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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 12-0899

STATE OF WEST VIRGINIA, ex rel, ALLEN H. LOUGHRY II, candidate for the Supreme Court of Appeals of West Virginia,

Petitioner,

v.

NATALIE E. TENNANT, in her official capacity as West Virginia Secretary of State; NATALIE E. TENNANT, GARY A. COLLIAS, WILLIAM N. RENZELLI, and ROBERT RUPP, in their official capacities as members of the West Virginia State Election Commission; GLENN B. GAINER III, in his official capacity as West Virginia State Auditor; and JOHN PERDUE, in his official capacity as West Virginia State Treasurer,

Respondents.

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

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QUESTION PRESENTED

This petition presents the question whether the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program, W. Va Code § 3-12-1 to -17 (the "Pilot Program"), requires the West Virginia State Election Commission (the "Commission") to disburse funds to a certified participating candidate once the Commission has certified that a non-participating candidate has satisfied the conditions for release of additional funds.

STATEMENT OF THE CASE

I. CREATION OF THE WEST VIRGINIA SUPREME COURT OF APPEALS PUBLIC CAMPAIGN FINANCING PILOT PROGRAM

In recent years, the amount of money spent in elections for seats on the Supreme Court of Appeals of West Virginia has skyrocketed. Candidates running for a seat on the Supreme Court of Appeals raised $1.4 million, $2.8 million, and $3.3 million in 2000, 2004, and 2008, respectively. W. Va. Code § 3-12-2(4)-(6). This outsized spending, coupled with the circumstances of *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 129 S. Ct. 2252 (2009), in which the United States Supreme Court held that a litigant's outsized campaign spending created a constitutionally impermissible risk of judicial bias, caused "an erosion of the public's confidence in the State's justice system as a neutral and unbiased arbiter." West Virginia Independent Commission on Judicial Reform ("WVICJR") Final Report at 3, *Appendix* at 6. As Justice Larry Starcher said regarding the campaign spending at issue in *Caperton*, one person's "bestowal of his personal wealth, political tactics, and 'friendship' . . . created a cancer in the affairs of this Court." *Caperton*, 556 U.S. at 875, 129 S. Ct. at 2258 (quoting Justice Starcher). These events were the impetus for the creation of the judicial public financing program.

Until recently, the "fundamental elements of West Virginia's judicial system, including the popular election of judges . . . ha[d] changed little since 1974." W. Va. Exec. Order 6-09, *Appendix* at 152. But the facts surrounding *Caperton*, coupled with the "surge in judicial campaign expenditures in the past few years," WVICJR Final Report at 3, and waning public confidence in the courts, led then-Governor Joe Manchin to convene the West Virginia Independent Commission on Judicial Reform (the "Independent Judicial Commission") to "study the need for broad systemic judicial reforms including, but not limited to . . . enacting judicial campaign finance reforms or reporting requirements . . . ." WVICJR Final Report at 1 (quoting W. Va. Exec. Order No. 6-09). The Independent Judicial Commission, led by Honorary Chairwoman and retired U.S. Supreme Court Justice Sandra Day O'Connor, "represented a broad spectrum of the legal community, including practicing lawyers, academics, and former jurists, in order to ensure that the Commission's recommendations were the product of diverse viewpoints and shared knowledge." *Id.* at ii, 1.[1]

The Independent Judicial Commission emphasized that its first order of business was strengthening public trust in the judiciary:

> First among these principles was a commitment to bolstering public trust and confidence in the judiciary and thus the legal system. The judiciary derives its legitimacy in large part, if not entirely, from the public's perception of its accuracy and impartiality. It was thus crucial that the Commission identify potential threats to the unprejudiced administration of justice and make

[1] In addition to Honorary Chairwoman O'Connor, other members of the nine-member Commission included Chairman Carte Goodwin, former general counsel for Gov. Joe Manchin, former U.S. Senator, and currently an attorney at Goodwin & Goodwin; Joyce McConnell, Dean of West Virginia College of Law; Sandra Chapman, President, West Virginia State Bar; Thomas Heywood, Esq.; Marvin Masters, Esq.; Mary McQueen, President, National Center for State Courts; Andy MacQueen, Esq.; John McCuskey, Esq.; and Caprice Roberts, Associate Dean West Virginia University College of Law. *See* Press Release, Office of the Governor of W. Va., Governor Makes Appointments to Independent Judicial Reform (June 15, 2009), http://www.wv.gov/news/governor/Pages/GovernorMakesAppointmentsToIndependentJudicialReform.aspx, *Appendix* at 157.

> recommendations targeted at improving both the performance of, and public faith in, the court system.

Id. at 1. As the Independent Judicial Commission recognized, "[a]s campaign spending has increased, so too has the perception that interested third parties can sway the court system in their favor through monetary participation in the election process. This perception strikes at the very heart of the judiciary's role in our society." *Id.* at 4.

The Independent Judicial Commission repeatedly identified the problem of bias and the appearance of bias as a concern stemming from significant judicial election spending, and proposed public financing for Supreme Court candidates as a way to address this problem:

> [T]he Legislature should adopt a public financing pilot program for one of the two open Supreme Court of Appeals seats in the 2012 election. West Virginia has witnessed a steady and substantial increase in the amount of money raised and spent by candidates in elections for Supreme Court of Appeals seats. As campaign expenditures rise, so too does the *threat of bias, and certainly the public perception of bias*, as candidates face mounting pressure to accept donations from lawyers and parties that may appear before them once they take a seat on the bench. This Commission therefore recommends a public financing pilot program to investigate the potential for removing the specter of out-of-control and otherwise troublesome spending from judicial elections.

Id. at 7 (emphasis added). The Independent Judicial Commission went on:

> Of even greater concern, judicial candidates will necessarily continue to accept substantial donations from lawyers, individuals, or corporations who may subsequently appear before them, thereby putting our judges in the untenable situation of potentially having to preside over cases involving campaign donors. *This is a serious threat, as impartiality and the appearance thereof are uniquely important to the integrity of a court system*, and such actions undermine trust in the judiciary regardless of the outcomes or merits of specific cases.

Id. at 10 (emphasis added).

Simply put, the Independent Judicial Commission concluded that, without a viable system for financing West Virginia's judicial elections with public funds, "[a]s spending by candidates and third parties increases, so too will the *perception* that 'justice may be bought.'"

Id. at 12. Accordingly, because the Independent Judicial Commission had a "conviction that the recommended change is needed," *Id.* at 6, it recommended the adoption of a public financing program that included provisions for supplemental funds and additional reports in order to ensure supplemental funds were promptly distributed. *Id.* at 16.

The West Virginia Legislature followed the Independent Judicial Commission's recommendations. It enacted the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program in March 2010. *See* W. Va. Code § 3-12-1 to -17.

The West Virginia Legislature does not routinely include formal fact finding in its records of legislative deliberation. *See Center for Individual Freedom v. Tennant*, 2011 WL 2912735, at *3 n.6 (S.D. W. Va. 2011) ("The West Virginia Legislature does not provide any type of formal legislative history . . . ."). In the case of the Pilot Program, however, the Legislature made an exception, compiling an extensive legislative record that provided its reasons for creating the judicial public financing program. The Legislature explained that:

> [o]ver the last decade, fundraising and campaign expenditures in elections for a seat on the Supreme Court of Appeals have dramatically increased in West Virginia . . . . As spending by candidates and independent parties increases, so does the *perception that contributors and interested third parties hold too much influence over the judicial process* . . . . The detrimental effects of spending large amounts by candidates and independent parties are especially problematic in judicial elections because *impartiality is uniquely important to the integrity and credibility of courts* . . . . An alternative public campaign financing option for candidates running for a seat on the Supreme Court of Appeals will ensure the fairness of democratic elections in this state, protect the Constitutional rights of voters and candidates from the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of elections, *protect the impartiality and integrity of the judiciary*, and *strengthen public confidence in the judiciary.*

W. Va. Code § 3-12-2(3), (7), (8), (9) (emphasis added). The Pilot Program applies solely to candidates running for justice of the Supreme Court of Appeals, and not to candidates for any legislative or executive offices. No other candidates for any other offices are included.

II. PETITIONER LOUGHRY'S PARTICIPATION IN THE JUDICIAL PUBLIC FINANCING PROGRAM

Allen H. Loughry II is a Republican candidate for Justice of the Supreme Court of Appeals of West Virginia. Petitioner Loughry is the only candidate participating in the Pilot Program, facing three non-participating candidates who are all vying for one of the two seats on the Court up for election this cycle.

Before seeking to qualify for the program, potential publicly-financed candidates are permitted to raise up to $20,000 in "exploratory contributions" to explore the viability of pursuing a candidacy. W. Va. Code §§ 3-12-3(4), (5), 3-12-8. Petitioner Loughry did so, raising $12,050 in exploratory contributions. He then sought to qualify for the Pilot Program.

To participate in the Pilot Program and receive public funds, candidates must demonstrate sufficient public support, by raising a specified number of "qualifying contributions." A "qualifying contribution" is a contribution of at least $1 and no more than $100 from a registered West Virginia voter. W. Va. Code §§ 3-12-3(15), 3-12-9. The "qualifying period," during which candidates raise these qualifying contributions to prove sufficient support, ran from September 1, 2011 until January 28, 2012. W. Va. Code § 3-12-3(16)(A). During the qualifying period and before accepting any qualifying contributions, Petitioner Loughry had to file a declaration of intent that he was "qualified to be placed on the ballot, and, if elected, to hold the office sought," and that he had "complied with and will continue to comply with all requirements of [the Pilot Program], including contribution and expenditure restrictions." W. Va. Code. § 3-12-7.

To qualify, Petitioner Loughry was required to accumulate at least $35,000 but no more than $50,000 in qualifying contributions. W. Va. Code. § 3-12-9. He also had to collect at least 500 qualifying contributions and at least 10 percent of the total number of qualifying

contributions had to come from each of the State's congressional districts. W. Va. Code § 3-12-9(c). Petitioner Loughry satisfied these requirements, collecting 676 qualifying contributions for a total of $36,295. Letter from Allen H. Loughry II to Natalie E. Tennant, W. Va. Secretary of State (Jan. 31, 2012), *Appendix* at 158.

After satisfying the eligibility requirements but before receiving any public funds, a participating candidate must be certified, at which point he or she becomes a certified candidate. W. Va. Code § 3-12-3(2). To become certified, Petitioner Loughry applied to the State Election Commission and filed a sworn statement that he had and would abide by the law's requirements. W. Va. Code § 3-12-10(a); *Appendix* at 158.

Once the State Election Commission receives notice from the Secretary of State that the participating candidate has received the requisite number and amount of contributions, the Commission "shall determine" whether the participating candidate has met the other requirements to participate, such as filing the aforementioned declaration of intent and abiding by contribution limits. W. Va. Code § 3-12-10(b). The Commission "shall" determine if a candidate is certified within three days of that candidate submitting his or her final report of qualifying contributions. W. Va. Code § 3-12-10(d). The Commission carried out these duties, and in February 2012, it certified Petitioner Loughry. *Appendix* at 159.

Within two days of certifying a candidate, the Commission, "acting in concert with the State Auditor's office and the State Treasurer's office, shall" disburse the initial primary election lump sum payment to the candidate. W. Va. Code §§ 3-12-10(e), 3-12-11(a), (b). As an unopposed primary election candidate, Petitioner Loughry received $13,705 in public funds, an amount equal to $50,000 less what he raised in qualifying funds. W. Va. Code §§ 3-12-11(a)(1), (b)(1), 3-12-12(e). The general election initial disbursement is provided "[w]ithin two business

days after the primary election results are certified by the Secretary of State . . . ." W. Va. Code § 3-12-11(b). Shortly after the primary election, Petitioner Loughry received the initial statutory disbursement of $350,000 for a contested general election. W. Va. Code § 3-12-11(1).

The Pilot Program also includes two supplemental funds provisions. Relevant here is Section 3-12-11(e). It provides that after the State Election Commission certifies that a non-participating candidate's spending exceeds the certified candidate's initial disbursement by 20%, the Commission must provide supplemental funds to the certified candidate equal to the amount by which the non-participating opponent exceeded the certified candidate's initial disbursement. W. Va. Code § 3-12-11(e). A second provision, included in Section 3-12-11(f), provides supplemental funds based upon spending by entities or individuals that make independent expenditures on behalf of non-participating candidates, either alone or in combination with the non-participating candidate's spending. W. Va. Code § 3-12-11(f). This latter provision is not at issue in this Petition.

The threshold to release supplemental funds for the general election is $420,000, W. Va. C.S.R. § 146-5-8.8.a.1 to -8.8.a.3, and when spending by a non-participating candidate exceeds this threshold, the Commission is obligated to disburse supplemental funds. The maximum amount of supplemental funds available to a certified candidate during the general election is $700,000. W. Va. Code § 3-12-11(h).

Petitioner Loughry, like any certified candidate, is subject to additional restrictions that do not apply to non-participating candidates. Most importantly, Petitioner Loughry cannot privately raise campaign funds and may only spend the amounts received from exploratory contributions, qualifying contributions, and public funds. *See* W. Va. Code § 3-12-12(b).[2]

[2] There is a narrow exception, inapplicable here, that permits a candidate to raise funds if the state has not allocated sufficient funds for distribution. *See* W. Va. Code § 3-12-11(d).

Unlike non-participating candidates, who can privately raise unlimited amounts of contributions, as a participating candidate, Petitioner Loughry is legally prohibited from collecting additional private contributions. *Cf.* W. Va. Code § 3-12-2(1).

On or about July 10, 2012, non-participating candidate Justice Robin Davis's campaign reported to the Secretary of State that her campaign had spent $494,471.46 during the general election period. Robin Jean Davis, Supreme Court Public Campaign Finance Disclosure (2012 Election Year) (July 10, 2012), *Appendix* at 161. The law is clear regarding what must occur as a result:

> If the commission determines . . . that a non-participating candidate's campaign expenditures or obligations, in the aggregate, have exceeded by twenty percent the initial funding available under this section [to] any certified candidate running for the same office [i.e., have exceeded $420,000], the commission *shall* authorize the release of additional funds in the amount of the reported excess to any opposing certified candidate for the same office.
>
> . . .
>
> In the event the commission determines that additional funds beyond the initial distribution are to be released to a participating candidate . . . , the commission, acting in concert with the State Auditor's office and the State Treasurer's office, *shall* cause a check for any such funds to be issued to the candidate's campaign depository within two business days.

W. Va. Code § 3-12-11(e), (i) (emphasis added). Pursuant to the statute, the Commission must cause a check for $144,471.46 to be issued to Petitioner Loughry's campaign depository.[3]

On July 17, 2012, the Commission held an emergency meeting to address the release of funds to Petitioner Loughry.[4] By a unanimous, 4-0 vote, the Commission formally determined

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[3] The amount to be released is the spending by the non-participating candidate during the general election period ($494,471.46) minus the initial disbursement given to the certified candidates for the general election ($350,000.00). Hence, Petitioner Loughry's campaign is entitled to $144,471.46.

[4] The State Election Commission is comprised of five members: the Secretary of State and four individuals appointed by the governor. W. Va. Code § 3-1A-1. The Commission currently has only four members, as there has been a vacancy since the August 11, 2011, resignation of Brent Pauley.

that Justice Davis's spending had exceeded the $420,000 threshold, and therefore that the statutory condition for the release of funds had been satisfied. *Appendix* at 162. But, by a 2-2 vote, the Commission deadlocked on a motion to authorize the actual release of those supplemental funds to Petitioner Loughry. As a result, the Commission failed to carry out the unambiguous duty imposed under the Pilot Program.

Through this failure, the Commission violated the statutory command of W. Va. Code § 3-12-11(e), which requires the Commission to authorize the release of funds once a determination has been made that the conditions for a release of supplemental funds have been met. Due to the Commission's failure to follow the law and perform this ministerial duty, the Commission also failed to perform its duty, working with the offices of the State Treasurer and State Auditor, to cause the funds to be disbursed to Petitioner Loughry's campaign.

As a result, Petitioner Loughry has been and continues to be injured by the Commission's failure to act, and his ability to wage a campaign of the caliber his supporters contemplated when they made qualifying donations to his campaign has been severely undermined. Lacking any other means of compelling the Commission to comply with its obligations under state law, Petitioner Loughry now files this petition for a writ of mandamus to compel the Respondents to perform their ministerial, statutory duties.[5]

SUMMARY OF ARGUMENT

[5] Petitioner Loughry notes that a complaint was filed with the United States District Court for the Southern District of West Virginia on July 18, 2012 by Michael Callaghan, a putative donor to a non-participating candidate, claiming that the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program violates his First and Fourteenth Amendment rights. *See* Complaint for Declaratory and Injunctive Relief at 1-2, Callaghan v. Tennant, No. 2:12-3419 (S.D. W. Va. July 18, 2012), ECF No. 1. Petitioner Loughry intends to file a motion to intervene in that case very soon after the filing of this petition.

Petitioner Loughry is a certified participant in the Pilot Program, which was duly enacted into law and has not been struck down in any part by any court of competent jurisdiction. The Pilot Program imposes a non-discretionary duty on the State Election Commission to disburse supplemental campaign funds to participating candidates once a determination has been made that the conditions for a release of supplemental funds have been met. On July 17, 2012, the Commission determined that these conditions have been met, yet the Commission failed to disburse the supplemental funds as required by law.

As a purported justification for its failure to carry out its legal duty, the Commission cited an advisory opinion by the office of the West Virginia Attorney General. It is well-established that such an opinion does not allow a state official to ignore a mandatory legal duty. Moreover, the opinion is unpersuasive and incorrect.

The advisory opinion concluded that the Pilot Program's supplemental funds provision is unconstitutional in light of the United States Supreme Court's opinion in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett,* 131 S. Ct. 2806 (2011). That opinion dealt with a statute that provided supplemental campaign funds to candidates in *non-judicial* elections only, however, and the Supreme Court has repeatedly made clear that judicial elections present unique state interests that non-judicial elections do not. Most importantly, as articulated by *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), there is a compelling interest of the highest order in maintaining a judiciary that is free of bias, and free from the appearance of bias. Indeed, Judge Blaine Michael identified this compelling interest in *North Carolina Right To Life Committee Fund For Independent Political Expenditures v. Leake*, 524 F.3d 427 (4th Cir. 2008), in which the Fourth Circuit upheld the constitutionality of a statute providing supplemental

campaign funds in *judicial* elections. *Bennett* did not mention, much less explicitly overturn, *Leake*, which remains good law in the Fourth Circuit.

For these reasons, this Court should grant the writ and order the State Election Commission to disburse the supplemental funds to the campaign of Petitioner Loughry.

STATEMENT REGARDING BRIEFING, ORAL ARGUMENT AND DECISION

Petitioner Loughry respectfully requests that this Court forthwith enter an expedited briefing schedule so that a decision regarding this petition can be reached as soon as possible.

Petitioner Loughry states that oral argument is unnecessary. He believes that the dispositive factual issues raised by this petition have already been authoritatively decided, that the relevant legal arguments will be adequately presented in the documents filed with the Court, and that oral argument would not be necessary to aid the decisional process. Consequently, and especially given the urgency of this petition, Petitioner Loughry believes that oral argument is unnecessary. Rev. R. App. P. 18(a). If the Court determines that oral argument would assist with the proper resolution of the question presented, however, Petitioner Loughry will participate to assist the Court in expeditiously resolving the question presented.

ARGUMENT

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

"Mandamus lies to require the discharge by a public officer of a nondiscretionary duty." Syl. Pt. 3, *State ex rel. Greenbrier County Airport Authority v. Hanna*, 151 W.Va. 479, 153 S.E.2d 284 (1967); Syl. Pt. 1, *State ex rel. West Virginia Housing Development Fund v. Copenhaver*, 153 W.Va. 636, 171 S.E.2d 545 (1969). Syl. Pt. 1, *State ex rel. Williams v. Department of Mil. Aff.*, 212 W.Va. 407, 573 S.E.2d 1 (2002). It is well-established that a writ of mandamus requires three elements:

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

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

A. Petitioner possesses a clear right to the relief sought

Petitioner Loughry has complied with all requirements of the Pilot Program. He filed his pre-candidacy forms, his Supreme Court of Appeals Public Campaign Financing Declaration of Intent, and his sworn statement declaring that he had obtained the required number and amount of qualifying contributions as required by W. Va. Code § 3-12-9. *See Appendix* at 158, 164-165. The Commission certified Petitioner Loughry as a participating candidate, and disbursed the initial primary and general election lump sum payments to him. *Appendix* at 161.

Non-participating candidate Justice Robin Davis' campaign reported to the Secretary of State that her campaign had spent $494,471.46 during the general election period. *Appendix* at 159. Because this amount exceeds $420,000.00, the specified statutory conditions for disbursement of supplemental funds has plainly been met, and the Commission is obligated to "authorize the release of additional funds in the amount of the reported excess to any opposing certified candidate for the same office." W. Va. Code § 3-12-11(e).

The Pilot Program is designed, *inter alia,* to "protect the Constitutional rights of voters and candidates from the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of elections, protect the impartiality and integrity of the judiciary, and strengthen public confidence in the judiciary[.]" W. Va. Code § 3-12-2(9).

"Inherent in the republican form of government established by our State Constitution is a concept of due process that insures that the people receive the benefit of legislative enactments." Syl. Pt. 1, *Cooper v. Gwinn*, 171 W.Va. 245, 298 S.E.2d 781 (1981).

All the conditions for disbursement of the Pilot Program's supplemental funds have been met. Petitioner Loughry has satisfied the conditions that entitle him to receive the benefits of the Pilot Program. He has a clear right to receive the supplemental funds.

B. Respondents have a clear duty to disburse the funds at issue

Respondents have a clear legal duty to release the supplemental campaign funds. West Virginia law requires the Commission to "carry out the duties assigned to the commission by the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program." W. Va. Code § 3-1A-5. In this case, the legislation establishing the Pilot Program makes it abundantly clear that the Commission "shall" release supplemental funds to the participating candidate when the various qualifying conditions are met:

> If the commission determines from any reports filed pursuant to this chapter or by other reliable and verifiable information obtained through investigation that independent expenditures on behalf of a certified candidate, in combination with the certified candidate's campaign expenditures or obligations, exceed by twenty percent the initial funding available under this section to any certified candidate running for the same office, the State Election Commission *shall authorize* the release of additional funds in the amount of the reported excess to any other certified candidate who is an opponent for the same office.

W. Va. Code § 3-12-11(g) (emphasis added).

As this Court has explained:

> The word "shall" is mandatory. *See State v. Allen*, 208 W. Va. 144, 153, 539 S.E.2d 87, 96 (1999) ("Generally, 'shall' commands a mandatory connotation and denotes that the described behavior is directory, rather than discretionary." (citations omitted)); Syl. pt. 1, *E.H. v. Matin*, 201 W. Va. 463, 498 S.E.2d 35 (1997) ("It is well established that the word 'shall,' in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation." (citation omitted)).

Keplinger v. Virginia Elec. and Power Co., 208 W.Va. 11, 21-22, 537 S.E.2d 632, 642-43 (2000).

Although the office of the West Virginia Attorney General issued an advisory opinion questioning the constitutionality of the supplemental funds provision, *Appendix* at 166-171, that opinion is not binding on the Commission or on this Court, and does not negate the Commission's clear legal duty. *See* 2A Michie's Jurisprudence of Va. & W. Va. Attorney General sec. 2 ("The attorney general should inform clients of the different legal strategies and defenses available and of his or her professional opinion as to the practical effect and probability of the outcome of each alternative, so as to enable the officer to make an intelligent decision with respect to how the litigation should be conducted. The attorney general should then stand aside and allow the client to exercise independent judgment on which course to pursue."); *State ex rel. Fahlgren Martin, Inc. v. McGraw*, 190 W. Va. 306, 313, 438 S.E.2d 338, 345 (1993) ("As disappointing as it might be to any Attorney General, who is viewed as the chief legal officer for the State, the Attorney General's statutory duty does not authorize the Attorney General to assert his vision of state interest.").

Furthermore, as discussed below, *see infra* at Part II.B., the Attorney General's conclusion is unpersuasive and the Pilot Program is constitutional.

C. Petitioner possesses no other adequate remedy

Finally, Petitioner Loughry lacks any adequate alternative remedy, and the writ should issue. The existence of *any* remedy will not suffice. "Mandamus will lie, notwithstanding the existence of another remedy, if such other remedy is inadequate or is not equally beneficial, convenient and effective." *State ex rel. Wheeling Downs Racing Ass'n v. Perry*, 148 W. Va. 68, 73, 132 S.E. 2d 922 (1963). "A remedy cannot be said to be fully adequate to meet the justice

and necessities of a case, unless it reaches the end intended, and actually compels a performance of the duty in question." *State ex rel. Bronaugh v. Parkersburg*, 148 W. Va. 568, 573, 136 S.E. 2d 783, 786 (1964) (quoting 12B Michie's Jurisprudence of Va. & W. Va. *Mandamus* § 9).

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

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

Because no other official can authorize the release of the supplemental funds or enforce the other provisions of the law, *see* W. Va. Code §§ 3-12-11, -13, no alternative adequate remedy exists for Petitioner Loughry. Petitioner Loughry cannot privately fundraise while participating as a certified candidate in the Pilot Program. W. Va. Code § 3-12-12(a). If the supplemental funds are not released, Petitioner Loughry will be limited for the remainder of the general election period to the remaining unspent funds he has in his campaign's treasury and not a dollar more.

Petitioner Loughry could only privately fundraise if he withdrew from the judicial public financing program, but Petitioner Loughry will not and cannot reasonably do so. *First*, Petitioner Loughry chose to participate in the program to safeguard and promote his impartiality and the appearance of impartiality of himself and the Court should he be elected. If he withdrew and took significant private funds, this goal—indeed, the overarching goal of the Pilot Program itself—would be significantly and irreparably compromised.

Second, even if Petitioner Loughry elected to withdraw, he would be required to return all of the public funds he has received to the state before he would be allowed to do so. W. Va. Code § 3-12-10(j). Here, that amount would be the substantial sum of $363,705, much of which

has already been obligated or spent in promotion of Petitioner Loughry's election campaign. While "the State Election Commission may, in exceptional circumstances, waive the repayment requirement," W. Va. Code § 3-12-10(j), there is no guarantee that would occur in this situation. If Petitioner Loughry withdrew without the Commission's permission, he could be fined up to $10,000. *Id.* Withdrawing at this point would be extraordinarily costly to Petitioner Loughry and his campaign.

Third, attempting to withdraw from the Pilot Program and begin privately fundraising at this late point in the election cycle is not a viable option. It would be, simply, too little and too late. Months have elapsed since Petitioner Loughry was certified to participate in February 2012. Had he not opted into the Pilot Program, Petitioner Loughry could have spent these many months fundraising privately, but he chose not to do so in order to promote the impartiality of the Court by campaigning with public funds. It is now inconceivable that Petitioner Loughry could raise funds in the short time left before the election comparable to the amount he would have privately raised had he chosen not to participate in the program.

Ironically, were the unavailability of the Pilot Program's supplemental funds to force him to renounce the program and raise funds privately, Petitioner Loughry would have little choice but to pursue a fundraising strategy that would require him to seek more and larger donations than would have been the case had he not participated in the Pilot Program from the inception of his campaign. Such a result would be a grave disservice to Petitioner Loughry's constitutional rights, and to the rights of the nearly 700 small donors who chose to support Petitioner Loughry with qualifying contributions in the belief that he could run a robust, publicly-financed campaign under the Pilot Program. Indeed, a choice at this late stage to abandon the Pilot Program and

pursue privately-raised funds would require Petitioner Loughry to vitiate the promise that the donors of his qualifying contributions relied upon in agreeing to support his candidacy.

Finally, even if Petitioner Loughry chose to renounce the Pilot Program and privately fundraise in spite of all these obstacles, the effort would unnecessarily waste the time and resources of his campaign. A central benefit of public financing is that it allows a publicly-financed candidate to spend his or her time meeting with voters rather than fundraising from donors who may have an interest in influencing judicial decision-making.

Renouncing the Pilot Program, returning public funds that have already been spent or obligated, and starting to privately fundraise now at the eleventh hour of the election cycle because of the Commission's improper and unlawful inaction is simply not a viable option.

For all of these reasons, Petitioner Loughry lacks any adequate remedy. The writ of mandamus should issue.

II. THE PILOT PROGRAM'S SUPPLEMENTAL FUNDS PROVISIONS ARE CONSTITUTIONAL AND SHOULD BE ENFORCED

As the foregoing makes clear, Petitioner Loughry has plainly satisfied the Pilot Program's conditions for the release of supplemental funds, and Respondents now have a clear duty under the statute to disburse those funds. Respondents have not—and cannot—point to any legally adequate justification for their failure to carry out this obligation. While Respondents have publicly suggested that an advisory opinion from the Attorney General absolves them of any responsibility to carry out their duties under the law, this is not the case. The advisory opinion is insufficient as a matter of law to nullify an unambiguous duty under a duly-enacted law.

As a legal matter, the advisory opinion is also incorrect: the Pilot Program's supplemental funds provisions are constitutional. No court of competent jurisdiction has opined

on the constitutionality of the Pilot Program, and no challenge to the specific statutory provision at issue here, Section 3-12-11(e), has been initiated. Accordingly, because government officials cannot pick and choose what pieces of West Virginia law they carry out, Respondents are obligated to enforce the law on the books and disburse the funds to which Petitioner Loughry is entitled.

A. The Attorney General's Advisory Opinion Does Not Negate Respondents' Duty to Enforce the Law

Under well-established West Virginia law, the Attorney General does not have the legal authority to declare duly-enacted provisions of state law unconstitutional. Accordingly, an advisory opinion from the Attorney General is insufficient to absolve state officials of their clear legal obligations.

This Court has repeatedly held that advisory opinions of the state Attorney General are not legally binding precedent. The Attorney General lacks the power to say what the law is, a duty that is exclusively reserved to the judicial branch. While advisory opinions from the Attorney General's office may be persuasive to the extent they are well reasoned, they are not binding. Thus, three-quarters of a century ago, this Court reiterated that it is exclusively the province of the judiciary to pass on the constitutionality of acts of the legislature, and that "[w]hile the construction placed upon a statute in [an] opinion of the attorney-general is persuasive authority, it is *neither conclusive nor binding* upon the courts, and where it is without authoritative legal support it should not be approved or followed." *State v. Conley*, 118 W.Va. 508, 528, 190 S.E. 908, 917 (1937) (emphasis added); *see also State v. Wassick*, 156 W. Va. 128, 133, 191 S.E.2d 283, 287 (1972) ("Opinions of the Attorney General are not considered as precedent to be followed by this Court."); Syl. Pt. 2, *Hoover v. Blankenship*, 199 W.Va. 670, 487

S.E. 2d 328 (1997) ("Opinions of the attorney general are not precedential or binding upon this Court. *Matter of Vandelinde*, 179 W.Va. 183, 189, 366 S.E.2d 631, 637 (1988).").

In *State v. Conley*, this Court made clear that officials may not rely on an advisory opinion of the Attorney General to take actions inconsistent with unambiguous constitutional or statutory language. In *Conley*, a school board had invested school funds in private securities, and claimed it had done so in good faith in reliance on an Attorney General advisory opinion advising them that they "had the legal right, authority and discretion" to invest in such securities. 118 W. Va. 517, 190 S.E. 913. This Court held that a "properly construed and interpreted" reading of the state Constitution and statute led to the opposite conclusion, and therefore rejected the Attorney General's analysis. *Id.* at Syl. Pt. 1. As a result, the individual members of the board were found personally liable for the unlawful investments, over objections that they had relied on the Attorney General's advisory opinion. The case makes clear that "[t]he fact that the Attorney General was consulted and advised" officials as to the legality of contemplated conduct "will not protect [officials] . . . from liability where [their actions are] in violation of a plain, unambiguous requirement of the statute." 118 W. Va. at 528, 190 S.E. 2d at 917.

State officials who have questions regarding the constitutionality of a statutory provision they are charged with enforcing are, of course, entitled to seek a declaratory judgment as to the provision's constitutionality from a court of competent jurisdiction. Respondents could have done so here. They did not. Because they have not sought judicial review of the statute at issue, however, Respondents may not choose to ignore its unambiguous terms by relying on a non-binding opinion of the Attorney General.

Nor have any other parties challenged the constitutionality of the specific provisions at issue here. It is true, as noted *supra*, that a constitutional challenge has been filed in federal

district court alleging that the Pilot Program infringes on the First Amendment rights of a putative donor who claims a desire to make independent expenditures in this year's Supreme Court election. *See Callaghan v. Tennant*, No. 2:12-3419 (S.D.W.V. July 18, 2012). As also noted, Petitioner Loughry seeks to intervene in that action, and is confident that the Pilot Program's constitutionality will be upheld. But in any event, that litigation does not involve the provisions at issue here: the *Callaghan* plaintiff has standing to challenge only the legality of W.Va. Code § 3-12-11(f), which concerns funds disbursed in association with *independent campaign expenditures*. As explained above, this Petition seeks a writ of mandamus to compel distribution of funds in association with spending *by a non-participating candidate* under W.Va. Code § 3-12-11(e). No person who might allege injuries caused by Section 3-12-11(e) has challenged the Pilot Program, and no party challenging the Pilot Program has standing to challenge Section 3-12-11(e).

B. The Pilot Program's Supplemental Funds Provision Is Constitutional

Because it is constitutional, this Court should not hesitate to require Respondents to comply with the Pilot Program's supplemental funds provision. The principal case on which the Attorney General's unpersuasive advisory opinion relied, *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett,* 131 S. Ct. 2806 (2011), dealt with an Arizona public financing law that applied exclusively to *non-judicial* elections, and therefore is wholly distinct from the law at issue here. Because *Bennett* did not involve regulation of judicial elections, it opined on neither the constitutional calculus involved in assessing such regulations nor the unique state interests implicated by judicial election regulations.

Crucially, *Bennett* did not even mention—much less overrule—the Fourth Circuit's opinion in *North Carolina Right To Life Committee Fund For Independent Political*

Expenditures v. Leake, 524 F.3d 427 (4th Cir. 2008), which upheld a supplemental funds provision in North Carolina's judicial public financing program similar to that at issue here. Because it was not overruled by *Bennett*, *Leake* remains the law of this Circuit.[6]

As Judge Blaine Michael explained in *Leake*—and as a federal court recognized in upholding the supplemental funds provision in Wisconsin's judicial public financing program, *see Wisconsin Right to Life Political Action Committee v. Brennan,* No. 3:09-cv-00764, Document 110 (W.D.Wis. March 31, 2011), it is necessary in assessing the constitutionality of judicial election regulation to apply a different calculus than that applicable in the context of non-judicial elections. Unlike in challenges to non-judicial election regulations, where plaintiffs' First Amendment rights often rest alone on the balance, in the judicial context, the First Amendment rights of those challenging election rules are counterbalanced by compelling—indeed fundamental—constitutional rights: the due process rights of litigants to a fair trial before a tribunal that is impartial in both fact and appearance.

Put simply, when assessing judicial election regulations, "constitutionally protected interests lie on both sides of the legal equation." *Nixon v. Shrink Mo. Gov't PAC,* 528 U.S. 377, 400 (2000) (Breyer, J., concurring). The importance of these countervailing constitutional interests counsels strongly against the rote application of constitutional rules, applicable only in the context of non-judicial elections, to situations involving judicial elections, like those at issue here.

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[6] The opinion by the U.S. District Court in *North Carolina Right to Life PAC v. Leake*, No. 11-CV-0472 (E.D.N.C. 2012) is inconsistent with the Fourth Circuit's 2008 opinion in *Leake* and, in any event, is neither controlling nor persuasive. The State of North Carolina did not contest that case, and thus the constitutionality of supplemental funds provisions in the judicial elections context has not been assessed with the benefit of adversarial briefing.

In the context of judicial elections, speculative claims of First Amendment injury like those posited in the Attorney General's advisory opinion must be balanced against the compelling state interests in combating judicial bias and preserving public confidence in the impartiality of the judiciary. These interests are different from the general governmental interest in combating corruption—the sole interest that was at stake in *Bennett*. They are state interests of the very highest order.

The need to prevent judicial bias and the need to preserve the appearance of judicial impartiality are unique interests that are not implicated in cases, like *Bennett*, that involve non-judicial elections. It is, of course, "axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process," *Caperton*, 129 S. Ct. at 2259 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)), but preserving public confidence in a fair and impartial judiciary is a distinct and equally important interest, *see Mistretta v. United States*, 488 U.S. 361, 407 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."). "[J]ustice must satisfy the appearance of justice," *Offut v. United States,* 348 U.S. 11, 14 (1954), because without public faith in fair and unbiased courts, the judiciary cannot function. *See In re Greenberg*, 280 A.2d 370, 372 (Pa. 1971) ("'[J]ustice must not only be done, it must be seen to be done.' Without the appearance as well as the fact of justice, respect for the law vanishes in a democracy." (citation omitted)), *vacated on other grounds*, 318 A.2d 740 (Pa. 1974).

The United States Supreme Court, in assessing the potential damage to the West Virginia judiciary that extraordinary judicial election spending may cause, emphasized the important state interest in avoiding the *perception* of judicial bias—even where no actual bias exists. Thus, in *Caperton*, the Court concluded that even without actual bias, and even in the absence of a "*quid*

pro quo agreement," public perceptions of bias stemming from a party's independent campaign expenditures were sufficient to mandate recusal—regardless of any First Amendment right to unlimited judicial election spending asserted. 129 S. Ct at 2265; *see also id.* ("Due process 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.'") (citation omitted). As *Caperton* made indisputably clear, the interests in maintaining public confidence in courts and avoiding even perceived judicial bias are separate and distinct from the interest in avoiding actual *quid pro quo* corruption. They are state interests of the highest order.

By contrast, outside the judicial election context, these state interests are absent, and the Court has made clear that nothing short of *actual quid pro quo corruption* is sufficient to justify burdening First Amendment rights. Thus, in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), the Court struck down restrictions on independent expenditures in *non-judicial* elections as violating the First Amendment, notwithstanding the fact that these independent expenditures created an appearance that spenders were able to influence elected non-judicial officials. The Court concluded that the fact "that speakers may have influence over or access to elected officials does not mean that these officials are corrupt," and held that, in non-judicial elections, "[t]he appearance of influence of access . . . will not cause the electorate to lose faith in our democracy." *Id.* at 910. While it is axiomatic that judges must be impartial toward the parties and lawyers who appear before them, "Legislators are not expected to be impartial; indeed they are elected to advance the policies advocated by particular political parties, interest groups, or individuals." *Siefert v. Alexander*, 608 F.3d 974, 989 n.6 (7th Cir. 2010), *cert denied*, 131 S.Ct. 2872, 2011 WL 1631092 (May 2, 2011). In short, judges and other elected officials play

demonstrably different roles within our republican democracy, and the rules that govern their selection also differ in constitutionally salient ways.

The Supreme Court's differential treatment of *quid pro quo* corruption in *Caperton* and *Citizens United* teaches that judicial elections present constitutionally distinct questions from those arising outside the judicial context. Avoiding *quid pro quo* corruption is the only legally cognizable interest sufficient to justify burdening political speech in legislative and executive elections; perceived influence or access are insufficiently compelling in these elections. By contrast, in the judicial elections context, the Due Process Clause's requirement that judges be, and appear to be, impartial give rise to independent, compelling interests beyond simply avoiding corruption. Indeed, *Caperton* held that even in the absence of actual corruption, the distinct constitutional interests in avoiding perceived bias and protecting impartial courts justified restrictions that would be impermissible in other elections.[7]

The Attorney General's advisory opinion was wrong to conclude that *Bennett*'s constitutional holding regarding non-judicial elections applied equally in the judicial context. The comparison of *Citizens United* and *Caperton* leads inexorably to the conclusion that "the compelling interest in ensuring impartial judges is sufficient to permit restrictions on campaign spending that would be unconstitutional for nonjudicial elections." Erwin Chemerinsky & James Sample, *You Get the Judges You Pay For*, N.Y. Times, Apr. 18, 2011.

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[7] *See generally* James Sample, *Democracy at the Corner of First and Fourteenth: Judicial Campaign Spending and Equality*, 66 N.Y.U. ANN. SURV. AM. L. 727, 776 (2011) (arguing "that judicial elections really are and ought to be different from legislative and executive races in constitutionally meaningful respects"); Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581, 612-15 (2011) (positing that explanation for evident inconsistency between *Caperton* and *Citizens United* "may be that Justice Kennedy views the balancing of interests in judicial elections differently"); Adam Liptak, Caperton *After* Citizens United, 52 ARIZ. L. REV. 203, 203 (2010) (suggesting "that the Supreme Court views the justice system as specially vulnerable to the influence of money").

Because *Bennett* did not consider and did not discuss the proper weight to be assigned to the governmental interests in combating judicial bias and preserving public confidence in the judiciary, it does not control here. And when the proper constitutional analysis is conducted, it is clear that the Pilot Program's supplemental funds provisions pass constitutional muster. As the Fourth Circuit explained when upholding North Carolina's judicial public financing program (including its supplemental funds):

> The Act's public funding system is necessary, the state concluded, because the "effects [of money have been] especially problematic in elections of the judiciary, since impartiality is uniquely important to the integrity and credibility of the courts." The concern for promoting and protecting the impartiality and independence of the judiciary is not a new one; it dates back at least to our nation's founding, when Alexander Hamilton wrote that "the complete independence of the courts of justice is peculiarly essential" to our form of government. *The Federalist* No. 78, at 426 (E.H. Scott ed., 1898). We conclude that the provisions challenged today, which embody North Carolina's effort to protect this vital interest in an independent judiciary, are within limits placed on the state by the First Amendment.

Leake, 524 F.3d at 441.

So, too, here. West Virginia's compelling interest in combating perceptions of judicial bias and ensuring a fair and impartial judiciary prompted adoption of the Pilot Program. These same interests provide a constitutionally sufficient justification for the supplemental funding provision on which Petitioner Loughry relies. The Pilot Program is constitutional.

CONCLUSION

As the foregoing makes clear, Petitioner Loughry has unquestionably demonstrated that the conditions for a writ of mandamus have been met. The supplemental funds provision at issue here has not been challenged in a court of competent jurisdiction, and remains in force as the law of the State of West Virginia. Respondents have not sought judicial review of the Pilot Program,

VERIFICATION

STATE OF WEST VIRGINIA

COUNTY OF CABELL, to-wit:

I, Allen H. Loughry II, being first duly sworn upon oath, state that I have read the foregoing **"Petition For Writ of Mandamus And Incorporated Memorandum of Law in Support,"** along with the attached **"Appendix To Petition For Writ of Mandamus,"** and that the facts and allegations therein contained are true and correct to the best of my belief and knowledge.

Allen H. Loughry II

ALLEN H. LOUGHRY II

Taken, sworn to, and subscribed before me this 30th day of July, 2012.

My commission expires: April 12, 2021.

Lacy Edmonds

NOTARY PUBLIC

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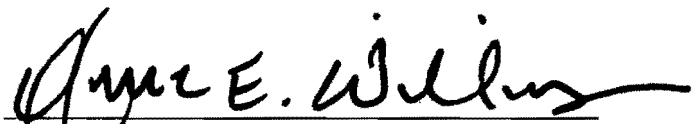
My Commission Expires April 12, 2021

and they may not rely on an unpersuasive advisory opinion to evade a clear statutory duty. The Pilot Program is constitutional, and the writ of mandamus should issue.

Accordingly, Petitioner Loughry respectfully requests that this Court grant the writ of mandamus; award Petitioner such attorneys' fees as this Court finds appropriate; and grant such other relief as may be just and equitable.[8]

ALLEN H. LOUGHRY II,



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[8] "Costs and attorney's fees may be awarded in mandamus proceedings involving public officials because citizens should not have to resort to lawsuits to force government officials to perform their legally prescribed nondiscretionary duties." Syl. Pt. 1, *State ex rel. West Virginia Highlands Conservancy, Inc. v. West Virginia Division of Environmental Protection*, 193 W.Va. 650, 458 S.E.2d 88 (1995).

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. ___

ALLEN H. LOUGHRY II, candidate for West Virginia Supreme Court of Appeals,
Petitioner,
v.

NATALIE E. TENNANT, in her official capacity as West Virginia Secretary of State; NATALIE E. TENNANT, GARY A. COLLIAS, WILLIAM N. RENZELLI, and ROBERT RUPP, in their official capacities as members of the West Virginia State Election Commission; GLENN B. GAINER III, in his official capacity as West Virginia State Auditor; and JOHN PERDUE, in his official capacity as West Virginia State Treasurer,
Respondents.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served the foregoing **Petition for Writ of Mandamus and Incorporated Memorandum of Law in Support** and **Appendix to Petition for Writ of Mandamus and Incorporated Memorandum of Law In Support** upon the following individuals via hand delivery, on the 30th day of July, 2012 to:

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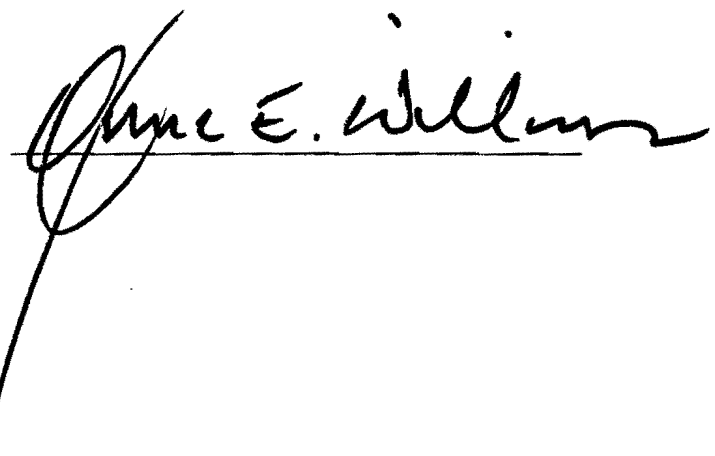
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