



IN THE SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA

Docket Number: 13-0102

STATE OF WEST VIRGINIA EX REL. GLAXOSMITHKLINE, LLC, FORMERLY
SMITHKLINE BEECHAM CORPORATION D/B/A GLAXOSMITHKLINE,

Petitioner/Defendant,

– v. –

THE HONORABLE JAMES H. YOUNG, JR., JUDGE OF THE CIRCUIT COURT OF
WAYNE COUNTY, WEST VIRGINIA; AND ALL PLAINTIFFS IN *STATE EX REL.*
MORRISEY V. GLAXOSMITHKLINE, LLC, Civil Action No.: 12-C-085

Respondents/Plaintiffs.

**RESPONSE OF STATE OF WEST VIRGINIA IN
OPPOSITION TO PETITION FOR A WRIT OF PROHIBITION**

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Table Contents

QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 1

 I. Background..... 1

 II. Petitioner’s Motion To Disqualify..... 2

 III. The Decision Below 4

 IV. The Petition For Writ Of Prohibition 5

SUMMARY OF ARGUMENT 6

STATEMENT REGARDING ORAL ARGUMENT 8

ARGUMENT..... 8

 I. Petitioner Fails to Show that an Extraordinary Writ Should Issue for the
 Circuit Court’s Determination that Petitioner Lacks Standing..... 9

 A. Standing Is Required For A Motion To Disqualify..... 10

 B. Petitioner Lacks Standing..... 12

 1. Petitioner Has Not Suffered An Injury-in-Fact. 12

 2. Any Injury Will Not Be Redressed By a Favorable Decision. 17

 II. Petitioner Fails to Show that an Extraordinary Writ Should Issue for the
 Circuit Court’s Determination that the Office of Attorney General had
 Ample Statutory Authority to Retain Outside Counsel. 18

 A. Petitioner Has Not Suffered Damage Or Prejudice That Warrants
 A Writ Of Prohibition..... 19

 B. The Circuit Court’s Order Raises No New Issues of First
 Impression. 23

 C. The Circuit Court Did Not Clearly Err as a Matter of Law..... 23

 1. The WVCCPA Can And Should Be Read To Permit The Attorney
 General To Retain Outside Counsel Who Act Under His Direction And
 Supervision. 24

 2. Petitioner’s Arguments In Support Of A Narrow Reading Of The
 Phrase “Personnel In His Office” Are Unpersuasive. 26

3. Even If Both Interpretations Are Reasonable, There Are
Compelling Reasons To Adopt The Broader Reading.....30

CONCLUSION33

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Arizona Christian Sch. Tuition Organization v. Winn</i> , 131 S. Ct. 1436 (2011).....	10
<i>Barr v. NCB Mgmt. Servs.</i> , 227 W. Va. 507, 711 S.E.2d 577 (2011)	25
<i>Bates v. Rumsfeld</i> , 271 F. Supp. 2d 54 (D.D.C. 2002).....	18
<i>Belcher v. Greer</i> , 181 W. Va. 196, 382 S.E.2d 33 (1989)	13
<i>Buskirk v. Judge of Circuit Court</i> , 7 W. Va. 91 (1873)	9
<i>Colyer v. Smith</i> , 50 F. Supp. 2d 966 (C.D. Cal. 1999).....	12, 13
<i>Commonwealth v. Janssen Pharmaceutical, Inc.</i> , 8 A.3d 267 (Pa. 2010).....	13
<i>DeBlasio v. Stone</i> , 2012 W. Va. LEXIS 976 (W. Va. Dec. 7, 2012).....	11
<i>Durham v. Jenkins</i> , 229 W. Va. 669, 735 S.E.2d 266,269 (2012)	28
<i>Fairchild v. Hughes</i> , 258 U.S. 126 (1922)	16
<i>Findley v. State Farm Mut. Auto Ins. Co.</i> , 213 W. Va. 80, 576 S.E.2d 807 (2002)	10,12, 13
<i>Flast v. Cohen</i> , 392 U.S. 83 (1968)	10
<i>Garlow v. Zakaib</i> , 186 W. Va. 457, 413 S.E.2d 112 (1991)	10, 22
<i>Harper v. Smith</i> , No. 11-0490, 2012 W. Va. LEXIS 165 (W. Va. Mar. 26, 2012)	12

<i>Hechler v. Casey</i> , 175 W. Va. 434, 333 S.E.2d 799 (1985)	28, 29
<i>In re Katrina Canal Breaches Consol. Litig.</i> , No. 05-4182, 2008 U.S. Dist. LEXIS 118674 (E.D. La. Aug. 13, 2008).....	17, 18
<i>In re Yarn Processing Patent Validity Litig.</i> , 530 F.2d 83 (5th Cir. 1976)	13
<i>Kasza v. Browner</i> , 133 F.3d 1159 (9th Cir. 1998)	11
<i>Kessel v. Monongalia County General Hosp. Co.</i> , 220 W.Va. 602, 648 S.E.2d 366 (2007)	31
<i>Linda R.S. v. Richard D.</i> , 410 U.S. 614 (1973)	16
<i>Lowe v. Experian</i> , 328 F. Supp. 2d 1122 (D. Kan. 2004).....	14
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	13, 18
<i>Manchin v. Browning</i> , 170 W. Va. 779, 296 S.E.2d 909 (1982)	25, 30, 31, 32
<i>Martin v. Randolph County Bd. of Educ.</i> , 195 W. Va. 297, 465 S.E.2d 399 (1995)	24
<i>McGriff v. Christie</i> , 477 Fed. Appx. 673 (11th Cir. 2012)	11
<i>Merck Sharp & Dohm Corp. v. Conway</i> , 861 F. Supp. 2d 802 (E.D. Ky. 2012).....	15, 22
<i>Philip Morris Inc. v. Glendening</i> , 709 A.2d 1230 (Md. 1998)	21
<i>Schlesinger v. Reservists Committee to Stop the War</i> , 418 U.S. 208 (1974)	16, 17
<i>Slack v. Jacob</i> , 8 W. Va. 612 (1875)	31
<i>State ex rel. Blake v. Hatcher</i> , 624 W. Va. 407, 412, 624 S.E.2d 844, 849 (2005)	10, 11, 14

<i>State ex rel. Bluestone Coal Corp. v. Mazzone,</i> 226 W. Va. 148, 697 S.E.2d 740 (2010)	14, 22
<i>State ex rel. Charles Town Gen. Hosp. v. Sanders,</i> 210 W. Va. 118, 556 S.E.2d 85 (2001)	9
<i>State ex rel. Cosenza v. Hill,</i> 216 W. Va. 482, 607 S.E.2d 811 (2004)	14
<i>State ex rel. Goodwin v. Cook,</i> 162 W. Va. 161, 248 S.E.2d 602 (1978)	15
<i>State ex rel. Hoover v. Berger,</i> 199 W. Va. 12 (1996)	19
<i>State ex rel. Jefferson Cnty. Bd. of Zoning Appeals v. Wilkes,</i> 221 W. Va. 432, 655 S.E.2d 178 (2007)	14
<i>State ex rel. Johnson v. Robinson,</i> 162 W. Va. 579, 251 S.E.2d 505 (1979)	24
<i>State ex rel. v. King,</i> 729 S.E.2d 200, 206 (W. Va. 2012)	8
<i>State ex rel. McGraw v. Burton,</i> 212 W. Va. 23, 569 S.E.2d 99 (2002)	32, 33
<i>State ex rel. Mcraw v. Scott Runyan Pontiac–Buick, Inc.,</i> 194 W. Va. 770, 461 S.E.2d 516 (1995)	25
<i>State ex rel. McGraw v. West Virginia Ethics Comm’n,</i> 200 W. Va. 723, 490 S.E.2d 812 (1997)	28
<i>State ex rel. Ogden Newspapers, Inc. v. Wilkes,</i> 198 W. Va. 587, 482 S.E.2d 204 (1996)	22
<i>State ex rel. Palumbo v. Graley’s Body Shop,</i> 188 W. Va. 501, 425 S.E.2d 177 (1992)	19
<i>State ex rel. Rose L. v. Pancake,</i> 209 W. Va. 188, 544 S.E.2d 403 (2001)	8
<i>State ex rel. State v. Alsop,</i> 227 W. Va. 276, 708 S.E.2d 470 (2009)	9
<i>State ex rel. W. Va. Nat’l Auto Ins. Co. v. Bedell,</i> 223 W. Va. 222, 672 S.E.2d 358 (2008)	9

<i>State ex rel. Walker v. Mental Hygiene Comm'rs</i> , 217 W. Va. 80, 614 S.E.2d 727 (2005)	30
<i>State ex rel. Westbrook Health Servs. v. Hill</i> , 209 W. Va. 668, 550 S.E.2d 646 (2001)	8
<i>State ex rel. Youngblood v. Sanders</i> , 212 W. Va. 885, 575 S.E.2d 864 (2002) (Davis, C.J., concurring)	10, 11
<i>State v. Lead Industries, Ass'n, Inc.</i> , 951 A.2d 428 (R.I. 2008)	21
<i>State v. Mullens</i> , 221 W. Va. 70, 650 S.E.2d 169 (2007)	31
<i>State v. Siers</i> , 103 W. Va. 34, 136 S.E. 504 (1927)	31, 33
<i>See State of West Virginia ex rel. Capital One Bank v. Nibert</i> , 11-1401 (W. Va. Nov. 22, 2011) (A.R. 147).....	23
<i>State of West Virginia ex rel McGraw v. Minnesota Mining & Mfg. Co.</i> , 354 F. Supp. 2d 660 (S.D. W.Va. 2005).....	23
<i>Summers v. Earth Island Inst.</i> , 555 U.S. 488 (2009)	12, 16
<i>Texas Catastrophe Property Ins. Assoc. v. Morales</i> , 975 F.2d 1178 (5th Cir. 1992)	26
<i>Toll Bros., Inc. v. Township of Readington</i> , 555 F.3d 131 (3d Cir. 2009)	16
<i>Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.</i> , 454 U.S. 464 (1982)	17
<i>Warth v. Seldin</i> , 422 U.S. 490, 498 (1975)	10
<i>Zsigray v. Gilmer County Pub. Serv. Dist.</i> , No. 11-0577, 2012 W. Va. LEXIS 393 (W. Va. May 29, 2012).....	12
CONSTITUTION, STATUTES, AND RULES	
W. Va. Const., art. VII, § 1	28, 29
W. Va. Const., art. VII, § 19.....	28, 29

W. Va. Code § 5-3-2.....	17
W. Va. Code § 5-3-2a (d)	26
W. Va. Code § 5-3-3.....	24, 29
W. Va. Code § 5-16-1 <i>et seq.</i>	2
W. Va. Code § 6B-1-1 <i>et seq.</i>	5
W. Va. Code § 6B-1-2.	28
W. Va. Code § 6B-2-5	27, 28
W. Va. Code § 9-7-6.....	2, 17
W. Va. Code § 9-7-6 (c)	17
W. Va. Code § 11-10-5h.....	26
W. Va. Code § 22B-1-7	26
W. Va. Code §§ 33-41-1 <i>et seq.</i>	2
W. Va. Code §§ 46A-6-101 to -110, 46A-7-101 <i>et seq.</i>	passim
W. Va. Code § 46A-6-101(1)	25
W. Va. Code § 46A-7-102(1)(e).....	31
W. Va. Code § 46A-7-102(1)(f).....	4, 23
W. Va. Code § 47-18-6.....	26
W. Va. Code § 53-1-1.....	9
W. Va. R. Prof. Cond. 1.7 Comment.....	14, 15

QUESTIONS PRESENTED

1. Whether Petitioner GlaxoSmithKline, LLC (“Petitioner”) has carried its burden of demonstrating that an extraordinary writ of prohibition should issue against the Circuit Court of Wayne County for its determination that Petitioner lacks standing to challenge the identity of opposing counsel that appear on behalf of the Office of the Attorney General of West Virginia.

2. Whether Petitioner has carried its burden of demonstrating that an extraordinary writ of prohibition should issue against the Circuit Court for its determination that the Attorney General had ample statutory authority to appoint private counsel to appear on his behalf.

STATEMENT OF THE CASE

This Petition is the latest in a string of failed attempts by defendants in consumer protection lawsuits to disqualify private counsel appearing on behalf of the Attorney General of West Virginia. As in each previous case, the Circuit Court in this case correctly found that Petitioner lacks standing because it has not suffered any personal and individual injury that would be redressed by disqualification. The Circuit Court was also correct, in the alternative, in joining the many other West Virginia courts that have refused disqualification on the merits. Just as it has before, this Court should deny the writ.

I. Background

The Attorney General, on behalf of the State, instituted this action on March 30, 2012, against Petitioner for unfair and deceptive acts and practices and unfair methods of competition in wrongfully and illegally marketing, promoting, and selling in West Virginia the diabetes drug rosiglitazone maleate (“Avandia”). The State alleges that Petitioner spent hundreds of millions of dollars promoting Avandia in the prescription drug market under the fiction that it is a medicine with beneficial properties. *See* A.R. 17, Plaintiffs’ Compl. at p. 8 ¶25. In reality, West

Virginians who took Avandia experienced serious adverse effects, including myocardial infarction, myocardial ischemia, severe injury to the heart leading to cardiac arrest, and death. *See* A.R. 11, Compl. at p. 2 ¶1. Through 2007, Petitioner’s domestic Avandia sales topped \$7 billion, with millions paid by West Virginia citizens and the State of West Virginia. A.R. 23, Compl. at p. 14 ¶40.

The Complaint alleges numerous violations of law and was filed by the Attorney General both pursuant to his authority and at the request of the Governor, who specifically requested that the Attorney General to pursue against Petitioner “any and all causes of action and remedies” on behalf of the State “and its agencies.” A.R. 204. Count II alleges a violation of the West Virginia Consumer Credit and Protection Act, W. Va. Code §§ 46A-6-101 to -110, 46A-7-101 *et seq.* (“WVCCPA”), which the Attorney General is charged with administering and enforcing. Counts III through V allege violations of statutes administered by State entities under the Governor’s control—the West Virginia Fraud and Abuse in the Medicaid Program Statute, W. Va. Code § 9-7-6; the Public Employees Insurance Act, W. Va. Code §§ 5-16-1 *et seq.*; and the West Virginia Insurance Fraud Prevention Act, W. Va. Code §§ 33-41-1 *et seq.*—and are brought pursuant to the Governor’s written request. Counts VI through XII allege violations of various common-law and equitable doctrines, and are authorized by the Attorney General’s powers and/or the Governor’s letter. *See* A.R. 6-65.¹

II. Petitioner’s Motion To Disqualify

More than four months after the filing of the Complaint, and weeks after a deadline imposed by the Circuit Court, Petitioner filed a motion to disqualify the private counsel who had been

¹ Counts I and XIII do not allege violations of law. Count I maintains that the running of any statute of limitations has been tolled by reason of Petitioner’s fraudulent concealment, and Count XIII seeks a declaratory judgment.

appearing on the Attorney General's behalf. *See* A.R. 110, Pl. Resp. at p. 1. Petitioner challenged the Attorney General's authority to retain outside counsel on five different grounds: (1) the Attorney General lacks statutory authority to retain outside counsel; (2) the Circuit Court is barred from awarding fees to outside counsel; (3) the retained attorneys are violating the Ethics Act by the mere fact of their retention; (4) the Rules of Professional Conduct require disqualification; and (5) due process. *See* A.R. 66-67, GSK Disq. Motion; A.R. 72-84, GSK Disq. Mem.

In support of its motion, Petitioner submitted the retention letters issued by the Office of the Attorney General to its outside counsel. *See* A.R. 88-93. The letters explain that the Office of the Attorney General retains control over the case: "In keeping with the Attorney General's policies and practices, it is anticipated that this office will be kept apprised of any and all actions taken in this case, and it is anticipated that we will have regular ongoing discussions regarding tactics and strategy." A.R. 88. Further, contrary to Petitioner's representation, *see* A.R. 83-84, the letters do not set forth a contingency fee arrangement tied to success in the lawsuit, but rather state that the court will determine "a proper, reasonable and customary fee" for outside counsel, *see* A.R. 88-93. Petitioner offered no other evidence.

In opposition, the State submitted written briefing and a supporting appendix. *See* A.R. 102-383. The State's briefing explained that the disqualification motion relied upon false factual claims, inapposite authorities, and misstatements of the law. A.R. 113-34. The appendix included several circuit court orders upholding the Attorney General's authority to retain outside counsel and his discretion over the terms of such retainer, as well orders of this Court denying writs of prohibition against some of those circuit court orders. *See* A.R. 140-95.

Perhaps most important, the then-Chief Deputy Attorney General attended and was available at the hearing on Petitioner's motion to answer all questions regarding the role of outside

counsel and the Attorney General's control and supervision over them. A.R. 492-637, Transcript. The State's outside counsel explained that the Chief Deputy "signed the Complaint," "controls this case," "supervises this case," is "involved in absolutely every strategic decision that's made about this case," "decides what legal positions the State is taking in the case," and "will make all decisions about whether and when the State will settle the case." A.R. 631:3-8, 13. Furthermore, "[t]here is no pleading filed in this case without her active involvement in reading it, in editing it, and in approving it." A.R. 631:10-12. The State's outside counsel specifically offered to have the Chief Deputy answer "any questions" about the veracity of those statements, and Petitioner's counsel declined. A.R. 631:14, 632:7-8.

III. The Decision Below

On September 28, 2012, the Circuit Court denied Petitioner's motion on all grounds. Independent of the merits, the court found that Petitioner lacks standing to pursue disqualification of the State's retained counsel. A.R. 5, Order. The court concluded that divesting the Attorney General of his authority to retain outside counsel "could not possibl[y] redress any concrete, particularized, actual, and non-conjectural injury of [Petitioner] GSK." *Id.*

On the merits, the Circuit Court first rejected the argument that the WVCCPA prohibits the Attorney General from retaining outside counsel. In light of "[t]he broad powers given to the Attorney General under the Act and the overall purpose of the Act to protect the citizens of the State of West Virginia," the court disagreed with Petitioner's argument that "the language of West Virginia Code §46A-7-102(f) limits the Attorney General's Authority to contract with private counsel." A.R. 3, Order. The court further rejected any notion that "the Attorney General ha[d] relinquished his authority by failing to supervise private counsel." *Id.* To the contrary, the court expressly found that "neither the letter authorizing private counsel nor the

actions of the Attorney General in this proceeding would suggest that the Attorney General is not active in supervising this litigation.” *Id.*

The Circuit Court next disposed of Petitioner’s argument that fees may not be awarded to the Attorney General’s outside counsel. Rejecting Petitioner’s assertions, the court found that there is, under certain of the State’s causes of action, the “possible award of attorney fees.” *Id.* at 4. More important, the court determined that the awarding of fees was premature, expressly made “no finding,” and reserved for the future a decision on fees to be made “according to principles of law.” *Id.*

Lastly, the Circuit Court quickly set aside Petitioner’s ethics and due process arguments. Finding that the appointment letters “do not provide for a contingency fee,” the court concluded that “private counsel’s fee arrangement does not violate the Ethics Act [of §6B-1-1 et seq.] and that private counsel do not have a conflict of interest pursuant to the West Virginia Rules of Professional Conduct.” A.R. 4, Order (emphasis added). The court similarly rejected Petitioner’s due process argument, explaining that the fee arrangement “is not a contingent fee” and that Petitioner “ha[d] presented no facts to demonstrate that the Attorney General is not exercising his authority and control over this litigation.” A.R. 5, Order.

IV. The Petition For Writ Of Prohibition

Following another delay of nearly five months, Petitioner filed the instant Petition challenging the Circuit Court’s decision. Notably, Petitioner entirely ignores the court’s factual findings regarding the Attorney General’s control and supervision of outside counsel, as well as Petitioner’s own failure to proffer any evidence to the contrary. Nowhere in its Statement of the Case does Petitioner acknowledge that the State made the then-Chief Deputy Attorney General available in open court to answer questions on the record regarding the degree of control

exercised by the Office of the Attorney General. As shown further below, these undeniable facts are fatal to the Petition.

Substantively, the Petition takes a narrower tack than the motion below. The Petition contests the Circuit Court’s decision on standing, asserting primarily that standing analysis is “unwarranted in the disqualification context.” Pet. 21. On the merits, Petitioner now claims only one ground for limiting the Attorney General’s authority to retain outside counsel—that the WVCCPA permits the Attorney General only to make use of State-salaried attorneys. *Id.* at 7; *see also id.* (“The Circuit Court’s refusal to enforce the statutory prohibition on the use of outside counsel to litigate WVCCPA claims brought by the State is clear error that demands correction.”); *id.* at 1 (urging this Court to issue the writ because the Circuit Court “violat[ed] ... the express command of the West Virginia Legislature that the State must be represented by qualified personnel in the Attorney General’s office”). Petitioner’s other arguments—regarding fees, ethics, and due process—are offered merely to support its crabbed reading of the WVCCPA.

SUMMARY OF ARGUMENT

The Petition falls well short of meeting the high threshold for a writ of prohibition. This is not the extraordinary case that requires an extraordinary remedy, but rather the latest attempt by yet another defendant in a consumer protection case to disqualify private counsel appearing on the Attorney General’s behalf. This Court has consistently rejected such efforts and should do so again here.

As a threshold matter, Petitioner fails to show that a writ of prohibition should issue for the Circuit Court’s determination that Petitioner lacks standing. The court was clearly correct. Despite Petitioner’s protestation, it is well settled that a party seeking to disqualify opposing

counsel ordinarily must itself have a conflict of interest with opposing counsel in order to demonstrate sufficient injury to establish standing. Petitioner lacks any such injury, and instead claims to be injured by the fact that the State's outside counsel are "biased" by "improper financial incentives." This alleged injury is belied by the record, however, which shows that outside counsel do not have a contingency fee arrangement and also that the Attorney General is exercising his authority and control over this litigation. Additionally, any injury would not be redressed by issuance of the writ. This Petition challenges only the Attorney General's statutory authority to retain outside counsel under the WVCCPA. Because there are multiple causes of action under different statutes, even if Petitioner prevails, outside counsel could continue to represent the State in the underlying lawsuit pursuant to some other statutory authority.

Although this Court need not consider Petitioner's merits arguments in light of the lack of standing, it is equally clear that those arguments fail, as well. Contrary to its assertion, Petitioner has not met the traditional factors for a writ of prohibition. To begin with, Petitioner has not suffered any damage or prejudice that warrants an extraordinary writ. It allegedly faces "a biased prosecution impermissibly tainted by a personal stake in the outcome of the litigation." But like Petitioner's claim of an injury-in-fact, this assertion of ongoing harm does not square with the record in this case. The Circuit Court's order also raises no new issues of first impression, as the Attorney General's authority to retain outside counsel has been challenged and upheld time and again.

Most important, the Circuit Court did not clearly err as a matter of law in agreeing that the Attorney General had ample statutory authority to retain outside counsel. The delegation authority granted to the Attorney General in the WVCCPA can and should be read to permit the Attorney General to retain outside counsel to appear on his behalf. The key phrase "personnel in

his office,” which Petitioner reads narrowly to include only State-salaried employees who work for the Attorney General, is better understood in context to include all individuals who the Attorney General permits to act as his agent. None of Petitioner’s hodgepodge of arguments in support of its narrow reading of the WVCCPA is persuasive.

But even assuming that both the State’s and Petitioner’s readings are reasonable, the Circuit Court was correct to side with the State. Between the Attorney General and Petitioner, the Attorney General is entitled to greater deference as the State officer charged with the administration of the WVCCPA. In addition, the doctrine of constitutional avoidance militates in favor of the State’s interpretation because a statute restricting the ability of the Attorney General to retain outside counsel would likely be unconstitutional.

For all these reasons, set forth in more detail below, this Court should deny the writ.

STATEMENT REGARDING ORAL ARGUMENT

The State respectfully submits that the writ may be denied without oral argument. It is apparent from the face of the briefing and appendix that Petitioner has failed to meet the strict standard for the extraordinary writ of prohibition.

ARGUMENT

The Petition fails to present the sort of “extraordinary case[]” required for the “extraordinary remedy” of a writ of prohibition. *State ex rel. v. King*, 729 S.E.2d 200, 206 (W. Va. 2012). Petitioners carry the burden of showing that “the extraordinary writ provides the only available and adequate remedy.” *State ex rel. Rose L. v. Pancake*, 209 W. Va. 188, 191, 544 S.E.2d 403, 406 (2001) (citation and quotations omitted). The right to the writ must “clearly appear.” *State ex rel. Westbrook Health Servs. v. Hill*, 209 W. Va. 668, 672, 550 S.E.2d 646, 650 (2001).

It is not enough to identify “a simple abuse of discretion by a trial court.” *State ex rel. State v. Alsop*, 227 W. Va. 276, 280, 708 S.E.2d 470, 474 (2009) (citing W. Va. Code § 53-1-1; further cit. & quote om.). “As early as 1873, this Court stated that ‘a mere error in the proceeding may be ground of appeal or review, but not of prohibition.’” *State ex rel. W. Va. Nat’l Auto Ins. Co. v. Bedell*, 223 W. Va. 222, 227, 672 S.E.2d 358, 363 (2008) (quoting Syl. pt. 3, in part, *Buskirk v. Judge of Circuit Court*, 7 W. Va. 91 (1873)). A writ of prohibition is appropriate “to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.” *State ex rel. Charles Town Gen. Hosp. v. Sanders*, 210 W. Va. 118, 122, 556 S.E.2d 85, 89-90 (2001) (cit. & int. quote om.).

As discussed below, Petitioner has failed to show that the Circuit Court committed a “substantial” and “clear-cut” legal error in denying the motion for disqualification. The court correctly concluded that Petitioner lacks standing to seek disqualification of opposing counsel in this case. The court was also right to deny the motion on the merits, as there was no factual or legal basis to disqualify counsel.

I. Petitioner Fails To Show That An Extraordinary Writ Should Issue For The Circuit Court’s Determination That Petitioner Lacks Standing.

Petitioner contests the Circuit Court’s standing determination on two grounds. *First*, it claims that standing “analysis is unwarranted in the disqualification context.” Petr. Writ 21. *Second*, Petitioner contends that even if standing is required, the Circuit Court incorrectly concluded that it failed to demonstrate the requisite standing. *Id.* at 21-22. Both arguments are wrong.

A. Standing Is Required For A Motion To Disqualify.

Contrary to Petitioner’s assertion, standing analysis is not limited to determining “whether a party has suffered an injury-in-fact entitling it to adjudication of a cause of action.” *Id.* at 21. In fact, the primary case relied upon by Petitioner—*Findley v. State Farm Mut. Auto Ins. Co.*, 213 W. Va. 80, 576 S.E.2d 807 (2002)—squarely rejects that narrow view of standing.² Standing “does not refer simply to a party’s capacity to appear in court.” *Id.* at 94, 576 S.E.2d at 821 (cit. om.). It can also refer to “whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue” in a case. *Id.* at 95, 576 S.E.2d at 822 (quoting *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968)) (emphasis added); see also *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (“[T]he question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.” (emphasis added)).

When a party seeks disqualification of opposing counsel, standing analysis is clearly required to determine whether the movant is “a proper party” to request adjudication of that “particular issue.” *Findley*, 213 W. Va. at 94. This Court has undertaken such an analysis at least twice. In *State ex rel. Blake v. Hatcher*, “[t]he primary issue presented to this Court [was] whether the State ha[d] standing to seek disqualification of defense counsel in a criminal proceeding on the basis of a conflict of interest where defense counsel formally [sic] represented a State’s witness.” 218 W. Va. 407, 412, 624 S.E.2d 844, 849 (2005). This Court found the

² The other case cited by Petitioner—*Garlow v. Zakaib*, 186 W. Va. 457, 413 S.E.2d 112 (1991)—explains the trial court’s power to resolve motions to disqualify, but it says nothing about whether a party must demonstrate standing to bring such a motion. It is therefore irrelevant. See *Arizona Christian Sch. Tuition Organization v. Winn*, 131 S. Ct. 1436, 1448 (2011) (“When a potential jurisdictional defect is neither noted nor discussed in a ... decision, the decision does not stand for the proposition that no defect existed.”); *State ex rel. Youngblood v. Sanders*, 212 W. Va. 885, 895, 575 S.E.2d 864, 874 (2002) (Davis, C.J., concurring) (“The fact that the majority opinion did not address the standing issue should not be interpreted to mean that the opinion imposes standing on the State or any party seeking to disqualify an opposing counsel[.]”).

State to have standing, though it cautioned that a circuit court “must consider whether a situation truly involves an actual or serious potential for a conflict of interest or whether the State is instead seeking to deprive the defendant of his or her counsel of choice.” *Id.* at 417, 624 S.E.2d at 854.

More recently, in *DeBlasio v. Stone*, this Court affirmed a circuit court’s denial of a disqualification motion based on the movant’s lack of standing. No. 11-1152, -53, 2012 W. Va. LEXIS 976 (W. Va. Dec. 7, 2012) (memorandum decision). The plaintiff had sought to disqualify opposing counsel, who represented one defendant, on the ground that counsel had a conflict of interest with another defendant. *Id.* at *6. Because the second defendant denied any conflict of interest, the circuit court rejected the motion, explaining that the plaintiff “lack[ed] standing to make such an objection and that those who might assert it in the context of this litigation have not done so.” *Id.* at *7. Emphasizing that motions to disqualify counsel should be viewed with extreme caution because of the interference with the lawyer-client relationship, this Court affirmed the circuit court’s ruling. *Id.* at *12; *see also Youngblood*, 212 W. Va. at 894, 575 S.E.2d at 873 (Davis, C.J., concurring) (contending that the majority should have addressed whether the State had standing to disqualify defense counsel).

Indeed, courts across the country appear universally to require some showing of standing to seek disqualification of opposing counsel. *See, e.g., Kasza v. Browner*, 133 F.3d 1159, 1171 (9th Cir. 1998) (affirming denial of motion to disqualify and expressing “difficulty seeing how [a plaintiff] ha[d] standing to complain about” defendant’s counsel); *McGriff v. Christie*, 477 Fed. App’x 673, 677 (11th Cir. 2012) (addressing the plaintiff’s argument that defendants “lack standing to move for disqualification”). If there is any dispute, it is not over whether the standing doctrine applies to motions to disqualify opposing counsel, but rather over the injury

that a movant must show to demonstrate standing. *See, e.g., Colyer v. Smith*, 50 F. Supp. 2d 966, 969 (C.D. Cal. 1999) (noting the split of authority over “[w]hen ... a party ha[s] standing to move to disqualify opposing counsel based on that counsel’s breach of its duties of loyalty and confidentiality owed to a third party”). The threshold question is settled, however—a party seeking to disqualify opposing counsel must have standing of *some* kind. *See* Douglas R. Richmond, *The Rude Question of Standing in Attorney Disqualification Disputes*, 25 Am. J. of Trial Advocacy 17, 21 (2001) (“A basic issue in attorney disqualification disputes is whether the party moving for disqualification has standing to do so.”).

B. Petitioner Lacks Standing.

Petitioner fails to meet the required elements for standing. *First*, the party attempting to establish standing must have suffered an “injury-in-fact.” *Findley*, 213 W. Va. at 94, 576 S.E.2d at 821 (quotations omitted). *Second*, there must be “a causal connection [between] the injury and the conduct forming the basis of the lawsuit.” *Id.* (quotations omitted). *Third*, it must be likely that “the injury will be redressed through a favorable decision of the court.” *Id.* (quotations omitted). Petitioner does not satisfy at least two of these three requirements.

1. Petitioner Has Not Suffered An Injury-in-Fact.

An “injury-in-fact” sufficient for standing requires “an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical.” *Id.* (quotations omitted). Put differently, the party seeking to establish standing must “show that the action injures him in a concrete *and personal way.*” *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) (emphasis added).³ It is not enough for a claimant to

³ *See, e.g., Zsigray v. Gilmer County Pub. Serv. Dist.*, No. 11-0577, 2012 W. Va. LEXIS 393, at *5 (W. Va. May 29, 2012) (finding no standing where plaintiff’s wife was only signatory on contract); *Harper v. Smith*, No. 11-0490, 2012 W. Va. LEXIS 165, at *14 (W. Va. Mar. 26, 2012) (finding no standing to challenge validity of deed because “[t]he right to redeem in this

assert “only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992).

Under the circumstances of this case, this requirement presents a high bar. “[A]s a general matter, it is difficult to see how a party-opponent in active litigation with the [State] could be said to have a substantial, direct and immediate interest in the authority or identity of the legal representation the [State] has chosen.” See *Commonwealth v. Janssen Pharmaceutica, Inc.*, 8 A.3d 267, 277 (Pa. 2010). Indeed, that Petitioner delayed several months before filing its motion to disqualify and then nearly another five months before filing this Petition strongly suggests that Petitioner’s alleged harm is neither “actual” nor imminent.” *Findley*, 213 W. Va. at 94, 576 S.E.2d at 821 (quotations omitted).

The majority of courts have determined that a party asserting a conflict of interest has sufficient personal injury to seek disqualification of opposing counsel if it is a “current or former client ... complain[ing] of that attorney’s representation of interests adverse to” the party. *Colyer*, 50 F. Supp. 2d at 969. In *In re Yarn Processing Patent Validity Litig.*, 530 F.2d 83 (5th Cir. 1976), the Fifth Circuit explained the reasoning behind this “general rule.” *Id.* at 88. To allow anyone else to seek disqualification would permit “[an] unauthorized surrogate” to “use the conflict rules for his own purposes where a genuine conflict might not really exist.” *Id.* at 90. The Fifth Circuit did contemplate, however, an exception for those limited circumstances where an ethical violation was “manifest and glaring” or “open and obvious and confronted the court with a plain duty to act.” *Id.* at 89.

instance belonged to the Bank of New York who is not a party in this case”) (fn. om.); *Belcher v. Greer*, 181 W. Va. 196, 382 S.E.2d 33 (1989) (finding no standing until because plaintiff—a mineral estate owner—had not paid the property taxes on his mineral interests).

This Court's decisions are consistent with this majority view. Time and again, this Court has approved a party's request to disqualify opposing counsel on conflict of interest grounds where the party was a former client of the disqualified counsel.⁴ Thus, this Court has explained that "standing to raise a conflict of interest in a disqualification is generally vested with the client." *Hatcher*, 218 W. Va. at 414, 624 S.E.2d at 851. The "exception to this rule [is] 'where the interests of the public are so greatly implicated that a third party should be entitled to raise the conflict.'" *Id.* (quoting *Lowe v. Experian*, 328 F. Supp. 2d 1122, 1128 (D. Kan. 2004)).

These decisions, in turn, track West Virginia's ethics rules. The Rules of Professional Conduct expressly state that the Rules "do[] not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule." W. Va. R. Prof. Conduct, Preamble, Scope. Indeed, "the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons." *Id.* Again, the exception is where "the conflict is such as clearly to call in question the fair or efficient administration of justice." W. Va. R. Prof. Cond. 1.7 Comment. In those limited circumstances, "opposing counsel may properly raise the question," though "[s]uch an objection should be viewed with caution, ... for it can be misused as a technique of harassment." *Id.*

Petitioner, however, does not even attempt to demonstrate any conflict of interest between itself and the Attorney General's retained counsel. There is no allegation that outside counsel previously represented Petitioner or that there is, or has ever been, any relationship whatsoever between private counsel and Petitioner. Instead, Petitioner seems to suggest that its

⁴ See, e.g., *State ex rel. Bluestone Coal Corp. v. Mazzone*, 226 W. Va. 148, 158, 697 S.E.2d 740, 750 (2010) (attorney formerly represented movant); *State ex rel. Jefferson Cnty. Bd. of Zoning Appeals v. Wilkes*, 221 W. Va. 432, 441, 655 S.E.2d 178, 187 (2007) (same); *State ex rel. Cosenza v. Hill*, 216 W. Va. 482, 487, 607 S.E.2d 811, 816 (2004) (attorney was previously employed by law firm that formerly represented movant).

case is the exceptional one that “clearly ... call[s] in question the fair or efficient administration of justice.” W. Va. R. Prof. Cond. 1.7 Comment.

Petitioner claims to be injured by having to participate in a proceeding where the State’s counsel is “biased” by “improper financial incentives.” Petr. Writ 21-22. But this alleged injury is belied by the Circuit Court’s unchallenged factual findings. To begin with, the record plainly shows that the State’s outside counsel do not have “financial incentives” tied to how this case proceeds. As the Circuit Court found, the retention letters do not set forth a contingency fee arrangement triggered by the degree of success in the lawsuit, but rather state that the court will, in its discretion, determine “a proper, reasonable and customary fee” for outside counsel. *See* A.R. 88-93. Furthermore, it is undisputed that the record includes “no facts to demonstrate that the Attorney General is not exercising his authority and control over this litigation.” A.R. 3, 5. Thus, no matter what their incentives, the State’s outside counsel has no ability to “bias” the proceeding. *See* A.R. 160 (*Johnson & Johnson* Order, p. 13) (“[T]he ‘neutrality’ at issue is that of the attorney general and staff attorneys assigned to the litigation, because they, not private counsel, decide how the case is handled.”), *petition denied*, A.R. 162. As explained in a case cited by Petitioner itself, “[t]here is a critical distinction between a private attorney who supplants the public entity’s duly authorized counsel and a private attorney who serves only in a subordinate role as co-counsel to the public entity.” *Merck Sharp & Dohm Corp. v. Conway*, 861 F. Supp. 2d 802, 814 (E.D. Ky. 2012).

Finally, Petitioner appears also to suggest that the Attorney General’s alleged violation of the WVCCPA provides it sufficient injury-in-fact. This claim, however, is directly at odds with decades of U.S. Supreme Court precedent. The Court has repeatedly made clear that courts may not “entertain citizen suits to vindicate the public’s nonconcrete interest in the proper

administration of the laws.” *Summers*, 555 U.S. at 497 (quotations omitted); *see also Fairchild v. Hughes*, 258 U.S. 126, 129-30 (1922) (“Plaintiff has only the right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys be not wasted. Obviously this general right does not entitle a private citizen to institute in the federal courts a suit.”); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 223 n.13 (1974) (rejecting an “abstract injury in nonobservance of the Constitution”).

To be sure, a plaintiff would have standing to challenge the violation of a statutory right. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973). But that is not what has been alleged here. Petitioner does not claim that the Attorney General has infringed on a right belonging to Petitioner, but rather that the Attorney General has exceeded the limits of his statutory authority. Without more, that claim is indistinguishable from the “generalized and undifferentiated interest every citizen has in good government” and is an insufficiently personal injury to establish standing. *Toll Bros., Inc. v. Township of Readington*, 555 F.3d 131, 138 (3d Cir. 2009).⁵

In sum, Petitioner has failed to establish on the record in this case that it has a sufficient personal stake in the identity of the counsel appearing on the Attorney General’s behalf. This does not necessarily mean that no party could ever challenge the Attorney General’s authority to retain outside counsel. Under different circumstances, this petitioner or another might be able to point to sufficient injury by presenting evidence of a conflict of interest or a lack of Attorney

⁵ *State ex rel. Goodwin v. Cook*, 162 W. Va. 161, 248 S.E.2d 602 (1978) (cited at Petr. Writ. 22), is not to the contrary. That case held that an individual subject to a criminal complaint had standing to challenge the constitutionality of a statute permitting the circuit court to appoint a special prosecutor. In other words, the individual had standing to challenge the authority of the government attorney in charge of the case against him—something in which he had a clear personal interest. Here, Petitioner does not challenge the overarching authority of the Attorney General to bring a case against it, but merely the Attorney General’s power to choose his subordinates.

General supervision over outside counsel. Of course, whether and when that might occur has no bearing on Petitioner's standing in *this* case.⁶

2. Any Injury Will Not Be Redressed By A Favorable Decision.

Even assuming that Petitioner has suffered some injury-in-fact, it still lacks standing because any injury would not be redressed by a favorable decision. To the extent that Petitioner has been harmed specifically by the presence of outside counsel in the underlying lawsuit, a favorable decision on this Petition would be too narrow to redress that injury. This Petition asserts only that the Attorney General lacks authority under the WVCCPA to retain outside counsel. But the underlying lawsuit is far broader in scope and includes other statutory causes of action that also arguably permit the State's use of outside counsel. For example, Count III alleges a violation of the West Virginia Fraud and Abuse in the Medicaid Program Statute, W. Va. Code § 9-7-6. A civil action to enforce that law may be brought by "any attorney in contract with or employed by the Department of Health and Human Resources." W. Va. Code § 9-7-6(c). Even if Petitioner prevails, outside counsel could continue to represent the State in the underlying lawsuit pursuant to that statutory authority. W. Va. Code § 5-3-2 may be another source of authority. *See id.* (stating that where the Attorney General appears in court on the written request of the governor, as here, "he shall take charge of and have control of such cause").

⁶ The Supreme Court has expressly cautioned courts against citing the possibility that "no one would have standing" as "a reason to find standing." *Schlesinger*, 418 U.S. at 227. Not every issue must be decided by the courts. To the contrary, "[o]ur system of government leaves many crucial decisions to the political processes," *id.*, and the checks and balances imposed by the other two branches on each other. Courts are not "ombudsmen of the general welfare" with "special license to roam ... in search of governmental wrongdoing." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 487 (1982).

To the extent that Petitioner has been harmed simply by the filing of the underlying lawsuit, that injury also would not be redressed by the issuance of the writ. The decision in *In re Katrina Canal Breaches Consol. Litig.*, No. 05-4182, 2008 U.S. Dist. LEXIS 118674 (E.D. La. Aug. 13, 2008), is instructive. There, the court found that the defendants lacked standing to disqualify seven private law firms hired to represent the State of Louisiana. *Id.* at *116. Addressing the issue of redressability, the court explained: “[E]ven if this Court were to invalidate the contract [for outside counsel], the Insurers would not necessarily be relieved from suit because the Attorney General would still be a viable plaintiff. Indeed, any adverse ruling by this Court would simply prompt the Attorney General to either properly hire these private attorneys, or carry out the litigation through his own appointed assistants.” *Id.* at *118 (citing, at note 8, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 568 (1992) (holding claim lacked redressability because a declaratory judgment against the Secretary would not resolve suit); *Bates v. Rumsfeld*, 271 F. Supp. 2d 54, 63 (D.D.C. 2002) (finding plaintiffs’ suit lacked redressability where relief sought would not redress the plaintiffs’ harm of having suffered a military court martial). Here, too, a favorable ruling for Petitioner would not “relieve[]” it from the underlying suit. *Id.* Even if barred from hiring outside counsel, the Attorney General could continue this litigation through State-salaried attorneys.

II. Petitioner Fails To Show That An Extraordinary Writ Should Issue For The Circuit Court’s Determination That The Office Of Attorney General Had Ample Statutory Authority To Retain Outside Counsel.

Though this Court need not consider Petitioner’s merits arguments in light of the lack of standing, it is equally clear that those arguments fail. Petitioner asserts that on the question of the Attorney General’s statutory authority to retain outside counsel, it meets all five factors for the issuance of a writ of prohibition:

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

State ex rel. Hoover v. Berger, 199 W. Va. 12, 21 (1996). It is wrong. Petitioner has not suffered any damage or prejudice, the Circuit Court's order raises no new issues of first impression, and the Circuit Court did not clearly err as a matter of law.

A. Petitioner Has Not Suffered Damage Or Prejudice That Warrants A Writ Of Prohibition.

Petitioner asserts that it is suffering an “ongoing harm caused by the State’s illegal use of private counsel.” Petr. Writ 13. Specifically, it allegedly “face[s] ... a biased prosecution impermissibly tainted by a personal stake in the outcome of the litigation.” *Id.* at 18. Petitioner “anticipate[s]” that outside counsel “will base their fee request in large part on the extent of the State’s recovery ... and prosecute this case with those financial incentives in mind.” *Id.* at 14. According to Petitioner, it is harmed because State-salaried attorneys do not have those same “financial incentives to maximize penalties,” *id.* at 17, and because “[d]ue process forbids prosecution ... by ‘Special Assistants’ who have a financial stake in the outcome with no effective means of oversight by an impartial Attorney General,” *id.* at 18.⁷

⁷ Petitioner curiously devotes several pages to attempting to prove that the Attorney General must abide in the underlying civil proceeding by the ethical standards required of prosecutors in criminal proceedings. *See* Petr. Writ 14-17. But the argument is irrelevant to Petitioner’s point—that outside counsel may have financial incentives that State-salaried attorneys do not—and therefore need not trouble this Court. It is hardly controversial to assert that State-salaried attorneys do not have a personal financial stake in the cases they litigate, and it certainly does not require this Court to decide whether civil actions under the WVCCPA are quasi-criminal in nature.

In any event, Petitioner’s argument is unpersuasive. Although it cites several cases that suggest civil penalties “could be viewed” and “may be considered” quasi-criminal in nature, *see*

But just as Petitioner's claim of an injury-in-fact was belied by the Circuit Court's unchallenged factual findings, this assertion of ongoing harm does not square with the record in this case. Nothing in the record supports Petitioner's claim that outside counsel have "financial incentives to maximize penalties" or a "financial stake in the outcome." The undisputed retention letters, which Petitioner itself submitted and which Petitioner's counsel conceded "speak[] for [them]sel[ves]," A.R. 632:9, say nothing that remotely suggests that outside counsel's fee is tied to or dependent upon their level of success in this case. Rather, the Circuit Court is entrusted entirely with the discretion to award what it deems to be "a proper, reasonable and customary fee," if any, to outside counsel. A.R. 88. Based on these letters, the Circuit Court unequivocally found that "private counsel's agreement with the Attorney General regarding fee *is not a contingent fee.*" A.R. 4-5 (emphasis added).

Petitioner's claim that improper financial incentives drive outside counsel is pure conjecture heaped upon speculation. By its own admission, it merely "*anticipate[s]*" that outside counsel will *both* (1) "base their fee request in large part on the extent of the State's recovery" and (2) "prosecute this case with those financial incentives in mind." Petr. Writ 14 (emphasis added). But neither Petitioner nor outside counsel has any firm reason to believe that the Circuit Court, which has already rejected the notion that outside counsel's fee is contingent on success, will be receptive to a fee request based on the level of success.

Petr. Writ 15, Petitioner offers no case that holds that civil penalties under the WVCCPA are such. In fact, the only West Virginia case cited by Petitioner that assesses whether a civil remedy should be treated as a criminal penalty, *see State ex rel. Palumbo v. Graley's Body Shop*, 188 W. Va. 501, 425 S.E.2d 177 (1992), found that the civil remedies imposed by the West Virginia Antitrust Act were *not* quasi-criminal. And at least two West Virginia circuit courts have rejected the argument that WVCCPA proceedings are analogous to criminal prosecutions. *See* A.R. 158, 182. Furthermore, even if civil penalties under the WVCCPA are quasi-criminal in nature, Petitioner cites no West Virginia case that imposes the ethical obligations of criminal prosecutors on civil attorneys pursuing quasi-criminal penalties.

Furthermore, it is undisputed as a factual matter that the Attorney General—not outside counsel—exercises authority and control over this litigation. At the hearing on Petitioner’s motion, the State’s outside counsel represented that the then-Chief Deputy Attorney General was intimately involved with the case, which included personally editing and approving every pleading, vetting every strategic decision, and exercising control over settlement. A.R. 631:3-12. Outside counsel specifically offered Petitioner’s counsel the opportunity to question the Chief Deputy to test the veracity of those statements, and Petitioner’s counsel declined. A.R. 631:14, 632:7-8. Based on this record, the Circuit Court found “no facts to demonstrate that the Attorney General is not exercising his authority and control over this litigation,” A.R. 5, and that finding is unchallenged.⁸

As several courts have held, including in decisions cited by Petitioner, these facts make clear that Petitioner could not be harmed even if outside counsel is motivated by improper financial incentives. For example, the Circuit Court of Brooke County rejected a due process claim in *State ex rel. McGraw v. Johnson & Johnson* because the record showed that the attorney general “retain[ed] control of the litigation and control of the private lawyers appointed to assist in the case.” A.R. 157. “[T]he financial interest of the private lawyers is irrelevant in the context of ‘neutrality’ insofar as due process is concerned,” the court explained, “because the private lawyers have no case management discretion.” *Id.* at 158. Likewise, the Court of Appeals of Maryland found a contingent fee contract with outside counsel “not violative of due process” because the facts showed that the Maryland Attorney General retained “final, sole and unreviewable authority” over “all aspects of [outside counsel’s] handling of the litigation.” *Philip Morris Inc. v. Glendening*, 709 A.2d 1230, 1231, 1234, 1243 (Md. 1998) (int. quot.

⁸ Petitioner also has offered no evidence that the level of supervision and control is any less under the newly elected Attorney General, nor could it, as no such evidence exists.

om.). So, too, the Rhode Island Supreme Court found “nothing unconstitutional” about a contingent-fee agreement “so long as the Office of Attorney General retains absolute and total control over all critical decision-making in any case in which such agreements have been entered into.” *State v. Lead Industries, Ass'n, Inc.*, 951 A.2d 428, 475 (R.I. 2008). And the federal district court in *Merck Sharp & Dohme Corp. v. Conway* (cited at Petr. Writ 16 n.15), found that the use of contingent-fee outside counsel was unlikely to be a due process violation because the record reflected that “the AG has retained the authority to direct the course of the action, the contingency fee counsel are not subject to the requirement of neutrality.” 961 F. Supp. 2d at 815. It is no surprise that Petitioner itself appears to acknowledge that financially interested outside counsel are problematic only where there is “no effective means of oversight by an impartial Attorney General”—a condition not present here. Petr. Writ 18.

But even ignoring the clearly contrary factual record, the harm that Petitioner alleges is not the sort of harm this Court has found worthy of an extraordinary writ in previous disqualification cases. As this Court has often explained, a writ of prohibition is available to those who unsuccessfully seek disqualification because “by the end of the first trial, the confidential information the party sought to protect may be disclosed to the opposing party or made a part of the record.” *Bluestone Coal*, 226 W. Va. at 154, 697 S.E.2d at 746 (quoting *State ex rel. Ogden Newspapers, Inc. v. Wilkes*, 198 W. Va. 587, 589, 482 S.E.2d 204, 206 (1996)). That is not the type of harm alleged here; as noted, Petitioner has not claimed a conflict of interest with opposing counsel, much less a need to protect confidential information from them. Moreover, this Court has consistently required at least “an adequately developed record” in support of disqualification. *Id.* at 154 n.3, 697 S.E.2d at 746 n.3 (citing Syl. Pt. 5, *Garlow*,

186 W. Va. 457, 413 S.E.2d 112). There is no record evidence here that supports Petitioner's allegations of harm; indeed, as discussed, all evidence is to the contrary.

B. The Circuit Court's Order Raises No New Issues Of First Impression.

Petitioner contends that this Petition "raises an important issue of first impression," but the facts indicate otherwise. As Petitioner candidly admits, the Attorney General's authority to retain outside counsel and the terms under which he may do so have been challenged in numerous circuit courts, and every circuit court to have considered this issue, save one nearly twenty years ago, have rejected the challenge. *See* Petr. Writ 18-19 & n.16; *see also* A.R. 140-195. At least one federal district court has also rejected such a challenge. *See State of West Virginia ex rel McGraw v. Minnesota Mining & Mfg. Co.*, 354 F. Supp. 2d 660, 666 n.6 (S.D. W.Va. 2005). This is hardly the sort of disagreement that urgently requires this Court's attention. Moreover, these issues are not new to this Court; two of the circuit court decisions were recently challenged, and this Court denied writs in both cases. *See State of West Virginia ex rel. Capital One Bank v. Nibert*, 11-1401 (W. Va. Nov. 22, 2011) (A.R. 147), and in *State of West Virginia ex rel. McGraw v. Johnson & Johnson*, No. 062154 (W. Va. Jan. 10, 2007) (A.R. 162). Petitioner is not advancing a new issue of first impression, but rather repeating the same failed arguments. Petitioner is right that this factor "weighs heavily"—in favor of denying the writ. Petr. Writ 19.

C. The Circuit Court Did Not Clearly Err As A Matter Of Law.

Lastly, Petitioner is also wrong on "the most important factor," *id.* at 7—whether the lower tribunal's decision is clearly erroneous as a matter of law. The WVCCPA provides that the Attorney General may "[d]elegate his power and duties under this chapter to qualified personnel in his office, who shall act under the direction and supervision of the Attorney General and for whose acts he shall be liable." W. Va. Code § 46A-7-102(1)(f). According

to Petitioner, the phrase “personnel in his office” prevents the Attorney General from retaining private counsel to appear on his behalf in WVCCPA cases. The Circuit Court did not err in rejecting this crabbed reading of the statute.

1. The WVCCPA Can And Should Be Read To Permit The Attorney General To Retain Outside Counsel Who Act Under His Direction And Supervision.

The delegation authority granted to the Attorney General in the WVCCPA can and should be read to permit the Attorney General to retain outside counsel to appear on his behalf. The key phrase “personnel in his office,” which Petitioner reads narrowly to include only State-salaried employees who work for the Attorney General, is better understood in context to include all individuals who the Attorney General permits to act as his agents. That understanding would include outside counsel over whom the Attorney General maintains ultimate control and authority, such as the counsel at issue in this case.

The lengthy clause following the phrase “personnel in his office”—“who shall act under the direction and supervision of the Attorney General and for whose acts he shall be liable”—supports this broader reading. To read the phrase as narrowly as Petitioner does would render the follow-on clause superfluous, since all salaried employees of the Attorney General by definition work under his direction and supervision. *See, e.g.,* W. Va. Code § 5-3-3 (“All Assistant Attorneys General ... shall serve at the pleasure of the Attorney General and shall perform such duties as he may require of them.”). This Court has expressed “a deep reluctance to interpret a statutory provision so as to render superfluous other provisions of the same enactment.” *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 312-13, 465 S.E.2d 399, 414-15 (1995). For the follow-on clause to serve any purpose, it must expand the universe of “personnel in his office” beyond simply the Attorney General’s salaried employees. *See State ex rel. Johnson v. Robinson*, 162 W. Va. 579, 582, 251 S.E.2d 505, 508 (1979) (“It is a well known

rule of statutory construction that the Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning.”). The reference to the Attorney General’s “office” is thus best understood as a broad reference to the Attorney General’s auspices, rather than a narrow reference to the physical locations where he and his salaried staff work. *See Webster’s II: New College Dictionary* 760 (1995) (defining “office,” among other things, as “[a] position of authority, duty, or trust, as in a government or institution”).

This broader reading is compelled, too, by the statutory and judicial instruction that the WVCCPA is “to be construed broadly.” *Barr v. NCB Mgmt. Servs.*, 227 W. Va. 507, 514, 711 S.E.2d 577, 584 (2011) (quote & cit. om.). The Act itself commands that “this article shall be liberally construed so that its beneficial purposes may be served.” W.Va. Code § 46A-6-101(1). Correspondingly, this Court has instructed that the statute be read in a manner that “supports the Legislature’s broad intent of protecting ‘consumers from unfair, illegal, and deceptive acts or practices by providing an avenue of relief for consumers who would otherwise have difficulty proving their case under a more traditional cause of action.’” *Barr*, at 514, 711 S.E.2d at 584. (quoting *State ex rel. McGraw v. Scott Runyan Pontiac–Buick, Inc.*, 194 W. Va. 770, 777, 461 S.E.2d 516, 523 (1995)). This reading of the statute complies with both dictates, as it gives the Attorney General the ability to protect more consumers by utilizing the additional resources and expertise of outside counsel.

Finally, the broader reading is consistent with the fact that “[t]he Attorney General ordinarily exercises complete control of litigation conducted in his name.” *Manchin v. Browning*, 170 W. Va. 779, 788, 296 S.E.2d 909, 918 (1982). When the Attorney General appears in a proceeding on behalf of the State in his name, as he does in WVCCPA litigation, “he exercises discretion as to the course *and conduct* of the litigation.” *Id.* (emphasis added). He

“assumes the role of a litigant,” *id.*, and just as any other litigant, he has the right to choose his counsel. *Cf. Texas Catastrophe Property Ins. Assoc. v. Morales*, 975 F.2d 1178, 1180-81 (5th Cir. 1992) (finding a fundamental right to retain counsel of choice in civil actions).

2. Petitioner’s Arguments In Support Of A Narrow Reading Of The Phrase “Personnel In His Office” Are Unpersuasive.

Petitioner advances a hodgepodge of arguments in support of reading the WVCCPA to prohibit the Attorney General from retaining outside counsel. None is persuasive.

a. Other statutory provisions. Petitioner cites a number of other statutory provisions that use language different from that in the WVCCPA to authorize the hiring of outside counsel. For example, according to Petitioner, the Uniform Consumer Credit Code allowed the use of “any necessary attorneys ... to appear for and represent the [state officer] in court.” Petr. Writ 8. Petitioner also cites several provisions of current West Virginia Code. *See, e.g.*, W. Va. Code § 47-18-6 (permitting the Attorney General to “direct the county prosecutor of any county” to assist with antitrust actions); § 11-10-5h (permitting the Tax Commissioner to be represented in civil collection actions by “any attorney permanently employed by the Tax Commissioner and designated by the Attorney General to be a special assistant Attorney General”); § 5-3-2a(d) (authorizing the Attorney General to “provide for an independent special assistant Attorney General to be retained” to review consent judgments against state agencies, officers, or employees”); § 22B-1-7 (permitting certain state officials to “employ counsel who shall be a special assistant attorney general” in appeals to state environmental boards). In Petitioner’s view, these provisions show that the WVCCPA does not permit the Attorney General to retain outside counsel.

For at least three reasons, however, these statutory provisions fail to support Petitioner’s argument. *First*, the varied language in these provisions hardly shows that there is some magic

statutory language—not present in the WVCCPA—that legislatures must use to authorize the hiring of outside counsel. *Second*, the difference between the WVCCPA (which does not specifically refer to “counsel” or “attorneys”) and all of these provisions (which do) could easily be explained by the Legislature’s intent to ensure that the Attorney General be able to delegate his authority to both attorneys *and* non-attorneys. The Attorney General is granted a number of powers in the WVCCPA, and many do not require legal training or the practice of law. *See, e.g.*, W. Va. Code § 46A-7-102(1)(a), (b) (granting power to “[r]eceive .. complaints” and “[m]ake studies”). *Third*, the real question here is the meaning of the phrase “in his office.” Because none of these statutory provisions use that phrase, they offer no insight into how broadly the Legislature intended the phrase to be construed.⁹

b. Ethics Act. Petitioner contends that allowing the retention of outside counsel under the WVCCPA would “run[] afoul of the West Virginia Ethics Act.” Petr. Writ 10. The Ethics Act prohibits any public employee from “knowingly and intentionally us[ing] his or her office ... for his or her own private gain.” W. Va. Code § 6B-2-5(b)(1). According to Petitioner, outside counsel violate this prohibition because they have “a direct financial stake in the outcome of the case.” Petr. Writ 10.

The primary failure of this argument is that the Ethics Act has no bearing on compensation lawfully received for work on behalf of the State. Under Petitioner’s interpretation, any State employee being paid for doing his or her job could be considered to have “knowingly and intentionally use[d] his or her office ... for his or her own private gain.” That makes no sense. Rather, it is clear from context that the prohibited “private gain” in

⁹ The same can be said about the long list of out-of-state consumer protection statutes cited in footnote 10 of Petitioner’s brief. As Petitioner concedes, none of those statutes uses the phrase “in his office.” Petr. Writ 8.

Section 6B-2-5(b)(1) does not refer to an employee's formal pay as Petitioner suggests. Other provisions in that same Section specifically reference a public employee's "compensation." See W. Va. Code § 6B-2-5(l). See *Durham v. Jenkins*, 229 W. Va. 669, 735 S.E.2d 266, 269 (2012) ("[P]ortions of a single section of a statute must ... be read together."). As this Court has explained, the Ethics Act is aimed at "state government employees and officials who 'exercise the powers of their office or employment for *personal gain beyond the lawful emoluments of their position.*'" *State ex rel. McGraw v. West Virginia Ethics Comm'n*, 200 W. Va. 723, 726-27, 490 S.E.2d 812, 815-16 (1997) (quoting W. Va. Code, 6B-1-2 [1989]) (emphasis added).

The second problem with Petitioner's argument is that it assumes that all outside counsel retained under the WVCCPA will have a "direct financial stake in the outcome of the case." But there is no requirement in the WVCCPA that outside counsel be retained on a contingent-fee basis. As discussed, the State's counsel in this case was not so retained.

c. Constitutional Restrictions on Compensation of Outside Counsel. Referencing Section 19 of Article VII of the West Virginia Constitution, Petitioner contends that certain constitutional restrictions on compensation support reading the WVCCPA to prohibit the retention of outside counsel. Petr. Writ 10-11. Specifically, the West Virginia Constitution "restricts the compensation of the Attorney General and of the other named executive department officers to a strict salary basis and bars the officers from supplementing or increasing their legislatively provided compensation by their receipt of fees or any other form of compensation." *Hechler v. Casey*, 175 W. Va. 434, 450, 333 S.E.2d 799, 815 (1985). In addition, "all fees ... for any service performed by any officer ... shall be paid in advance into the state treasury." W. Va. Const., art. VII, § 19. Citing these principles, Petitioner contends that all counsel for the Attorney General must be paid a salary. See Petr. Writ 11.

This argument borders on the frivolous. Article VII, § 19 applies by its terms *only* to the specific executive officers “named in this article.” Those officers are the “governor, secretary of state, auditor, treasurer, commissioner of agriculture and attorney general.” W. Va. Const., art. VII, § 1. The provision does not apply to individuals who work for those officers. *See Hechler*, 175 W. Va. at 451, 333 S.E.2d at 816 (“W.Va. Const. art. VII, § 19 does not expressly prohibit assistant attorneys general from supplementing their salaries from sources other than the State treasury.”).

d. Statutory Restrictions on Compensation of Outside Counsel. Petitioner also contends that certain statutory restrictions on compensation support reading the WVCCPA to prohibit the retention of outside counsel. Petr Writ. 10. In particular, W. Va. Code § 5-3-3 provides that compensation for “Assistant Attorneys General” “shall be within the limits of the amounts appropriated by the Legislature for personal services.” According to Petitioner, the retention of outside counsel with a court-awarded fee would conflict with this provision.

Petitioner, however, reads far too much into Section 5-3-3. That provision applies by its terms only to “assistant attorneys general” and makes no mention of outside counsel or “*special* assistant attorneys general,” a term used elsewhere in the West Virginia Code. It is thus hardly clear that the provision in any way limits the compensation of outside counsel retained under the WVCCPA or any other statute. Moreover, even if it did apply, this Court has made clear that the statutory cap in Section 5-3-3 applies only to compensation paid by the Attorney General from the State treasury. *Hechler*, 175 W. Va. at 451, 333 S.E.2d at 816 (“Under W. Va. Code, 5-3-3 [1961], assistant attorneys general may receive compensation *from the State treasury* for services performed for the State only ‘within the limits of the amounts appropriated by the legislature for

personal services.” (emphasis added)). Nothing prohibits assistant attorneys general from supplementing their salaries from other sources.

e. Lack of Authority to Assign Away Fees. Finally, Petitioner contends that the WVCCPA cannot permit the retention of outside counsel because the Attorney General lacks the authority to “assign away any part of [the] recovery.” Petr. Writ 12. Petitioner argues that attorneys’ fees are “the property of the litigant, not its lawyers.” *Id.* Because the Attorney General is merely the State’s lawyer, Petitioner asserts, neither the Attorney General nor his outside counsel can lay claim to “any part of the State’s recovery including any award of attorneys’ fees.” *Id.*

This argument fundamentally misunderstands the Attorney General’s role in WVCCPA cases. The Attorney General is not merely the lawyer; he stands in the shoes of the State and *is* the litigant. When the Attorney General appears in a proceeding on behalf of the State in his name, as he does in WVCCPA litigation, he “assumes the role of a litigant” and “exercises discretion as to the course and conduct of the litigation.” *Manchin*, 170 W. Va. at 788, 296 S.E.2d at 918. That control entitles him to claim the recovery and assign the fees as he deems appropriate.¹⁰

3. Even If Both Interpretations Are Reasonable, There Are Compelling Reasons To Adopt The Broader Reading.

Even assuming that both the State’s and Petitioner’s readings are reasonable, the Circuit Court did not clearly err in siding with the State. For starters, if both readings are reasonable, the statutory provision is ambiguous, which means that the court by definition could not have committed clear error. *See State ex rel., Walker v. Mental Hygiene Comm’rs*, 217 W. Va. 80, 90,

¹⁰ To the extent that Petitioner is challenging the availability of fees at all, *see* Petr. Writ 12 (“[T]he WVCCPA does not permit an award of attorneys’ fees *at all*.”), that claim is premature. The Circuit Court expressly withheld any ruling on fees and will make a decision “according to principles of law.” A.R. 4.

614 S.E.2d 727, 737 (2005) (“[T]he somewhat ambiguous language in [the statute] is not, taken alone, clear or emphatic enough to ground a decision on the requested writ of prohibition.”). More important, there are at least two compelling reasons to resolve the ambiguity in favor of the State.

First, between the Attorney General and Petitioner, the Attorney General has the stronger claim for deference. The Attorney General is charged with the administration of the WVCCPA. *See, e.g.*, W. Va. Code §46A-7-102(1)(e) (granting the Attorney General authority to make rules “as are necessary and proper to effectuate the purposes of this chapter and to prevent circumvention or evasion thereof”). Where a statute is ambiguous, courts generally will “defer to an agency’s reasonable interpretation of a statute it administers.” *Kessel v. Monongalia County General Hosp. Co.*, 220 W.Va. 602, 619, 648 S.E.2d 366, 383 (2007). To be sure, the Attorney General has not articulated his interpretation in a rule. But by virtue of his statutory duties under the WVCCPA, he is without question entitled to greater deference than Petitioner, a private entity with no role whatsoever in the administration of the WVCCPA.

Second, the doctrine of constitutional avoidance militates in favor of the State’s interpretation. “It is a longstanding fundamental principle of law that ‘[w]herever an act of the Legislature can be so construed and applied as to avoid a conflict with the Constitution, and give it the force of law, such construction will be adopted by the courts.’” *State v. Mullens*, 221 W. Va. 70, 91, 650 S.E.2d 169, 190 (2007) (quoting Syl. pt. 3, *Slack v. Jacob*, 8 W. Va. 612 (1875)). Put another way, “when two constructions may be placed upon a statute, one of which renders it constitutional and the other unconstitutional, it is the duty of the courts to so limit the statute as to make it comply with constitutional requirements.” *State v. Siers*, 103 W. Va. 34, 36, 136 S.E. 504, 505 (1927).

The doctrine applies here because a statute restricting the ability of the Attorney General to retain outside counsel would likely be unconstitutional. Contrary to Petitioner's bald assertions, the Attorney General's authority is *not* "limited to those powers 'prescribed or provided by statutes.'" Petr. Writ 7 (quoting *Manchin*, 170 W. Va. at 785, 296 S.E.2d at 915). No case stands for that proposition. Rather, this Court has clearly held that the West Virginia Constitution vests the Attorney General with "certain core functions ... of which the Office of Attorney General may not be deprived" and has squarely repudiated any suggestion that "the legislature possesses unfettered discretion to define, delineate, and limit the duties of the Attorney General." *State ex rel. McGraw v. Burton*, 212 W. Va. 23, 31, 569 S.E.2d 99, 107 (2002). Petitioner relies heavily on *Manchin* for its narrow view of the Attorney General's authority, but it misreads that case. This Court made very clear in *Burton* that *Manchin*, too, stands for the proposition that the Attorney General's powers are defined principally "by the constitution" and secondarily "by rules of law prescribed pursuant thereto." *Burton*, 212 W. Va. at 30, 569 S.E.2d at 106 (quoting Syllabus Point 1 in *Manchin* and adding emphasis).

At the heart of the Attorney General's inviolable constitutional functions is his role as the State's chief legal officer. In that capacity, he has "the constitutional responsibility for providing legal counsel to State officials and State entities." *Id.* at 32, 569 S.E.2d at 108. This means, at a minimum, that the Legislature may not by statute inhibit the Attorney General's ability to: (1) "play a central role in the provision of day-to-day professional legal services to State officials and entities"; (2) "play a central role in ensuring the adoption and assertion of legal policy and positions by the State of West Virginia and State entities, particularly before tribunals, is made only after meaningful consideration"; and (3) "assure that a constitutional officer who is directly elected by and accountable to the people may express his legal view on matters of State policy

generally and particularly before tribunals where the State is a party.” *Id.* at 39-40, 569 S.E.2d at 115-16.

A statute restricting the retention of outside counsel would likely be unconstitutional because it would inhibit the Attorney General’s ability carry out these extensive duties. The Attorney General’s State-funded resources are necessarily finite, and he can only hire so many salaried attorneys. The resources and expertise available from outside counsel are indispensable to the Attorney General’s discharge of his constitutional duties. The Legislature could no more remove the Attorney General’s power to retain such counsel than it could refuse to fund the office. *Id.* at 41, 569 S.E.2d at 117 (“We ... hold that to ensure that the Office of the Attorney General can perform its inherent constitutional functions, the Legislature has the implicit obligation to provide sufficient funding to the office.”).

The doctrine of constitutional avoidance, therefore, provides another reason to adopt the State’s reading of the statute if both interpretations are deemed reasonable. If “two constructions may be placed upon a statute, one of which renders it constitutional and the other unconstitutional, it is the duty of the courts to so limit the statute as to make it comply with constitutional requirements.” *Siers*, 103 W. Va. at 36, 136 S.E. at 505.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court deny the Petition for Writ of Prohibition. Petitioner has failed to show that the Circuit Court clearly erred either in determining that Petitioner lacks standing or in denying disqualification on the merits.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have transmitted true and correct copies of the **RESPONSE OF STATE OF WEST VIRGINIA IN OPPOSITION TO PETITION FOR A WRIT OF PROHIBITION** on April 8, 2013, to the following via Email and/or First Class U.S. Mail or as indicated below:

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