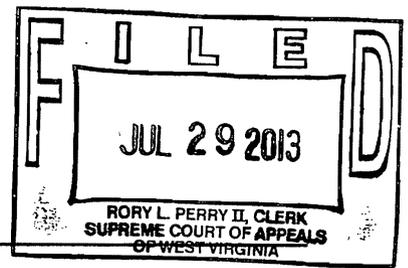


RECORD NO. 13-0234



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

DEAN LOWE and MARTHA LOWE, individually and as Trustees of the Demar Revocable Trust, Counter-Plaintiffs and Third-Party Plaintiffs Below,

Petitioners,

vs.

JOSEPH C. RICHARDS and JOYCE A. RICHARDS, Third-Party Defendants Below, and **HUGH E. HEGYI**, Trustee of the Herman Hegyi Trust, Counter-Defendant Below,

Respondents.

ON APPEAL FROM THE CIRCUIT COURT OF BERKELEY COUNTY
(CIVIL ACTION NO. 11-C-979)

**BRIEF OF RESPONDENTS JOSEPH C. RICHARDS AND
JOYCE A. RICHARDS**

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I. QUESTIONS PRESENTED

1. Did the Circuit Court err in dismissing the Petitioners' claim for a declaratory judgment as to the correct boundary line between the State of West Virginia and the Commonwealth of Virginia when (1) courts lack subject matter jurisdiction over non-justiciable political questions, (2) a controversy is considered a non-justiciable political question if there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department," (3) courts have routinely held that questions of *de jure* and *de facto* sovereignty are archetypal political questions, and (4) the authority to establish the location of a disputed or uncertain segment of the West Virginia state boundary has been delegated to the West Virginia Boundary Commission and the State Legislature pursuant to W. Va. Code § 29-23-1 (1987) *et seq.*?

2. Did the Circuit Court err in dismissing the Petitioners' claim for a declaratory judgment as to the correct boundary line between the State of West Virginia and the Commonwealth of Virginia when the United States Supreme Court has original and exclusive jurisdiction over litigation to establish the boundary between two states pursuant to Article III, § 2, clause 2 of the United States Constitution?

3. Did the Circuit Court err in dismissing the Petitioners' claim for a declaratory judgment as to the correct boundary line between the State of West Virginia and the Commonwealth of Virginia when (1) the court may dismiss an action for failure to join an indispensable party if the party cannot be joined and his interest is so situated that the disposition of the action in his absence may impair or impede his ability to protect that interest, (2) neither state has consented to suit before the Circuit Court over the extent of their respective borders, and (3) the Petitioners' requested relief would require the court to distribute territory between the two states?

4. Did the Circuit Court err in dismissing the Petitioners' claims for ejectment and adverse possession when (1) the Petitioners' claims depend upon a judicial decree as to the location of the correct boundary line between the State of West Virginia and the Commonwealth of Virginia, (2) the Circuit Court lacked jurisdiction to declare the location of the boundary line, and (3) the Petitioners have not shown how their claims could otherwise be adjudicated without the court's declaration of the boundary line?

5. Must the courts of West Virginia treat the Richards' property as situate in the Commonwealth of Virginia when (1) courts are bound to take cognizance of the boundaries in fact claimed by a state, (2) the courts cannot pass upon the validity of a state's claim, but may only declare the fact of sovereignty, when the political authorities of a state have actually claimed and exercised jurisdiction over a particular locality, and (3) it is undisputed that the Richards' property is recorded upon the land books of Frederick County, Virginia, and is actually assessed and taxed by the Commonwealth of Virginia as if it were entirely situate in Virginia?

II. STATEMENT OF THE CASE

Respondent Hugh E. Hegyi ("Respondent Hegyi") originally filed this action on November 17, 2011 to establish an easement across a roadway running through the Petitioners' property to the public highway. Respondent Hegyi owns twenty-five (25) acres of real estate located along the northeastern boundary line of Frederick County, Virginia, and the Petitioners own an adjoining fifty (50) acres of real estate located along the southwestern boundary line of Berkeley County, West Virginia.

After litigating for nearly a year, by Order entered October 16, 2012, the Circuit Court permitted the Petitioners to file a Counterclaim and Third Party Complaint adding Joseph

C. Richards and Joyce A. Richards (the “Richards”), neighbors of Respondent Hegyi and the Petitioners, as Third Party Defendants. The Richards own nine and eighty-nine hundredths (9.89) acres of real estate located in Frederick County, Virginia, which adjoins the lands of the other parties and is separated from the Lowes’ property by the Virginia/West Virginia line. Other than the vicinity of their real property to the real property owned by the Petitioners and Respondent Hegyi, the Richards have no connection to, or interest in, the underlying easement dispute that spawned this litigation.

In their Third Party Complaint, the Petitioners contended that, as to Respondent Hegyi and the Richards, they own all property north of what they believe to be the “correct” physical location of the Virginia/West Virginia state line, which according to their private surveyor is located at N. 50° 16’ 09” West. Based on their private surveyor’s assertion that the physical location of the Virginia/West Virginia state line is N. 50° 16’ 09” West, the Lowes claimed title to all lands owned by Plaintiff Hegyi and the Richards situate north of that line. The Petitioners thus asked the Circuit Court to declare (1) that their private survey established that the physical location of the Virginia/West Virginia state line is N. 50° 16’ 09” West and (2) that Petitioners therefore own all of Respondent Hegyi and Richards’ real estate situate north of that line.

The Richards moved to dismiss the Petitioners’ Third Party Complaint on the ground that (1) the Petitioners’ claims of ejectment and adverse possession entirely depend upon the Circuit Court declaring that the “correct” physical location of the Virginia/West Virginia state line is N. 50° 16’ 09” West and (2) the question of the true physical location of the Virginia/West Virginia line is a non-justiciable political question. The Richards further pointed out that the Circuit Court was bound by the Commonwealth of Virginia’s exercise of *de facto*

sovereignty over the Richards' real estate, which is assessed and taxed as if it were entirely situate in Virginia. The Circuit Court agreed with the Richards and dismissed the Petitioners' Third Party Complaint for (1) lack of subject matter jurisdiction over the Petitioners' declaratory judgment claim and (2) failure to state a claim for ejectment and adverse possession.

III. SUMMARY OF ARGUMENT

The Petitioners set forth no legal authority in support of their appeal or in contradiction of the Circuit Court's Order. Instead, the Petitioners rehash the same arguments that the Circuit Court rejected and simply argue the evidence they would have presented if this case were properly before the court. None of the Petitioners' arguments have merit and the Circuit Court's Order granting the Richards' motion to dismiss should therefore be affirmed.

First, the Circuit Court correctly dismissed the Petitioners' declaratory judgment claim as a non-justiciable political question. The Petitioners' requested that the court decree the "correct" physical location of the state boundary line between the State of West Virginia and the Commonwealth of Virginia. The location of the boundaries between states, however, is *per se* a political question that has been demonstrably committed to the executive and legislative functions of government by the law of nations and pursuant to W. Va. Code §§ 29-23-1 (1987) *et seq.*

Second, the Circuit Court correctly dismissed the Petitioners' declaratory judgment claim for lack of jurisdiction. Only the United States Supreme Court, through an action between two states pursuant to Article III, § 2, clause 2 of the United States Constitution, has jurisdiction to adjudicate the issue of the "correct" physical location of the state boundary line between the State of West Virginia and the Commonwealth of Virginia.

Third, the Circuit Court correctly dismissed the Petitioners' declaratory judgment claim for failure to join an indispensable party. The State of West Virginia and the Commonwealth of Virginia are indispensable parties to the Petitioners' declaratory judgment claim because a decree setting the boundary between the states would have the effect of distributing territory between them. A decree of the physical location of the border without the presence of the states would impair the rights of the states to protect their sovereign territory, but neither state has consented to suit in a West Virginia court.

Fourth, the Circuit Court correctly dismissed the Petitioners' ejectment and adverse possession claims for failure to state a claim. The Petitioners' claims for ejectment and adverse possession depend entirely upon a decree of the "correct" physical location of the West Virginia / Virginia boundary but the court lacked jurisdiction to make that initial decree. The Petitioners failed to set forth any alternative grounds upon which their claims could be determined and thus could not prove any set of facts in support of their claims.

Finally, the Circuit Court was bound to accept the Commonwealth of Virginia's actual exercise of jurisdiction over the disputed property as conclusive evidence that the property is in Virginia and the Petitioners' claims lack merit. It is undisputed that the property, which the Petitioners seek to claim through ejectment and adverse possession, is actually assessed and taxed by the Commonwealth of Virginia as if it were entirely situate there. Irrespective of the Petitioners' belief that this property is located in West Virginia, the exercise of *de facto* sovereignty by Virginia prevents the courts from doing anything other than taking judicial notice that the property is legally situate in Virginia.

IV. STATEMENT REGARDING ORAL ARGUMENT

All of the Petitioners' arguments on appeal were thoroughly addressed by the Richards' reply in support of their motion to dismiss. *See* App. 81-90. The Richards, therefore, believe that the briefs submitted by the parties and the trial court record adequately present the facts and legal arguments relevant to this appeal. Furthermore, issues of territorial sovereignty have been repeatedly held to be non-justiciable political questions:

Who is the sovereign, *de jure* or *de facto*, of a territory, is not a judicial, but a political, question, the determination of which by the legislative and executive of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances.

Jones v. United States, 137 U.S. 202, 212, 11 S. Ct. 80, 34 L.Ed. 691 (1890) (citing cases as far back as 1818). The Petitioners present no legal authority that contradicts the principle stated in *Jones*; in fact, the Petitioners present no legal authority in support of their claims at all. Oral argument, therefore, is unnecessary because the appeal is frivolous, the dispositive issue has been decided by prior decision of the United States Supreme Court, and the decisional process would not be significantly aided by oral argument. *See* W. Va. R. App. P. 18(a). Accordingly, the Richards requests that the Court dispense with oral argument and issue a memorandum decision affirming the order of the Circuit Court. *See* W. Va. R. App. P. 21(a). However, in the event that the Petitioners are granted oral argument by this Court, the Richards respectfully request a similar opportunity for oral argument in order to respond to any facts or legal arguments raised by the Petitioners in the hearing before the Court.

V. ARGUMENT

A. THE CIRCUIT COURT CORRECTLY DETERMINED THAT THE PETITIONERS' CLAIM FOR A DECLARATORY JUDGMENT AS TO THE "CORRECT" PHYSICAL LOCATION OF THE VIRGINIA/WEST VIRGINIA BORDER IS A NON-JUSTICIABLE POLITICAL QUESTION.

The central issue before this Court is whether a West Virginia trial court may declare the "correct" physical location of the Virginia/West Virginia state boundary. It is undisputed that, without such a declaration, the Petitioners' substantive claims for adverse possession and ejectment must fail. The Circuit Court correctly ruled that a determination of the "correct" physical location of the Virginia/West Virginia state boundary is a non-justiciable political question committed to the legislative and executive branches of government under the law of nations and pursuant to W. Va. Code §§ 29-23-1 (1987) *et seq.* The question of who is the sovereign, *de jure* or *de facto*, over any given area of territory is an "archetypal" political question, "the determination of which by the legislative and executive of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government." *Jones v. United States*, 137 U.S. 202, 212, 11 S. Ct. 80, 34 L.Ed. 691 (1890).

1. **The "Political Question" doctrine deprives courts of jurisdiction, based on prudential concerns, over cases or controversies that would normally fall within their purview but that have one or more elements that are inextricably tied to decision-making that implicates the separation of powers.**

Article III, § 2 of the United States Constitution limits the "judicial power" to actual "cases or controversies." *Harshbarger v. Gainer*, 184 W. Va. 656, 659, 403 S.E.2d 399, 402 (1991). The case or controversy requirement "applies to all West Virginia judicial proceedings."¹ *Id.*

¹ The *Harshbarger* court noted that "the declaratory judgment act does not mandate an actual dispute or controversy . . ." *Harshbarger*, 184 W. Va. at 659, 403 S.E.2d at 402. However, "the issue to

The requirement of an actual case or controversy imposes a “dual limitation” upon the courts. *See Flast v. Cohen*, 392 U.S. 83, 94, 88 S. Ct. 1942, 20 L.Ed.2d 947 (1968). First, this requirement serves to “limit the business of [] courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.” *Id.* Second, this requirement “define[s] the role assigned to the judiciary in a tripartite allocation of power to assure that the [] courts will not intrude into areas committed to the other branches of government.” *Id.* The dual limitation imposed by the case or controversy requirement is enforced through the “justiciability” doctrines of Article III, which state the fundamental limits on judicial power in our system of government. *See Allen v. Wright*, 468 U.S. 737, 750, 104 S. Ct. 3315, 82 L.Ed.2d 556 (1984).

“Concerns of justiciability go to the power of the [] courts to entertain disputes, and to the wisdom of their doing so.” *Renne v. Geary*, 501 U.S. 312, 316, 111 S. Ct. 2331, 115 L.Ed.2d 288 (1991). The justiciability doctrines that have developed to limit the exercise of judicial power are thus “founded in the concern about the proper – and properly limited – role of the courts in a democratic society.” *Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L.Ed.2d 343 (1975). The justiciability doctrines include principles such as standing, ripeness, mootness, the prohibition against advisory opinions, and the political question doctrine. *See generally* Erwin Chemerinsky, *Constitutional Law* 30 (2d ed. 2005).

be determined [by declaratory judgment] must be potentially justiciable at some future time when the things sought to be avoided by the declaratory judgment action will have occurred.” *Trail v. Hawley*, 163 W. Va. 626, 259 S.E.2d 423 (1979). Irrespective of whether the declaratory judgment act requires an actual dispute or controversy in all cases, the Petitioners’ declaratory judgment claims are not “potentially justiciable at some future time” because, as discussed *infra*, a West Virginia court does not have jurisdiction to define a boundary shared by West Virginia with a neighboring state. The power to define West Virginia’s border with another state is confined exclusively to the executive and legislative branches of the affected states or to the original and exclusive jurisdiction of the United States Supreme Court through an action between the states themselves.

“The political question doctrine deprives [] courts of jurisdiction, based on prudential concerns, over cases which would normally fall within their purview.” *Lin v. United States*, 561 F.3d 502, 506 (D.C. Cir. 2009). Although the circumstances vary in which the political question doctrine may be presented, “each has one or more elements which identify it as essentially a function of the separation of powers.” *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 7 L.Ed.2d 663 (1962). The political question doctrine thus prevents the courts from trespassing into areas that are best left to the political branches of government to interpret and enforce. See Chemerinsky, *Constitutional Law* 77 (2d ed. 2005). This prudential restraint upon judicial power operates to preserve the mandatory separation of powers inherent in our system of government. See *State ex rel. Barker v. Manchin*, 167 W. Va. 155, 167, 279 S.E.2d 622, 630 (1981) (“[Article V, section 1 of the state constitution] which prohibits any one department of our state government from exercising the powers of the others 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.”).

2. **Prominent on the surface of any case held to involve a political question is found (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or (2) a lack of judicially discoverable and manageable standards for resolving it; or (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or (4) the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or (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. To find a political question, the Court need only conclude that one of the above factors is present.**

Although the circumstances in which the political question doctrine apply vary depending upon the specific issues to be adjudicated, the United States Supreme Court has identified six factors that constitute a non-justiciable political question:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217, 82 S. Ct. 691, 7 L.Ed.2d 663 (1962). “To find a political question, [the Court] need only conclude that one factor is present, not all.” *Schneider v. Kissinger*, 412 F.3d 190, 194 (. 2005).

- 3. The questions of sovereignty over territory and the boundaries between States are, *per se*, non-justiciable political questions, the determination of which by the legislative and executive of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government.**

The determination of who is sovereign over specific territory is, *per se*, a non-justiciable political question:

Who is the sovereign, *de jure* or *de facto*, of a territory, is not a judicial, but a political, question, the determination of which by the legislative and executive of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances.

Jones v. United States, 137 U.S. 202, 212, 11 S. Ct. 80, 34 L.Ed. 691 (1890) (citing cases as far back as 1818). *See also Lin v. United States*, 561 F.3d 502, 505 (D.C. Cir. 2009) (quoting *Jones*); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 103 (C.D. Cal. 1971) (“The determination of foreign states’ boundaries is certainly not a permissible function of

this court. In our system, the questions of what are a country's boundaries, or of what nation has sovereignty over a certain piece of territory, are not for the judiciary to decide; they are political questions, upon which the courts must be guided and bound by the pronouncements of the executive.”). This rule applies equally to determinations of the boundaries between the states, which are considered separate sovereigns under our system of government:

It cannot be doubted, that it is a part of the general right of sovereignty, belonging to independent nations, to establish and fix the disputed boundaries between their respective territories; and the boundaries, so established and fixed by compact between nations, become conclusive upon all the subjects and citizens thereof, and bind their rights, and are to be treated, to all intents and purposes, as the true and real boundaries. *This is a doctrine universally recognized in the law and practice of nations. It is a right equally belonging to the states of this Union, unless it has been surrendered, under the constitution of the United States.*

Poole v. Fleeger's Lessee, 36 U.S. (11 Pet.) 185, 209 (1837) (emphasis added). Accordingly, “boundaries between States [are] a political question, *per se*, and should be adjusted by political tribunals, unless agreed to be settled as a judicial question, and in the Constitution so provided for.”² *Luther v. Borden*, 48 U.S. (7 How.) 1, 56 (1849) (Woodbury, J., dissenting) (citing *State of Rhode Island v. Com. of Massachusetts*, 37 U.S. (12 Pet.) 657, 738 (1838)).

The handful of state courts that have been presented with questions involving the physical location of a state boundary line are uniformly in agreement that the determination of the state's boundary is a non-justiciable political question. See *Harrold v. Arrington*, 64 Tex.

² As discussed *infra*, boundaries between states may be adjudicated before the United States Supreme Court pursuant to its exclusive and original jurisdiction over controversies between states. Pursuant to Article III, § 2, clause 2 of the United States Constitution, the states agreed to surrender to the United States Supreme Court their sovereign right to settle mutual controversies. No similar grant of authority, however, has been given to any state tribunal, and thus no jurisdiction exists in the courts of this State to decide the location of the Virginia/West Virginia boundary.

233 (1885) (“Whether or not Greer county is part of the state of Texas depends upon where the northern boundary line of our state, dividing it from the Indian territory, should be located. This is a question to be settled by the political and not the judicial department of our state government.”); *State v. Dunwell*, 3 R.I. 127 (1855) (“This exception assumes to bring in question the eastern boundary line of this State. Where that line is, *de jure*, is a political question, with which the Courts of the State will not intermeddle.”); *Daniels v. Stevens’ Lessee*, 19 Ohio 222, 231 (1850) (en banc) (emphasis added) (“no state court has jurisdiction of the question of boundary at all . . . these powers appertain exclusively to the law and treaty making departments of its government, whose action must necessarily conclude the question in all the forms in which it is capable of being presented.”).

4. The true physical location of this State’s border with another state is a non-justiciable political question committed to the legislative and executive branches of government pursuant to W. Va. Code § 29-23-1 (1987).

West Virginia has clearly committed the issue put before this Court – the determination of the exact physical boundary between West Virginia and an adjoining state – to the legislative and executive branches of government, which ordinarily set the state’s physical boundaries by acting in conjunction with the neighboring states to take recommendations from an interstate boundary commission and enact them as law.

West Virginia Code Chapter 29, Article 23 established the West Virginia boundary commission, which is authorized to “meet with similar commissions or bodies of any of the several states contiguous with this state, whose purpose in their respective states is to establish state boundary lines coterminous with the boundary of the state of West Virginia and submit findings and recommendations to the Legislature, applicable to the location of any particular boundary segment in question.” W. Va. Code § 29-23-2(c)(5) (1987). Once its

investigation is complete, the commission recommends to the Legislature “that appropriate legislation be enacted, establishing the true boundary line at those portions of the state boundary that are in dispute with another state or whose location is uncertain: Provided, That the contiguous state agrees with the recommendation.” W. Va. Code § 29-23-2(c)(6) (1987). The exact physical boundary is only determined by this process if the affected states enact legislation approving the boundary commissions’ recommendations.³ See Va. Code § 1-313 (2005) (adopting boundary commission survey as the physical boundary between Loudon County, Virginia and Jefferson County, West Virginia); W. Va. Code § 29-23-3 (1998) (same).

5. **The Circuit Court correctly dismissed the Petitioners’ claim for a declaratory judgment as to the correct boundary line between the State of West Virginia and the Commonwealth of Virginia because their claim presented a non-justiciable political question that must be resolved by the executive and legislative branches of the West Virginia and Virginia governments.**

“A controversy is nonjusticiable -- *i.e.*, involves a political question -- where there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department’” *Nixon v. United States*, 506 U.S. 224, 228, 113 S. Ct. 732, 122 L.Ed.2d 1 (1993) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). The Petitioners’ claim for a declaratory judgment as to the “correct” location of the boundary line between West Virginia and Virginia clearly requires resolution of a political question committed to the executive and legislative branches of the West Virginia and Virginia governments, which must work together through an interstate boundary commission and enact legislation approving the commission’s

³ As discussed *infra*, if the affected states cannot agree on their exact physical boundary they may file an original action before the United States Supreme Court to have the line determined. West Virginia, however, may only file such an action if the state legislature enacts “proper legislation to direct that the attorney general proceed under the constitution of the United States with litigation to adjudicate the exact and true location of any boundary line in dispute or whose precise location is unascertainable.” See W. Va. Code § 29-23-2(c)(7) (1987).

recommendations. Usurping this carefully-crafted statutory process through a declaratory judgment action is an impermissible function of the courts of this State, which the Circuit Court correctly recognized.

The State of West Virginia and the Commonwealth of Virginia recently utilized an interstate boundary commission in neighboring Jefferson County, WV and Loudoun County, VA, due to the exact same issue faced by this Court. Without a definitive survey of the state line, the courts previously had no power to adjudicate claims that depended upon the boundary's location:

Incidentally, the Virginia-West Virginia boundary is still not final in some places. In 1991 (yes, 1991) the Virginia and West Virginia legislatures appropriated money for a boundary commission to look at 15 miles of fuzzy border between Loudoun County, Virginia and Jefferson County, West Virginia. Why? The Virginia attorney general had an assault prosecution thrown out of court. Because the boundary is so fuzzy, they couldn't prove the crime took place in Virginia.

Prof. Charlie Grymes, Virginia-West Virginia Boundary, available at <http://www.virginiaplaces.org/boundaries/wvboundary.html> (last accessed on January 17, 2013). See also Kevin Vaughn, *Surveying the Virginia/West Virginia Boundary*, Professional Surveyor Magazine (Jan/Feb 1998) ("Later, [the boundary] location was disputed in criminal and civil cases, leading to the first ever survey of this historic line."). If the exact physical location of the boundary between Loudoun and Jefferson Counties were a justiciable issue, the Virginia attorney general undoubtedly could have surveyed the boundary for itself to prove that the assault occurred in Virginia. The Virginia courts determined otherwise, dismissing the Commonwealth's assault case and spurring Virginia and West Virginia to conduct an official survey of their shared boundary.

Just as the courts in Virginia refused to adjudicate the location of the state line between Jefferson and Loudoun counties, the Circuit Court correctly dismissed the Petitioners' declaratory judgment claim because the court lacked subject matter jurisdiction to decree that the boundary line between West Virginia and Virginia is demarcated by a line running N. 50 16' 09" West.

B. THE CIRCUIT COURT CORRECTLY DETERMINED THAT ADJUDICATION OF THE EXACT PHYSICAL BOUNDARY BETWEEN TWO STATES FALLS WITHIN THE EXCLUSIVE ORIGINAL JURISDICTION OF THE UNITED STATES SUPREME COURT.

The Circuit Court correctly determined that it lacked subject matter jurisdiction over the Petitioners' declaratory judgment claim because only the United States Supreme Court, through an action brought by the states themselves, has jurisdiction to adjudicate the location of a state boundary.⁴

"The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States." 28 U.S.C. § 1251 (1978). *See also* U.S. Const. art. III, § 2, cl. 2 ("In all cases . . . in which a State shall be Party, the supreme Court shall have original jurisdiction."). An action between sister states to establish the boundary between them is within the original and exclusive jurisdiction of the United States Supreme Court pursuant to Article III, § 2, clause 2. *See Ohio v. Kentucky*, 410 U.S. 641, 93 S.Ct. 1178, 35 L.Ed.2d 560 (1973).⁵ The United States Supreme Court has jurisdiction over state boundary determinations

⁴ The Petitioners would lack standing in the United States Supreme Court to file this claim in their own right. A boundary action under the Court's original and exclusive jurisdiction must be filed by the West Virginia attorney general on behalf of the state and the Petitioners pursuant to specific legislation enacted under W. Va. Code § 29-23-2(c)(7) (1987).

⁵ Boundary adjudications under the United States Supreme Court's original jurisdiction are equitable in nature and are governed by the law of nations. *See Ohio v. Kentucky*, 410 U.S. 641, 93 S.Ct. 1178, 35 L.Ed.2d 560 (1973); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1838).

not because of the general justiciability of that issue but because the states, pursuant to Article III, § 2, clause 2 of the United States Constitution, agreed to surrender to the Court their sovereign right to settle mutual controversies:

In the declaration of independence, the states assumed their equal station among the powers of the earth, and asserted that they could of right do, what other independent states could do; 'declare war, make peace, contract alliances;' of consequence, to settle their controversies with a foreign power, or among themselves, which no state, and no power could do for them . . . but they surrendered to congress, and its appointed Court, the right and power of settling their mutual controversies; thus making them judicial questions, whether they arose on 'boundary, jurisdiction, or any other cause whatever.'

State of Rhode Island v. Com. of Massachusetts, 37 U.S. (12 Pet.) 657, 737 (1838).

Even if there were a dispute between Virginia and West Virginia over their shared boundary, the Circuit Court would nonetheless have lacked subject matter jurisdiction because the United States Supreme Court has exclusive original jurisdiction over boundary disputes between states. The Circuit Court, therefore, correctly dismissed the Petitioners' declaratory judgment claim because only the United States Supreme Court has subject matter jurisdiction to adjudicate the boundary between two states and the Court may only do so in a suit between the states themselves.

C. THE CIRCUIT COURT CORRECTLY DETERMINED THAT THE STATE OF WEST VIRGINIA AND THE COMMONWEALTH OF VIRGINIA ARE INDISPENSABLE PARTIES TO AN ADJUDICATION OF THEIR RESPECTIVE BORDER AND THAT NEITHER STATE CAN BE JOINED AS A PARTY TO THIS SUIT.

The Circuit Court correctly determined that it must dismiss this action because the State of West Virginia and the Commonwealth of Virginia are indispensable parties that cannot be joined as parties to this suit. Rule 19(a) of the West Virginia Rules of Civil Procedure states:

A person who is subject to service of process shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

W. Va. R. Civ. P. 19(a). "If a person as described in subdivision (a)(1)-(2) [of Rule 19] cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." W. Va. R. Civ. P. 19(b). "Under Rule 19(a) of the West Virginia Rules of Civil Procedure a party becomes an indispensable party if he has an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may as a practical matter impair or impede his ability to protect that interest." Syl. Pt. 2, *State ex rel. One-Gateway v. Johnson*, 208 W. Va. 731, 542 S.E.2d 894 (2000) (quoting Syl. Pt. 1, *Pauley v. Gainer*, 177 W. Va. 464, 353 S.E.2d 318 (1986)).

A court must refuse jurisdiction over any matter in which a state is an indispensable party. Only the United States Supreme Court, pursuant to the original jurisdiction conferred upon it by the United States Constitution, may join a state as a defendant without its consent:

It may be accepted as a point of departure unquestioned, that neither a state nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a state may be made a party in the supreme court of the United States by virtue of the original jurisdiction conferred on that court by the constitution. This principle is conceded in all the cases, and whenever it can be

clearly seen that the state is an indispensable party to enable the court, according to the rules that govern its procedure, to grant the relief sought, it will refuse to take jurisdiction.

Cunningham v. Macon & B. R. Co., 109 U.S. 446, 451, 3 S. Ct. 292, 27 L.Ed. 992 (1883).

Both the State of West Virginia and the Commonwealth of Virginia are indispensable parties to the determination of the physical location of the border between them. A decree setting the boundary between West Virginia and Virginia would distribute territory between the two states, diminishing the area of one state to the benefit of the other. Any decree of the border without the presence of the states as parties would impair the rights of those states to protect their sovereign territory and thus cannot be made without their presence. West Virginia and Virginia, however, have not consented to suit in a West Virginia state court over the extent of their respective borders. The Circuit Court thus correctly determined that the State of West Virginia and the Commonwealth of Virginia are indispensable parties to the Petitioners' claims and that the court therefore must refuse jurisdiction over the case.

D. THE CIRCUIT COURT CORRECTLY DETERMINED THAT THE PETITIONERS FAILED TO STATE A CLAIM FOR ADVERSE POSSESSION OR EJECTMENT.

The Circuit Court correctly determined that the Petitioners failed to state a claim for adverse possession or ejectment because the Petitioners' claims rely upon a decree that the physical boundary between West Virginia and Virginia is demarcated by a line running N 50 16' 09" West and the court lacks jurisdiction to enter such a decree.

"The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Syl., *John W.*

Lodge Distrib. Co., Inc. v. Texaco, Inc., 161 W. Va. 603, 245 S.E.2d 157 (1978) (quoting Syl. Pt. 3, *Chapman v. Kane Transfer Co.*, 160 W. Va. 530, 236 S.E.2d 207 (1977)). For purposes of the motion to dismiss, the complaint is construed in the light most favorable to the plaintiff and its allegations are to be taken as true. *John W. Lodge Distrib. Co., Inc. v. Texaco, Inc.*, 161 W. Va. 603, 605, 245 S.E.2d 157, 158 (1978). “The trial court’s inquiry (is) directed to whether the allegations constitute a statement of a claim under Rule 8(a).” *John W. Lodge Distrib. Co., Inc. v. Texaco, Inc.*, 161 W. Va. 603, 605, 245 S.E.2d 157, 159 (1978) (quoting *Chapman v. Kane Transfer Co.*, 160 W. Va. 530, 236 S.E.2d 207 (1977)). “A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief” W. Va. R. Civ. P. 8(a).

Count One of the Counterclaim and Third Party Complaint alleges “[t]hat Defendant Lowe Trustees’ title to all real estate situate north of the Virginia/West Virginia state line, being N. 50° 16’ 09” West, is superior to the titles of the Hegyi Trust and that of Richards.” App. at 28. Count Two of the Counterclaim and Third Party Complaint alleges that “Defendant Lowe Trustees have openly, notoriously, continuously, hostilely and under color of title and/or claim of right possessed all real estate in the State of West Virginia, situate north of the line designated as N. 50° 16’ 09” West for a period in excess of ten (10) years” App. at 29. Counts One and Two were entirely dependent upon the Court’s resolution of Count Three, which requested a declaration of the “correct” location of the boundary line between West Virginia and Virginia:

Defendant Lowe Trustees believe upon information that the correct boundary line between the State of West Virginia and the Commonwealth of Virginia and as between the properties of these parties is the line whose course is N. 50° 16’ 09” West, and the Defendant Lowe Trustees seek a declaration of this Honorable

Court that that is the boundary line between the State of West Virginia and the Commonwealth of Virginia as it relates to the boundary between these parties' properties as the resolution of this boundary controversy between Defendant Lowe Trustees with the Hegyi Trust and Richards.

App. at 30. The Petitioners failed to make any showing that their claims could be adjudicated without a declaration of the exact physical location of the Virginia / West Virginia boundary and thus their claims necessarily rose and fell with the Circuit Court's ability to make that declaration.

As discussed *supra*, the Circuit Court lacked jurisdiction to declare "the correct boundary line between the State of West Virginia and the Commonwealth of Virginia" because the exact physical boundary between the states can only be determined (a) through specific legislation, enacted by the legislative bodies of both West Virginia and Virginia, adopting the findings of an interstate boundary commission; or (b) upon original action filed by the two states before the United States Supreme Court. Because the Circuit Court could not declare as a matter of law that the Virginia/West Virginia boundary between the properties of the parties is a line bearing N. 50° 16' 09" West, the Petitioners' claims of ejectment and adverse possession were properly dismissed for failure to state a claim.

E. THE PETITIONERS' APPEAL SETS FORTH NO LEGAL AUTHORITY IN SUPPORT OF THEIR POSITION AND RELIES ENTIRELY UPON THE SAME ARGUMENTS THAT WERE FULLY CONSIDERED AND REJECTED BY THE CIRCUIT COURT.

The Petitioners' brief sets forth no legal authority in support of their appeal or in contradiction of the Circuit Court's Order. Instead, the Petitioners rehash the same arguments that the Circuit Court rejected and simply argue the evidence they would have presented if this case were justiciable. None of the Petitioners' arguments have merit.

- 1. Whether there is a dispute between West Virginia and Virginia as to the location of the state boundary line is irrelevant for purposes of the Circuit Court's jurisdiction and the Circuit Court's Order is not premised upon the existence of a dispute between the states.**

The Petitioners repeatedly argue that the Circuit Court's ruling is incorrect because the court "appears to have found . . . that there was some disagreement or controversy between the States of Virginia and West Virginia as to the location of the boundary line between the two states." Pet. at 13. The Petitioners set forth no legal authority in support of this assertion because it is simply a straw man argument; whether there is an actual dispute between the states is irrelevant for purposes of the Circuit Court's jurisdiction. In fact, the Circuit Court's Order expressly acknowledges that the states are not actively disputing their shared boundary and therefore is not premised upon the existence of such a dispute: "[e]ven if there were a dispute between Virginia and West Virginia over their shared boundary, this Court would nonetheless lack subject matter jurisdiction" App. at 110. It makes no difference whether this is an action between the states, an action between private landowners, or an action between private landowners and the states; in any case, the Circuit Court of Berkeley County, West Virginia has no jurisdiction to decide the location of the state boundary line.

- 2. The Petitioners' surveyor is incompetent to provide evidence as to the physical location of the Virginia / West Virginia state boundary.**

The Petitioners largely use their brief to set forth the evidence they intended to present to the Circuit Court, namely the report of their privately-retained surveyor, Edward L. Johnson. See Pet. at 16-17. The report of the Petitioners' private surveyor, however, is not competent evidence on the issue of the location of a state boundary because his survey was not authorized by the states. See *De Loney v. State*, 115 S.W. 138, 141 (Ark. 1908) (private survey offered to prove the true boundary line between the states of Arkansas and Texas was

inadmissible because it was not authorized by either government). Indeed, the report of the Petitioners' private surveyor is barred by the hearsay rule, which only permits testimony as to a State boundary that arose prior to the controversy. *See* W. Va. R. Evid. 803(20) (evidence as to reputation of boundary must arise prior to the controversy). The fact that Virginia and West Virginia have not authorized a survey of the state boundary adjoining the Petitioners' property does not authorize the Petitioners to rely upon the representations of their private surveyor to establish the state boundary.

3. West Virginia Code § 29-23-2 does not confer jurisdiction upon the Circuit Court to determine the location of an interstate boundary line.

The Petitioners also suggest that the Circuit Court has jurisdiction over their claims because W. Va. Code § 29-23-2 states that a boundary line established by the West Virginia Boundary Commission "shall be presumed correct unless proven otherwise in a court of law." Pet. at 19. This argument is a red herring. The statutory language only creates a legal presumption in favor of the findings of the commission before a court of competent jurisdiction – it does not expand or otherwise affect the jurisdiction of the courts themselves. The only court with jurisdiction over the correctness of a state boundary line established by the commission is the United States Supreme Court pursuant to Article III, § 2, clause 2 of the United States Constitution.

F. THE PETITIONERS HAVE NO COGNIZABLE CLAIM BECAUSE COURTS ARE BOUND TO ACCEPT THE COMMONWEALTH OF VIRGINIA'S EXERCISE OF *DE FACTO* JURISDICTION OVER THE DISPUTED PROPERTY AS CONCLUSIVE OF ITS SITUS.

As demonstrated *supra*, the Circuit Court correctly determined that it lacked jurisdiction to declare the location of the state boundary. Instead, the courts may only take judicial notice of the fact that the Commonwealth of Virginia currently exercises jurisdiction

over the disputed property by assessing and taxing that property as situate in Virginia. This act of *de facto* sovereignty is conclusive upon the question of situs and cannot be denied or disturbed absent an agreement by the states or a decree from the United States Supreme Court.

“[I]n cases where the political authorities of the state have actually claimed and exercised jurisdiction over particular localities, the doctrine of the law seems to be that the courts are thereby concluded, and have only to declare the fact and govern themselves accordingly, without undertaking to pass upon the validity of such claim.” *State of Maine v. Wagner*, 61 Me. 178, 184 (1873). *See also Harrold v. Arrington*, 64 Tex. 233, 238 (1885) (“We cannot undertake to limit the jurisdiction thus recognized and asserted by the political department, and, until that department ceases to exercise such authority, we must treat this county as subject to the jurisdiction of the state of Texas.”); *State v. Dunwell*, 3 R.I. 127 (1855) (“The Courts are bound to take cognizance of the boundaries in fact claimed by the State.”).

The Petitioners admit in their complaint that the disputed property is recorded upon the land books of Frederick County, Virginia, and is thus legally situate there. App. at 26-27. Further, the property is actually assessed and taxed by the Commonwealth of Virginia as if it were situate in Virginia. App. at 95-98. Regardless of the Petitioners’ claims that the disputed property is located in West Virginia, the Commonwealth of Virginia exercises actual jurisdiction over the property. The courts of both West Virginia and Virginia, therefore, are bound to accept the Commonwealth of Virginia’s exercise of jurisdiction as conclusive evidence of the property’s situs.

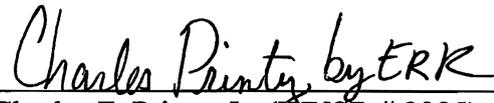
The Petitioners complain that the Circuit Court has deprived them of a remedy for their claims. The Petitioners, however, have no cognizable claim for relief because the courts of

this State must take judicial notice that the property in question is located in Virginia. Unless and until the states themselves choose to redefine their shared boundary, the Petitioners have neither a claim nor a remedy.

VI. CONCLUSION

Ever since the United States Supreme Court's opinion in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the political question doctrine has served as a mechanism for protecting the separation of powers put in place by the framers of our government. The question that the Petitioners seek to adjudicate in a West Virginia state court requires the determination of a quintessential political question: "[u]nder precedent both *de jure* and *de facto* sovereignty are political questions – indeed, *archetypal political questions*." *Lin v. United States*, 561 F.3d 502, 507 (D.C. Cir. 2009) (emphasis added). Petitioners put forward no legal authority contradicting this basic statement of law or otherwise showing how their claims could be adjudicated without impinging upon the executive and legislative branches of government. The Circuit Court, therefore, correctly dismissed the Petitioners' Counterclaim and Third Party Complaint, and this Court should affirm the Circuit Court's Order of dismissal.

Respectfully submitted,



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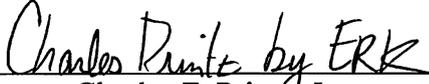
CERTIFICATE OF SERVICE

I certify that I served a true copy of the foregoing BRIEF OF RESPONDENTS JOSEPH C. RICHARDS AND JOYCE A. RICHARDS upon all counsel of record via First Class United States mail, postage prepaid, in envelopes addressed as follows:

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Dated the 29th day of July 2013.



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