IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 20-0292

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.

RESPONSE TO PETITION FOR WRIT OF MANDAMUS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Constitutional Provisions

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

Rule

Other Authorities

QUESTIONS PRESENTED

1. Whether mandamus is appropriate to compel the West Virginia Governor to "convene a special session of the West Virginia Legislature," Pet. 36, where that decision is discretionary unless the Legislature demands a special session on a three-fifths vote.
2. Whether mandamus is appropriate to compel the West Virginia Governor to "rescind all of his Executive Orders in response to COVID-19," Pet. 36, where the authorizing statute contains multiple safeguards to ensure no unlawful delegation of legislative authority and the courts remain open to take up any cases challenging specific orders as exceeding the Governor's statutory or constitutional powers.

STATEMENT

The timeline and basic facts Petitioners describe surrounding Respondent Governor James C. Justice, II's response to the coronavirus pandemic are not in dispute: COVID-19 is a worldwide crisis and the Governor has taken numerous steps in recent months to respond to this natural disaster pursuant to his express statutory authority to issue orders under a state of emergency. *See* W. Va. Code §§ 15-5-5, 15-5-6. As "[n]o statement of the case or statement of facts need be made" in this response "beyond what may be deemed necessary in correcting any inaccuracy or omission in the petition," W. Va. R. App. P. 16(g), the Governor does not repeat that timeframe here. The Governor does, however, correct the statement that "the West Virginia Legislature has been powerless to enact legislation—and will remain so until they return to session in February of 2021." Pet. 12. The West Virginia Constitution provides that a special session of the Legislature is convened either at the Governor's discretion when "the public safety or welfare shall require it," or, *as a mandatory duty*, "on application in writing, of three fifths of the members elected to each house." W. Va. Const. art. VI, § 19.

SUMMARY OF ARGUMENT

Petitioners ask the Court to use the extraordinary remedy of mandamus to force an outcome that they already have power (as members of the Legislature) to achieve on their own: calling the Legislature into special session. They urge the Court to overlook the West Virginia Constitution's plain text and turn the Governor's discretionary power to *sua sponte* call a special session into a command because the alternative is for the Governor to "act unilaterally in the capacities of both the executive and legislative branch for so long as he finds that an emergency exists." Pet. 1. That is not the alternative. If the Legislature believes the Governor has gone too far or even simply disagrees with his approach as a matter of policy, it has full authority to demand a special legislative session, to invalidate the Governor's COVID-19 executive orders through legislation, and even to end the state of emergency altogether. And any aggrieved party can challenge some or all of the executive orders using ordinary judicial process. These checks on the Governor's emergency powers and alternate avenues of relief soundly defeat Petitioners' special session and separation-of-powers claims—and confirm that they cannot meet the demanding standard for mandamus relief.

I. Petitioners cannot use the extraordinary remedy of a writ of mandamus to force the Governor to call the Legislature into special session because his constitutional prerogative to do so is discretionary and confers no legal right to relief nor duty to act. Further, Petitioners themselves can work with the rest of the Legislature to apply for a special session to address issues related to the COVID-19 crisis. In *that* situation the Governor would have a duty to call the session, but not before. It is thus fully within Petitioners' power to cure their alleged injury—rendering mandamus relief inappropriate.

II. Petitioners cannot use mandamus to gut the Governor's emergency powers and unwind every executive order related to COVID-19 because mandamus is about compelling official conduct, not stopping or undoing it. Even if the Court entertains this claim, it should be denied on the merits because Petitioners raise only generalized constitutional arguments about perceived errors in some executive orders, but cannot show that they are clearly entitled to relief on the grounds that *all* of them are constitutionally deficient. Nor are Petitioners clearly entitled to relief on their claim that the emergency-powers statute is unconstitutional because it contains numerous checks on the Governor's authority and his actions remain subject to individual judicial review.

III. Lastly, the Petition contains a jurisdictional defect that can serve as an independent basis for dismissal.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not needed as this case turns on well-settled principles of law concerning the high standard for mandamus relief.

STANDARD OF REVIEW

"Mandamus is an extraordinary remedy [that] should be invoked sparingly." *State ex rel. Ridge v. W. Va. Dep't of Health & Human Res.*, 238 W. Va. 268, 272, 793 S.E.2d 918, 922 (2016) (citation omitted). "A writ of mandamus will not issue unless three elements coexist—(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." Syl. pt. 1, *State ex rel. Brown v. Corp. of Bolivar*, 217 W. Va. 72, 614 S.E.2d 719 (2005) (quoting syl. pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969)).

As Petitioners agree (at Pet. 13), the purpose of a writ of mandamus is "to require the discharge by a public officer of a *nondiscretionary duty*." Syl. pt. 3, *State ex rel. Greenbrier Cty.*

Airport Auth. v. Hanna, 151 W. Va. 479, 153 S.E.2d 284 (1967) (emphasis added). Mandamus is never appropriate, by contrast, "to prescribe in what manner . . . officers shall act," nor to "correct errors they may have made." *Sluss v. McCusky*, 2019 WL 5960252, at *7-8 (W. Va. Nov. 13, 2019) (mem.) (quoting syl. pt. 3, *Meador v. Cty. Ct. of McDowell Cty.*, 141 W. Va. 96, 87 S.E.2d 725 (1955); emphasis removed).

ARGUMENT

I. Unless And Until The Legislature Calls For A Special Session, the Governor Has No Mandatory Duty To Convene A Special Session.

Petitioners complain that the Governor has relied on his statutorily enumerated emergency powers to respond to the COVID-19 crisis instead of calling them to the table to help. But any potential advisability of holding a special session from a policy perspective is still no basis for a writ of mandamus; Petitioners' claim turns on whether the Governor is *required* to act. Petitioners have not shown that they are clearly entitled to the relief they seek, and indeed, West Virginia's Constitution gives them the express power to solve their own concern.

Our Constitution provides that "[t]he governor *may* convene the Legislature by proclamation whenever, *in his opinion*, the public safety or welfare shall require it." W. Va. Const. art. VI, § 19 (emphases added). This doubly permissive language leaves no doubt that the Governor is permitted—but not required—to convene the Legislature in the interest of public safety. "The Legislature's choice of the word 'may,'" for instance, "usually 'renders the referenced act discretionary, rather than mandatory.'" *Pioneer Pipe Inc. v. Swain*, 237 W. Va. 722, 725, 791 S.E.2d 168, 171 (2016) (citation omitted). To read the constitutional text as anything other than permissive would thus violate "elementary principle[s] of statutory construction." *Id.*; *see also State ex rel. Morrisey v. W. Va. Office of Disciplinary Counsel*, 234 W. Va. 238, 255, 764

S.E.2d 769, 786 (2014) (explaining that "ordinary principles employed in statutory construction must be applied" to constitutional interpretation (citation omitted)).

As this provision makes the Governor's decision whether to convene a special session discretionary, Petitioners cannot have any legal right to that relief. To conclude otherwise would be akin to holding that legislators have a legal right for the Governor to sign a bill into law—the Governor is free to do so, but also has discretion to veto. Nor (even if the text did not make the argument a non-starter) is it proper for Petitioners to ask the Court to establish that right "[in this mandamus] proceeding itself." *State ex rel. Deblasio v. Jackson*, 227 W. Va. 206, 209, 707 S.E.2d 33, 36 (2011) (quoting syl. pt. 1, *Kucera*, 153 W. Va. 538, 170 S.E.2d 367).

It follows for the same reasons that the Governor has not refused to perform a legal duty. The Constitution makes this source of authority to call the Legislature into special session purely discretionary, and mandamus is not a proper mechanism to force the exercise of discretion in any "particular manner." *Cty. Comm'n of Greenbrier Cty. v. Cummings*, 228 W. Va. 464, 470, 720 S.E.2d 587, 593 (2011) (citation omitted). Petitioners argue that legislatures in 38 other States have convened to address the COVID-19 crisis, Pet. 20, but do not explain whether any or all of those governors were required to call those sessions, much less how a hypothetical duty grounded in California or Utah law would be relevant when interpreting West Virginia's.

It is also baffling why a writ of mandamus could be appropriate when the same constitutional section describing the Governor's discretion authorizes Petitioners to remedy their own problem. The very next sentence reads, "It shall be [the Governor's] duty to convene [the Legislature], on application in writing, of three fifths of the members elected to each house." W. Va. Const. art. VI, § 19. Notably, the terms "shall" and "duty" highlight the Governor's *obligation* to act—even Petitioners admit that under those circumstances the Governor "would be required to

oblige." Pet. 35. And unlike when the Governor initiates a special session focused on specific issues, when convened at their own request the Legislature "can act upon any subject not interdicted by the Constitution itself" because it is considered to be in plenary session. 46 W. Va. Op. Att'y Gen. 142, 144 (1955). Because this self-curing, alternate remedy clearly "reaches the end intended," Petitioners are not entitled to mandamus relief. *State ex rel. Bronaugh v. City of Parkersburg*, 148 W. Va. 568, 573, 136 S.E.2d 783, 786 (1964) (citation omitted).

Petitioners conjure a purported "Catch-22" to dismiss this alternate remedy, arguing the three-fifths requirement is unfairly difficult because, "since they're not already convened, they have no practical or reasonable possibility of achieving such a result." Pet. 35. That, however, is a complaint with the Constitution, not the Governor. Nor is the criticism realistic, because Section 19 does not require any formal procedure, simply a written application to the Governor. *See* 46 W. Va. Op. Atty. Gen. at 143 (explaining that signatures need only be "properly authenticated" and the application delivered to the Governor). In a world where so many things have gone virtual—from college and kindergarten classes, court hearings and yoga sessions, concerts and catch ups with grandparents—it is implausible that requiring the Legislature to coordinate remotely is a bridge too far. They can call, text, or email their fellow legislators to garner votes, or even mail around a ballot—no technology needed. Nor is campaign season a valid excuse. Pet. 18. If campaigning makes this single vote impossible, it is unclear how Petitioners plan to participate in the session they ask the Governor to convene. Regardless, the Constitution has more faith in legislators' ability to communicate outside of formal session than Petitioners do.

Failing to get *enough* votes for a special session is not a cognizable legal injury, either, and it is certainly not the Governor's fault. Lack of success persuading three-fifths of the Legislature to demand a special session is no more a separation-of-powers violation than is failing to get

enough votes for a particular bill. And it does not "disenfranchise[] the people of West Virginia," Pet. 35, to follow the Constitution. If anything, it appears that principles of democracy are working: The three-fifths requirement shows that the Constitution's drafters intended for calling the Legislature into special session not to be a simple task. Because there is no valid basis to brush aside this alternate remedy, there is no basis for a writ of mandamus.

II. The State's Emergency Powers Statute Does Not Violate Separation Of Powers And Mandamus Is The Wrong Avenue To Declare Months Of Executive Orders Unconstitutional.

A writ of mandamus is also inappropriate for Petitioners' claim that each and every executive order the Governor issued pursuant to West Virginia Code Section 15-5-6 since March is unconstitutional.

As an initial matter, mandamus is the wrong remedy because this aspect of Petitioners' claim is not about wrongfully withheld, nondiscretionary action—it is a challenge to actions *already taken*. There is thus nothing for the Court to compel the Governor to do. After all, when the Court holds a statute unconstitutional, it does not order the Legislature to repeal it. There is no legal basis to require the Governor to "rescind all of his Executive Orders in response to COVID-19," either. Pet. 36. The Court should dismiss this claim on that basis alone.

The argument fares no better on the merits, even if the Court entertains it. *First*, Petitioners have not come close to showing that every one of the COVID-19 executive orders—issued at different times, with different facts, and implicating different constitutional interests—is legally flawed. Perhaps plausible constitutional challenges could be brought to some subset of the orders, but it would take more than generalized invocations of "other rights secured by the West Virginia Constitution and U.S. Constitution," Pet. 36, to succeed in striking down any one or more of them. Similarly, the missing piece from Petitioners' discussion of liberty interests and equal protection,

Pet. 30-33, is an argument that any specific order fails strict scrutiny or other pertinent constitutional tests for analyzing these rights, much less that *all* of them do. And in any event, mandamus is not a tool for error correction. *State ex rel. Ray v. Wilson*, 2013 WL 2477272, at *2 (W. Va. June 10, 2013) (mem.) (citing syl. pt. 1, *State ex rel. Buxton v. O'Brien*, 97 W. Va. 343, 125 S.E. 154 (1924)). This means that even if Petitioners could demonstrate clear legal deficiency in every COVID-19 executive order, mandamus would still be unwarranted.

Second, Petitioners' claim that the legal framework undergirding the Governor's actions is shaky also fails. At best for Petitioners, this is a disputed issue. Yet the existence of "core . . . legal disputes" is reason to withhold mandamus relief. *Sluss*, 2019 WL 5960252, at *6. Petitioners are not entitled to resolve this far-reaching question in the extraordinary posture of mandamus.

The Court can also refuse the writ on more direct grounds: Statutes and the West Virginia Constitution support the Governor's initial authority to declare a state of emergency under these circumstances and to exercise emergency powers pursuant to West Virginia Code Section 15-5-6. To begin, COVID-19 was an appropriate predicate for a state of emergency. The Governor has the power to declare a state of emergency when "a natural or man-made disaster of major proportions has actually occurred or is imminent within the state." W. Va. Code § 15-5-6(a). "Disaster" is defined broadly, and the statute specifically includes "epidemic" in its list of examples. *Id.* § 15-5-2(h). Petitioners are therefore incorrect that the Legislature deliberately excluded sickness from the statute. Pet. 28-29. It is also irrelevant whether any positive cases had been identified in the State when the Governor declared a state of emergency, Pet. 25, because the statute speaks in terms of "imminent" as well as actual threats. W. Va. Code § 15-5-6(a). Likewise, reasonable minds can disagree at what point COVID-19 is serious enough to justify emergency powers—a separate question from whether *specific* actions taken pursuant to that

authority are constitutional—but courts uphold threshold decisions like these as long as there is "a factual basis" and the official "acted in good faith." *United States v. Chalk*, 441 F.2d 1277, 1282 (4th Cir. 1971). And because "evidence cannot be taken and proof cannot be made" during mandamus proceedings, disputes over the degree of risk COVID-19 poses for West Virginia only underscore that mandamus is the wrong tool. Syl. pt. 6, *Veltri v. Parker*, 232 W. Va. 1, 750 S.E.2d 116 (2013) (citation omitted).

The emergency powers statute also does not impermissibly delegate legislative power to the Executive. Unlike more common separation-of-powers claims that one branch is unilaterally infringing another's role, here the Legislature expressly authorized the actions Petitioners challenge. This is thus not a case of executive encroachment "absent a specific grant of power," *State v. Clark*, 232 W. Va. 480, 498, 752 S.E.2d 907, 925 (2013), distinguishing cases where the Court struck down executive orders as contrary to "specific statutory mandate[s]," Syl. pt. 1, *Cty. Comm'n of Mercer Cty. v. Dodrill*, 182 W. Va. 10, 385 S.E.2d 248 (1989) (citation omitted).

To be sure, it is possible for the Legislature to delegate too much authority to the Executive Branch, but that is not this case. The Legislature may "obtain[] the assistance of the coordinate Branches" without violating the separation of powers. *Mistretta v. United States*, 488 U.S. 361, 372 (1989). The key lies in checks and balances, and whether the Legislature provides limits and direction when delegating. Petitioners themselves acknowledge that the Court "recognized the need for some flexibility in interpreting the separation of powers doctrine in order to meet the realities of modern day government." Pet. 25 (quoting *Appalachian Power Co. v. Public Serv. Comm'n of W. Va.*, 170 W. Va. 757, 759, 296 S.E.2d 887, 889 (1982)). It is difficult to imagine a context where flexibility is more important than in responding to emergency situations where time is of the essence and lives are at stake. The emergency powers statute strikes a balance between

making sure the State can take fast action even when the Legislature is not in session, and ensuring that the Governor does not take advantage of the situation through numerous statutory checks: The Governor may act only in a state of emergency or preparedness pursuant to a specific statutory definition, for example, and then only in eleven areas the statute enumerates. W. Va. Code § 15-5-6(a), (c). This means the Governor cannot issue orders on any topic, in contrast to the Legislature's general legislative and police powers. The Legislature also retains power to call "stop!" at any time by terminating the state of emergency through a concurrent resolution, *id.* § 15-5-6(b)—and of course the courts remain open to hear challenges that orders issued pursuant to emergency powers violate constitutional freedoms.

Petitioners rely heavily on the Wisconsin Supreme Court's recent decision invalidating COVID-19 orders, but that trust is misplaced. The Wisconsin court decided the case on statutory grounds, not constitutional. *See* Pet. 21 ("We further conclude that Palm's order . . . exceeded the statutory authority of Wis. Stat. § 252.02 upon which Palm claims to rely." (quoting *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 4 (May 13, 2020))). Even the court's alternate "constitutional-doubt principle" analysis is distinguishable: The sticking point was that it was unlikely to be constitutional for "an unconfirmed cabinet secretary" to wield police powers. *Palm*, 20 WI 42, ¶ 31. What is more, the court not only emphasized that "the Governor's emergency powers" were not at issue, but strongly indicated that any challenge on those grounds would fail because "[c]onstitutional law has generally permitted the Governor to respond to emergencies without the need for legislative approval." *Id.* ¶ 41.

A better comparison case is the Michigan Court of Claims's recent decision, which upheld the Michigan Governor's exercise of emergency powers against a non-delegation challenge similar to Petitioners' here. *Mich. House & Senate v. Gov. Whitmer*, No. 20-79, at 4-6 (Mich. Ct. of

Claims May 19, 2020). That court did not rush to invalidate a public-safety statute as Petitioners would have this Court do, and instead rejected the challengers' view of delegation of legislative power as out of step with the decisions of state and federal courts. *Id.* at 2, 4. It also emphasized the checks in Michigan's statutes, similar to those in West Virginia Code Section 15-5-6, including definitions of "emergency" and "disaster" and a limited set of subjects on which the Governor can issue orders. *Id.* at 4-6. And it explained it would be "unreasonable" to require a more "demanding or precise set of legislative standards" for a statute designed for "dynamic, unpredictable situation[s] fraught with complexity." *Id.* at 7. The same is true here.

Finally, mandamus is unavailable because there are at least two alternate remedies for any legal challenges to the Governor's COVID-19 executive orders. First, there is no need for judicial intervention at all because if the Legislature disagrees with the Governor the cure is in its own kitchen: A state of emergency "terminates upon . . . the passage by the Legislature of a concurrent resolution terminating the state of emergency or state of preparedness." W. Va. Code § 15-5-6(b). The Legislature could also rescind any and all executive orders it deems unwise through legislation. *See Baker v. Civil Serv. Comm'n*, 161 W. Va. 666, 672, 245 S.E.2d 908, 911 (1978) (holding that statute effectively voiding executive order did not violate separation of powers).

In the meantime, anyone aggrieved by a COVID-19 executive order could challenge it in the normal course by filing a complaint in circuit court and, if necessary, taking an appeal to this Court. Courts have been responsive to time-sensitive matters throughout the COVID-19 crisis, and Petitioners could seek the same relief through an ordinary lawsuit. Indeed, an injunction would be "equally beneficial, convenient and effective" as mandamus. Syl. pt. 2, *Stowers v. Blackburn*, 141 W. Va. 328, 90 S.E.2d 277 (1955). Petitioners give no reason why other means of judicial review are inadequate, urging instead "the importance of the instant constitutional crisis" as the

reason they have "no other adequate remedy." Pet. 37. Yet importance is not enough to jettison the mandamus standard; circuit courts hear (and this Court reviews) important cases all the time. To the contrary, Petitioners had it right when they acknowledged courts' rightful skepticism where a party is "attempting to substitute a mandamus for an appeal." Pet. 37. Because the ordinary judicial process is the right way to resolve any challenge to COVID-19 executive orders—wholesale or individually—Petitioners cannot meet the high standard for mandamus relief.

III. Petitioners' Jurisdictional Failing Also Bars Relief.

Beyond the substance of the Petition, Petitioners' failure to provide pre-suit notice, W. Va. Code § 55-17-3(a)(1), can also serve as a separate basis for dismissal. The Court need not reach this issue as the Petition can be dismissed for its failure to satisfy the mandamus standard, as discussed in Parts I and II. *See State ex rel. Fairmont State Univ. Bd. of Govs. v. Wilson*, 239 W. Va. 870, 875 n.15, 806 S.E.2d 794, 799 n.15 (2017) (declining to reach pre-suit notice issue after denying writ of prohibition on other grounds). But Petitioners are incorrect (at Pet. 37-38) that the pre-suit notice requirement never applies to mandamus proceedings. *See State ex rel. McDavid v. Tennant*, 2014 WL 4922641, at *3 (W. Va. Oct. 1, 2014) (mem.) (noting that the petitioner provided pre-suit notice before filing mandamus action).

The pre-suit notice statute exempts actions for 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." W. Va. Code § 55-17-3(a)(1). It is difficult to credit Petitioners' asserted basis for this emergency exception where they filed over two months after their alleged injuries began, and well into the State's road to "reopening" when many of the restrictions have been lifted. Petitioners' claim that requiring them to comply with the pre-suit notice requirement violates separation of powers by letting the Legislature limit this Court's jurisdiction, Pet. 38, is also

unavailing. It is well established that the Legislature may limit how lawsuits are initiated and that "consequences [may] flow if the limits are not followed, including dismissal." *W. Va. Human Rights Comm'n v. Garretson*, 196 W. Va. 118, 125, 468 S.E.2d 733, 740 (1996). Because failure to provide pre-suit notice is jurisdictional, the Court could also dismiss on this basis. Syl. pt. 3, *Motto v. CSX Transp., Inc.*, 220 W. Va. 412, 647 S.E.2d 848 (2007).

CONCLUSION

The Court should deny the Petition.

Respectfully submitted.

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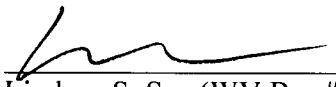

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DATED: June 29, 2020

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 29, 2020, a copy of the foregoing Response To Petition For Writ Of Mandamus was served on opposing counsel via email and first-class mail addressed as follows:

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