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October 19, 2020

Cathy S. Gatson
Kanawha County Circuit Clerk
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Ms. Gatson:

Please find enclosed a motion to dismiss, motion to exceed page limit, response to request for preliminary injunction, and combined witness/exhibit disclosure for filing in *West Virginia Education Association v. Justice*, 20-P-280. The required appendices to the motion to dismiss and response to request for preliminary injunction have been provided to Judge Webster and Mr. Katz but are not being filed.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Brent W. Wolfingbarger
Senior Deputy Attorney General

cc: Honorable Carrie Webster
Andrew J. Katz, Esquire

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

WEST VIRGINIA EDUCATION ASSOCIATION,
DALE LEE and HOLLY RHINEHART,

Petitioners,

v.

Civil Action No. 20-P-280
The Honorable Carrie Webster

THE HONORABLE JAMES JUSTICE,
GOVERNOR OF THE STATE OF WEST VIRGINIA

Respondent.

MOTION TO DISMISS PETITION FOR INJUNCTIVE RELIEF

Respondent Governor James Justice (hereinafter the Governor) respectfully moves this Court to dismiss this *Petition for Injunctive Relief including a Temporary Restraining Order and to Enforce the West Virginia Open Meetings Act* (hereinafter, the "Petition") pursuant to Rules 12(b)(6) and 12(b)(1) of the West Virginia Rules of Civil Procedure because the Petitioners fail to state a claim upon which relief may be granted and the Petition is jurisdictionally barred. Pursuant to W.Va. Code § 55-17-3(a)(1), the Petitioners were required to provide the Governor and Attorney General Patrick Morrisey with notice of their alleged claims and the relief desired at least thirty (30) days prior to initiating this civil action. The Petitioners failed to provide such notice and their claims do not fit within the narrow notice exception set forth in that Code section. Moreover, the Petitioners lack standing because they failed to allege a concrete or imminent injury. Thus, dismissal of this action is mandated by the plain meaning of the statute and precedential case law. Additionally, because the Court does not have jurisdiction to review the Governor's discretionary acts taken during a state of emergency, Count I of the *Petition* must be dismissed because it seeks

to litigate a non-justiciable political question. Count I also must be dismissed because it fails to identify any specific right, rule or statute the Governor's actions allegedly violated; it fails to demonstrate that the Petitioners have been treated differently than those similarly situated, and it fails to articulate any cognizable cause of action upon which relief can be granted. Lastly, Count II must be dismissed because the Open Governmental Proceedings Act is plainly inapplicable here.

BACKGROUND

On March 4, 2020, the Governor proclaimed a State of Preparedness to enable state officials to respond appropriately to the potential threats created by an outbreak of a novel coronavirus (hereinafter, "COVID-19"). MTD Ex. A, at 1.[1] Nine days later, the Governor announced the physical closure of all pre-kindergarten through twelfth grade schools (hereinafter "pre-K-12 schools") in West Virginia; and on March 16, 2020, he declared a State of Emergency related to COVID-19. MTD Ex. B. Soon afterwards, he issued an executive order limiting the operation of non-essential businesses and directing individuals to stay at home unless performing an essential activity. Exec. Order No. 9-20 (Mar. 23, 2020). By April, the Governor initiated a phased plan to lift a number of these restrictions. Exec. Order No. 32-20 (April 13, 2020).

As part of that phased reopening, the Governor issued an executive order on July 21, 2020, establishing September 8, 2020 as the anticipated date that in-person instruction for pre-K-12 schools would resume. Exec. Order 56-20, at 3 (July 24, 2020). To effectuate this reopening date, the Governor also implemented a County Alert System with the advice of public health experts

[1] The proclamations and executive orders of the Governor of West Virginia are publically available in the Executive Journal maintained online by the West Virginia Secretary of State, *see* W. VA. SECRETARY OF STATE, EXECUTIVE JOURNAL: PROCLAMATIONS, *available at* http://apps.sos.wv.gov/adlaw/executivejournal/searchproclamations.aspx; W. VA. SECRETARY OF STATE, EXECUTIVE JOURNAL: EXECUTIVE ORDERS, *available at* http://apps.sos.wv.gov/adlaw/executivejournal/searchproclamations.aspx, and subject to judicial notice. W. Va. R. Evid. 202. For this Court's convenience, each cited proclamation and executive order is enclosed with the Governor's *Motion to Dismiss* as Exhibit A.

that provided a "county-by-county color-coded system and map to monitor COVID-19 case rates." Exec. Order 68-20, at 3 (Sept. 4, 2020). That order also indicated that as "COVID-19 case rates may change from time to time," the "limitations placed on in-person instruction and athletic and extracurricular activities" could also change. *Id.* at 3. The Governor also created the COVID-19 Data Review Panel (hereinafter, the "Panel"), Pet. ¶ 23, which included various public health officials to review these changing case rates and to verify the accuracy of reported data.[2] The County Alert System originally assigned each county one of four colors – green, yellow, orange, or red – at the beginning of each week based on the incidence of COVID-19 within the county's borders. Pet. ¶ 12. On September 15, 2020, the Governor added a fifth color (gold) to the system. Exec. Order 70-20, at 3 (Sept. 15, 2020).[3] Each color corresponds to certain restrictions on in-person instruction, extra-curricular activities, and athletic events for pre-K-12 schools. *Id.*

On October 5, 2020, the Petitioner filed their *Petition*.[4] The Petitioners did not indicate they gave the Governor or the Attorney General pre-suit notice of this action as required by W.Va. Code § 55-17-3(a)(1) and the mail logs of both officers reflect neither official received such notice.

The *Petition* contains two counts. In Count I, the Petitioners appear to argue that the Governor's County Alert System must *precisely* correspond to parameters and recommendations set forth in a color-coded map created by the Harvard Global Health Initiative (hereinafter, the

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[2] W. VA. DEP'T HEALTH & HUMAN RES., "COVID-19 Data Review Panel Examines State's Data" (Sept. 5, 2020), *available at* http://dhhr.wv.gov/News/2020/Pages/COVID-19-Data-Review-Panel-Examines-State's-Data.aspx.

[3] *See* W. VA. DEP'T OF ED., School Alert System: Saturday Education Map (updated Oct. 17, 2020), *available at* http://wvde.us/school-reentry-metrics-protocols/.

[4] When a complaint names "more than one individual plaintiff," the Rules of Civil Procedures provide that "each plaintiff . . . be assigned a separate civil action number and . . . be charged a separate fee" for filing their suit. W. Va. R. Civ. Pro. 3(a). Despite joining three petitioners to this suit, it appears form the Petitioner's Civil Case Information Statement that they paid a single filing fee for all three petitioners. In such circumstances, "the circuit judge to whom the case has been assigned must determine whether the requirements" of Rule 3(a) "are met such that additional filing fees should be assessed." *State ex rel. J.C. v. Mazzone*, 233 W. Va. 457, 466, 759 S.E.2d 200, 209 (2014) (quoting Syl. Pt. 4, *Cable v. Hatfield*, 202 W. Va. 638, 639, 505 S.E.2d 701, 702 (1998)).

"Harvard Map"). Pet. ¶ 13. They also appear to argue the Governor should "spend tens of millions of dollars" the State received through Title V, Section 5001 of the Coronavirus Aid, Relief, and Economic Security Act of 2020 (hereinafter, the "CARES Act"), Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020), to purchase additional school safety equipment. Pet. ¶ 20. In Count II, the Petitioners argue the Governor must comply with the Open Governmental Proceedings Act, W. Va. Code §§ 6-9A-1 *et seq*. (hereinafter, "Sunshine Act") when he meets with the Panel to review and discuss current COVID-19 test information before updating the County Alert System each week. Pet. at ¶ 23-27. They also argue the Governor must comply with the Sunshine Act when he with 'health experts' to help him formulate the State's COVID-19 responses. Pet. ¶ 25-27.

In Count I, the Petitioners request a temporary restraining order ("TRO") and permanent injunction ordering the Governor to "strictly follow the criteria of the Harvard Map," to modify certain testing criteria, and to "release additional" CARES Act money for the safety of students, education personnel, and their families. Pet. at 7-8. In Count II, the Petitioners request a TRO and permanent injunction ordering the Governor to comply with Sunshine Act requirements including public notice and publication of minutes. *Id.* at 9.

BURDEN

A circuit court must "address[] problems regarding subject-matter jurisdiction" with "urgency" because where jurisdiction is lacking, any action it takes is void. *State ex rel. Univ. Underwriters Ins. Co. v. Wilson*, 239 W. Va. 338, 346, 801 S.E.2d 216, 224 (2017). The Petitioners bear the burden of establishing jurisdiction in this matter. *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999); *cf.* Syl. Pt. 3, *State ex. rel. TermNet Merchant Serv., Inc. v. Jordan*, 217 W. Va. 696, 697, 619 S.E.2d 209, 211 (2005). And whenever jurisdiction is lacking in a case, the court "must take no further action in the case other than to dismiss it from the docket." *Cf.* Syl. Pt. 1, *Hinkle v. Bauer Lumber & Home Bldg. Center, Inc.*, 158 W. Va. 492, 211 S.E.2d 705 (1975).

The *Petition* must also be dismissed under Rule 12(b)(6) of the Rules of Civil Procedure if the Petitioners failed to "allege[] sufficient facts" to "outline the essential elements" of their claims, *Brown v. City of Montgomery*, 233 W. Va. 119, 127, 755 S.E.2d 653, 661 (2014) (quoting FRANKLIN D. CLECKLEY, ROBIN J. DAVIS, & LOUIS J. PALMER, JR., LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE, § 12(b)(6)[2], at 384-88 (4th ed. 2012)), or if it appears that they can prove no set of facts to support their requested relief. Syl. Pt. 3, *Bowden v. Monroe Cnty. Comm'n*, 232 W. Va. 47, 47, 750 S.E.2d 263, 264 (2013). For the purposes of this motion, the factual allegations of the *Petition* must be taken as true. Syl. Pt. 2, *Bowden*, 232 W. Va. at 47, 232 S.E.2d at 264.

ARGUMENT

I. THE *PETITION* IS JURISDICTIONALLY DEFECTIVE AND MUST BE DISMISSED.

The *Petition* is jurisdictionally defective in its entirety and must be dismissed because the Petitioners failed to provide the Governor and the Attorney General pre-suit notice as required and because they failed to allege a concrete or imminent injury. Count I also must be dismissed because the Court does not have jurisdiction to review the Governor's discretionary acts taken during a state of emergency despite the Petitioners' efforts to litigate a non-justiciable political question.

a. The Petitioners' failure to provide pre-suit notice requires dismissal.

No less than thirty days before the Petitioners filed this civil action, W.Va. Code § 55-17-3(a)(1) required them to provide the Governor and the Attorney General with "written notice, by certified mail, return receipt requested, of (their) alleged claim and the relief desired." *Id.* Failure to comply with this notice requirement has clear and mandatory consequences. The Supreme Court of Appeals has concluded that pre-suit notice is a "jurisdictional pre-requisite" for filing suit against the State. Syl. Pt. 3, *Motto v. CSX Transp., Inc.*, 220 W.Va. 412, 413, 647 S.E.2d 848, 849

(2007). It also has repeatedly affirmed that a party's "failure to comply" with this requirement "mandate[s]" dismissal. *Id.* at 419, 647 S.E.2d at 855; *Melissa C. v. W. Va. Dep't of Health & Human Res.*, No. 15-0863, 2016 WL 2970887, *2 (W.Va. May 20, 2016) (memorandum decision).

The Petitioners' pleadings in this case do not allege that they gave either the Governor or the Attorney General the required pre-suit notice. And because such allegations are a pre-requisite to this Court's jurisdiction, it is their burden to do so. Syl. Pt. 3, *Motto*, 220 W. Va. at 413, 647 S.E.2d at 849. But this is not simply a failure of pleading. Upon information and belief, neither State officer received pre-suit notice. The Petitioners have simply failed to provide the notice mandated by West Virginia Code § 55-17-3(a)(1).

W.Va. Code § 55-17-3(a)(1) provides an exception to the pre-suit notice requirement, but the Petitioners do not meet its requirements. This exception applies where (1) the complaining parties "seek injunctive relief" and (2) the court finds "that irreparable harm would have occurred if the institution of the action was delayed" by the pre-suit notice requirement. *Id.*

The exception's "irreparable harm" requirement echoes part of the test for determining when a temporary restraining order (hereinafter "TRO") and a preliminary injunction is appropriate. W. Va. R. Civ. P. 65(b); *Morrisey v. W. Va. AFL-CIO*, 239 W. Va. 633, 639, 804 S.E.2d 883, 889 (2017). A TRO may only be granted where "it clearly appears . . . that immediate and irreparable injury, loss, or damage will result" if the TRO is not immediately granted. W. Va. R. Civ. P. 65(b)(1). And to meet this burden, the requesting party must present "specific facts" to the court "by affidavit or by verified complaint." *Id.* To grant a preliminary injunction, "irreparable harm" must be likely. *Camden-Clark Mem'l Hosp. Corp. v. Turner*, 212 W. Va. 752, 760, 575 S.E.2d 362, 370 (2002). And "the party seeking the injunction . . . bear[s] the burden of demonstrating" this factor. *Id.*

Similarly, the Petitioners bear the burden of showing that an exception to pre-suit notice exists here. *Cf. Evans*, 166 F.3d at 647. Admittedly, the Petitioners seek a TRO and permanent injunctive relief, but this alone is insufficient to fall within the exception's plain language. *See Gomez v. State Athletic Comm'n*, No. 16-0103, 2016 WL 5348350, at *3 (W.Va. Sept. 23, 2016) (memorandum decision) (dismissing suit for permanent injunction for failure to provide pre-suit notice). They must also make a sufficient showing to enable this Court to find that "irreparable harm **would have occurred** if the institution of the action was delayed" by the notice. W. Va. Code § 55-17-3(a)(1) (emphasis added). And they have failed to meet this burden.

The Petitioners have alleged the Governor's actions "increase the risk of exposure to COVID-19" for West Virginians and that this allegedly increased risk of exposure constitutes irreparable harm. Pet. ¶ 22. But they have not filed an affidavit or verified complaint which makes the "specific facts" of this alleged harm "clear," nor have they shown that this harm is likely. W.Va. R. Civ. Pro. 65(b)(1); *see also Camden-Clark*, 212 W. Va. at 760, 575 S.E.2d at 370. They also have not shown that this harm "would have occurred" if they had provided notice and waited thirty days before filing suit. W. Va. Code § 55-17-3(a)(1). In fact, they have not even made such allegations. They simply have made no attempt to show an exception to pre-suit notice exists here.

b. The Petitioners' failure to allege a concrete or imminent injury requires dismissal.

As a threshold matter, litigants must always satisfy "the irreducible constitutional minimum of standing" to invoke this Court's jurisdiction. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Standing is composed of three elements:

> First, the party attempting to establish must have suffered an "injury-in-fact" – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must also be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court.

Syl. Pt. 5, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 576 S.E.2d 807 (2002).

The Petitioners clearly fail on the first and third prongs because they have failed to allege a concrete injury or one that is imminent, and this Court cannot offer redress for their vague claims. At best, the alleged harm is speculative, hypothetical, and far from concrete or particularized.

c. Count I of the *Petition* is barred by the political question doctrine.

The State Constitution and laws "vest in [the Governor] certain powers and duties, and he is necessarily clothed with the right to determine what his duties are in any emergency; and, so long as he acts within the limits of his constitutional powers and privileges, his official conduct is not subject to review in any other manner than that provided by the Constitution which created his high office." *Hatfield v. Graham*, 73 W.Va. 759, 81 S.E. 533 (1914). Because the Petitioners have failed to identify any constitutional or statutory provisions that the Governor has allegedly violated in this matter, this Court lacks jurisdiction to consider their attempt to micromanage the Governor's executive action during a state of emergency via litigation. Thus, the Petition should be dismissed pursuant to Rules 12(b)(1) and 12(b)(6) for lack of jurisdiction and failure to state a claim.

Count I must also be dismissed as barred by the political question doctrine. Petitioners ask this Court to umpire a political dispute – whether the Governor's actions on re-opening schools is wise. Although courts can "call[] balls and strikes" for legal disputes, *West v. Ky. Horse Racing Comm'n*, 972 F.3d 881, 889 (6th Cir. 2020) (citation omitted), they cannot do the same for political disputes. *See Bds. of Educ. of Ctys. of Barbour v. Pub. Employees Ins. Agency*, 2011 WL 9373981, *5 (W. Va. Nov. 10, 2011) (memorandum decision). Rather, courts lack subject-matter jurisdiction over non-justiciable political questions. *See, e.g.*, *State ex rel. Erie Fire Ins. Co. v. Madden*, 204 W. Va. 606, 610 n.6, 515 S.E.2d 351, 355 n.6 (1998) (citing *E. v. Doe*, 159 W.Va. 200, 208, 220 S.E.2d 672, 678 (1975)).

The political question doctrine bars suits under two circumstances that are relevant here. It applies *first*, where there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department," *Baker v. Carr*, 369 U.S. 186, 216 (1962); and *second*, where there is "a lack of judicially discoverable and manageable standards for resolving" the question. *Id.* Both circumstances apply here.

First, the issues raised in Count I are demonstrably committed to the Governor. For over 100 years, the Supreme Court of Appeals has recognized that questions regarding the wisdom of the Governor's emergency actions are political and non-justiciable. In the *Hatfield* case cited above, the Governor declared a state of insurrection in portions of the State. *See Hatfield*, *supra.* During this state of insurrection, the Governor prevented the Socialist Printing Company from encouraging insurrection, and this action was challenged in court. *Id.* at 81 S.E. 536. But the Supreme Court of Appeals granted a writ of prohibition for want of jurisdiction, explaining that "[t]he office of Governor is political, and the discretion vested in the chief executive by the Constitution and laws of the state respecting his official duties is not subject to control or review by the courts." Syl. Pt. 1, *Hatfield*, 73 W. Va. 759, 81 S.E. 533. During states of emergency, "the courts have been very careful to observe the line of demarcation separating the jurisdiction of the executive from the judiciary." *Hatfield*, at 81 S.E. 538.

The facts of *Hatfield* closely resemble this case, where the Governor has declared a state of emergency, and exercised his statutory and constitutional authority to develop metrics for re-opening public schools. MTD Ex. B; *see also* Exec. Orders 68-20, 70-20. This Court should conclude – as did the court in *Hatfield* – that the exercise of the Governor's discretion here "is not subject to control or review by the courts." Syl. Pt. 1, *Hatfield*, 73 W. Va. 759, 81 S.E. 533.

More recently, the court confirmed that political questions should be addressed by legislators and voters. In *State ex rel. League of Women Voters of W. Virginia v. Tomblin*, the court held that whether to follow "suggestions contained in the budget digest . . . is a matter with which the executive branch, not this Court, must deal." 209 W. Va. 565, 574, 550 S.E.2d 355, 364 (2001). Even if the decision to follow or ignore those suggestions was unwise, the court held "there is no legal impediment to that decision." *Id.*

Persuasive federal precedent similarly indicates that Count I raises non-justiciable political questions. In *Mi Familia Vota v. Abbott*, plaintiffs challenged COVID-19 related election procedures. 2020 WL 5366291 (W.D. Tex. Sept. 7, 2020). The court dismissed the case for lack of subject-matter jurisdiction after holding that the claims were non-justiciable political questions, explaining that "[a]nalysis of the causes of action asserted necessarily requires determination of the danger to the public health of the current election procedures, and disparate impact, if any, on protected classes of citizens to devise and determine proper procedures to reduce this public health risk." *Id.* at *6. As making public health decisions falls to the political branches and not the judicial branch, the court held it lacked jurisdiction over the plaintiffs' claims. *Id.*

This conclusion is also consistent with the decision issued by the Supreme Court of the United States two weeks ago in *Andino v. Middleton*, 2020 WL 5887393 (U.S. Oct. 5, 2020) (*per curiam*). There, the Fourth Circuit enjoined South Carolina's response to COVID-19. *Id.* at *1. But the Court granted in part South Carolina's request for a stay. *Id.* This conclusion was justified because "the Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States. When those officials undertake[ ] to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad." *Id.* (Kavanaugh, J., concurring) (quotations and internal citations omitted). Similarly, if this Court

second-guesses the Governor's decision-making on re-opening public school – as the Petitioners request – it would interfere with an area left by statute and constitution to his discretion. The political question doctrine bars the requested exercise of judicial power.

Second, there is no judicially manageable standard for determining what COVID-19 reopening metrics are legal. As the Supreme Court of the United States explained, for a claim to be justiciable there must be a "standard for resolving such claims" that is "grounded in a limited and precise rationale" while also being "clear, manageable, and politically neutral." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2498 (2019) (quotation omitted).

In *Rucho*, the Court held there is no such limited and clear rationale for resolving partisan gerrymandering cases: "Deciding" political gerrymandering cases requires choosing "among" several "different visions of fairness" which poses basic political – not legal – questions. *Rucho*, 139 S. Ct. at 2500. Petitioners ask this Court to engage in a similar process and decide among several different visions of what constitutes an appropriate school re-opening plan. Pet. ¶ 15.

The mere fact that Petitioners offer the Harvard Map as an alternate metric is irrelevant. In *Rucho*, plaintiffs offered a metric to calculate the amount of "wasted" votes to determine whether politically gerrymandered maps were constitutional. *See Rucho*, 139 S. Ct. at 2518 n.4. Yet the Court still held the case raised a non-justiciable political question because it required the Court to decide between competing metrics. Petitioners ask this Court to choose between two different metrics: One crafted by an outside group at Harvard that was not specifically tailored to address West Virginia's unique circumstances and one crafted by the Governor. But they have presented no appropriate standards for selecting one metric over the other. The choice between the competing plans for re-opening public schools is simply political and not subject to this Court's jurisdiction.

But that does not mean that the Governor's authority is unbridled. Rather, he "must . . . defend [his actions], both to the [Legislature] and to the public, in whose best interests we must assume [he] intended to act." *League of Women Voters*, 209 W. Va. at 574, 550 S.E.2d at 364. Here, the Legislature could choose to call itself into special session and end the declared state of emergency. Or it could pass legislation divesting the Governor of the authority to make these decisions unilaterally. To date, it has chosen not to exercise these political checks.

In three weeks, the citizens of this State will go to the polls to elect a governor to serve for the next four years. The Governor is standing for re-election and his response to the COVID-19 pandemic – including his school re-opening plan – is at the center of the campaign. "[W]herever, within the sphere of his duties, the executive has a discretion, he is amenable for refusing to perform, not to the court, but to the Senate on an impeachment, or to the people at the polls." *Hatfield*, 81 S.E. at 538 (quoting *Mauran v. Smith*, 8 R.I. 192, 5 Am. Rep. 546 (1865)). The Constitution and precedent appropriately divests courts of subject-matter jurisdiction over non-justiciable political questions. Thus, Count I must be dismissed for lack of jurisdiction.

II. THE *PETITION* MUST BE DISMISSED ON THE MERITS.

a. Count I fails to set forth any basis for relief.

Count I fails to articulate any cognizable causes of action. There are no allegations that the Governor has violated any constitutional or statutory provision. Nor is there any allegation that the Governor is violating a common law duty. Instead, Count I just makes factual averments and argues that this Court should enjoin the Governor's actions simply because the Petitioners disagree with his approach. This is insufficient to state a claim for relief; therefore, dismissal is warranted.

To state a claim for relief, a plaintiff must "set forth what specific right, rule, or statute was violated or created a duty on [a defendant's] part that was breached." *Andy E. v. Doe*, 2015 WL 2381320, *2 (W.Va. May 18, 2015) (memorandum decision). When the plaintiff fails to do so, it

"fails to state a claim upon which relief can be granted." *Id.*; *see also Nasious v. Two Unknown B.I.C.E. Agents, at Arapahoe Cty. Justice Ctr.*, 492 F.3d 1158, 1163 (10th Cir. 2007) ("After all, these are, very basically put, the elements that enable the legal system to get weaving – permitting the defendant sufficient notice to begin preparing its defense and the court sufficient clarity to adjudicate the merits.").

This is not a heavy burden. All that is required is "a short and plain statement" that gives "the defendant fair notice of" the claim "and the grounds upon which it rests." *Brown*, 233 W. Va. at 127, 755 S.E.2d at 661. But Petitioners here have plainly failed to meet even this basic requirement. Count I does not allege that the Governor violated any constitutional right, statutory right, or common law duty, and it cites no legal authority for its requested relief. Such a pleading is plainly inadequate and must be dismissed.

b. Any claims Petitioners theoretically could plead are inapplicable.

But even if this Court engages in speculation regarding the Petitioners' intended causes of action, such potential causes are inapplicable and would fail to state a claim for relief if asserted.

i. The Governor has statutory authority to implement his County Alert System.

Any claim that the Governor lacks statutory authority to implement his County Alert System is clearly without merit. A state of emergency may be "proclaimed by the Governor or by concurrent resolution of the Legislature" if the Governor or Legislature finds 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). On March 16, 2020, the Governor declared a state of emergency in response to the COVID-19 pandemic, thus authorizing his exercise of such emergency authority. The state of emergency continues and therefore the Governor's emergency authority continues.

The Governor's emergency powers include the discretion to "implement a comprehensive plan and program" in response to a state of emergency. W. Va. Code § 15-5-5(2). He is also authorized "[t]o control . . . the occupancy of premises" where a state of emergency exists. W.Va. Code § 15-5-6(c)(6). Currently, the declared emergency covers the entire State, MTD Ex. B, so the Governor can control the occupancy of buildings in the state. The Governor has exercised this authority at times by barring occupancy of casinos, gyms, and other businesses.

But the statute is not limited to just private businesses. The Governor also has the authority to control the occupancy of public buildings such as schools. However, the methods used to determine whether and how to limit the occupancy of such buildings are left to the Governor's discretion, and he chose to use certain metrics – published periodically – in making those decisions pursuant to his statutory authority arising from W.Va. Code § 15-5-6(c)(6).

The Governor similarly has statutory authority to promulgate those metrics under West Virginia Code § 15-5-6(c)(11). During a state of emergency, the Governor may "perform and exercise other functions, powers and duties that are necessary to promote and secure the safety and protection of the civilian population." The Governor determined that allowing in-person public schooling would promote the safety of the State's civilian population only when certain metrics are satisfied. If Count I was intended to allege that the Governor lacked statutory authority to promulgate the metrics, that allegation fails to state a claim upon which relief may be granted.

ii. The Governor's actions satisfy rational-basis review.

The Governor's creation and implementation of the County Alert System also satisfy rational-basis review for constitutional Due Process and Equal Protection purposes.

Our Constitution provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers." W. Va. Const. art. III, § 10; *see also id.* § 3, U.S. Const. amend XIV § 1. The operative question here is whether there is a non-arbitrary

basis for the Governor's executive actions. *See FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). And the burden rests "on [the] one complaining of a due process violation to establish that" the challenged action is "arbitrary and irrational." *Wampler Foods, Inc. v. Workers' Comp. Div.*, 216 W. Va. 129, 145, 602 S.E.2d 805, 821 (2004) (quotation marks and citation omitted).

Because the County Alert System does not implicate fundamental rights or suspect classifications, it "cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*, 509 U.S. 312, 319 (1993). So if the County Alert System is rational, it satisfies the state and federal constitutional requirements for Due Process and Equal Protection purposes.

By criticizing the Governor's decision to incorporate the Harvard Map as part of the basis for the County Alert System, the Petitioners appear to be asserting that the only rational way to decide whether to allow in-person instruction in pre-K-12 schools is strict adherence to every aspect of the Harvard Map. Unfortunately, that position cannot withstand scrutiny. Experts across the State, the Nation, and the world disagree on whether and when in-person schooling can be safely resumed, ranging from allowing it regardless of the number of COVID-19 diagnoses to barring in-person instruction until a vaccine is approved. In between these two extremes, experts have developed various metrics for deciding when in-person instruction can be safely resumed, and the County Alert System constitutes one of many rational plans to do so.

The State of West Virginia faces unique challenges not accounted for by the Harvard Map. For example, West Virginia has many small counties. Our most populous county has less residents than suburbs of some large cities. This means that a few cases can significantly affect rate numbers.

Based on these factors and others, the Governor consulted with his public health advisors about an appropriate metric for resuming in-person instruction at public schools. Relying on the

advice of doctors, epidemiologists, educators, and others the Governor modified the Harvard Map in some respects. As the Governor continued gathering more information, he understood he could improve the County Alert System to protect citizens and to ensure that students in pre-K-12 schools could resume in-person instruction when it was reasonably safe to do so. The Governor therefore modified the County Alert System after it was first announced to account for this added information. This decision is clearly rational. *See Texas Democratic Party v. Abbott*, 961 F.3d 389, 393 (5th Cir. 2020) ("Local officials are working tirelessly to shape their response to changing facts on the ground." (brackets and quotation omitted)).

Petitioners essentially ask this Court to overrule the Governor's rational actions and impose its own vision regarding what constitutes the "best" metrics for deciding whether and when to resume in-person instruction in our State's pre-K-12 schools. However, neither the federal nor the state constitution permit this Court to substitute its own opinion regarding the "best" metrics to do so. Instead, the Governor's actions survive constitutional scrutiny because they reflect rational decisions. Thus, the *Petition* fails to state a claim for Due Process or Equal Protection violations.

iii. The Governor's actions are not arbitrary or capricious.

The Governor's actions also do not violate West Virginia's Administrative Procedures Act, W. Va. Code § 29A-1-1 *et seq.* (hereinafter, the "APA"). *First*, the APA provides that it does "not apply in any respect whatever to executive orders of the governor, which orders to the extent otherwise lawful shall be effective according to their terms." W. Va. Code § 29A-1-3(a). This statutory provision is clear and unambiguous. And its application exempts the Governor's reopening metrics from the APA.

Second, the APA specifically does not apply to "executive orders *or proclamations* by the Governor issued solely in the exercise of executive power, including executive orders issued *in the event of a public disaster or emergency.*" W. Va. Code. § 29A-1-2(e) (emphasis added).

Currently, the State is under a declared state of emergency because of the COVID-19 pandemic. Any proclamation or executive order the Governor issues under that emergency declaration are exempt from the APA, including the County Alert System. Exec. Orders, 68-20, 70-20. Accordingly, the metrics selected by the Governor to help him determine whether and when to resume in-person instruction in the State's pre-K-12 schools are exempt from the APA.

Third, even if the APA normally applied to the Governor's actions, the Governor's emergency powers include the ability "[t]o suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business." W. Va. Code § 15-5-6(c)(7). Thus, the Governor could have suspended the APA if necessary to promulgate the County Alert System.

Yet even if the APA applies, the Governor's actions can be invalidated only if they are "arbitrary or capricious." W. Va. Code § 29A-4-2(b). However, the Governor's actions here are far from arbitrary or capricious. Rather, as discussed above, they are rationally based on the advice he received from his public health, medical, and education experts. The Governor has not chosen to decide which public schools may open based on the first letter of a county's name or by throwing darts at the wall. He has relied on statistics and expert advice in making his decisions. The mere fact that Petitioners might utilize different statistics in making school re-opening decisions does not render the Governor's actions arbitrary or capricious. Count I failed to state a claim arising under the APA upon which relief may be granted. Thus, Count I must be dismissed.

c. Count II fails to state violations of the Sunshine Act.

The *Petition* also alleged that the Governor violates the Sunshine Act when he meets with the Panel of public health officials prior to the weekly updates of the County Alert System. Count II also alleged that the Governor "regularly meets with 'health experts'" without complying with the Sunshine Act. Specifically, it asserts that these meetings are not properly noticed, that no agenda is provided, and that no minutes of these meetings are created. But these allegations fail to

state a claim for relief because the Sunshine Act's procedures simply do not apply to the Governor's exercise of his lawful emergency powers.

The Sunshine Act requires that "all meetings of any governing body shall be open to the public." W. Va. Code § 6-9A-3(a). A "governing body" must also notify the public of their meetings by filing a notice with the Secretary of State "at least five business days prior to the date of the meeting." *Id.* § 6-9A-3(e), (e)(2). After any meeting, a "governing body" must make the minutes of its meetings available to the public. *Id.* § 6-9A-5.

But the Governor is not a "governing body" under the Sunshine Act; and so its requirements are plainly inapplicable. By statute, a "governing body" is defined as "the members of a public agency" that "consists of two or more members." W.Va. Code § 6-9A-2(4). The Office of the Governor does not "consist of two or more members," nor does his exercise of his emergency powers require the presence of a "quorum." W.Va. Code § 6-9A-2(4), (5). Rather, the authority of the Governor rests in a single individual who is elected by the citizens of the State. W.Va. Const. art. VII, §1, §5. His Office does not fall within the definition of a "governing body" and he does not have to hold a meeting to make a decision or deliberate toward one. W.Va. Code § 6-9A-2(5).

The Panel similarly is not a "governing body" subject to the Sunshine Act because it is not "authorized by law to exercise some portion of executive . . . power." W. Va. Code § 6-9A-2(4), (7). When the Governor meets with this Panel, it is *the Governor* – not the Panel – that is "authorized by law to exercise . . . executive . . . power." W. Va. Code § 6-9A-2(7) (emphasis added). The Panel's sole purpose is to review the reported COVID-19 case data and advise the Governor "[i]n performing *his* duties" W. Va. Code § 15-5-5 (emphasis added).

Likewise, when the Governor meets with health experts, he is not required to comply with the Sunshine Act because that informal group does not exercise any portion of executive power,

and no quorum of these public health officials is necessary for it to function. Experts and public health officials may provide advice to the Governor individually or collectively, but executive and emergency power remains solely with the Governor by law, and any decisions he makes are his own, even if guided by expert advice. W.Va. Const. art. VII, § 5; W.Va. Code §§ 15-5-5, 15-5-6.

West Virginia has little precedent in this area. *See, e.g.*, *McComas v. Bd. of Educ. of Fayette Cnty.*, 197 W. Va. 188, 194, 475 S.E.2d 280, 286 (1996) (finding that there "is no question that the members of" a county board of education "constitute a 'governing body' subject to" the Sunshine Act). But persuasive federal precedent supports the plain inapplicability of the Sunshine Act here. For example, in *Rushford v. Council of Economic Advisors*, a litigant sued a council that advised the President regarding economic development issues to enforce compliance with the federal Sunshine Act. 762 F.2d 1038, 1038, 1042 (D.C. Cir. 1985). But on appeal, the D.C. Circuit determined that the Council was not an "agency" that was subject to the federal Sunshine Act. *Id.* at 1043. In part, this conclusion was based on the fact that the Council's "sole function" was "to advise and assist the President" and that it "has no independent authority." *Id.* at 1042.

Applied here, the Panel and the various health experts who advise the Governor are not subject to the Sunshine Act. Neither the Panel nor the various health experts exercise "independent authority" from the Governor. *Rushford*, 762 F.2d at 1042. Their "sole function" is to review current COVID-19 data and they simply "advise and assist" the Governor in the exercise of his executive and emergency powers. As the Legislature noted when it enacted the Sunshine Act:

> The Legislature finds, however, that openness, public access to information and a desire to improve the operation of government do not require nor permit every meeting to be a public meeting. *The Legislature finds that it would be unrealistic, if not impossible, to carry on the business of government should every meeting, every contact and every discussion seeking advice and counsel in order to acquire the necessary information, data or intelligence needed by a governing body were required to be a public meeting.* It is the intent of the Legislature to balance these

> interests in order to allow government to function and the public to participate in a meaningful manner in public agency decisionmaking.

See W.Va. Code § 6-9A-1 (emphasis added). Thus, Count II fails to state a claim for relief under the Sunshine Act, and it must be dismissed accordingly.

CONCLUSION

For the foregoing reasons, the *Petition for Injunctive Relief including a Temporary Restraining Order and to Enforce the West Virginia Open Meetings Act* must be dismissed. The Petitioners failed to comply with the jurisdictional prerequisite notice mandated by West Virginia Code § 55-17-3(a)(1) and they failed to allege a concrete or imminent injury. Count I must also be dismissed because it raises a non-justiciable political question. And even if the *Petition* survives these jurisdictional hurdles, dismissal under Rule 12(b)(6) of the Rules of Civil Procedures is warranted because the Petition fails to state a claim upon which relief can be granted.

Respectfully submitted,

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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

WEST VIRGINIA EDUCATION ASSOCIATION,
DALE LEE and HOLLY RHINEHART,

Petitioners,

v.

Civil Action No. 20-P-280
The Honorable Carrie Webster

THE HONORABLE JAMES JUSTICE,
GOVERNOR OF THE STATE OF WEST VIRGINIA

Respondent.

CERTIFICATE OF SERVICE

Undersigned counsel certifies that a copy of the Motion to Dismiss, was served on the following individuals by the method(s) indicated below on October 19, 2020:

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