) that the Governor

is not spending sufficient time at the Capitol or the Governor's Mansion. Accordingly, the mandamus relief sought by Petitioner is not only inappropriate under the law, but also impractical. Indeed, the Governor must have the autonomy and discretion to allocate his time without the constant specter of being hailed into court by his political opponents.

II. OTHER REMEDIES EXIST TO REDRESS PETITIONER'S ALLEGED CONCERNS.

Petitioner alleges that he is concerned about Respondent's "habitual absenteeism," which Petitioner claims has caused "poor productivity of state government," "declining morale among many state workers," and "recent scandals that appear in the daily newspapers." Petition at p. 10.[10] Petitioner further alleges that he is concerned about "the inability of citizens and taxpayers of West Virginia having access to the Governor," citing the right of public assembly set forth in Section 16, Article III of the West Virginia Constitution. Petition at pp. 10-11.[11] Lastly, Petitioner alleges that he is "concerned about who is providing Respondent with his daily reports of state government since he is not present to witness it first hand," and speculates that Respondent may be getting most of his information from "a controversial advisor with ties to the Oil and Gas Industry." Petition at p. 12.[12]

However, not only does Petitioner have other remedies to address these alleged concerns, but

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[10] Petitioner cites utterly no data to show that this "poor productivity" and "declining morale" even exist, let alone that they were caused by any action or inaction by the Respondent. Furthermore, as discussed *infra*, the purported "scandals" referenced by Petitioner are actually success stories.

[11] The right of public assembly is not implicated in this case. Petitioner cites no case holding that the right of public assembly requires the Governor to be at a particular location for some threshhold amount of time so that people can assemble in his or her direct presence.

[12] Even if this were true (which Respondent denies), it has nothing to do with whether Respondent resides at the seat of government. Certainly Petitioner does not believe that even if Respondent spent all of his time at the seat of government, he would be patrolling the halls of the various government buildings to "witness state government first hand." Whether working from his office at the Capitol or elsewhere, Respondent would get reports from others, and the identity or number of the people giving him those reports has nothing to do with his physical location.

the mandamus remedy he seeks would *not* address these concerns. It is axiomatic that if Petitioner (or any citizen of this State) is dissatisfied with the manner in which Respondent is performing his job, they have the ability to vote him out of office at the next gubernatorial election. In addition, Petitioner, as a member of the Legislature, also has the ability to initiate impeachment proceedings if he deems them warranted.

Conversely, a writ of mandamus ordering Respondent to "reside" at the seat of government would *not* address Petitioner's alleged concerns. There is no definition of "reside" that renders mandamus a workable solution to the alleged problems about which petitioner complains. If "reside" means that Respondent must "live" or "sleep" in Charleston, then Respondent could spend his nights there but still spend his working hours traveling about the state far from the seat of government. Thus, there would be no guarantee that he would be present at the Capitol in order to prevent the purported injuries that Petitioner claims have resulted from his alleged absence, nor would there be any guarantee that Respondent would be present during every "public assembly" of citizens at the Capitol. If "reside" is read to mean that Respondent must be "present" at the seat of government, then the requirement is axiomatically unenforceable through mandamus, because the governor must be afforded the discretion to travel about the state and perform his job as he sees fit and as required by any given set of circumstances. There is simply no plausible definition of "reside" that would allow this Court to command the Governor of the State of West Virginia to be physically present at the seat of government for some arbitrarily-determined minimum number of hours on a daily basis throughout his term, which is apparently what Petitioner seeks.

Again, mandamus does not lie to compel a duty unless it is "so plain in point of law and so clear in matter of fact that no element of discretion is left as to the precise mode of its performance." Syl. Pt. 7, Nobles, *supra*. It is not available to control the *manner* in which a public officer shall act.

(Syl. Pt. 8, Nobles, *supra*), or to compel a general course of official conduct to be performed over a long period of time. Thus, mandamus is not an available remedy to address purported deficiencies in state government by directing the Governor of the State of West Virginia to "reside" (whatever that means) or spend some pre-determined portion of his time in Charleston throughout his term. If Petitioner truly believes that the Respondent is not adequately performing his responsibilities as Governor of the State of West Virginia, his remedy is at the ballot box.

III. THE MOTIVE OF THE PETITIONER IS PURELY POLITICAL.

Petitioner's brief is replete with allegations of injuries he perceives have been caused by the Governor's alleged "absenteeism." In this regard, Petitioner states he "feels," is "concerned" and "believes" that the Governor's absence has caused low morale among state employees, poor productivity and scandals. However, Petitioner cites no data demonstrating that low moral and poor productivity even exist, let alone that they are caused by the Governor's alleged "absenteeism." By providing no proof demonstrating the truth of these allegations, Petitioner has revealed that his real motives in pursuing this action are simply political.[13]

Beyond the general averments of low morale and poor productivity, Petitioner claims that the Governor's decision to not be present in his office every day somehow caused the teachers' strike of 2018, and the failure of the West Virginia Department of Commerce to adequately administer the State response to the 2016 flood. However, rather than blame the Governor for causing the teachers' strike, he should be praised for bringing the controversy to a successful conclusion. After much

[13] The online news articles in Petitioner's appendix, containing nothing more than speculative and conclusory remarks regarding the purported effects of the Governor's alleged absence, are not proof of anything. They provide no data regarding where the Governor was present on any given day nor evidentiary basis to conclude that any specific outcome would have been different or better had the Governor spent more days or nights in Charleston.

haggling in the West Virginia Legislature (both within and between the House of Delegates and the Senate) on the proper resolution of the matter, it was through the leadership of Governor Justice that the matter was resolved. First, he proposed and obtained the support of the House for a 5% pay increase for teachers and service personnel. R. App. at 53-57. Then, he persuaded the Senate to agree to the raise after demonstrating that future revenues would support the increase. Id. at 55-57, 63-67. Finally, he agreed to establish a task force to study changes to PEIA that would benefit participants. Id. at 58. As part of his efforts to persuade the various stakeholders to support his proposals, he held public meetings in several counties and held press conferences. Id. 59-62. In the end, the teachers and service workers received the largest pay increase in West Virginia history, according to the West Virginia Senate Finance Chairman.[14] Id. at 66.

The Governor should also be commended for taking the bull by the horns and correcting the issues relating to the RISE Program. Upon first hearing that there were issues with the underlying contract with the consultant hired under the prior administration to assist in managing over $100 million in federal monies, the Governor charged his General Counsel to investigate. Id. at 71-73; *see also* P. App. at 33, 39, 51. Under the direction of the General Counsel, it was revealed that officials in the Commerce Department had executed contracts obligating the state to pay up to $17 million without proper authority. R. App. at 71. What could have become a legal nightmare was quickly rectified. The investigation further revealed that implementation of the RISE Program was woefully delayed. To correct this, the Governor removed control from the Department of Commerce and placed it in the capable hands of Adjutant General James Hoyer. Id. at 75-77. Thereafter,

[14] Earlier this month, Governor Justice announced he would seek an additional 5% pay increase for teachers and service workers and dedicate $100 million to fixing PEIA. R. App. at 69. These increases were made possible due to increased tax revenues received and projected to be received by the state. Id.; *see also* P. App. at 98.

significant improvements have been implemented bringing new homes and repairs to those who need them.[15] Id. at 78-79. The complete lack of any mention by Petitioner of these positive outcomes, and the Governor's role in achieving the same, lays bare the political motivation behind the instant mandamus action.

In the final analysis, Petitioner relies solely on online news articles containing statements by six members of the West Virginia Legislature (including the Petitioner) who take issue with what they claim to be a lack of availability to the Governor. But the fact remains, in today's world, accessibility is simply a phone call away and travel is far more efficient than it was when the West Virginia Constitution was drafted. As this Court has recognized, "our Constitution is a living document that must be viewed in light of modern realities." State ex rel. McGraw v. Burton, 212 W. Va. 23, 36, 569 S.E.2d 99, 112 (2002). We have come a long way since 1872, when the only communication beyond face to face meetings was letter writing, telegraph, and emissaries. Travel was limited to trains, horses, and walking. In those times, everyday presence by the Governor was perhaps necessary for the efficient management of government. However, it is also true that government was much smaller and less complex in 1872. Today, government is far more demanding, expansive, and complicated. In view of the realities of modern technology and government, the Governor must be allowed the discretion to allocate his time as he sees fit. If a majority of the Legislature and/or the electorate disapproves of the manner in which he has exercised that discretion, then they can impeach him or vote him out of office. However, the Governor cannot

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[15] Petitioner also claims that the Governor's absence somehow created problems related to a private entity that was involved in discussions along with the Department of Commerce and the Chinese. To the contrary, it was the Governor who directed his General Counsel to review the relationship and, as a consequence of his investigation, the private entity reimbursed the state about $23,000. P. App. at 63-66. It is also noteworthy that the investigation also led to the discovery of the issues with the contracts with the RISE consultant. Id. at 64.

and should not be subjected to politically-motivated lawsuits every time one of his critics professes to feel that he is not spending sufficient time at the Capitol.

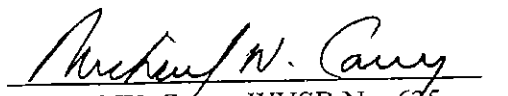
CONCLUSION

As demonstrated above, a writ of mandamus is neither appropriate nor available in this case. Accordingly, Respondent respectfully submits that the instant Petition for Writ of Mandamus must be denied.

Respectfully submitted,

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

By Counsel,



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IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

NO. 18-0810

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.

CERTIFICATE OF SERVICE

I, Michael W. Carey, do hereby certify that on the 16th day of October, 2018, I have served the foregoing **"Respondent, James Conley Justice, II's, Response to Petitioner's Petition for Writ of Mandamus"** and the **"Respondent, James Conley Justice, II's Appendix"** upon the parties to this action, via United States Mail, postage pre-paid, addressed as follows:

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