

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. \_\_\_\_\_

STATE OF WEST VIRGINIA, ex rel, S. MARSHALL WILSON, Delegate District 60,  
JAMES HARRY BUTLER, Delegate District 14, THOMAS M. BIBBY, Delegate District  
62, TONY PAYNTER, Delegate District 25, MICHAEL AZINGER, Senator, 3rd District,

Petitioners,

v.

JAMES C. JUSTICE, II, GOVERNOR OF WEST VIRGINIA,

Respondent.

---

**PETITION FOR WRIT OF MANDAMUS AND INCORPORATED**  
**MEMORANDUM OF LAW IN SUPPORT**

---

John H. Bryan (WVBN 10259)  
JOHN H. BRYAN, ATTORNEY AT LAW  
411 Main Street  
P. O. Box 366  
Union, WV 24983  
304-772-4999  
Facsimile: 304-772-4998  
Email: [jhb@johnbryanlaw.com](mailto:jhb@johnbryanlaw.com)

**COUNSEL FOR PETITIONERS,**  
**S. MARSHALL WILSON**, Delegate District 60  
**JAMES HARRY BUTLER**, Delegate District 14  
**THOMAS M. BIBBY**, Delegate, District 62,  
**TONY PAYNTER**, Delegate, District 25,  
**MICHAEL AZINGER**, Senator, 3rd District,

## **TABLE OF CONTENTS**

TABLE OF AUTHORITIES.....	ii
QUESTION PRESENTED.....	1
STATEMENT OF THE CASE.....	1
I.    WEST VIRGINIA’S GOVERNOR IS CURRENTLY RULING THE STATE BY EXECUTIVE FIAT AND IS DRASTICALLY EXPANDING THE POWER OF THE EXECUTIVE BRANCH.....	1
II.   THE WEST VIRGINIA LEGISLATURE HAS BEEN EXCLUDED AND/OR ABSENT FROM INVOLVEMENT IN THE LEGISLATIVE RESPONSE TO COVID-19.....	11
SUMMARY OF ARGUMENT.....	12
STATEMENT REGARDING ORAL ARGUMENT.....	13
ARGUMENT.....	13
I.    THE REQUIRED ELEMENTS FOR A WRIT OF MANDAMUS ARE SATISFIED.....	13
a.   PETITIONER POSSESSES A CLEAR RIGHT TO THE RELIEF SOUGHT.....	14
b.   RESPONDENT HAS A CLEAR DUTY TO CONVENE A SPECIAL SESSION OF THE W. VA. LEGISLATURE AND TO RESCIND ALL OF HIS EXECUTIVE ORDERS ISSUED IN RESPONSE TO COVID-19 AS VIOLATIVE OF THE DOCTRINE OF SEPARATION OF POWERS AND OTHER RIGHTS SECURED BY THE W. VA. AND U.S. CONSTITUTIONS.....	15
c.   PETITIONERS POSSESS NO OTHER ADEQUATE REMEDY.....	36
II.   INAPPLICABILITY OF PRE-SUIT NOTIVE PROVISIONS OF § 55-17-3.....	37
CONCLUSION.....	40
CERTIFICATE OF SERVICE AND VERIFICATIONS.....	41

## **TABLE OF AUTHORITIES**

### **Cases**

<u>State ex rel. Greenbrier County Airport Authority v. Hanna,</u> 151 W.Va 479 (1967).....	13
<u>State ex rel. West Virginia Housing Development Fund v. Copenhaver,</u> 153 W.Va. 636 (1969).....	14
<u>State ex rel. Williams v. Department of Mil. Aff,</u> 212 W.Va. 407, 573 S.E.2d 1 (2002).....	14
<u>State ex rel. Kucera v. City of Wheeling,</u> 153 W.Va. 538, 170 S.E.2d 367 (1969).....	14
<u>State ex rel. Blankenship v. Richardson,</u> 196 W.Va. 726, 474 S.E.2d 906 (1996).....	14
<u>Hickman v. Epstein,</u> 192 W.Va. 42, 450 S.E.2d 406 (1994).....	14
<u>State ex rel. McGraw v. West Virginia Ethics Comm'n,</u> 200 W.Va. 723,490 S.E.2d 812 (1997).....	14
<u>State ex rel. Billy Ray C. v. Skaff,</u> 438 S.E.2d 837, 850 (W. Va. 1993).....	15
<u>Wisconsin Legislature v. Secretary Palm, at al.,</u> Supreme Court of Wisconsin, Case No. 2020AP765-OA.....	21, 22, 23
<u>Clark v. Martinez,</u> 543 U.S. 371, 380-81 (2005).....	21
<u>Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.,</u> 448 U.S. 607, 646 (1980).....	21
<u>Hodges v. Public Serv. Comm'n,</u> 110 W.Va. 649, 159 S.E. 834 (1931).....	22
<u>Dailey, Application of,</u> 465 S.E.2d 601, 195 W.Va. 330 (W. Va. 1995).....	22

<u>Appalachian Power Co. v. Public Service Comm'n,</u> 170 W.Va. 757, 296 S.E.2d 887 (1982).....	22
<u>State ex rel. State Line Sparkler of WV, Ltd. v. Teach,</u> 418 S.E.2d 585, 187 W.Va. 271 (W. Va. 1992).....	23
<u>State ex rel. Meadows v. Hechler,</u> 195 W.Va. 11, 462 S.E.2d 586 (W. Va. 1995).....	24
<u>Appalachian Power Co. v. Public Service Com'n of W. Va.,</u> 296 S.E.2D 887, 170 W.VA. 757 (W. VA. 1982).....	24, 25
<u>State ex rel. Dodrill v. Scott,</u> 352 S.E.2d 741, 177 W.Va. 452 (W. Va. 1986).....	27, 28
<u>County of Sacramento v. Lewis,</u> 523 U.S. 833, 845 (1988).....	31
<u>Board of Regents of State Colleges v. Roth,</u> 408 U.S. 564, 572 (1972).....	31
<u>Truax v. Raich,</u> 239 U.S. 33, 41, 36 S.Ct. 7, 10, 60 L.Ed. 131 (1915).....	31
<u>Meyer v. Nebraska,</u> 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923).....	31
<u>Schware v. Board of Bar Examiners,</u> 353 U.S. 232, 238-39, 77 S.Ct. 752, 756, 1 L.Ed.2d 796 (1957).....	31
<u>Greene v. McElroy,</u> 360 U.S. 474, 492, 79 S.Ct. 1400 1411, 3 L.Ed.2d 1377 (1959).....	32
<u>Board of Regents v. Roth,</u> 408 U.S. 564, 573-74, 92 S.Ct. 2701 2707, 33 L.Ed.2d 548 (1972).....	32
<u>Phillips v. Vandygriff,</u> 711 F.2d 1217 (5th Cir. 1983).....	32
<u>Mfs Inc. v. Dilazaro,</u> 771 F.Supp.2d 382, 434-35 (E.D. Pa. 2011).....	32
<u>Bannum, Inc. v. Town of Ashland,</u> 922 F.2d 197 (4th Cir. 1990).....	32

<u>Johnson v. City of Cincinnati,</u>	
310 F.3d 484, 495 (CA6 2002).....	32
<u>NAACP v. Alabama,</u>	
357 U.S. 449 (1958).....	32
<u>Willowbrook v. Olech,</u>	
120 S.Ct. 1073, 528 U.S. 562, 145 L.Ed.2d 1060 (2000).....	33
<u>State ex rel. Wheeling Downs Racing Ass'n v. Perry,</u>	
148 W. Va. 68, 73, 132 S.E. 2d 922 (1963).....	36
<u>State ex rei. Bronaugh v. Parkersburg,</u>	
148 W. Va. 568, 573, 136 S.E. 2d 783, 786 (1964).....	36
<u>State ex rel. Billy Ray C. v. Skaff,</u>	
438, S.E.2d 837, 850 (W. Va. 1993).....	37
<u>State ex rel. Boggs v. County Court,</u>	
11 S.E. 72 (W. Va. 1980).....	37
<u>State ex rel. ACF Indust., Inc. v. Vieweg,</u>	
514 S.E.2d 176, 186 (W. Va. 1999).....	37
<u>State ex rel. Brotherton v. Blankenship,</u>	
158 W.Va. 390, 402, 214 S.E.2d 467, 477 (1975).....	39
<u>State v. Arbaugh,</u>	
215 W.Va. 132, 138, 595 S.E.2d 289, 295 (2004).....	39
<u>People v. Hollis,</u>	
670 P.2d 441, 442 (Colo.Ct.App.1983).....	39
<u>Bennett v. Warner,</u>	
179 W.Va. 742, 372 S.E.2d 920 (1988).....	39
<u>State v. David K.,</u>	
238 W.Va. 33, 792 S.E.2d 44 (W. Va. 2016).....	39
<u>Schoenvogel ex rel. Schoenvogel v. Venator Grp. Retail, Inc. ,</u>	
895 So.2d 225, 234 (Ala. 2004).....	39
<u>Bennett v. Warner,</u>	
179 W.Va. 742, 372 S.E.2d 920 (1988).....	39

## **Statutes**

W. Va. Code 15-5-6.....	1, 13, 15, 16, 22, 25, 26, 35
W. Va. Code 15-5-2(h).....	3
W. Va. Code 15-5-1.....	28
W. Va. Code 55-17-3.....	38, 40
W. Va. Code 55-17-3(a)(1).....	37, 38
W. Va. Code 55-17-6(a).....	38
W. Va. Code 61-17-5.....	6, 23

## **Other Authorities**

Constitution of West Virginia, Article 1, Sec. 1.....	30
Constitution of West Virginia, Article 1, Sec. 2.....	16
Constitution of West Virginia, Article 1, Sec. 3.....	16, 17, 29, 36
Constitution of West Virginia, Article 2, Sec. 2.....	17, 35
Constitution of West Virginia, Article 3, Sec. 1.....	17, 29
Constitution of West Virginia, Article 3, Sec. 2.....	17, 30
Constitution of West Virginia, Article 3, Sec. 4.....	30
Constitution of West Virginia, Article 3, Sec. 6.....	30
Constitution of West Virginia, Article 3, Sec. 9.....	30
Constitution of West Virginia, Article 3, Sec. 10.....	30, 40
Constitution of West Virginia, Article 3, Sec. 15.....	30
Constitution of West Virginia, Article 3, Sec. 17.....	30, 39, 40

Constitution of West Virginia, Article 5, Sec. 1.....	17, 24
Constitution of West Virginia, Article 6, Sec. 1.....	17
Constitution of West Virginia, Article 6, Section 18.....	12, 18, 36
Constitution of West Virginia, Article 6, Section 19.....	12, 18, 36
Wis. Const. art. V, § 10.....	21, 22
Wis. Const. art. IV, § 7.....	21

### **Treatises**

Black’s Law Dictionary, Sixth Edition.....	7, 38
12B Michie's Jurisprudence of Va. & W. Va. Mandamus § 9.....	36
West Virginia DHHR COVID Dashboard, <a href="https://dhhr.wv.gov/COVID-19/Pages/default.aspx">https://dhhr.wv.gov/COVID-19/Pages/default.aspx</a> .....	7, 26, 34
Center for Disease Control National Center for Health Statistics, <a href="https://www.cdc.gov/nchs">https://www.cdc.gov/nchs</a> .....	27, 29
Center for Disease Control Flu Resources, <a href="https://www.cdc.gov/flu">https://www.cdc.gov/flu</a> .....	28

## **QUESTION PRESENTED**

This petition presents the question of whether the Governor of the State of West Virginia is required to convene a special session of the West Virginia Legislature if he finds that the “public safety and welfare” are threatened by an emergency, as defined by the emergency powers statute, W. Va. Code § 15-5-6, or whether the Governor can act unilaterally in the capacities of both the executive and legislative branch for so long as he finds that an emergency exists, and whether the Governor can, in so doing, expand the power of the executive branch of State Government, so as to encroach on the core powers and responsibilities of the legislative branch, as well as the core rights of the people of West Virginia, in violation of the West Virginia Constitution and United States Constitution?

## **STATEMENT OF THE CASE**

### **I. WEST VIRGINIA’S GOVERNOR IS CURRENTLY RULING THE STATE BY EXECUTIVE FIAT AND IS DRASTICALLY EXPANDING THE POWER OF THE EXECUTIVE BRANCH**

On February 26, 2020, Governor Jim Justice (“Gov. Justice”) urged the West Virginia Department of Health and Human Resources to prepare for potential spread of COVID-19. On March 2, 2020, Gov. Justice participated in a “national call briefing” on the issue. On March 4, 2020, Gov. Justice met with members of his administration and medical experts chosen by him to discuss and brief the press on the potential COVID-19 threat. Following the meeting, Gov. Justice announced that he was issuing a “State of Preparedness” proclamation. At that time, the Governor admitted that there were no cases of COVID-19 yet present in West Virginia:

Currently West Virginia has no cases of COVID-19, but that doesn’t mean we don’t take this very seriously because we most certainly are . . . . I want us to be fully prepared and take every precaution we need to keep West Virginians safe. That is the highest of priorities.



See Appendix (hereinafter “App.”) at 1.<sup>1</sup>

On March 9, 2020, Gov. Justice participated in a national call briefing with Vice President Mike Pence. On March 11, 2020, Gov. Justice instituted daily weekday press briefings. Among those in attendance at the announcement were numerous members of the executive branch. Not present at the meeting were any representatives of the West Virginia Legislature. In the ensuing press release informing the public of the meeting and the Governor’s actions, it was noted that, “[t]he Governor has been meeting regularly with members of his administration on coronavirus preparations going back for more than a month.” See App. at 7.<sup>2</sup> Thus the Governor and his administration had already been planning their actions since at least early February.

On March 12, 2020, Gov. Justice announced that he was asking all nursing homes in the state to restrict all visitors to state nursing homes, with exceptions for end-of-life or serious illness situations. He also announced that he ordered the suspension of state high school basketball tournaments, and made the following statement:

I hate that we’re at the point where we have to make some of these decisions,” Gov. Justice said. “When you look at the state basketball tournament, I of all people know how much hard work the kids and their parents put in. The team I coach is in the state tournament. I truly know the hours of practices that these kids put in, for months and months, and how disappointed they and their families will be, along with the kids at the other schools. And again, this is all being done out of an abundance of caution, but we have to think of the long-term health and safety of all of our people first and foremost. With that, I would tell you that we should still continue to live our lives as best we can, but we need to be smart.

---

<sup>1</sup> <https://governor.wv.gov/News/press-releases/2020/Pages/Gov.-Justice-hosts-roundtable-meeting-on-coronavirus-preparations.aspx>; see also West Virginia’s Response to COVID-19, Office of the Governor, <https://governor.wv.gov/Pages/WV-COVID-19-actions-and-executive-orders.aspx>.

<sup>2</sup> <https://governor.wv.gov/News/press-releases/2020/Pages/Gov.-Justice-Administration-members,-State-officials-provide-updates-on-COVID-19-preparedness-efforts.aspx>.

See App. at 16.<sup>3</sup> As of that date there still had been zero positive cases of COVID-19 in West Virginia.

On March 13, 2020, the Governor announced the closure of West Virginia *public* schools, and made the following statement:

There are currently no confirmed cases of COVID-19 in West Virginia. However, it's anticipated that the disease will come to West Virginia soon. The number of completed tests have changed since the Governor's press conference on Friday. As of 1:30 p.m. on March 13, 2020, West Virginia, through its public health lab, has tested 21 residents for COVID-19, with 17 results coming back negative and four pending.

See App. at 22.<sup>4</sup>

On March 16, 2020, Gov. Justice declared a "State of Emergency" under W. Va. Code § 15-5-6. In the proclamation, the Governor provided the following substantiation for his declaration of a "State of Emergency":

- On January 21, 2020, the Center for Disease Control and Prevention activated their Emergency Response Center and began responding to COVID-19;
- On March 2, 2020, the Governor declared a "State of Preparedness;"
- It is of the utmost importance that Cabinet Secretaries, Commissioners, and Directors throughout the state have the ability to take measures necessary to ensure the safety of citizens;
- The COVID-19 epidemic constitutes a disaster under W. Va. Code § 15-5-2;<sup>5</sup>
- COVID-19 has been deemed a pandemic by the World Health Organization and the President of the United States has declared a national emergency;
- It is in the best interest of the citizens of West Virginia that we are able to stand up emergency operation centers and allow boards and agencies to suspend certain rules that inhibit them from responding effectively.

---

<sup>3</sup> <https://governor.wv.gov/News/press-releases/2020/Pages/COVID-UPDATE-Gov.-Justice-announces-State-employee-travel-ban,-basketball-tournament-cancellation-among-latest-precautions.aspx>

<sup>4</sup> <https://governor.wv.gov/News/press-releases/2020/Pages/COVID19-UPDATE-Gov.-Justice-announces-closure-of-West-Virginia-schools.aspx>

<sup>5</sup> Under W. Va. Code 15-5-2(h), "Disaster" means *the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or terrorist or man-made cause, including weapons of mass destruction, fire, flood, earthquake, wind, snow, storm, chemical or oil spill or other water or soil contamination, epidemic, air contamination, blight, drought, infestation or other public calamity requiring emergency action.*

See App. at 26. As of the issuance of the “State of Emergency,” there still had been zero positive cases of COVID-19 in the State of West Virginia.

On March 17, 2020, Gov. Justice announced that West Virginia had one positive COVID-19 case, in the eastern panhandle of the State. See COVID-19 Daily Update, App. at 29.<sup>6</sup> On the same day, Gov. Justice ordered the closure of all restaurants, bars, casinos, gyms, recreational facilities “and similar businesses or entities where the public tends to congregate for recreation, sport, or similar leisure activities,” within all fifty-five counties the State. See Executive Orders 2-20,<sup>7</sup> 3-20.<sup>8</sup> As of the issuance of those orders, there were only two confirmed cases of COVID-19 in West Virginia. The next day, on March 19, Gov. Justice ordered the closure of barber shops, nail salons and hair salons. The Order noted that the Governor was authorized to take such measures in order to:

[A]mong other things, control ingress and egress to and from a disaster area or an area where large-scale threat exists, the movements of persons within the area, and the occupancy of premises therein.”

See Executive Order 6-20.<sup>9</sup>

On March 20, 2020, Gov. Justice ordered the closure of state parks and the Hatfield & McCoy Trail System. See Executive Order 8-20.<sup>10</sup> On March 21, 2020, Gov. Justice gave a televised address at the State Capitol. He stated that:

All of us are really really worried, where’s our next paycheck going to come from? How are we going to sustain ourselves? I would tell you that **the government, in every way, is stepping up as a nation and a state**. You’ll be made as whole as you can possibly be made.

---

<sup>6</sup> <https://dhhr.wv.gov/News/2020/Pages/COVID-19-Daily-Update---March-17,-2020.aspx>

<sup>7</sup> App. at 30.

<sup>8</sup> App. at 32.

<sup>9</sup> App. at 34.

<sup>10</sup> App. at 36.

See App. at 38.<sup>11</sup> However, despite the Governor telling the viewers that the government was “stepping up” in every way, he failed to mention that the legislature had been entirely excluded from involvement in the COVID-19 response. He hadn’t called the legislature into session - nor consulted them as a body since the beginning of the long-anticipated crisis. He alone was running the government via the issuance of executive orders. Despite several months of ongoing crisis and policy discussions, he had found it unnecessary to include the Legislature in the COVID-19 response.

On March 16, 2020, Gov. Justice issued the “***Stay at Home Order***,” via Executive Order 9-20, ordering West Virginia residents to stay at home, for “non-essential” businesses and operations to cease operations, for “essential” businesses to continue operations, and further dictating which businesses were “*essential*” under the Order. The Order likewise dictated which businesses were compelled by him to cease operations and close their doors. The Order directed that it would be “enforced by State and local law enforcement, and by state and location regulatory and/or licensing bodies to the extent possible under West Virginia law.” It also directed that it, along with all prior executive orders related to COVID-19, would be effective “until terminated by subsequent executive order.” See Executive Order 9-20.<sup>12</sup>

On March 30, 2020, Gov. Justice issued an Executive Order closing state park campgrounds and ordering a fourteen day quarantine for any individuals entering the state from high-risk areas. The order also provided that the West Virginia State Police may conduct surveillance on roads and highways leading to, or from, high risk areas. The order also provided that:

To the extent that any individual fails to comply with the terms of this Order and in any way illegally hinders or obstructs, or attempts to hinder or obstruct, any law- enforcement

---

<sup>11</sup> <https://governor.wv.gov/News/press-releases/2020/Pages/COVID-19-UPDATE-Gov.-Justice-urges-all-West-Virginians-to-follow-guidelines-to-save-lives-in-statewide-address.aspx>

<sup>12</sup> App. at 42.

officer acting in his or her official capacity to enforce the terms of this Order, such individual shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than \$50 nor more than \$500 or confined in jail not more than one year, or both fined and confined pursuant to Chapter 61, Article 5, Section 17 of the West Virginia Code.<sup>13</sup>

See Executive Order 14-20.<sup>14</sup>

On March 31, 2020, Gov. Justice issued an Executive Order closing all private campgrounds to new out-of-state arrivals, prohibiting elective medical procedures, and suspending additional health regulations “identified as preventing the state from best coping with the emergency.” See Executive Orders 15-20,<sup>15</sup> 16-20.<sup>16</sup> On April 3, 2020, Gov. Justice issued an Executive Order expanding the March 23, 2020 Stay at Home order for Berkeley, Jefferson and Morgan counties, adding provisions and granting broad authority to local officials. The order provided additional restrictions on the residents and businesses of those counties, including ordering private employers of essential businesses to order their employees to work from home, or remotely. See Executive Order 20-20.<sup>17</sup>

On April 4, 2020, Gov. Justice issued yet another Executive Order, expanding the “Stay at Home” order for Harrison, Kanawha and Monongalia Counties, establishing the same increase in restrictions for those counties, as was including in Executive Order 20-20, and directing that local officials “establish and enforce protocols to limit occupancy of any such business and entity that remains open . . . .” See Executive Order 21-20.<sup>18</sup>

---

<sup>13</sup> Obstructing an officer.

<sup>14</sup> App. at 53.

<sup>15</sup> App. at 59.

<sup>16</sup> App. at 57.

<sup>17</sup> App. at 62.

<sup>18</sup> App. at 65.

On April 6, 2020, still with no involvement of West Virginia's Legislature, Gov. Justice provided an update on the status of his actions, wherein he proclaimed that Dr. Clay Marsh, of WVU, was West Virginia's COVID-19 "Czar" - a job title which is conspicuously absent from both the West Virginia Constitution and the West Virginia Code.<sup>19</sup> Dr. Marsh gave a statement that "new modeling" showed that the surge of COVID-19 cases in West Virginia was anticipated as April 15, and that the number of projected deaths in West Virginia had changed from 500 to between 150 and 170. *See App. at 68.*<sup>20</sup> Thus the anticipated disaster of COVID-19, as expressly and implicitly recited in the Governor's declarations, had proven over time to be a substantial overestimation of projected deaths in the State, including being well-under Dr. Marsh's revised projections from April 6.

As of the date of this writing, West Virginia Department of Health and Human Resources COVID-19 "Dashboard," shows that by May 15, there were only 70 deaths in West Virginia, and that West Virginia's COVID-19 "Czar" was incorrect in his projections.<sup>21</sup> The nominal amount of deaths, as compared to other causes of death in the State, was not for lack of COVID-19 testing. West Virginia successfully surpassed all of its bordering states, as well as the U.S. national average, in terms of the percentage of the overall population that has been tested for COVID-19. *See April 21, 2020 Press Release.*<sup>22</sup>

---

<sup>19</sup> "Czar" is the title of the former emperors of Russia, derived from the old Slavonic *cesar*, king or emperor, which, although long held to be derived from the Roman title *Caesar*, is almost certainly of Tartar origin. The Slavonic word ultimately represents the Latin *Caesar*, but came through the medium of a Germanic language in which the word had the general sense "emperor." *Black's Law Dictionary*, Sixth Edition.

<sup>20</sup> <https://governor.wv.gov/News/press-releases/2020/Pages/COVID-19-UPDATE-Gov.-Justice-says-we-will-remain-as-aggressive-as-possible-to-save-as-many-lives-as-we-possibly-can-in-f.aspx>

<sup>21</sup> *See* <https://dhhr.wv.gov/COVID-19/Pages/default.aspx>.

<sup>22</sup> <https://governor.wv.gov/News/press-releases/2020/Pages/COVID-19-UPDATE-Gov.-Justice-announces-West-Virginia-schools-to-remain-closed-for-rest-of-academic-year.aspx>

During the April 6, public briefing, Gov. Justice declared that, in his view, “overreaction” would be worth it, ***if even one life were saved***:

We are on top of this and overreaction never hurt anyone, it may be inconvenient, but if it gives us the ability to save just one life it’s worth it . . . Just keep the faith . . . I know I’ve been saying it but I’ll say it again, we’re doing the right things so just stay the course because we still have a long way to go.

See App. at 68.<sup>23</sup> According to the Governor, it may have been an *overreaction* to shut down the entire state’s economy based on perceived harm, which has not yet occurred, or which may never occur. Nevertheless, such actions were “*worth it*,” in the Governor’s personal estimation. Gov. Justice also opined that there was no end in sight to the state of emergency. Yet, despite the long-term framing of the crisis, Gov. Justice continued to refrain from calling the Senate and the House of Delegates into session so as to enact the important life-changing, career-altering, business-ending, and community-transforming legislation which the Governor found was necessary. Instead, he would continue to act unilaterally via executive orders.

Following a bevy of additional executive orders, Gov. Justice announced “West Virginia Strong - The Comeback,” on April 29, 2020 announcing “his plan to reopen the state.” In the plan, devised wholly in absence of West Virginia’s legislative branch, the Governor described which businesses in the State were allowed to open, by which date they would be able to open, and also proscribing various restrictions on those businesses. Some businesses, “[d]ue to safety concerns,” were given no timetable to reopen. Some counties, such as Berkeley, Harrison, Jefferson, Marion and Monongalia counties, were declared to be “hotspots,” and therefore were required to have additional restrictions under the Governor’s plan. See West Virginia Strong – The Comeback,<sup>24</sup> see also Executive Order 32-20.<sup>25</sup>

---

<sup>23</sup> <https://governor.wv.gov/News/press-releases/2020/Pages/COVID-19-UPDATE-Gov.-Justice-says-we-“will-remain-as-aggressive-as-possible-to-save-as-many-lives-as-we-possibly-can”-in-f.aspx>

<sup>24</sup> App. at 82, <https://governor.wv.gov/Pages/The-Comeback.aspx>

<sup>25</sup> App. at 74.

As the Governor implemented his plan of reopening the State, on May 5, 2020, he announced that “the number of people who have recovered from COVID-19 in West Virginia now significantly exceeds the number of active cases in the state.” See App. at 116.<sup>26</sup> In just ten days following that announcement, the Governor engaged in a high-speed flurry of activity and press releases. This is a partial excerpt from the Governor’s press release website:

5/5/2020 Gov. Justice announces that West Virginians who have exhausted their regular unemployment benefits are eligible for Pandemic Emergency Unemployment Compensation – a 13-week extension on unemployment benefits provided by the federal CARES Act.

5/6/2020 Gov. Justice issues an Executive Order, directing the DHHR and the West Virginia National Guard to test all daycare employees, as well as all residents and staff members at assisted living facilities and residential care communities throughout the state for COVID-19.

5/6/2020 Gov. Justice announces that he has directed targeted testing to begin in several African American communities in West Virginia through the newly-established COVID-19 Advisory Commission on African American Disparities.

5/6/2020 Gov. Justice issues proclamation designating May 6, 2020 as Nurses Day in West Virginia in honor of those who have put their lives on the line to help in the fight against COVID-19.

5/6/2020 Gov. Justice issues proclamation designating May 6, 2020 as National Interpreter Appreciation Day in West Virginia, taking time to thank the two sign language interpreters who have been a part of the Governor’s daily media briefings throughout the COVID-19 pandemic.

5/7/2020 Gov. Justice announces that West Virginia has become the first state in the nation to require all-inclusive assisted living facility testing statewide.

5/7/2020 Gov. Justice observes the 2020 National Day of Prayer, praying for the safety of frontline workers and for the health and well-being of all West Virginians.

5/7/2020 Under the direction of Gov. Justice, the West Virginia National Guard provides a training session on the proper use of personal protective equipment to members of the West Virginia Division of Highways.

5/8/2020 Gov. Justice announces that as part of his statewide reopening plan, West Virginia Strong – The Comeback, the Hatfield-McCoy Trail System will be permitted to open, with limitations, on Thursday, May 21, 2020.

---

<sup>26</sup> <https://governor.wv.gov/Pages/WV-COVID-19-actions-and-executive-orders.aspx>



5/8/2020 Gov. Justice officially signs and files the Executive Order that will allow businesses in the “Week 3” phase of the his reopening plan to resume operations if they so choose.

5/11/2020 Gov. Justice announces that entities included in the Week 3 phase of his reopening plan are now permitted to resume services, provided that they follow all additional safety guidelines issued by the State.

5/11/2020 Gov. Justice announces the businesses and entities that will be permitted to resume operations in the Week 4 phase of his reopening plan.

5/11/2020 Gov. Justice provides additional guidelines for the reopening of indoor dining at restaurants.

5/11/2020 Gov. Justice provides additional guidelines for the reopening of large/ specialty retail stores.

5/11/2020 Gov. Justice provides additional guidelines for the use of campgrounds throughout the state.

5/11/2020 Gov. Justice provides additional guidelines for the reopening of outdoor recreation rental outfitters.

5/11/2020 Gov. Justice provides additional guidelines for the operation of hotels, motels, condo hotels, rental properties, and cabins, with the executive order requiring out-of-state travelers to self-quarantine currently scheduled to be lifted during Week 4.

5/11/2020 Gov. Justice announces that, in addition to the reopening of campgrounds at West Virginia state parks to in-state residents, some public restrooms will also be reopened with proper sanitization protocols in place.

5/11/2020 Gov. Justice announces that outdoor guided fishing will be permitted to resume on Friday, May 15, under strict limitations, including that the maximum capacity for any boat be no more than two anglers and one guide.

5/11/2020 Gov. Justice announces that state park cabins and lodges will be permitted to reopen to in-state residents on Tuesday, May 26.

5/11/2020 Gov. Justice announces that certain outdoor, low-contact youth sports activities will be permitted to resume on Monday June 8.

5/11/2020 Gov. Justice announces that progress is being made toward setting guidelines and scheduling a date for the reopening of whitewater rafting operations in West Virginia.

5/11/2020 Gov. Justice takes time to thank all of the correctional officers across West Virginia, in honor of National Correctional Officers Week.

5/11/2020 Gov. Justice and the West Virginia Air National Guard announce that their airlift wings in Charleston and Martinsburg will honor front line COVID-19 healthcare and first responders with a flyover of hospitals in the region on Wednesday, May 13.

5/12/2020 Gov. Justice visits a State warehouse facility that is currently being established as a regional food distribution center.

5/12/2020 Gov. Justice announces that West Virginia medical experts are closely following new reports of nearly 100 children in New York City who have experienced multi-system inflammatory symptoms that health officials believe may be linked to COVID-19 and will continue to monitor the situation as reopening dates approach. Gov. Justice reminds public that all reopening timelines, such as a tentative date of June 8 for low-contact outdoor youth sports, are subject to change depending on how circumstances develop.

See App. at 116-19.<sup>27</sup>

Despite announcing all of the aforesaid press releases, and despite all of the activity discussed by the Governor in the *months* prior, the Governor still has not called the West Virginia Legislature into session, despite there being a “State of Emergency.” Gov. Justice’s actions stand alone, and in stark contrast, when compared to the 38 other states who have introduced legislation in response to the COVID-19 crisis. It’s apparent that Gov. Justice intends to continue to legislate via executive order, rather than in accordance with West Virginia’s Constitution.

## **II. THE WEST VIRGINIA LEGISLATURE HAS BEEN EXCLUDED AND/OR ABSENT FROM INVOLVEMENT IN THE LEGISLATIVE RESPONSE TO COVID-19**

As of March 15, 2020, at least thirty eight (38) states have enacted legislation, via their legislatures, pursuant to their respective responses to COVID-19 issues.

At least thirty-eight states, the District of Columbia, Guam and Puerto Rico have introduced legislation to support state action related to COVID-19. Several resolutions adjourn legislative sessions or adopt temporary rules to allow governing bodies to meet or vote electronically. Many bills appropriate funds or focus on health topics such as insurance coverage, medical costs or telehealth services. Others involve paid leave, unemployment benefits, guidance for schools, or workforce protections for those in

---

<sup>27</sup> <https://governor.wv.gov/Pages/WV-COVID-19-actions-and-executive-orders.aspx>.

quarantine or isolation. Some bills address price gouging or eligibility for public services, temporarily prohibit evictions and ensure utility services, or extend certain legal deadlines. Thirty-seven states, the District of Columbia and Puerto Rico have enacted or adopted legislation.

See State Action on Coronavirus (COVID-10), National Conference of State Legislatures.<sup>28</sup>

Many of those states have introduced multiple pieces of legislation each, in order to respond to the needs, wishes, and welfare of their constituents.

Missing from that list, showing zero legislative activity during this period of time, is West Virginia, which at present is being operated solely by the Governor under the emergency powers contained in W. Va. Code § 15-5-6, pursuant to his declaration of a “State of Emergency.” Thus far, the West Virginia Legislature has been powerless to enact legislation - and will remain so until they return to session in February of 2021.<sup>29</sup> Until that time, the legislature can only act *if called into session by the Governor*. The West Virginia Constitution provides that,

The Legislature shall assemble annually at the seat of government, and not oftener unless convened by the governor . . . . The governor may convene the Legislature by proclamation whenever, in his opinion, the public safety or welfare shall require it.

W. Va. Const. Article 6, Section 6-18, 6-19. The only other option is for *three-fifths* of each house of the Legislature to make written request to the Governor. However, the Legislature is not in session, nor otherwise convened or organized to make such a unified request.

As of the date of this writing, the Governor has not called the legislature into session, despite the plea of numerous legislators. Nor has the legislature, as a body, been consulted in any way by the Governor.

### **SUMMARY OF ARGUMENT**

---

<sup>28</sup> <https://www.ncsl.org/research/health/state-action-on-coronavirus-covid-19.aspx>

<sup>29</sup> As 2021 is a presidential election year, the West Virginia Legislature will not resume until February, rather than January of 2021.

The Governor has exceeded his lawful authority in declaring a perpetual and unrestricted “State of Emergency” in West Virginia due to COVID-19, wherein he unilaterally has asserted, and continues to assert, the power of both the executive and legislative branches of State government. Despite the broad language of W. Va. Code § 15-5-6, upon which he relies, Gov. Justice remains bound by all provisions of both the U.S. Constitution and the West Virginia Constitution, even in a declared “State of Emergency.” The Governor has demonstrably and egregiously exceeded his lawful powers under the emergency powers statute. He is vested with the responsibility and obligation to convene a special session of the Legislature, *if the public safety and welfare require* immediate legislation in response to an emergency, if the Legislature is out of session at the time legislation is needed. The Governor cannot lawfully *refrain* from convening the Legislature, and instead *himself* unilaterally issue legislation by executive order in place of the Senate and House of Delegates. The Governor may not unconstitutionally expand the power of the executive branch to the detriment of the legislative branch. If Gov. Justice has not exceeded his lawfully authority of his emergency powers under W. Va. Code 15-5-6, then the statute is unconstitutional and must be invalidated.

#### **STATEMENT REGARDING BRIEFING, ORAL ARGUMENT AND DECISION**

Petitioners seek to have the Clerk schedule this case for oral argument under Rule 20 of the Rules of Appellate Procedure. This case concerns issues of fundamental public importance and involves the constitutionality of W. Va. Code § 15-5-6, as well as the COVID-19 related executive orders issued by Gov. Justice. Hence, oral argument is appropriate in this proceeding, as soon as possible.

#### **ARGUMENT**

##### **I. THE REQUIRED ELEMENTS FOR A WRIT OF MANDAMUS ARE SATISFIED**

"Mandamus lies to require the discharge by a public officer of a nondiscretionary duty."

Syl. Pt. 3, State ex rel. Greenbrier County Airport Authority v. Hanna, 151 W.Va 479, 153 S.E.2d

284 (1967); Syl. Pt. 1, State ex rel. West Virginia Housing Development Fund v. Copenhaver, 153 W.Va. 636, 171 S.E.2d 545 (1969). Syl. Pt. 1, State ex rel. Williams v. Department of Mil. Aff., 212 W.Va. 407, 573 S.E.2d 1 (2002). It is well-established that a writ of mandamus requires three elements:

(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.

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

**A. Petitioners possess a clear right to the relief sought**

Petitioners are duly elected members of the West Virginia Legislature, including both the House of Delegates and the Senate. They and their colleagues have been wholly excluded from their responsibilities as the elected representatives of their constituents and the *free people* of the State of West Virginia. Only the Governor can call a session of the legislature prior to the next official legislative session, which doesn't occur until February of 2021. In the meantime, Gov. Justice is operating as a one-man government, engaging in both his powers, and powers solely held by the the legislative branch. His actions have been, and continue to be, performed in violation of the West Virginia Constitution. Several months have passed since the beginning of the COVID-19 crisis, with no attempts by Gov. Justice at conferring with the Legislature as a body, or with calling a session of the Legislature. Petitioners are "*trustees and servants*" of the people of West Virginia - especially the constituents in their districts - and are duty-bound to take actions to prevent Gov. Justice from expanding the power of the executive branch, and from further disrupting the Doctrine of Separation of Powers.

Whether a petitioner has a clear legal right, “is generally a question of standing. Thus, where the [petitioner] has a special interest in the sense that he is part of the class that is being affected by the action then he ordinarily is found to have a clear legal right.” State ex rel. Billy Ray C. v. Skaff, 438 S.E.2d 837, 850 (W. Va. 1993). Because of the importance of the current constitutional crisis, as well as the fact that the petitioners are duly elected members of the the West Virginia Legislature, including both the House of Delegates and the Senate, petitioners have demonstrated that they possesses a clear right to the relief sought herein.

**B. Respondent has a clear duty to convene a special session of the West Virginia Legislature and to rescind all of his Executive Orders issued in response to COVID-19 as violative of the Doctrine of Separation of Powers and other rights secured by the West Virginia and United States Constitutions**

Gov. Justice relies upon W. Va. Code 15-5-6 as the lawful basis for his executive actions in “*closing*” the State of West Virginia, as well as for his phased approach at “*re-opening*” West Virginia, among many other decrees in between. The statute provides as follows:

**§15-5-6. Emergency powers of Governor.**

(a) The provisions of this section are operative only during the existence of a state of emergency or state of preparedness. The existence of a state of emergency or state of preparedness may be proclaimed by the Governor or by concurrent resolution of the Legislature if the Governor in the proclamation, or the Legislature in the resolution, finds that an attack upon the United States has occurred or is anticipated in the immediate future, or that a natural or man-made disaster of major proportions has actually occurred or is imminent within the state, or that an emergency exists or may be imminent due to a large-scale threat beyond local control, and that the safety and welfare of the inhabitants of this state require an invocation of the provisions of this section.

(b) Any state of emergency or state of preparedness, whether proclaimed by the Governor or by the Legislature, terminates upon the proclamation of the termination by the Governor, or the passage by the Legislature of a concurrent resolution terminating the state of emergency or state of preparedness: Provided, That in no case shall a state of preparedness last longer than thirty days.

(c) So long as a state of emergency or state of preparedness exists, the Governor has and may exercise the following additional emergency powers:

Gov. Justice relies primarily on subsection (6) of the express emergency powers as his primary support, which has been recited as the legal foundation of the COVID-19 executive orders. The subsection provides that during a declared “State of Emergency,” the Governor has the power:

To control ingress and egress to and from a disaster area or an area where large-scale threat exists, the movement of persons within the area and the occupancy of premises therein.

W. Va. Code 15-5-6(c)(6).

The emergency powers of 15-5-6, despite the broad language included in subsection (6) cannot suspend the rights and obligations contained in the West Virginia Constitution. Gov. Justice exceeded his statutory powers and violated the Constitution, by admittedly “closing” or “shutting down” the State, thus depriving the people of their liberty, property, and their pursuit of happiness. In direct opposition to the Governor’s actions, the West Virginia Constitution instead provides that it’s the inherent and solemn duty of State government to *guard and protect* its citizens from such intrusions.

The West Virginia Constitution establishes that the U.S. Constitution is the supreme law of the land, and that the very purpose of West Virginia’s state government is to guard and protect the people of West Virginia from any and all encroachments on their liberty:

The state of West Virginia is, and shall remain, one of the United States of America. The constitution of the United States of America, and the laws and treaties made in pursuance thereof, shall be the supreme law of the land . . . .

The government of the United States is a government of enumerated powers, and all powers not delegated to it, nor inhibited to the states, are reserved to the states or to the people thereof. Among the powers so reserved to the states is the exclusive regulation of their own internal government and police; and it is the high and solemn duty of the several departments of government, created by this constitution, to guard and protect the people of this state from all encroachments upon the rights so reserved.

W. Va. Const. Art. 1, Sec. 1-2, 1-3. Additionally, the West Virginia Constitution solidifies the underlying principle which was first asserted in the Declaration of Independence, that all rights

secured by the two respective constitutions, *natural rights endowed by our Creator*, will never be suspended under any circumstances:

**The provisions of the constitution of the United States, and of this state, are operative alike in a period of war as in time of peace, and any departure therefrom, or violation thereof, under the plea of necessity, or any other plea, is subversive of good government, and tends to anarchy and despotism.**

W. Va. Const. Art. 1, Sec. 1-3 (emphasis added). West Virginia was founded on the principle that power resides in the people and can only be exercised pursuant to their will:

The powers of government reside in all the citizens of the state, and can be rightfully exercised only in accordance with their will and appointment.

W. Va. Const. Art. 2, Sec. 2-2. This founding document declares in no uncertain terms, that West Virginia is a free society, and that no government can deprive a free people of their inherent natural rights:

All men are, by nature, equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely: The enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety.

W. Va. Const. Art. 3, Sec. 3-1. All power is vested in, and derived from, the people. Government officials, bureaucrats, politicians, and the likewise are the “trustees and servants” of the people, “and at all times amenable to them.” W. Va. Const. Art. 3, Sec. 3-2.

The West Virginia Constitution vested the people’s legislative authority in the Senate and the House of Delegates, and established an express separation of powers doctrine:

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.

W. Va. Const. Art. 5, Sec. 5-1; *see also* W. Va. Const. Art. 6, Sec. 6-1 (vesting legislative power in the Senate and House of Delegates). Inherent in this doctrine, is the restriction on any one branch from controlling both its own powers, and the powers of any other branch, as the Governor is now doing at a furious pace, and without restriction.



Nor can the Governor rely on the inaction of a Legislature which is out-of-session and in the midst of campaign season. The Legislature simply does not have the ability to call itself into session. Nor does it have the ability to act in any official manner outside of an official declared session at the Capitol, other than by the submission of a written request to the Governor to do so. The Governor alone is tasked with overseeing the convening of the Legislature, where required under the Constitution, or where otherwise necessary *for public safety and welfare*:

The Legislature shall assemble annually at the seat of government, and not oftener unless convened by the governor . . . .

The governor may convene the Legislature by proclamation ***whenever, in his opinion, the public safety or welfare shall require it.*** It shall be his duty to convene it, on application in writing, of three fifths of the members elected to each house.

W. Va. Const. Art. 6, Sec. 6-18, 6-19 (emphasis added).

The Governor's opinions have been expressed in numerous public statements regarding whether he perceived an imminent threat to *public safety and welfare*. He made each of the following statements in his press briefings during the months of March and April, 2020:

I want us to be fully prepared and take every precaution we need to keep West Virginians safe. That is the highest of priorities . . . ." (App. at 2);

I hate that we're at the point where we have to make some of these decisions . . . ." (App. at 19);

"And again, this is all being done out of an abundance of caution, but we have to think of the long-term health and safety of all of our people first and foremost . . . ." (App. at 19);

"I would tell you that we should still continue to live our lives as best we can, but we need to be smart . . . ." (App. at 20);

"There are currently no confirmed cases of COVID-19 in West Virginia. However, it's anticipated that the disease will come to West Virginia soon . . . ." (App. at 23);

"We might be able to prevent us from getting to a point where we've got to shut down the entire state, but to do that we've got to move and we've got to move stronger than we already are right now . . . . Right now, you've got to really bear down and buckle up." (App. at 38);

"This truly is real. It's the event of all of our lifetimes unlike any that we've ever seen before . . . ." (App. at 39);

“All of us are really really worried, where’s our next paycheck going to come from? How are we going to sustain ourselves? I would tell you that the government, in every way, is stepping up as a nation and a state. You’ll be made as whole as you can possibly be made . . . .” (App. at 41);

“This disease is really serious stuff. Please stay home, please listen to our order, and please in every way shape, form, or fashion keep consulting your God above and absolutely every one of us will get through this . . . .”<sup>30</sup>

“Now is not the time to panic, we need to remain cautious, smart and strong . . . .” The curve is not spiking and we are making headway, but this is a long way from being over. Every one of us needs to clearly understand that . . . .”<sup>31</sup>

“We are working around the clock, along with members of my administration, and the top medical experts in our state to do absolutely everything we can to protect West Virginians.”<sup>32</sup>

Despite having the sole ability of convening the Legislature when “the public safety or welfare shall require it,” Gov. Justice has failed to do so. Nevertheless, across a period of several months, he has instead conducted daily press briefings and published dozens of press releases on his website describing the unprecedented safety threat posed by COVID-19. He has done so without the legislature, despite having the ability and obligation to call them into session where the public safety and welfare requires it. Instead of activating the legislature to respond jointly to a crisis he deemed to be “***the event of all our lifetimes***,” the Governor instead engaged in an executive power-grab, unilaterally and comprehensively encroaching onto the legislative branch’s domain. In so doing, he has drastically affected and violated the rights and liberties expressly secured for the people by the West Virginia Constitution. The constitutional damage which has been inflicted is ongoing and indefinite.

---

<sup>30</sup> March 23, 2020 Press Release, <https://governor.wv.gov/News/press-releases/2020/Pages/COVID-19-UPDATE-Gov.-Justice-issues-Stay-at-Home-order-for-all-West-Virginians.aspx>

<sup>31</sup> March 26, 2020 Press Release, <https://governor.wv.gov/News/press-releases/2020/Pages/COVID-19-UPDATE-Gov.-Justice-urges-West-Virginians-to-“stay-the-course,-stay-strong”-in-face-of-pandemic;-appoints-Dr.-Cla.aspx>

<sup>32</sup> March 29, 2020 Press Release, <https://governor.wv.gov/News/press-releases/2020/Pages/COVID-19-UPDATE-Governor-and-First-Lady-Justice-issue-statement-after-learning-of-first-West-Virginian-to-pass-away-from-C.aspx>

By excluding the people's elected representatives in the Senate and House of Delegates from the COVID-19 response, Gov. Justice excluded the very people who have suffered from his unilateral decisions. In contrast to Justice's unilateral actions, 38 other state legislatures have convened and introduced legislation in response to COVID-19, 37 of which have enacted legislation. *See State Action on Coronavirus (COVID-10)*, National Conference of State Legislatures.<sup>33</sup> This includes Alabama, Alaska, Arizona, Arkansas, California, Colorado, District of Columbia, Florida, Georgia, Guam, Hawaii, Idaho, Iowa, Illinois, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Maryland, Michigan, Minnesota, Missouri, Mississippi, Nebraska, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington and Wisconsin.

Legislation passed in the foregoing states, in many cases, pertains to the same subject matter as Gov. Justice's unilateral actions, such as determining business closures (Pennsylvania), professional licensing (Ohio), appropriates funds to emergency first-responders (North Carolina), establishes new crimes (New York), modifies election deadlines (Missouri), secures the civil liberties of its people (Minnesota), established restriction timeframes (Michigan), established immunity protections related to COVID-19 (Massachusetts), and even ratification of a governor's decision to establish a State of Emergency (Georgia). *Id.* However, West Virginia's Legislature is notably absent, having zero legislative activity in response to COVID-19.

Recently the Wisconsin Legislature was forced to challenge executive overreaching in their state, filing an petition before the Wisconsin Supreme Court. They asserted that the executive branch of their state government had exceeded their emergency powers by violating the separation of powers, and by otherwise exceeding their lawful authority by ordering

---

<sup>33</sup> <https://www.ncsl.org/research/health/state-action-on-coronavirus-covid-19.aspx>

everyone to stay home, ordering the closure of “non-essential” businesses, prohibiting private gatherings, and by forbidding all “non-essential” travel. The Wisconsin Supreme Court struck down the executive orders:

We do not conclude that Palm<sup>34</sup> was without any power to act in the face of this pandemic. However, Palm must follow the law that is applicable to state-wide emergencies. We further conclude that Palm's order confining all people to their homes, forbidding travel and closing businesses exceeded the statutory authority of Wis. Stat. § 252.02 upon which Palm claims to rely.

Wisconsin Legislature v. Secretary Palm, at al., Supreme Court of Wisconsin, Case No.

2020AP765-OA, at 3. Much of the Court's ruling was predicated on principles of federal constitutional law, which would similarly apply in West Virginia:

In addition, we employ the constitutional-doubt principle. That is, we disfavor statutory interpretations that unnecessarily raise serious constitutional questions about the statute under consideration. Clark v. Martinez, 543 U.S. 371, 380-81 (2005). Palm points to statutes that she asserts give her broad authority to impose regulation; but it does not follow she can impose regulation without going through a process to give the people faith in the justness of the regulation. However, under Palm's theory, she can "implement all emergency measures necessary to control communicable diseases," Wis. Stat. § 252.02(6), even at the expense of fundamental liberties, without rulemaking. That interpretation is constitutionally suspect. We do not construe § 252.02(6) as an "open-ended grant" of police powers to an unconfirmed cabinet secretary. Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 646 (1980) (plurality) (explaining that statutory construction that affords a "sweeping delegation of legislative power" has the potential to cause constitutional problems in future cases).

Id. at 18. Additionally, the Court supported much of its ruling on foundational principles of liberty, espoused in its state constitution, most of which are substantially similar to West Virginia's protections of individual liberty and representative democracy:

To explain further, Article I, Section 1 of the Wisconsin Constitution provides that "**All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.**" The people consent to the Legislature making laws because they have faith that the procedural hurdles required to pass legislation limit the ability of the Legislature to infringe on their rights. These limits include bicameralism and presentment, Wis. Const. art. V, § 10, quorum requirements, Wis. Const. art. IV, § 7, and journal and open

---

<sup>34</sup> <sup>34</sup> Andrea Palm is the DHS Secretary-designee in Wisconsin, who issued various Emergency Orders, to which the Wisconsin Legislature were challenging.

door requirements, Wis. Const. art. IV, § 10. At times, legislation is enacted that infringes on a person's rights despite these front-end procedures, however, for that we have judicial review.

Id. at 18-19.

Under Wisconsin law, grants of legislative authority to administrative agencies are legal, if there are procedural safeguards in place to prevent the “arbitrary, unreasonable or oppressive conduct of the agency.” Id. at 19-20. However, the Court found that Palm could not point to any procedural safeguards on the power she was asserting in Wisconsin, other than “judicial review” itself. Id. at 20. In West Virginia, on the other hand, there is a stronger case for violation of separation of powers. Unlike in Wisconsin, West Virginia law doesn’t allow for the delegation of real legislative authority to the executive, other than some logistical “flexibility.” “[T]he Legislature cannot commit to the judiciary powers which are primarily legislative.” Hodges v. Public Serv. Comm’n, 110 W.Va. 649, 159 S.E. 834 (1931). Syl. Pt. 4, Dailey, Application of, 465 S.E.2d 601, 195 W.Va. 330 (W. Va. 1995) (holding that a delegation of concealed weapon licensing powers to the judicial branch was an unconstitutional delegation of legislative powers); *see also* Appalachian Power Co. v. Public Service Comm’n, 170 W.Va. 757, 296 S.E.2d 887 (1982) (“While we recognize that the doctrine of separation of powers is complex and that some flexibility is required in interpreting this doctrine to meet the realities of contemporary government, we have never hesitated to apply the doctrine where we felt that there was a direct and fundamental relinquishment by one branch of its traditional powers to another branch.”).

Similar to Gov. Justice’s actions, Wisconsin Emergency Order 28 purported to criminalize conduct pursuant to an existing Wisconsin’s obstruction statute, Wis. Stat. § 252.25 when a factual directive of Order 28 is transgressed. The Court found that “in order to constitute criminal conduct proscribed by statute, the conduct must be set out with specificity in the statute

to give fair notice” under Wisconsin law.<sup>35</sup> Likewise, the Respondent’s issuance of legislative police powers violates the West Virginia Constitution. The West Virginia Legislature cannot empower an executive agency or official with the ability to “engraft future declarations” of unlawful conduct by other bodies onto a present statute. “The authority to enact laws, being exclusively a legislative function, cannot be transferred or abdicated to others.” State ex rel. State Line Sparkler of WV, Ltd. v. Teach, 418 S.E.2d 585, 187 W.Va. 271 (W. Va. 1992) (holding that the legislature cannot empower the Board of Pharmacy with the ability to declare future criminal violations of the present statutes without violating the separation of powers).

Gov. Justice’s “Stay at Home” Order directed that it would be “enforced by State and local law enforcement, and by state and location regulatory and/or licensing bodies to the extent possible under West Virginia law.” It further directed that it, along with all prior executive orders related to COVID-19, it would be effective “until terminated by subsequent executive order.” See Executive Order 9-20.<sup>36</sup> Executive Order 14-20<sup>37</sup> provide that:

To the extent that any individual fails to comply with the terms of this Order and in any way illegally hinders or obstructs, or attempts to hinder or obstruct, any law- enforcement officer acting in his or her official capacity to enforce the terms of this Order, such individual shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than \$50 nor more than \$500 or confined in jail not more than one year, or both fined and confined pursuant to Chapter 61, Article 5, Section 17 of the West Virginia Code.<sup>38</sup>

Section 15-5-6 doesn’t expressly provide the Governor with the ability to “redefine” and “expand” existing criminal statutes in the W. Va. Code. Like Andrea Palm in Wisconsin, the Governor has taken the liberty of doing so unilaterally under the narrow authority of executive

---

<sup>35</sup> Wisconsin Legislature v. Secretary Palm, at al., Supreme Court of Wisconsin, Case No. 2020AP765-OA, at 20.

<sup>36</sup> App. at 42.

<sup>37</sup> App. at 53.

<sup>38</sup> Obstructing an officer.

order. If § 15-5-6 is to be interpreted so as to authorize such a delegation, then it is in violation of the West Virginia Constitution, and must be invalidated, as occurred in Wisconsin.

By acting as both the executive branch and the legislative branch, Gov. Justice has violated the Doctrine of Separation of Powers, contained in W. Va. Const. Art. 5, Sec. 5-1. He can't have both the discretion *of not convening* the Legislature, and also the emergency authority *to act in the place of* the Legislature. The Governor is required under the Constitution to convene the Legislature, or to limit his executive decrees to executive actions as the Constitution so provides. At no point is the West Virginia Constitution *ever* suspended.

This Court has previously invalidated a statute where the legislature enacted an encroachment onto the powers of the executive branch. See Syl. Pt. 2, State ex rel. Meadows v. Hechler, 195 W.Va. 11, 462 S.E.2d 586 (W. Va. 1995). In Hechler, the Court discussed the importance of the Doctrine of Separation of Powers:

The separation of powers doctrine 12 expressly stated in our constitution 13 is a core principle of our system of government, whose roots can be traced back to the founding of this country. See Hodges v. Public Serv. Comm'n, 110 W.Va. 649, 652-54, 159 S.E. 834, 835-36 (1931) (discussing the origin of the separation of powers principle and noting "that the very first resolution passed in the convention which framed our national Constitution called for a separation of governmental powers") . . . .

State ex rel. Meadows v. Hechler, 195 W.Va. 11, 462 S.E.2d 586 (W. Va. 1995). Unlike its federal counterpart, the West Virginia Doctrine of Separation of Powers is expressly set forth in the Constitution, which emphasizes its importance to the current constitutional crisis:

The doctrine of "separation of powers" was included in the West Virginia Constitution. Unlike the federal constitution, which implies and executes "separation of powers," but which does not expressly state so, the West Virginia Constitution enshrined this principle directly in their Constitution.

Appalachian Power Co. v. Public Service Com'n of W. Va., 296 S.E.2D 887, 170 W.VA. 757 (W. VA. 1982). This Court has cautiously allowed "some flexibility" on separation of powers issues in the past, but has adamantly foreclosed one branch from ever delegating, or exercising, the core

authority of another branch on any core issue. For instance, an unconstitutional encroachment was found where the Legislature encroached on a core domain of the judiciary:

[W]e have recognized the need for some flexibility in interpreting the separation of powers doctrine in order to meet the realities of modern day government and particularly the proliferation of administrative agencies. We have not however hesitated to utilize the doctrine where we felt there was a direct and fundamental encroachment by one branch of government into the traditional powers of another branch of government.

In West Virginia State Bar, *supra*, Judge Haymond writing for an unanimous court postulated that the separation of powers doctrine would preclude the Legislature from delegating to an administrative agency the right to determine who could practice law before the agency. He stated, "If the statute attempted to authorize the commissioner to promulgate a rule of that character such provision of the statute would be void as a legislative encroachment upon the inherent power of the judicial department of the government." 144 W.Va. at 535, 109 S.E.2d at 439.

Appalachian Power Co. v. Public Service Com'n of W. Va., 296 S.E.2D 887, 170 W.VA. 757 (W. VA. 1982) (citations omitted).

Using a "State of Emergency" declaration, Gov. Justice has encroached onto the core domain of the legislature through the exercise of his purported statutory emergency powers. His unilateral issuance of numerous executive orders have drastically altered the lives, liberty, and property, of the free people of West Virginia. These actions were taken in excess of the broad, though not unlimited, language of W. Va. Code § 15-5-6. If such actions are authorized under the Court's interpretation of the 15-5-6, then the statute does so in violation of the West Virginia Constitution and therefore must be invalidated.

W. Va. Code 15-5-6, doesn't anticipate, nor can it authorize, a Governor ruling the State by executive decree in response to a worldwide pandemic which has only minimally impacted the State of West Virginia. At the time the Governor declared a State of Emergency, upon which he relies for his drastic executive orders, there had not been a single positive case of COVID-19 in the State. There is no war. There is no armed insurrection. There was no earthquake, fire, nor hurricane. Not one life had been lost at the issuance of the declaration. No disaster had



occurred. Section 15-5-6 doesn't mention a "pandemic," nor a virus. It does mention "attack upon the United States" and both man-made and natural disasters of major proportions:

. . . finds that an attack upon the United States has occurred or is anticipated in the immediate future, or that a natural or man-made disaster of major proportions has actually occurred or is imminent within the state, or that an emergency exists or may be imminent due to a large-scale threat beyond local control, and that the safety and welfare of the inhabitants of this state require an invocation of the provisions of this section.

W. Va. Code § 15-5-6(a). It's quite a leap to interpret the emergency powers act as authorizing a "closing" of West Virginia in all 55 counties, nor an indefinite "State of Emergency" style government, where the Governor rules alone and without a legislature. This is especially true where the emergency consists of a virus which, to date has claimed only 70 lives in West Virginia, with at least 32 of those - *almost half* - occurring in nursing homes.<sup>39</sup>

Of course it's a tragedy to lose even one life to any cause. But there is no balancing test in the Constitution, which measures the inherent rights of a free people against the number of deaths attributable to any particular cause. Gov. Justice was not acting in accordance with his oath to defend the Constitution when he declared that "***overreaction never hurt anyone, it may be inconvenient, but if it gives us the ability to save just one life it's worth it . . . . Just keep the faith . . . .***"<sup>40</sup> The West Virginia Constitution secures the inherent rights of West Virginians irregardless of whether Gov. Justice would dispose of all of them in exchange for any one life. No Governor, nor President, possesses the entitlement of placing a personal valuation on the concept of liberty and free government. If the Governor intends to justify the suspension of constitutional restrictions and liberties in the name of saving lives, the policy is a new one.

In 2018, while Gov. Justice was in office, West Virginia nearly led the nation in deaths due to heart disease, with a death rate in the State of 196.4 deaths per 100,000 of total

---

<sup>39</sup> See WVDHHR's COVID Dashboard, <https://dhhr.wv.gov/COVID-19/Pages/default.aspx>

<sup>40</sup> App. at 69.

population, resulting in 5,007 West Virginia deaths that year alone. See Heart Disease Mortality by State, CDC National Center for Health Statistics.<sup>41</sup> Likewise, in 2018, West Virginia was third in the nation for having the highest death rate for cancer, with 179.5 deaths per 100,000 of total population, resulting in 4,682 cancer deaths in 2018 alone.<sup>42</sup> That same year, West Virginia led the country with the highest death rate for chronic lower respiratory disease mortality, with 64.3 deaths per 100,000 total population, resulting in 1,723 deaths in West Virginia in 2018.<sup>43</sup> West Virginia also led the country in 2018 for deaths by accident, with 1,707 deaths. *Id.* In 2018, West Virginia had 539 deaths from the basic flu. *Id.* Yet, in Executive Order 16-20,<sup>44</sup> issued on March 31, 2020, Gov. Justice unilaterally prohibited elective medical procedures during the “State of Emergency” in order to meet the perceived future need for COVID-19 medical treatment, forcefully and unilaterally disrupting, and redistributing, the available medical care available to the public.

This Court has previously found the emergency powers of the Governor to have inherent restrictions, even where crisis exists. In *State ex rel. Dodrill v. Scott*, 352 S.E.2d 741, 177 W.Va. 452 (W. Va. 1986) the Court examined the Governor’s emergency powers in the context of the Governor’s issuance of executive orders in an attempt to resolve the prison overcrowding crisis, which had reached a boiling point. The Court provided an interpretation of the statute so as to exclude the prison crisis from the spectrum of potential states of emergency:

In view of the existing and increasing possibility of the occurrence of disasters of unprecedented size and destructiveness, resulting from enemy attack, sabotage or other hostile action, or from fire, flood, earthquakes or other natural or man-made causes and in order to insure that preparations of this State will be adequate to deal with such disasters, and generally to provide for the common defense and to protect the public

---

<sup>41</sup> [https://www.cdc.gov/nchs/pressroom/sosmap/heart\\_disease\\_mortality/heart\\_disease.htm](https://www.cdc.gov/nchs/pressroom/sosmap/heart_disease_mortality/heart_disease.htm)

<sup>42</sup> [https://www.cdc.gov/nchs/pressroom/sosmap/cancer\\_mortality/cancer.htm](https://www.cdc.gov/nchs/pressroom/sosmap/cancer_mortality/cancer.htm)

<sup>43</sup> [https://www.cdc.gov/nchs/pressroom/sosmap/lung\\_disease\\_mortality/lung\\_disease.htm](https://www.cdc.gov/nchs/pressroom/sosmap/lung_disease_mortality/lung_disease.htm)

<sup>44</sup> App. at 57.

peace, health and safety and to preserve the lives and property of the people of the State, it is hereby found and declared to be necessary....

These provisions of the Code do not contemplate prison overcrowding as a state of emergency.

State ex rel. Dodrill v. Scott, 352 S.E.2d 741, 177 W.Va. 452 (W. Va. 1986). The Court further elaborated in a footnote, that the language of the West Virginia emergency powers statute was more restrictive than the language included in the New Jersey statute, and that it did not give the West Virginia governor unbridled power in the choice of what is, and what is not, a sufficient emergency:

We note that the New Jersey Disaster Control Act defined “disaster” to include “any unusual incident.” Although we express no opinion on the merits of the Worthington cases, we are of the opinion that the term “any unusual incident” is substantially more expansive than either “natural or manmade disaster of major proportions” or “disasters of unprecedented size and destructiveness.”

Id. at FN 2.

Indeed, the Governor cannot wield emergency powers in all spheres, crisis or no crisis. At the time of the Legislature’s passage of 15-5-1, *et seq.*, the Legislature was certainly aware of the possibility of a respiratory virus pandemic, having experienced the nationwide Spanish Flu pandemic during 1918-1919:

The 1918 influenza pandemic was the most severe pandemic in recent history. It was caused by an H1N1 virus with genes of avian origin. Although there is not universal consensus regarding where the virus originated, it spread worldwide during 1918-1919. In the United States, it was first identified in military personnel in spring 1918. It is estimated that about 500 million people or one-third of the world’s population became infected with this virus. The number of deaths was estimated to be at least 50 million worldwide with about **675,000 occurring in the United States**.

See 1918 Pandemic (H1N1 virus), Centers for Disease Control Website (emphasis added).<sup>45</sup>

Our forefathers and our Founding Fathers experienced terrible outbreaks of sicknesses, including cholera, smallpox, measles, polio, and so on. Their ancestors experienced the Black Plague, and other awful ways to die, in the preceding centuries. Yet, the legislature did not

---

<sup>45</sup> <https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html>

provide for their powers to be ceded to the executive in the event of a virus pandemic, such as the Spanish Flu or COVID-19 - which may or may not exceed the number of *annual* deaths caused by the regular flu. So far in West Virginia, annual flu deaths still far outnumber COVID-19 deaths.<sup>46</sup>

Common sense dictates that, in the event a foreign power invading the United States, a Governor might be entitled to some additional “*flexibility*” in his executive actions, as far as issuing orders regarding ingress, egress, and the sort. If an earthquake destroyed much of the State, covering roadways and flooding disaster areas, the Governor might need, and be entitled to, some “*flexibility*” in directing and restricting ingress and egress. But here, where 70 people have died (almost half of which were in nursing homes), the Governor is not justified in asserting supreme authority over the lives, liberty and property of West Virginia’s people - especially in the total absence of legislative representation.

Even had the legislature expressly authorized the Governor to “shut down” the State in advance of a possible pandemic virus, they still would have been unable to suspend *any portion* of the West Virginia Constitution, which expressly states that it remains in effect even in “a period of war,” or perhaps more importantly, where the government claims it’s “*necessary*.” W. Va. Const. Art. 1, Sec. 1-3. As Ronald Reagan said, “[t]he nine most terrifying words in the English language are: *I’m from the Government, and I’m here to help.*” Any actions taken by Gov. Justice under the emergency powers statute are unlawful to the extent that they deprive West Virginians of their “enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety.” W. Va. Const. Art. 3, Sec. 3-1.

---

<sup>46</sup> In 2018, West Virginia suffered 539 deaths from the regular flu. As of the date of this writing, West Virginia had suffered 70 deaths from COVID-19. In 2017, West Virginia suffered 458 flu deaths. In 2016, 423 flu deaths. In 2015, West Virginia suffered 526 flu deaths. See Center for Disease Control, National Center for Health Statistics, Influenza/Pneumonia Mortality by State, [https://www.cdc.gov/nchs/pressroom/sosmap/flu\\_pneumonia\\_mortality/flu\\_pneumonia.htm](https://www.cdc.gov/nchs/pressroom/sosmap/flu_pneumonia_mortality/flu_pneumonia.htm)

In addition to all the rights secured by the U.S. Constitution, which are the “Supreme Law of the Land” by virtue of W. Va. Const. Art. 1, Sec. 1-1, the West Virginia Constitution additionally provides for its own *supplemental* restrictions on the government’s actions - whether in time of peace, war, or any claim of “necessity”:

The privilege of the writ of habeas corpus shall not be suspended. No person shall be held to answer for treason, felony or other crime, not cognizable by a justice, unless on presentment or indictment of a grand jury. No bill of attainder, ex post facto law, or law impairing the obligation of a contract, shall be passed . . . .

The rights of the citizens to be secure in their houses, persons, papers and effects, against unreasonable searches and seizures, shall not be violated. No warrant shall issue except upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, or the person or thing to be seized . . . .

Private property shall not be taken or damaged for public use, without just compensation; nor shall the same be taken by any company, incorporated for the purposes of internal improvement, until just compensation shall have been paid, or secured to be paid, to the owner; and when private property shall be taken, or damaged for public use, or for the use of such corporation, the compensation to the owner shall be ascertained in such manner as may be prescribed by general law: Provided, That when required by either of the parties, such compensation shall be ascertained by an impartial jury of twelve freeholders . . . .

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

No man shall be . . . enforced, restrained, molested or bothered, in his body or goods, or otherwise suffer, on account of his religious opinions or belief[s] . . . .

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 . . . .

Free government and the blessings of liberty can be preserved to any people only by a firm adherence to justice, moderation, temperance, frugality and virtue, and by a frequent recurrence to fundamental principles . . . .

WV. Const. Art. 3 Sec. 3-2, 3-4, 3-6, 3-9, 3-10, 3-15, 3-17.

In unilaterally “closing” the State of West Virginia, Gov. Justice cannot reconcile the constitutional violations which have occurred as a consequence of his executive orders, with the express and unambiguous protections secured to the people in State Constitution. This is

especially true where the Legislature has not been convened. Property has been seized; the means of acquiring property and wealth has been seized - all without due process and equal protection under the law. The people's representatives were excluded from participation in the COVID-19 response, and therefore so were the people. West Virginians across the State lost their incomes and their businesses pursuant to the direct and unilateral order of the Governor.

The U.S. Constitution, the Supreme Law of the Land, prohibits government from depriving the petitioners, and their constituents, of their life, liberty and property interests, without due process of law. The petitioners and their constituents owned protected liberty interests in the right to live without arbitrary governmental interference with his liberty and property interests. County of Sacramento v. Lewis, 523 U.S. 833, 845 (1988). Liberty "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized ... as essential to the orderly pursuit of happiness by free men." Board of Regents of State Colleges v. Roth, 408 U.S. 564, 572 (1972).

"It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [fourteenth] Amendment to secure." Truax v. Raich, 239 U.S. 33, 41, 36 S.Ct. 7, 10, 60 L.Ed. 131 (1915). *See also* Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923) ("Without doubt, ['liberty' in the fourteenth amendment] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life ...."); Schwartz v. Board of Bar Examiners, 353 U.S. 232, 238-39, 77 S.Ct. 752, 756, 1 L.Ed.2d 796 (1957) ("A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment.")

(footnote omitted); Greene v. McElroy, 360 U.S. 474, 492, 79 S.Ct. 1400 1411, 3 L.Ed.2d 1377 (1959) ("[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment ...."); Board of Regents v. Roth, 408 U.S. 564, 573-74, 92 S.Ct. 2701 2707, 33 L.Ed.2d 548 (1972) (respondent denied relief because "[t]he State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, again, would be a different case.") (*quoting* Phillips v. Vandygriff, 711 F.2d 1217 (5th Cir. 1983)).

A business itself, constitutes a protected property right under the Fourteenth

Amendment:

Clearly, a business is an established property right entitled to protection under the Fourteenth Amendment. *See, e.g., Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 465, 41 S.Ct. 172, 176, 65 L.Ed. 349 (1921) (finding that a "business ... is a property right, entitled to protection against unlawful injury of interference ...."); United States v. Tropiano, 418 F.2d 1069, 1076 (2d Cir.1969) ("The right to pursue a lawful business including the solicitation of customers necessary to the conduct of such business has long been recognized as a property right within the protection of the Fifth and Fourteenth Amendments to the Constitution.") (citations omitted); Small v. United States, 333 F.2d 702, 704 (3d Cir.1964) ("The right to pursue a lawful business or occupation is a right of property which the law protects against intentional and unjustifiable interference. A cause of action based upon such an interference is analogous to one based upon unlawful interference with existing contracts, and is governed by the same principles."). 131 F.3d 353, 361 (3d Cir.1997) (citations omitted).

Mfs Inc. v. Dilazaro, 771 F.Supp.2d 382, 434-35 (E.D. Pa. 2011); *see also* Bannum, Inc. v. Town of Ashland, 922 F.2d 197 (4th Cir. 1990) (the mere denial of a business opportunity, without more, such as deprivation of an existing business benefit or entitlement, does not deprive a person of a property or liberty interest). The right to engage in intrastate travel is a protected liberty interest. Johnson v. City of Cincinnati, 310 F.3d 484, 495 (CA6 2002). The right of association is a protected liberty interest under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. NAACP v. Alabama, 357 U.S. 449 (1958).

Petitioners and their constituents have been deprived and restricted in all of these areas by virtue of the unilateral decrees of the Governor. The failure to convene the legislature in and of itself deprives such people of due process. In the event that an emergency would foreclose other traditional forms of process, such as hearings and appeals, such individuals would at the very least have some modicum of representation and redress through their elected legislators. No process has been given in regards to the exercise of the State's discretion, mandating closure, or continued operation.

Many of the petitioners' constituents, as with people across the State of West Virginia, have been intentionally treated differently from others similarly situated, with no rational basis underlying the disparity. Some businesses have been forced to close, and remain close; while other businesses, who may sell the same or similar products, or provide the same or similar services, have been allowed to remain open. Such treatment is a violation of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. See Willowbrook v. Olech, 120 S.Ct. 1073, 528 U.S. 562, 145 L.Ed.2d 1060 (2000). Underlying the lack of a rationale behind the disparate treatment, is the fact that the Governor did so unilaterally, with unknown, or unnamed, members of the administration making such decisions, which may be founded on political pressure, or even political favors. Had the Governor convened the legislature, communications and grievances could have been addressed by these individuals to their respective elected representatives. However, the Governor has deprived them of such representation or means of process.

In Greenbrier County, where there's a population of roughly 30,000 residents - including the Governor - there were only 9 total cases throughout the entire crisis to date, with zero deaths. Yet, by decree of the Governor, the entire Main Street of quaint shops, restaurants, coffee shops, and bars, i.e., the entire local economy, was forcefully shut down due to COVID-19. Common sense dictates that there was never any "state of emergency" in



Greenbrier County. There was no disaster. There was no imminent disaster there on March 16, when Gov. Justice declared a statewide “State of Emergency.” Nor did a disaster occur for another two months afterwards. Yet, along with the counties who did have a cluster of COVID-19 cases, they too were forced to “close.” Likewise, other counties faced very little threat at the time of the Governor’s declaration, and remain so over two months later, at the time of this writing, such as Barbour County (7 total cases, 1 death), Boone (9 total cases, 0 deaths), Braxton County (2 total cases, 0 deaths), Brooke County (3 total cases, 0 deaths), Calhoun County (2 total cases, 0 deaths), Clay County (2 total cases, 0 deaths), Gilmer County (8 total cases, 0 deaths), Grant County (6 total cases, 0 deaths), Lewis County (5 total cases, 0 deaths), Lincoln County (5 total cases, 0 deaths), McDowell County (6 total cases, 0 deaths), Mercer County - one of the larger counties in the State (13 total cases, 0 deaths), Mingo County (3 total cases, 1 death), Monroe County (6 total cases, 0 deaths), Nicholas County (9 total cases, 1 death), Pendleton County (5 total cases, 0 deaths), Pleasants County (2 total cases, 0 deaths), Pocahontas County (8 total cases, 0 deaths), Randolph County (8 total cases, 0 deaths), Ritchie County (1 total case, 0 deaths), Roane County (9 total cases, 0 deaths), Summers County (1 total case, 0 deaths), Taylor County (8 total cases, 0 deaths), Tucker County - where the local economy depends on the state park being open (4 total cases, 0 deaths), Tyler County (3 total cases, 0 deaths), Upshur County (6 total cases, 0 deaths), Wetzel County (7 total cases, 0 deaths), Wirt County (4 total cases, 0 deaths), or Wyoming County (3 total cases, 0 deaths). See WV DHHR COVID-19 Dashboard.<sup>47</sup> The West Virginia Constitution doesn’t allow for the legislature, much less a Governor acting alone, to be lawfully capable of shutting down hundreds of “Mom and Pop” private businesses in those minimally-impacted counties, on account of a virus. The only significant damage most people in West Virginia have

---

<sup>47</sup> <https://dhhr.wv.gov/COVID-19/Pages/default.aspx>

suffered, which has been overwhelming and substantial, is the economic closure of the State, under the Governor's executive decrees.

The Constitution does not make it the exclusive province of the executive to declare or manage disasters. The emergency powers statute equally authorizes the legislature to also declare a "State of Emergency," or to terminate the "State of Emergency." The entire crux of the instant constitutional crisis, is that the Legislature happens to not be in session, leaving the Governor to his own devices. It's true that the legislature possesses the ability to submit a handwritten request for a special session to the Governor, which he would be required to oblige, so long as 3/5 of both houses join in the written request. However, this assumes that the Legislature is capable of achieving such a feat while not in session. This is a "Catch-22" scenario. A 3/5 super-majority of the Legislature can require the Governor to convene them, but since they're not already convened, they have no practical or reasonable possibility of achieving such a result. If the legislature were in session, a simple majority could issue a resolution terminating a "State of Emergency." But without a 3/5 super-majority, or the Governor convening a session, they are powerless to act, even with a majority consensus, should one exist. Such a scenario disenfranchises the people of West Virginia, who according to the Constitution, are supposed to be vested with the power of self-government:

The powers of government reside in all the citizens of the state, and can be rightfully exercised only in accordance with their will and appointment.

WV Const. Art. 2, Sec. 2-2.

Whether by legislative overreaching in the initial enactment of W. Va. Code 15-5-6, or whether by executive overreaching by Gov. Justice in running away with the entire State Government during the present COVID-19 crisis, the people have been disenfranchised of their rightful power. They are left only with the remaining branch of government - the judicial - to put

an end to what our founders described, could only be “subversive of good government,” and leading to “anarchy and despotism.” WV. Const. Art. 1, Sec. 1-3.

Because of the importance of the instant constitutional crisis, and because of the foregoing, the Petitioners have demonstrated that Respondent has a clear duty to either convene a special session of the West Virginia Legislature, and to rescind all of his Executive Orders in response to COVID-19 as violative of the Doctrine of Separation of Powers, as well as other rights secured by the West Virginia Constitution and the U.S. Constitution.

**C. Petitioners possess no other adequate remedy**

The existence of any remedy will not suffice. "Mandamus will lie, notwithstanding the existence of another remedy, if such other remedy is inadequate or is not equally beneficial, convenient and effective." State ex rel. Wheeling Downs Racing Ass'n v. Perry, 148 W. Va. 68, 73, 132 S.E. 2d 922 (1963). "A remedy cannot be said to be fully adequate to meet the justice and necessities of a case, unless it reaches the end intended, and actually compels a performance of the duty in question." State ex rei. Bronaugh v. Parkersburg, 148 W. Va. 568, 573, 136 S.E. 2d 783, 786 (1964) (*quoting* 12B Michie's Jurisprudence of Va. & W.Va. Mandamus § 9).

Such other remedy, in order to constitute a bar to mandamus, must also be adequate to place the injured party, as nearly as the circumstances of the case will permit, in the position he occupied before the injury or omission of duty complained of. The controlling question is not "Has the party a remedy at law?" but "Is that remedy fully commensurate with the necessities and rights of the party under all the circumstances of the particular case?"

12B Michie's Jurisprudence of Va. & W. Va. Mandamus § 9.

Only the Governor can convene a special session of the Legislature, even with a handwritten request signed by a 3/5 supermajority of both houses. Only Mandamus will lie so as to force the Governor to do so, if legislation is necessary for the public safety and welfare:

The Legislature shall assemble annually at the seat of government, and not oftener unless convened by the governor . . . .

. . .

The governor may convene the Legislature by proclamation whenever, in his opinion, the public safety or welfare shall require it. It shall be his duty to convene it, on application in writing, of three fifths of the members elected to each house.

W. Va. Const. Art. 6, Sec. 6-18, 6-19. Even if there was some other “adequate” remedy, this Court has been reticent in finding other remedies “adequate.” *See generally*, State ex rel. Billy Ray C. v. Skaff, 438, S.E.2d 837, 850 (W. Va. 1993). Thus, so long as a party is not attempting to substitute a mandamus for an appeal, “if such other remedy is not equally as beneficial, convenient, and effective, mandamus will lie.” Syl. Pt. 4, State ex rel. Boggs v. County Court, 11 S.E. 72 (W. Va. 1980); State ex rel. ACF Indust., Inc. v. Vieweg, 514 S.E.2d 176, 186 (W. Va. 1999). Because of the importance of the instant constitutional crisis, and because of the foregoing, the Petitioners have demonstrated that he possesses no other adequate remedy.

## **II. INAPPLICABILITY OF PRE-SUIT NOTICE PROVISIONS OF § 55-17-3**

W. Va. Code Section § 55-17-3 provides for written pre-suit notice to be provided to the chief officer of the government agency of any state agency defendant and the attorney general, by certified mail, return receipt requested, of any alleged claim and the relief desired 30 days prior to the inception of any suit against the State or any of its agencies, which in turn carries with it requirements to notify and inform the Legislature, and so on. However, it is inapplicable to the instant petition, for a number of reasons. Construed liberally, the statute expressly exempts mandamus actions exercising the original jurisdiction of this Court. Moreover, even if the Legislature intended to make pre-suit notice provisions applicable to the action *sub judice*, it would be unconstitutional as a violation of the Doctrine of Separation of Powers, as well as the Certain Remedy Clause.

W. Va. Code § 55-17-3(a)(1) provides an exception to actions seeking “injunctive” relief, where there are important and time-sensitive issues to be decided:

The provisions of this subdivision do not apply in actions seeking injunctive relief where the court finds that irreparable harm would have occurred if the institution of the action was delayed by the provisions of this subsection.

Being that the instant petition is a petition for writ of mandamus, exercising the original jurisdiction of this Court, “injunctive relief,” *per se*, is not procedurally available.

Where a petition for writ of mandamus is filed alleging and supporting an imminent and ongoing constitutional crisis, asserted by active members of the West Virginia Legislature, who are seeking to compel and restrain the actions of their Governor, according to the law, the action is outside the ambit of cases contemplated by § 55-17-3. As with “injunctive relief” claims, petitions for writs of mandamus seek no award of damages, for which the Legislature requires prospective notification, but rather asserts entitlement to judicial review by the judicial branch on important issues pertaining to separation of powers and constitutionality of the assertion of the Governor’s emergency powers.

An “injunction” is “[a] court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury.” Black’s Law Dictionary, Sixth Edition. Likewise, a “writ,” generally, is a “written judicial order to perform a specified act, or giving authority to have it done . . . .” Id. W. Va. Code § 55-17-6(a) provides that “It is the express intent of the Legislature that the provisions of this article be liberally construed to effectuate the public policy set forth in section one of this article.” Therefore, liberally construed, the exception for “injunctive relief” is equally applicable to writs asserting the original jurisdiction of the Court, as both identically seek the order of a court compelling or prohibiting a state official, rather than traditional money damages.

Moreover, to allow the Legislature to control or limit the original jurisdiction of this Court in such a manner as to disallow the instant filing, would be a violation of the Doctrine of Separation of Powers. The Separation of Powers Clause literally “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). the Supreme “[C]ourt 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. 8, § 3. *See also* State v. Arbaugh, 215 W.Va. 132, 138, 595 S.E.2d 289, 295 (2004) (Davis, J., *dissenting*) (*quoting* People v. Hollis, 670 P.2d 441, 442 (Colo.Ct.App.1983)). *See also* Syl. pt. 1, Bennett v. Warner, 179 W.Va. 742, 372 S.E.2d 920 (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.”); *See also* State v. David K., 238 W.Va. 33, 792 S.E.2d 44 (W. Va. 2016) (“The Legislature exceeds its power in the area of rulemaking if its action ‘prohibits the due and orderly processes by which [a] court functions, or prevents it from properly functioning,’ or disturbs the functions and orderly processes of the court[.]”), *citing* Schoenvogel ex rel. Schoenvogel v. Venator Grp. Retail, Inc., 895 So.2d 225, 234 (Ala. 2004). The Legislature cannot enact a jurisdictional bar to legislators seeking original jurisdiction judicial review of the emergency actions of a Governor without violating the Doctrine of Separation of Powers and the Rule-Making Clause.

Lastly, to foreclose legislators seeking assistance from the judicial branch would also violate the Certain Remedy Clause of Article 3, Section 17 of the West Virginia Constitution. It is provided in Article III, Section 17 of the state constitution that “[t]he 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 [.]” The Certain Remedy Clause is a constitutional guarantee that all citizens have a right to seek redress for injuries in the courts of this state. *See* Syl. pt. 8, Bennett v. Warner, 179 W.Va. 742, 372 S.E.2d 920 (1988) (“It is beyond argument that the courts of this state are open to all and that parties in litigation should have access to their

legal proceedings, W. Va. Const., Art. 3, Sec. 3-17, and such access to court proceedings is also required as a part of due process, W. Va. Const., Art. 3, Sec. 3-10.”).

Therefore, the petitioners are not bound by the pre-suit notice provision contained in W. Va. Code Section § 55-17-3, since they are asserting a petition for writ of mandamus under the original jurisdiction of this Court, and should the said statute be interpreted so as to include the instant action, it would do so in violation of the West Virginia Constitution.

### **CONCLUSION**

As the foregoing makes clear, petitioners have unquestionably demonstrated that the conditions for a writ of mandamus have been met. The petitioners, as members of the West Virginia Legislature, respectfully request that this Court grant the writ of mandamus; award the petitioners such costs or fees as allowable by law that this Court finds appropriate; and grant such other relief as may be just and equitable, or as the Court deems fit.

S. MARSHALL WILSON, Delegate, District 60,  
JAMES HARRY BUTLER, Delegate, District 14,  
THOMAS M. BIBBY, Delegate, District 62,  
TONY PAYNTER, Delegate, District 25,  
MICHAEL AZINGER, Senator, 3rd District,  
By Counsel,

---

John H. Bryan (WV Bar No. 10259)  
JOHN H. BRYAN, ATTORNEY AT LAW  
411 Main Street  
P.O. Box 366  
Union, WV 24983  
[jhb@johnbryanlaw.com](mailto:jhb@johnbryanlaw.com)  
(304) 772-4999  
Fax: (304) 772-4998

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

**DOCKET NO. \_\_\_\_\_**

STATE OF WEST VIRGINIA, ex rel, S. MARSHALL WILSON, Delegate District 60,  
JAMES HARRY BUTLER, Delegate District 14, THOMAS M. BIBBY, Delegate District  
62, TONY PAYNTER, Delegate District 25, MICHAEL AZINGER, Senator, 3rd District,

Petitioners,

v.

JAMES C. JUSTICE, II, GOVERNOR OF WEST VIRGINIA,

Respondent.

---

**CERTIFICATE OF SERVICE**

---

The undersigned attorney hereby certifies that he served the foregoing PETITION FOR WRIT OF MANDAMUS AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT and APPENDIX TO PETITION FOR WRIT OF MANDAMUS AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT, upon the following individuals via U.S. Certified Mail and/or hand delivery on this the 22nd day of May, 2020, to:

JAMES C. JUSTICE, II, Governor  
Office of the Governor  
State Capitol, 1900 Kanawha Blvd. E.  
Charleston, WV 25305

Patrick Morrissey, West Virginia Attorney General  
State Capitol, Room E-26, 1900 Kanawha Blvd. E.  
Charleston, WV25305

---

JOHN H. BRYAN (WVBN 10259)