IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. _____

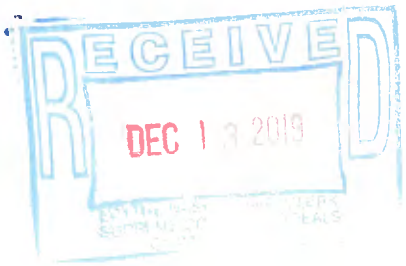
STATE OF WEST VIRGINIA, ex rel.,
JAMES CONLEY JUSTICE, II,
Governor of the State of West Virginia,

Petitioner,

v.

THE HONORABLE CHARLES E. KING, JR.,
Judge of the Circuit Court of Kanawha County,
West Virginia, and G. ISAAC SPONAUGLE, III,

Respondents.



PETITION FOR WRIT OF PROHIBITION

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QUESTIONS PRESENTED

1. Does the separation of powers provision of the Constitution of West Virginia preclude a court from issuing the writ of mandamus sought in this case because the issue presented by the mandamus petition is a non-justiciable political question?

2. As a matter of law, is mandamus available to compel the Governor of the State of West Virginia to "reside" at the seat of government, even though (a) the duty to "reside" is unspecific and intrinsically laden with discretion; (b) any writ granted would require a court to monitor and supervise the State's Chief Executive on an ongoing basis; and (c) other adequate and more appropriate remedies exist?

STATEMENT OF THE CASE

The Constitution of West Virginia expressly mandates that the separation of powers among the branches of the State's government be maintained. It provides:

> 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. V, § 1. It further places all "chief executive power … in the governor." W. Va. Const. art. VII, § 5.

G. Isaac Sponaugle, III, the petitioner below, is a member of the West Virginia House of Delegates and has been since November 2, 2012. He serves as Assistant Minority Whip for the Democratic caucus, a leadership position. From June 19, 2018, to present, Mr. Sponaugle filed a series of petitions challenging the Governor's compliance with Section I, Article VII of the West Virginia Constitution. Through these petitions, Mr. Sponaugle sought discovery related to the Governor's daily activities, both personal and political.

On June 19, 2018, Mr. Sponaugle filed a Petition for Writ of Mandamus against Governor James Conley Justice, II, in his official capacity as Governor of the State of West Virginia, asking the Circuit Court of Kanawha County, West Virginia to order the Governor to reside at the seat of government during his term of office. The petition was based on Section I, Article VII of the West Virginia Constitution, which states as follows:

> The executive department shall consist of a governor, secretary of state, auditor, treasurer, commissioner of agriculture and attorney general, who shall be ex officio reporter of the court of appeals. Their terms of office shall be four years and shall commence on the first Monday after the second Wednesday of January next after their election. They shall reside at the seat of government during their terms of office, keep there the public records, books and papers pertaining to their respective offices and shall perform such duties as may be prescribed by law.

W. Va. Const. art. VII, § 1.

When the circuit court questioned Mr. Sponaugle as to what exactly he wanted the court to order the Governor to do, and what exactly he meant by "reside," Mr. Sponaugle initially indicated that he wanted the circuit court to order the Governor to "live" in Charleston, though not necessarily at the Governor's Mansion. App. 180-182. When asked how many days of the week or month the Governor needed to "live" in Charleston, Mr. Sponaugle conjectured "I would suspect it would be more than half the year to reside." App. 182. The circuit court ultimately dismissed the petition based on Mr. Sponaugle's failure to comply with the pre-suit notice procedures set forth in W. Va. Code § 55-17-3(a)(1).

Following the dismissal of his petition to the circuit court, Mr. Sponaugle filed a Petition for Writ of Mandamus before this Court, again seeking a writ directing the Governor to "reside" at the seat of government. Despite having been confronted with the issue in the circuit court, Mr. Sponaugle did not even attempt to offer a definition of "reside" or explain what exactly he wanted this Court to direct the Governor to do. App. 188-205. On November 14, 2018, this Court

entered an Order stating that "the Court is of the opinion that a rule should not be awarded, and the writ prayed for by the petitioner is hereby refused." App. 206.

On December 11, 2018, Mr. Sponaugle returned to the circuit court and filed yet another Petition for Writ of Mandamus seeking a writ directing the Governor to "reside" at the seat of government. App. 18-52. Once again, Mr. Sponaugle did not even attempt to articulate (much less cite any authority for) any workable definition of the term "reside" in his petition, or explain the specifics of what he would like the court to order the Governor to do. The factual allegations in the petition provide no clarity. At certain points in his petition, Mr. Sponaugle complains that the Governor has allegedly not spent more than a "handful of nights" at the Governor's Mansion. App. 41. At other points, Mr. Sponaugle complains that the Governor allegedly does not report for work at the Capitol as often as Mr. Sponaugle would like. App. 41, 48-49.

On February 19, 2019, the Governor filed a motion to dismiss and supporting memorandum demonstrating that Mr. Sponaugle is not entitled to a writ of mandamus as a matter of law. App. 157, 160. The Governor's motion argued, *inter alia*, that (a) mandamus cannot be employed to prescribe the manner in which a government official shall act, and the duty to "reside" at the seat of government is so nebulous and laden with discretion that any writ granted in this case would necessarily involve prescribing the manner in which the Governor shall act; (b) a writ prescribing the amount of time the Governor must spend in Charleston, and/or restraining his discretion to determine where he will be present on any given day under any given set of circumstances, would run afoul of the political question doctrine and corresponding separation of powers principles; (c) mandamus is not available to compel a general course of conduct to be performed over a long period of time (as opposed to a discrete act), especially where, as here, it

would require a court to monitor and supervise the conduct of the State's Chief Executive on an ongoing basis; and (d) other adequate and more appropriate remedies exist. App. 164-175.

By Order dated July 17, 2019, the circuit court denied the Governor's motion to dismiss. In doing so, the Court implicitly ruled that mandamus is at least theoretically available to compel the Governor to "reside" in Charleston. App. 7-9. However, the circuit court's Order did not contain findings of fact and conclusions of law that support and form the basis of the court's decision. Moreover, the circuit court's Order did not attempt to define the parameters of the duty to "reside" in Charleston, nor the nature and/or threshold amount of time that the Governor must spend in Charleston before he is deemed to be "residing" there.

On July 29, 2019, the Governor filed a motion requesting that the circuit court certify questions to this Court, and to stay all further proceedings in this case until such questions have been decided. App. 248. On the same day, the Governor filed a motion requesting, in the alternative, that the circuit court enter an order setting forth findings of fact and conclusions of law in support of its decision to deny the Governor's motion to dismiss, because if the circuit court declined to certify questions to this Court, then the Governor intended to file a petition for writ of prohibition. App. 259.

On October 21, 2019, the circuit court entered an Order denying in part and granting in part the Governor's motion to certify questions and stay further proceedings. Specifically, the circuit court denied the motion to certify questions, but granted the motion to stay further proceedings. App. 11. In the same Order, the circuit court granted the Governor's motion for entry of an order containing findings of fact and conclusions of law. App. 11-12. The circuit court then issued a separate Order containing findings of fact and conclusions of law in support of its denial of the Governor's motion to dismiss. App. 1.

In that Order, the circuit court essentially found that the determination as to whether the duty to "reside" is discretionary or non-discretionary is premature, and that factual development will aid the Court in making that determination. App. 3. The circuit court did not elaborate as to how factual development could bear on the determination as to whether this duty is discretionary or not. The circuit court then stated that even if it ultimately determines that the duty at issue is discretionary, "mandamus will lie to require that discretion be exercised, provided discovery shows that [the Governor] is not already exercising his discretion," but that "[m]andamus cannot be used to control the manner in which discretion is exercised." App. 5. The circuit court did not explain how, in the context of the duty to "reside" in Charleston, a court could conceivably order the Governor to "exercise his discretion" in any meaningful way without also providing specific parameters and thereby curtailing the Governor's discretion to apportion his time and presence.

The Separation of Powers doctrine precludes the courts' jurisdiction over political questions. Political questions include those matters presented for judicial resolution that are not susceptible to judicially manageable standards in providing a remedy at law. As demonstrated below, there can be no meaningful writ of mandamus directing the Governor "reside" in Charleston without also prescribing the amount of time the Governor must spend in Charleston and restraining his discretion to determine where he will be present on any given day under any given set of circumstances, which would not be subject to judicially manageable standards. In sum, the circuit court does not have jurisdiction and/or the legitimate power to decide the matter presented by Mr. Sponaugle's petition for a writ of mandamus. Accordingly, the Governor has filed the instant Petition for Writ of Prohibition.

SUMMARY OF ARGUMENT

The West Virginia Constitution unmistakably prescribes a clear separation of powers among the three branches of the State's government which it establishes. This Court has time and

again and without relevant exception respected the importance of maintaining that division of powers and responsibilities. Based on separation of powers principles, our jurisprudence recognizes the fundamental doctrine of judicial abstention from deciding political questions because they offend that separation by empowering one branch to impermissibly intrude on the execution of responsibility by a co-equal branch. This case presents just such a non-justiciable political question.

The constitution requires that the Governor "reside" in Charleston, but it does not follow that the courts can mandate that requirement through an extraordinary writ. *Marbury v. Madison* held that it is emphatically the province of the judiciary to state what the law is. But it is equally clear that there are some questions that are essentially political in nature – meaning that they are committed to the discretion of the political branches – and not susceptible to judicial interpretation or enforcement.

Here, before further discovery was stayed, the Governor stated below that he does "reside" in Charleston, as specified in the Constitution of West Virginia, in that he has a residence there, maintains the Office of the Governor there, and is physically present there as often as he needs to be as determined by the judgment, autonomy, and discretion inherent to his office. The further court-ordered discovery Mr. Sponaugle seeks into where and how the Governor spends his time would itself offend the separation of powers by impermissibly allowing the authority of the courts to be used to intrude into the inner workings of the office of the State's chief executive. Moreover, Mr. Sponaugle seeks this discovery as a basis for a judicial mandate directing the Governor where and how to "reside" in the State capital. If such a mandate could issue, its enforcement would entail court-supervised monitoring of the Governor's whereabouts. In so doing, the courts would become overseers of the personal and

political activity of the Governor. The absurdity of that proposition is unavoidable and the fundamental, constitutional principle of separation of powers prudently forbids it.

Even if this dispute is one within the jurisdiction of the courts, it is not a dispute that meets the stringent requirements of mandamus. First, this Court has long recognized that mandamus is never employed to prescribe the manner in which executive officers shall act. The duty to "reside" at the seat of government, as set forth in the West Virginia Constitution and W. Va. Code § 6-5-4, is undefined and so intrinsically laden with discretion that it would be impossible to issue any meaningful writ without improperly prescribing the manner in which the Governor shall act.

Second, numerous jurisdictions have held that mandamus is not available to compel a general course of conduct to be performed over a long period of time, as opposed to a discrete act. This is because issuing a writ directing a public official to adopt an ongoing course of action would require the issuing court to monitor and supervise the official's conduct on a continuing basis. It would also subject the official to politically-motivated contempt actions, and hamper the official's discretion to act as he deems appropriate in any given set of circumstances. These concerns are magnified where, as here, the official involved is the State's Chief Executive and the duty sought to be enforced relates to where and how he spends his time throughout the duration of his term.

Third, mandamus is unavailable where other adequate remedies exist. Indeed, the political nature of the issue presented is amply demonstrated by the availability of other remedies of a political nature. If Mr. Sponaugle is truly dissatisfied with the manner in which the Governor is performing his duties, then he (and every other citizen of this State) has the ability to vote against him at the next gubernatorial election. In addition, Mr. Sponaugle can advocate for impeachment proceedings if he deems them warranted. Not only are these remedies available to

him, but the writ he seeks would actually be *less* effective at addressing his purported concerns. Mr. Sponaugle's complaint is that the Governor is allegedly not present enough at the Capitol complex, but Mr. Sponaugle acknowledges that the duty to "reside" in Charleston does not require the Governor to work from his office at the Capitol or spend any given amount of time there.

In short, all aspects of the issue tendered to the courts for resolution by this petition for a writ of mandamus are committed instead to the political branches of government, and the courts should decline Mr. Sponaugle's invitation to enter the fray.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Governor respectfully requests a Rule 20 argument, as this case involves issues of first impression and issues of fundamental public importance.

ARGUMENT

A writ of prohibition should issue to preclude the circuit court from allowing this fatally flawed mandamus action to proceed, and to require the circuit court to dismiss this matter with prejudice. This Court has original jurisdiction in cases seeking a writ of prohibition and/or mandamus. W.Va. R. App. 16. The Court has explained that a writ of prohibition "lies as a matter of right whenever the inferior court (a) has not jurisdiction or (b) has jurisdiction but exceeds its legitimate powers and it matters not if the aggrieved party has some other remedy adequate or inadequate." State ex rel. Jones v. Recht, 221 W. Va. 380, 384, 655 S.E.2d 126, 130 (2007)(*citing* State ex rel. Valley Distributors, Inc. v. Oakley, 153 W.Va. 94, 99, 168 S.E.2d 532, 535 (1969)); *see also* State ex rel. Cicchirillo v. Alsop, 218 W. Va. 674, 677, 629 S.E.2d 733, 736 (2006). As demonstrated below, the circuit court lacks jurisdiction to issue a writ of mandamus compelling the Governor to "reside" in Charleston. Alternatively, even if the circuit court has jurisdiction, it nonetheless lacks the legitimate power to issue the writ of mandamus

Mr. Sponaugle seeks, and therefore exceeded its legitimate powers by refusing to dismiss this case.

I. UNDER THE POLITICAL QUESTION DOCTRINE AND CORRESPONDING SEPARATION OF POWERS PRINCIPLES, THE CIRCUIT COURT IS WITHOUT JURISDICTION TO ISSUE A WRIT OF MANDAMUS COMPELLING THE GOVERNOR TO "RESIDE" IN CHARLESTON.

As the Governor argued to the circuit court (App. 164-170, 238-240), the Governor's duty to "reside" at the seat of government is vague and undefined, and necessarily implicates executive decisions as to where and how the Governor spends his time on any given day. Under these circumstances, the political question doctrine and corresponding separation of powers principles preclude the courts from passing judgment on whether the State's Chief Executive is spending sufficient time in Charleston and/or imposing a specific quota as to the amount of time he must spend there.

A. The circuit court lacks jurisdiction over non-justiciable political questions.

The West Virginia Constitution grants the judicial power to this Court and the circuit courts. W. Va. Const. Art. VII § 1. This grant of authority includes the "duty of the judicial department to say what the law is" in cases properly before the Court. *Marbury v. Madison*, 1 Cranch 137, 177 (1803). But courts have long acknowledged that this duty extends only to legal disputes "of a Judiciary Nature." Rucho v. Common Cause, 139 S. Ct. 2484, 2494 (2019). As the United States Supreme Court recently recognized, in some cases "the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights." Id. (quoting Vieth v. Jubelirer, 541 U.S. 267, 277 (2004) (plurality opinion)). That kind of claim is "said to present a 'political question' and to be nonjusticiable—outside the courts' competence and therefore beyond the courts' jurisdiction." Rucho, 139 S. Ct. at 2494.

This doctrine is grounded in the principle of separation of powers. The Supreme Court of the United States explained the political question doctrine in Baker v. Carr, setting forth six tests to determine whether a case presents a political question: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department;" (2) "a lack of judicially discoverable and manageable standards for resolving it;" (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;" (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;" (5) "an unusual need for unquestioning adherence to a political decision already made;" or (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." 369 U.S. 186, 217 (1962). A non-justiciable political question exists if any one of these tests is met. Id.

Consistent with these principles, this Court has declined to address issues entrusted to the discretion of the legislative and executive branches of government. In State ex rel. League of Women Voters of W. Virginia v. Tomblin, this Court concluded that questions involving a conflict between legislative and executive branches were political questions "which do not present issues with which this Court can, or should, concern itself." 209 W. Va. 565, 573–74, 550 S.E.2d 355, 363–64 (2001) (leaving agency to make funding decisions without judicial intervention). In State ex rel. Cooper v. Tennant, this Court addressed writs of mandamus and prohibition challenging, *inter alia*, the constitutionality of gerrymandering and residency requirements for the House of Delegates. 229 W. Va. 585, 600, 730 S.E.2d 368 (2012). There, the Court determined that, "reasonable minds may differ upon such complex issues … and competing policy considerations may enter the fray … however, the policy choices of those elected to the judicial branch provide no legitimate basis" for challenging legislative authority. Id. at 615, 730 S.E.2d at 398. As a result,

"the development and implementation of a legislative redistricting plan in the State of West Virginia are entirely within the province of the Legislature." Id. at 614, 730 S.E.2d at 397. This Court noted that, historically, the lack of judicially manageable standards (like those for reapportionment) rendered an issue a political question, and that political questions are "unanswerable by the judiciary." Id. at 600, 730 S.E.2d at 383. Indeed, the Court found no relief was warranted, in part because it lacked "any authoritative standard by which to definitely judge such matters." Id. at 607, 730 S.E.2d at 390.

B. The Governor's allocation of his time and presence presents a nonjusticiable issue committed to executive discretion.

The West Virginia Constitution places all "chief executive power ... in the governor." W. Va. Const. art. VII, § 5. This Court has long held that disputes concerning the Governor's exercise of discretion as chief executive are not justiciable. *See* Hatfield v. Graham, 73 W. Va. 759, 767, 81 S.E. 533, 536 (1914). For example, in Hatfield, this Court confronted the constitutionality of the then-governor's decision to shutter a newspaper, and imprison its operators, for aiding riots and disobeying martial law. 73 W. Va. at 760–64, 81 S.E. at 533–35. The newspaper sued the then-governor for damages related to the arrests and to its business. Id. In response, the Court reviewed the governor's authority as commander-in-chief of the state's military forces and determined that the state constitution vests the Governor with broad discretion to carry out such executive functions and, as a result, "the Governor's actions [in furtherance of this discretion] can not be reviewed by this court." Id. at 773, 81 S.E. at 538. It also determined that the proper recourse for challenging the manner of this discretion is, "to the Senate on an impeachment, or to the people at the polls." Id. at 772, 81 S.E. at 538 (*quoting* Mauran v. Smith, 8 R.I. 192, 219 (1865)); *see also* Hussey v. Say, 384 P.3d 1282, 1289 (Haw. 2016) (applying the same Baker v. Carr principles and deciding that residential requirements for state legislators

presented a political question that threatened confrontation with a co-equal branch of government and noting that other state supreme courts had decided similarly).

Fulfillment of the requirement that the Governor reside at the seat of government similarly requires an exercise of discretion. The Governor must decide whether he has spent sufficient time at the seat of government to fulfill this requirement. *See* Hatfield, 73 W. Va. at 765, 81 S.E. at 535 (finding that an act involved executive discretion because it required a determination "whether the conditions existing are such as to make it necessary to put in operation and effect the military power"). In making this determination, the Governor must consider not only this requirement, but the other demands on his presence.

It is difficult to imagine a matter more fundamentally meant for executive discretion than the allocation of the Governor's time and presence. The responsibilities of the Governor, as the Chief Executive of the State, are enormous. Ultimately, he must oversee the operation of the entire executive branch, whose duties and responsibilities are myriad and complex, throughout the entire State. He must establish policies and goals for the operation of government. He must propose legislation to accomplish those goals. He must prepare, propose, and seek passage of a multi-billion dollar budget annually to fund the operation of government. He often confers with the public, and attends important events throughout the State. He further meets with legislative leaders and executive branch officials, meets with a multitude of stakeholders in various locales, responds as needed to press and public inquiries and, when he can, spends some time with his family. Quite simply, the tasks to be fulfilled are endless and the demands on his time are substantial. Governors necessarily and historically have exercised discretion in determining their own whereabouts.

In fact, this Court has already held that enforcement of the residency provision requires an exercise of executive discretion. In Slack v. Jacob, 8 W. Va. 612 (1875), this Court held that the Governor should not have been enjoined from moving his office's records to Wheeling in compliance with a statute that was being challenged. The Court explained that it was the Governor's duty to "determine for himself where the seat of government was" after the passage of an act changing the seat of government to Wheeling. Id. at 657. This exercise of discretion was necessary to comply with the residence requirement and the obligation to enforce the law. The Court explained that "[w]hen he determined in his mind and conscience that the law was constitutional, it then devolved on him to execute it--the power and duty in this case being, in our opinion, clearly executive, requiring the exercise of discretion and judgment, on his part." Id. For this reason, "the circuit court of the county of Kanawha could not properly enjoin the removal of the archives of the State and the State library from the city of Charleston to Wheeling, until the court passed upon the constitutionality of the act, notwithstanding the allegations in the bill that the act was unconstitutional." Id. at 658 (1875).

C. There is a lack of judicially manageable standards for determining where the Governor resides.

Not only would a writ of mandamus interfere with the discretion accorded to the executive branch, but there are no judicially manageable standards for the Court to dictate the allocation of the Governor's time and presence. Deciding where and how the Governor is to spend his time necessarily requires making a policy determination of a kind clearly meant for non-judicial discretion. While both the Constitution and W. Va. Code § 6-5-4 provide that the Governor shall "reside" at the seat of government, neither contains any specific guidance as to the meaning of the term "reside" in this context, or any specific legal requirements as to how much time the Governor is to spend in any particular locale.

Although Mr. Sponaugle insists that the word "reside" has a clear, universally understood meaning, this Court has found otherwise. In the words of the Court,

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

Brooke B. v. Ray, 230 W. Va. 355, 364, 738 S.E.2d 21, 30 (2013). There is no clear definition of the term "reside" as used in Article VII, Section I of the Constitution. For example, the Constitution is silent as to how many hours, days, and/or nights per week or per month the Governor must spend in Charleston before he is deemed to be "residing" there. Is he "residing" in Charleston if he sleeps there but departs in the morning and spends his waking hours elsewhere? Conversely, is he "residing" in Charleston if he spends some portion of his waking hours there but sleeps elsewhere? There is simply no applicable precedent and no manageable standard to guide the resolution of these questions. *See* Baker v. Carr, 369 U.S. 186, 220 (1962) (discussing precedent on the justiciability of disputes arising under the Guaranty Clause of the U.S. Constitution and stating that non-justiciability resulted, at least in part, from the dearth of sources to define the meaning of "Republican Form of Government").

Mr. Sponaugle, for his part, has argued that "residence" is a combination of bodily presence and the intention to remain. However, these are the elements of "domicile," not "residence." *See* Lotz v. Atamaniuk, 172 W. Va. 116, 119, 304 S.E.2d 20, 23 (1983). As this Court explained in Lotz,

> Domicile and residence are ***not synonymous***. Shaw v. Shaw, 155 W.Va. 712, 187 S.E.2d 124 (1972). A man may have ***several residences***, but only one domicile. ***Nonetheless, courts frequently interchange the words, as do legislatures***. *See* Patterson v. Patterson, 167 W.Va. 1, 277 S.E.2d 709, 717 (1981). ***Cases that we quote in which the word "residence" is used clearly mean what we mean by "domicile".*** Our law about domicile dates to 1888. In White v. Tennant, 31 W.Va.

> 790, 8 S.E. 596, 597, we stated: "Two things must concur to establish domicile,—the fact of residence, and the intention of remaining. These two must exist, or must have existed, in combination.... The character of the residence is of no importance; and if domicile has once existed, mere temporary absence will not destroy it, however long continued."

Id. at 118-119, 304 S.E.2d at 23(emphasis added); *see also* Brooke B., 230 W. Va. at 364, 738 S.E.2d at 30 (recognizing that residence and domicile are not synonymous). To the extent that Mr. Sponaugle contends that the word "reside" in Section I, Article VII means "domicile," his contention should be rejected because it makes no sense. A person's domicile is the place where he/she "intends to remain as a permanent residence and go back to ultimately after moving away." Brooke B., 230 W. Va. at 364, 738 S.E.2d at 30 (*citing* Syl. Pt. 2, Shaw v. Shaw, 155 W. Va. 712, 187 S.E.2d 124 (1972)). Thus, the consequence of Mr. Sponaugle's reasoning is that Section I, Article VII would require the Governor to make Charleston his permanent home, where he would have to remain even after his term has expired.[1] That cannot be correct.

Furthermore, the cases relied upon by Mr. Sponaugle involve comparative determinations of whether a person's true domicile is in one jurisdiction or another, not directives to "reside" at a particular place. *See* State ex rel. Linger v. Cty. Court of Upshur Cty., 150 W. Va. 207, 228, 144 S.E.2d 689, 703 (1965) (using "residence" interchangeably with "domicile," and determining whether decedent's residence was in Upshur County or Lewis County); White v. Manchin, 173 W. Va. 526, 536–39, 318 S.E.2d 470, 481–83 (1984) (using "residence" interchangeably with "domicile," and determining whether senate candidate resided in 13th Senatorial District or 14th Senatorial District); Ward v. Ward, 115 W. Va. 429, 176 S.E. 708 (1934) (using "residence"

[1] It should also be noted that in explaining the difference between "residence" and "domicile," this Court has stated that a person may have several residences but only one domicile. Brooke B., 230 W. Va. at 364, 738 S.E.2d at 30. To the extent that the word "reside" simply means to maintain a residence in a particular locale, Mr. Sponaugle's mandamus petition fails on its face, because Mr. Sponaugle does not dispute that the Governor has a residence (the Governor's Mansion) available to him in Charleston, and Mr. Sponaugle's own exhibits indicate that the Governor has furniture and other belongings there. App. 68, 74.

interchangeably with "domicile," and determining whether husband was resident of Nevada or West Virginia for purposes of validity of Nevada divorce decree); Shaw, 155 W. Va. at 716, 187 S.E.2d at 127 (determining whether husband's domicile was in Wayne County or Putnam County for purpose of venue in divorce action); State-Planters Bank & Tr. Co. of Richmond v. Commonwealth, 6 S.E.2d 629, 632 (Va. 1940) (determining whether individual's domicile was in Richmond, Virginia or Rome, Italy for purposes of Virginia tax laws).

Neither Mr. Sponaugle nor the circuit court has cited a single case in which a court ordered someone (let alone a state's chief executive) to reside in any particular location and/or made any attempt to set specific criteria as to the nature and amount of time the person must spend in that location.

D. A writ prescribing the amount of time the Governor "resides" in Charleston is an unreasonable interference with the executive branch.

This Court has long recognized the high level of autonomy and respect accorded to the Governor and his or her decisions:

> The 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. His proclamations, warrants, and orders made in the discharge of his official duties are as much due process of law as the judgment of a court.

Syl. Pt. 1, Hatfield, 73 W. Va. 759, 81 S.E. 533. Likewise, our State Constitution provides that "[t]he legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others[.]" W. Va. Const. art. V, § 1. This provision "is not merely a suggestion; it is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed." Syl. Pt. 4, State v. Bostic, 229 W. Va. 513, 729 S.E.2d 835 (2012).

To command the Governor to spend more time in the City of Charleston, and impose a quota as to the amount of time the Governor must spend there, would severely restrain the autonomy of the State's Chief Executive. Indeed, it would suggest the judicial branch has the authority to dictate when and where the Governor must be present. If the Governor was required to relocate for any period of time, in effect, the circuit court would have to provide him with a leave slip. Any writ ordering the Governor's presence in a certain locale not only effectively deprives him of the discretion to perform the duties of his office, but also demeans the Office of Governor and subjects this State to embarrassment.

As a result, to grant Mr. Sponaugle's petition to compel the Governor to "reside" in Charleston (which would necessarily involve deciding whether the Governor is spending sufficient time in Charleston and imposing thresholds as to the amount of time he may spend elsewhere) would fly in face of the separation of powers principles fundamental to our system of government. As discussed above, the judicial power does not include an authority to intervene in the operations of a coordinate branch in this way. Thus, because the issue of whether the Governor is spending sufficient time in Charleston presents a non-justiciable political question, the circuit courts lack jurisdiction to decide it. Clark v. Shores, 201 W. Va. 636, 637, 499 S.E.2d 858, 859 (1997) ("The courts of this State have no jurisdiction ... if no justiciable controversy exists[.]"). Accordingly, Mr. Sponaugle's mandamus action seeking to compel the Governor to "reside" in Charleston must be dismissed.

II. MANDAMUS IS UNAVAILABLE AS A MATTER OF LAW TO COMPEL THE GOVERNOR OF THE STATE OF WEST VIRGINIA TO "RESIDE" IN CHARLESTON.

Even if this Court concludes that the circuit court has *jurisdiction* in this case, mandamus is still unavailable as a matter of law to compel the Governor to reside in Charleston, and the

circuit court exceeded its legitimate powers when it refused to dismiss this case. In determining whether to issue a writ of prohibition where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine the following five factors:

> (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.

State ex rel. U.S. Bank Nat. Ass'n v. McGraw, 234 W. Va. 687, 691-92, 769 S.E.2d 476, 480-81 (2015)(*quoting* Syl. Pt. 4, State ex rel. Hoover v. Berger, 199 W. Va. 12, 483 S.E.2d 12 (1996)); *see also* SER Monongahela Power Co. v. Fox, 227 W. Va. 531, 534-35, 711 S.E.2d 601, 604-05 (2011). Importantly, "[a]lthough all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." Syl. Pt. 4, Hoover, *supra*. As demonstrated below, these factors weigh heavily in favor of granting a writ of prohibition in the case at bar. Because the third factor is the most important, the Governor will address it first, and then proceed to discuss the remaining factors.

A. The circuit court's Order denying the Governor's motion to dismiss is clearly erroneous.

This Court has long held that "[a] writ of mandamus will not issue unless three elements coexist - (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." Syl. Pt. 2, State ex rel. Kucera v. City of Wheeling, 153 W. Va. 538, 170 S.E.2d 367 (1969). The burden of proof as to these elements is on the party seeking the relief, and "failure to meet any one of them is fatal." State ex rel. Richey v. Hill, 216 W.Va. 155, 160, 603 S.E.2d 177, 182 (2004). As the Governor argued to the circuit court (App. 164-175,

238-246), the first two elements are not met in this case, as a matter of law, because the duty to reside at the seat of government is not the type of specific, discrete, nondiscretionary duty that can be compelled through mandamus. In addition, the third element is not met because there are other adequate remedies through which Mr. Sponaugle (and the citizens of this state in general) can redress any perceived deficiencies in the Governor's performance, while the writ of mandamus Mr. Sponaugle seeks would *not* address his purported concerns.

1. Mandamus is inappropriate in this case because the duty to "reside" at the seat of government is unspecific and necessarily involves elements of discretion that cannot properly be controlled through mandamus.

It is well-settled that "[m]andamus lies to require the discharge by a public officer of a nondiscretionary duty." Nobles v. Duncil, 202 W. Va. 523, 534, 505 S.E.2d 442, 453 (1998). However, this Court has explained that "[a] non-discretionary or ministerial duty in the context of a mandamus action is one that *is so plain in point of law and so clear in matter of fact that no element of discretion is left as to the precise mode of its performance*." Syl. Pt. 7, Nobles, *supra* (emphasis added). Where a duty involves elements of discretion, mandamus will only lie to compel the exercise of the duty, and not to compel the specifics of the performance. *See* Id. at 534-535, 505 S.E.2d at 453-454. As this Court has explained, "[m]andamus is a proper remedy to compel tribunals and officers exercising discretionary and judicial powers *to act*, when they refuse so to do, in violation of their duty, *but it is never employed to prescribe in what manner they shall act*, or to correct errors they have made." Id. (emphasis added); *see also* Ney v. W. Virginia Workers' Comp. Fund, 186 W. Va. 180, 182, 411 S.E.2d 699, 701 (1991).

The duty to reside at the seat of government, as set forth in Section I, Article VII of the West Virginia Constitution and W. Va. Code § 6-5-4, is vague and involves discretion to the point where any writ granted would necessarily (and improperly) involve prescribing the manner

in which the Governor shall act. As discussed above, neither Section I, Article VII of the Constitution nor W. Va. Code § 6-5-4 contains any guidance as to the meaning and/or parameters of "reside at," and this Court has recognized that the word "reside" has no clear, universal meaning that applies in all contexts. *See* Brooke B., 230 W. Va. at 364, 738 S.E.2d at 30.

At times, this Court has indicated that residence, as a component of domicile, refers to bodily presence. *See* Syl. Pt. 7, State ex rel. Sandy v. Johnson, 212 W. Va. 343, 571 S.E.2d 333 (2002)(stating that domicile is "a combination of *residence (or presence)* and an intention of remaining.")(emphasis added); Syl. Pt. 2, State v. Stalnaker, 186 W. Va. 233, 412 S.E.2d 231 (1991)(same). Furthermore, "presence" appears to be the meaning that Mr. Sponaugle attaches to the word "reside." Throughout his mandamus petition and supporting memorandum, he complains about the Governor's purported failure to report on a daily basis to his office at the Capitol, where he would allegedly be more accessible to state workers and members of the public. App. 20, 41-42, 48-50.

If residence means "presence," then the duty to "reside" at the seat of government is indisputably laden with elements of discretion. There are no specific legal requirements as to how much time the Governor is to spend in any particular locale, and it is axiomatic that the Governor must be afforded the discretion to travel about the State and govern as he sees fit. Thus, to the extent that the word "reside" refers to presence, the duty to "reside" at the seat of government cannot be enforced through mandamus because any order would of necessity involve prescribing where and how the Governor spends his time.[2] Indeed, were the circuit

[2] This is because defining the word "reside," as it is used in Section I, Article VII of our State Constitution, to mean bodily presence does not, without more, resolve any of the lingering questions regarding the precise contours of the duty to "reside" at the seat of government, such as (a) how many hours, days, and/or nights per week or per month must the Governor spend in Charleston before he is deemed to be

court to simply order the Governor to "reside" in Charleston without setting specific parameters as to the character and amount of time he must spend there in order to be deemed "residing" there, the circuit court's order would be effectively meaningless and would add nothing to the undefined directive to "reside" that already exists in Section I, Article VII of the Constitution and W. Va. Code § 6-5-4.

To have any import at all, the circuit court's order would have to direct the Governor to spend some specified threshold or additional amount of time in Charleston. This would plainly violate the precept that mandamus "is never employed to prescribe in what manner [an official] shall act." *See* Syl. Pt. 8, Nobles, *supra*; *see also* State ex rel. Brotherton v. Moore, 230 S.E.2d 638, 642 (W. Va. 1976)("Where, however, the act required of a governor is 'political' in the sense that it necessitates the exercise of executive discretion and judgment, the right of the courts to compel performance is uniformly held to be nonexistent.").

Despite this inescapable truth, the circuit court denied the Governor's motion to dismiss, reasoning that (a) the determination as to whether the duty to "reside" is discretionary or non-discretionary is premature, (b) factual development would aid the Court in making that determination, and (c) if the duty is discretionary, then "mandamus will lie to require that discretion be exercised, provided discovery shows that the [Governor] is not already exercising his discretion." App. 3, 5. These conclusions are clearly erroneous.

First, there is no "determination" to be made regarding whether the duty to "reside" at the seat of government is discretionary or non-discretionary. The duty is unquestionably discretionary under the definition established by this Court in Nobles. Again, "[a] non-discretionary or ministerial duty in the context of a mandamus action is one that *is so plain*

"residing" there; and (b) is the Governor "residing" in Charleston if he sleeps there but departs in the morning and spends his waking hours elsewhere, or vice versa?

in point of law and so clear in matter of fact that no element of discretion is left as to the precise mode of its performance." Syl. Pt. 7, Nobles, *supra* (emphasis added). There can be no serious contention that the bald statement in Section I, Article VII of the Constitution and W. Va. Code § 6-5-4 that the Governor shall "reside" at the seat of government "is so plain in point of law and so clear in matter of fact that no element of discretion is left as to the precise mode of its performance." As previously discussed, "reside" has no clear, universally applicable legal meaning (*see* Brooke B., 230 W. Va. at 364, 738 S.E.2d at 30), and neither the Constitution nor the statute says a word about "the precise mode of its performance." Thus, the duty to "reside" in Charleston patently involves elements of discretion.[3]

Second, to the extent that the duty to "reside" in Charleston is not obviously discretionary, no factual development will aid in determining whether the duty is discretionary or not. Factual development can only provide additional information as to *the manner in which the Governor has been exercising his discretion* (i.e. the amount of time he is spending in Charleston); it cannot reveal whether the duty itself is discretionary or not under the law.

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[3] Below, Mr. Sponaugle cited Slack v. Jacob, 8 W. Va. 612 (1875) in support of the assertion that this Court has "interpreted Section 1 of Article VII of the West Virginia Constitution to be [a] nondiscretionary duty of the executive department." App. 47. Slack, however, supports the proposition enforcement of Article VII, Section 1 is a matter of executive discretion—at least when what is required for compliance with that provision is unclear. As explained, that case presented the question whether a circuit court could restrain the Governor from moving government property from Charleston to Wheeling during a constitutional challenge to an act that moved the Capitol. *See* Slack, 8 W. Va. at 615-623. While the Court noted that the Constitution "unequivocally requires" the Governor to "reside at the seat of government during his term of office, and keep there the public records of his office," it found that "to determine his constitutional duty" under this provision "he must exercise his discretion and best judgment." Id. at 657. Specifically, in that case, the Governor had to decide whether the law establishing Wheeling as seat of government was constutitonal. Id. The Court ultimately concluded that "power and duty were "clearly executive, requiring the exercise of discretion and judgment, on his part." Id. at 657-58. For that reason, the circuit court could not enjoin the Governor without addressing the constitutionality of the act. Id. at 658. Far from establishing that the duty to "reside" could be enforced through mandamus, this decision illustrates that circuit courts should not inject themselves when an ambiguous constitutional duty requires the Governor to exercise discretion when determining what the Constitution requires.

Third, the circuit court's conclusion that "mandamus will lie to require that [the Governor's] discretion be exercised, provided discovery shows that [the Governor] is not already exercising his discretion," makes no sense in the context of the duty to "reside" in Charleston. By the very nature of the duty to "reside" in Charleston, it is manifest that the Governor has already exercised his discretion, and continues to exercise his discretion every day, by choosing how and where to spend his time. Further, the Governor stated in his discovery responses, which the Governor's counsel discussed with the circuit court (App. 362-363), that he does "reside" in Charleston, as specified in the Constitution of West Virginia, in that he has a residence there, maintains the Office of the Governor there, and is physically present there as often as he needs to be as determined by the judgment, autonomy, and discretion inherent to his office. App. 297.[4]

Thus, neither a writ of mandamus "to require that [the Governor's discretion be exercised," nor discovery to determine if the Governor is "already exercising his discretion," are availing in this case, because it is clear that the Governor is already exercising his discretion.[5] Rather, the only writ that would be of any benefit to Mr. Sponaugle is a writ controlling the *manner* in which the Governor exercises his discretion, but as the circuit court acknowledged, "[m]andamus cannot be used to control the manner in which discretion is exercised." App 5.

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[4] Although the Governor's discovery responses were not attached to any filing and therefore not contained in the record of the circuit court, the Governor has provisionally included them in the Appendix pursuant to W. Va. R. App. P. 16(e)(5). A motion, as contemplated by Rule 16(e)(5), for leave to include the Governor's discovery responses has been filed contemporaneously herewith.

[5] Moreover, as a practical matter, discovery cannot proceed in this case in the absence of a specific and workable definition of "reside." Conducting discovery regarding whether the Governor is "residing" in Charleston without any guidance as to what "reside" requires would leave the parties (and the circuit court) fumbling in the dark for (a) a legal grounding to find the most basic elements of Mr. Sponaugle's claims; and (b) a basis to determine what (if any) of the information Mr. Sponaugle seeks is relevant and within the proper scope of discovery.

Accordingly, the circuit court's determination that mandamus is available in this case is clearly erroneous.

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

Although this Court has not squarely addressed the issue, numerous courts have held that mandamus is not an appropriate remedy to compel a general course of official conduct to be performed over a long period of time. *See e.g.* Rocky Mountain Animal Def. v. Colorado Div. of Wildlife, 100 P.3d 508, 517 (Colo. App. 2004)("[M]andamus will not lie to enforce duties generally, or to control and regulate a general course of official conduct for a long series of continuous acts to be performed under varying conditions."); Stone v. Ward, 752 So. 2d 100, 101 (Fla. Dist. Ct. App. 2000)("It is well-settled that mandamus is not appropriate to control or regulate a general course of conduct for an unspecified period of time."); Frank H. Hiscock Legal Aid Soc. v. City of Syracuse, 391 N.Y.S.2d 787, 788 (Sup. Ct. 1977)("[M]andamus is not available 'to compel a general course of official conduct or a long series of continuous acts', performance of which it would be impossible for a court to oversee," and "is particularly inappropriate where a relevant statutory duty involves the exercise of judgment and discretion."); State ex rel. Patterson v. Bd. of Sup'rs of Warren Cty., 125 So. 2d 91, 92 (Miss. 1960)(Mandamus "contemplates the necessity of indicating the precise thing to be done, and so is not an appropriate remedy for the enforcement of duties generally, or to control and regulate a general course of official conduct for a long series of continuous acts to be performed under varying conditions."); State ex rel. Bd. of Pub. Ed. for City of Savannah & Chatham Cty. v. Johnson,106 S.E.2d 353, 356 (Ga. 1958)("While mandamus will lie to compel performance of specific acts, where the duty to discharge them is clear, it is not an appropriate remedy to compel a general course of official conduct for a long series of continuous acts to be performed under

varying conditions."); Dorris v. Lloyd, 100 A.2d 924, 927 (Pa. 1953)("That mandamus will not lie to compel the pursuance of a general course of official conduct and the performance of continuous duties has been generally held."); Retail Liquor Dealers Protective Ass'n of Illinois v. Schreiber,47 N.E.2d 462, 465 (Ill. 1943)("Mandamus will not lie where to issue the writ would put into the hands of the court the control and regulation of the general course of official conduct or enforce the performance of official duties generally.")[6]

There are sound public policy considerations that buttress this rule, and weigh heavily in favor of joining the many courts that adhere to it. As one court explained,

> [w]here the court is asked to require the defendant to adopt a course of official action, although it is a course required by statute and imposed on the official by

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[6] Below, Mr. Sponaugle cited this Court's statement, in Syl. Pt. 2 of Gribben v. Kirk, 195 W. Va. 488, 466 S.E.2d 147 (1995), that "[m]andamus will lie against a State official to adjust prospectively his or her conduct to bring it into compliance with any statutory or constitutional standard." Mr. Sponaugle's reliance on Gribben is misplaced. In Gribben, the Court faced the issue of whether sovereign immunity precluded a circuit court from awarding unpaid overtime wages to a group of State Troopers. *See* 195 W. Va. 491-493, 466 S.E.2d at 150-152. The Court discussed the limited exceptions to sovereign immunity under which monetary awards against the State have been upheld. Id. at 494-495, 466 S.E.2d at 153-154. One such exception holds that sovereign immunity is not implicated where the State, as an employer, has wrongfully withheld all or part of an employee's salary and the Legislature had already budgeted for the employee's services. Id. at 495-496, 466 S.E.2d at 154-155. On the other hand, where, as in Gribben, there has not been a legislatively anticipated liability, sovereign immunity bars retroactive recovery, and only prospective relief may be awarded. Id. at 496-497, 466 S.E.2d at 155-156.

The issue in Gribben therefore became whether the circuit court's award of overtime damages was properly considered prospective or retroactive. Id. at 498, 466 S.E.2d at 157. The circuit court had previously ruled in a related case that its award of overtime pay from the date of the initiation of the litigation was prospective relief only, and the State did not appeal that determination. As a result, this Court held in Gribben that collateral estoppel required the Court to consider the award as prospective relief, and therefore the award of overtime pay for the period ensuing from the outset of the litigation was not barred by sovereign immunity. Id. at 498-499, 466 S.E.2d at 157-158.

Thus, when this Court stated in Gribben that mandamus will lie against a State official to adjust "prospectively" his or her conduct, it was merely addressing the above-described distinction between retroactive monetary relief (which is barred by sovereign immunity) and prospective monetary relief (which is not barred by sovereign immunity). In other words, Gribben concerns only the availability of back pay damages. At no point in Gribben did the Court hold that mandamus is available to compel and regulate a general, continuing course of official conduct. Moreover, Gribben did not involve the Governor, and did not place a court in charge of supervising the daily schedule of the State's chief executive. Accordingly, Gribben is inapposite and does not control the issues presented in the case at bar.

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

Stone, 752 So. 2d at101-02; *see also* Dorris, 100 A.2d at 927. These concerns are magnified by the separation of powers principles discussed in the foregoing where, as here, the official at issue is the State's Chief Executive and the duty sought to be enforced relates to where and how he, as the head of the executive branch of government, spends his time.

Indeed, if the circuit court granted the writ of mandamus that Mr. Sponaugle seeks, then the court would be required to supervise and manage the activities and whereabouts of the Governor of the State of West Virginia on an ongoing basis, and determine in numerous instances whether the Governor is spending sufficient time in Charleston. To render the circuit court (or any court) a supervising and managerial body over the State's Chief Executive would be not only manifestly inappropriate, but also impractical and unmanageable.

Below, Mr. Sponaugle suggested that a writ directing the Governor to "reside" in Charleston could be enforced through contempt proceedings. This suggestion is unmanageable for several reasons. App. 227. First, as discussed above, there are no specific guidelines as to how many hours, days, and/or nights per week or per month the Governor must spend in Charleston before he is deemed to be "residing" there. As a result, there are no standards by which to determine whether the Governor is in violation of a hypothetical writ directing him to "reside" in Charleston. Second, and relatedly, the lack of specificity in the directive to "reside" in Charleston would allow Mr. Sponaugle (and potentially others) to harass the Governor with contempt proceedings any time Mr. Sponaugle subjectively feels (or professes to feel) that the

Governor is not spending sufficient time there. Third, even if mandamus could be employed to set some arbitrarily-determined, specific number of days or hours that the Governor must spend in Charleston (which it cannot), Mr. Sponaugle's suggestion would still require the circuit court to monitor and supervise the Governor's daily activities throughout his term, and motivate the Governor's political opponents to harass him with repeated efforts to hold him in contempt.

Mr. Sponaugle also suggested that the circuit court could rule that the Governor's failure to "reside" at the seat of government constitutes a "disability" for purposes of Article VII, Section 16 of our State Constitution, and remove him from office until such "disability" is removed. App. 227-228.[7] This suggestion is absurd and should be flatly rejected. First, Mr. Sponaugle has cited no authority in support of his contention that the alleged failure to comply with the duty to "reside" at the seat government (or any duty) constitutes a "disability" within the meaning of Article VII, § 16. Second, while Article VII, § 16 does not explicitly state who makes the determination as to whether the Governor has a "disability," context suggests it is the Legislature, not the courts. Indeed, removing a governor from office is the purview of the Legislature through the impeachment process under Article IV, § 9. It is highly unlikely that the authors of our Constitution intended to allow individual citizens to circumvent that process and unilaterally remove the Governor from office by filing lawsuits to declare him/her "disabled." Third, it bears repeating that there are no specific parameters for the duty to "reside" at the seat of

[7] W. Va. Const. art. VII, § 16 states as follows:"In case of the death, conviction or impeachment, failure to qualify, resignation, or other disability of the governor, the president of the Senate shall act as governor until the vacancy is filled, or the disability removed; and if the president of the Senate, for any of the above named causes, shall become incapable of performing the duties of governor, the same shall devolve upon the speaker of the House of Delegates; and in all other cases where there is no one to act as governor, one shall be chosen by joint vote of the Legislature. Whenever a vacancy shall occur in the office of governor before the first three years of the term shall have expired, a new election for governor shall take place to fill the vacancy."

government. As a result, even if the alleged failure to "reside" in Charleston could be considered a "disability" under Article VII, § 16, there is no basis for the circuit court (or any court) to determine when or whether this purported "disability" exists and/or has been removed.

For all of the foregoing reasons, the enforcement mechanisms Mr. Sponaugle has suggested are both inappropriate and unworkable. There is simply no manageable and appropriate way to place a court in charge of regulating the Governor's presence and activities on a continuing basis. Accordingly, this Court should hold that mandamus is not available to enforce the Governor's ongoing duty to "reside" in Charleston throughout his term.

3. Other remedies exist to address Mr. Sponaugle's alleged concerns, while the remedy he seeks would not address his concerns.

Mr. Sponaugle's mandamus petition alleges that he is concerned about the Governor's "habitual absenteeism," which Mr. Sponaugle claims has caused poor productivity in state government and other problems. App. 20, 41-42, 48-50. However, if Mr. Sponaugle (or any citizen of this State) is dissatisfied with the manner in which the Governor is performing his job, he has the ability to vote against him at the next gubernatorial election and rally others to do so as well. Mr. Sponaugle argued below that a future election does not provide a remedy for the alleged current neglect of duty, but, in a democracy, future elections are precisely the mechanism by which voters remedy any concerns they may have that an elected official is not adequately performing his or her duties.

In addition, if Mr. Sponaugle believes that the circumstances are such that he cannot wait until the next election, he can seek impeachment. Below, Mr. Sponaugle protested that he brought this action in his individual capacity as a citizen and taxpayer, and not as an elected member of the Legislature. App. 225. However, this does not change the fact that he *is* a member of the Legislature, and even if he were not, individual citizens have the ability to call or

write to their representatives in the Legislature and urge them to initiate impeachment proceedings.

Moreover, Mr. Sponaugle's assertion that he is bringing this action as a citizen and a taxpayer underscores the inherent danger in allowing mandamus actions like the one at bar to proceed. To hold that every individual citizen can file and maintain a lawsuit against the Governor every time he or she professes to feel that the Governor is not spending sufficient time at the Capitol, or not adequately performing some other purported ongoing duty, would be to open the courthouse doors to potentially thousands of costly, politically-motivated lawsuits. Given that other, more appropriate avenues exist to address purported deficiencies in the Governor's performance of his duties, Mr. Sponaugle's invitation to open the floodgates to individual lawsuits against the Governor should be rejected.

The circuit court, observing that mandamus should not be denied based on the existence of another remedy unless the other remedy is equally convenient, beneficial and effective, held that waiting for a future election or impeachment proceedings "are not remedies that are as equally convenient, beneficial and effective as this mandamus action." App. 3. However, Mr. Sponaugle's mandamus action is plainly *not* an effective means of addressing Mr. Sponaugle's purported concerns. To elaborate, even if the circuit court were to issue a writ directing the Governor to "reside" within the territorial limits of the City of Charleston, the writ would not necessarily address the purported neglect of duty or absenteeism issues that Mr. Sponaugle has alleged. Mr. Sponaugle acknowledges that our Constitution does not require the Governor to "reside" at any particular location (such as the Governor's Mansion) within Charleston, nor does it say that the Governor must work from his office at the Capitol complex. App. 330, 336. In Mr. Sponaugle's own words, "he doesn't have to reside at the governor's mansion," and "could

get a house or an apartment on the east end of Charleston," or even "live in a van down by the Kanawha River." App. 330.

Thus, as the circuit court previously recognized, ordering the Governor to "reside" in Charleston would not mean that the Governor would have to spend more time at his office in the Capitol, which is apparently what Mr. Sponaugle desires. App. 336-337. Furthermore, if "reside" means that the Governor must "live" or "sleep" in Charleston, then he could spend his nights there but still spend his working hours traveling about the state far from the seat of government. In the final analysis, if Mr. Sponaugle believes that the Governor is not adequately performing the responsibilities of his Office, his remedy is in the halls of the Legislature or at the ballot box.

For all of the foregoing reasons, the circuit court clearly erred in refusing to dismiss the underlying mandamus action seeking to compel the Governor to "reside" in Charleston. Accordingly, the third (and most important) Hoover factor weighs in favor of granting the requested writ of prohibition.

B. The other Hoover factors also weigh in favor of granting the requested writ of prohibition.

As discussed *supra*, the third Hoover factor (the existence of clear error as a matter of law) should be given substantial weight, and a petitioner need not satisfy all of the remaining Hoover factors. *See* Syl. Pt. 4, Hoover, 199 W. Va. 12, 483 S.E.2d 12. Nevertheless, in the case at bar, all of the Hoover factors weigh in favor of granting the writ requested.

1. The first and second Hoover factors weigh in the Governor's favor.

The first and second Hoover factors ask whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief, and whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal. Syl. Pt. 4, Hoover, 199 W.

Va. 12, 483 S.E.2d 12. Here, the Governor has no adequate means other than this Petition for Writ of Prohibition to stop Mr. Sponaugle's fatally-flawed and non-justiciable mandamus petition from proceeding. The circuit court denied the Governor's motion to certify questions (App. 11), and the Governor will be damaged in a way that is not correctable on appeal if Mr. Sponaugle's mandamus action is allowed to proceed.

To elaborate, if Mr. Sponaugle's novel, unprecedented mandamus action is allowed to proceed through discovery and an evidentiary hearing, and subsequently, on appeal, this Court agrees with the Governor that the case is non-justiciable and/or otherwise fails on its face as a matter of law, then all of the time and resources that the Governor was forced to devote to the underlying proceedings will have been wasted. Further, he will have endured an immense and needlessly protracted disruption of his already enormous responsibilities. A favorable ruling on appeal will not be able to correct the harm sustained.[8]

2. The fourth Hoover factor weighs in the Governor's favor.

The fourth Hoover factor asks whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law. Syl. Pt. 4, Hoover, 199 W. Va. 12, 483 S.E.2d 12. While, due to the novelty of the underlying petition for writ of mandamus to compel the Governor to "reside" in Charleston, the circuit court's order is not an

[8] This is especially true given that Mr. Sponaugle has served intrusive and burdensome discovery requests seeking detailed and sensitive documents and information about such matters as the Governor's sleeping habits and movements throughout the State, the location of his personal property, and records of the security details provided by the West Virginia State Police and West Virginia Capitol Police. App. 212-217, 288-309. Mr. Sponaugle even seeks to obtain records and copies of every single government-related phone call, email, and text message that the Governor has made while away from his office at the West Virginia Capitol. App. 217, 307-308. These discovery requests are not only disruptive of the Governor's duties and invasive of the decision-making process of his Office, but also present a threat to his safety, as the information sought regarding the Governor's habits and movements, and the records of the security details provided to him, could be put to nefarious use by persons wishing to harm him.

"oft-repeated" error, it opens the door to repeated actions and/or contempt proceedings that would hamper the Governor's ability to attend to the duties and functions of his office. Indeed, given that Mr. Sponaugle claims no individual and particularized injury, and is simply asserting standing as a citizen and taxpayer, allowing this case to proceed is tantamount to holding that any citizen who professes to feel that the Governor of the State of West Virginia is not spending sufficient time in Charleston can hail the Governor into court and force him to answer (or object to and litigate over) discovery requests about his whereabouts, sleeping habits, and movements throughout the State.

3. The fifth Hoover factor weighs in the Governor's favor.

The fifth Hoover factor asks whether the lower tribunal's order raises new and important problems or issues of law of first impression. Syl. Pt. 4, Hoover, 199 W. Va. 12, 483 S.E.2d 12. Here, the circuit court's order raises critically important issues such as (a) whether the courts have jurisdiction and/or the legitimate power to decide whether the Governor is spending sufficient time in Charleston and override his autonomy and discretion to apportion his time and presence, and (b) if the circuit court is correct that mandamus is theoretically available to compel the Governor to "reside" in Charleston, what are the specific parameters of the character and amount of time that the Governor must spend at the seat of government before he is deemed to be "residing" there? Further, there is no question that this case presents issues of first impression. Neither Mr. Sponaugle nor the circuit court has cited, nor has the Governor found, a single case in which any court has entertained a mandamus action (let alone granted a writ of mandamus) against a state's chief executive to compel him or her to "reside" at a specified location, nor attempted to define parameters as to the character and amount of time that the chief executive must spend in that location in order to satisfy his or her duty to "reside" there.

Accordingly, all five of the Hoover factors weigh in favor of granting a writ of prohibition to the Governor.

CONCLUSION

For all of the foregoing reasons, the Governor respectfully requests that this Court issue a writ of prohibition directing the circuit court to dismiss Mr. Sponaugle's mandamus action with prejudice.

Respectfully submitted,

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

By Counsel,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. _____

STATE OF WEST VIRGINIA, ex rel.,
JAMES CONLEY JUSTICE, II,
Governor of the State of West Virginia,

Petitioner,

v.

THE HONORABLE CHARLES E. KING, JR.,
Judge of the Circuit Court of Kanawha County,
West Virginia, and G. ISAAC SPONAUGLE, III,

Respondents.

VERIFICATION

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

I, James Conley Justice, II, Petitioner in the above-styled matter, hereby verify pursuant to W. Va. Code § 53-1-3 that the facts and allegations contained in this Petition for Writ of Prohibition are true and correct to the best of my knowledge, information, and belief.

James Conley Justice, II

Taken, subscribed, and sworn to before me this 13th day of December, 2019.

My commission expires: April 15, 2023

[Seal]

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
NANCY E. SMITH
Carey, Scott, Douglas & Kessler
[illegible] PO Box 913 Charleston [illegible]
MY COMMISSION EXPIRES APRIL 15, 2023

Nancy E. Smith
Notary Public

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Respondents.

CERTIFICATE OF SERVICE

I, Michael W. Carey, do hereby certify that on the 13th day of December, 2019, I have served the foregoing **"Petition for Writ of Prohibition;" "Appendix to Petition for Writ of Prohibition;"** and **"Petitioner's Motion for Leave to Include Documents in the Appendix That Are Not Contained in the Record Below,"** upon the parties to this action, via United States Mail, postage pre-paid, addressed as follows:

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Kanawha County Judicial Building
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Charleston, WV 25301

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December 13, 2019

Edythe Nashe Gaiser, Clerk of Court
Supreme Court of Appeals of West Virginia
State Capitol Building Room E-317
1900 Kanawha Blvd. East
Charleston, West Virginia 25305

Re: State of West Virginia, ex rel., James Conley Justice, II
v. The Honorable Charles E. King, Jr., et al.
Docket No. _____

Dear Ms. Gaiser:

Enclosed for filing please find the original and ten (10) copies of the **"Petition for Writ of Prohibition;"** the original and one (1) copy of the **"Appendix to Petition for Writ of Prohibition;"** and the original and five (5) copies of **"Petitioner's Motion for Leave to Include Documents in the Appendix That Are Not Contained in the Record Below,"** regarding the above-styled case. By copy of the referenced document, all interested parties have been notified of this filing.

Thank you for your assistance in this matter. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Michael W. Carey

MWC/amb
Enclosures
cc: Honorable Charles E. King, Judge
G. Isaac Sponaugle, Esq.
George J. Terwilliger, III, Esq.