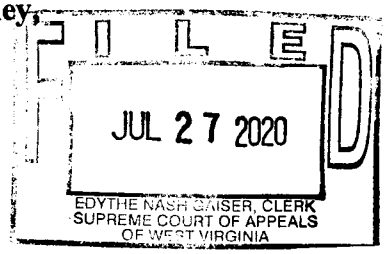
No. 20-0295

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Lisa Wilkinson, Heather Morris, Kathryn A. Bradley, Pamela Stumpf, and Lula V. Dickerson,

Plaintiffs Below, Petitioners,

v.



West Virginia Office of the Governor and Jim Justice, Governor, West Virginia State Auditor's Office and John B. McCuskey, State Auditor, West Virginia State Treasurer's Office and John Perdue, State Treasurer, West Virginia Office of the Secretary of State and Mac Warner, Secretary of State, West Virginia Office of the Attorney General and Patrick Morrisey, Attorney General; and West Virginia Supreme Court of Appeals and Chief Justice Tim Armstead,

Defendants Below, Respondents.

From the Circuit Court of Kanawha County, West Virginia
The Honorable Thomas Evans III
Civil Action No. 18-C-549

RESPONDENTS' JOINT RESPONSE TO PETITIONERS' OPENING BRIEF

Anna F. Ballard, WV State Bar No. 9511
Evan S. Olds, Esq., WV State Bar No. 12311
Kelly G. Pawlowski, Esq. WV State Bar No. 12795
PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC
JamesMark Building
901 Quarrier Street
Charleston, WV 25301
Telephone: (304) 344-0100
Facsimile: (304) 342-1545
E-mail: eolds@pffwv.com
Counsel for West Virginia Office of the Governor and Jim Justice, Governor

John L. MacCorkle, WV State Bar No. 2286
David P. Cook, Jr., WV State Bar No. 9905
MacCorkle Lavender, PLLC
300 Summers Street, #800
Charleston, WV 25301
Telephone: (304) 344-5600
Facsimile: (304) 344-8141
E-mail: dcook@mlclaw.com
***Counsel for West Virginia State Auditor's Office and John B. McCuskey,* State Auditor,**

Charles R. Bailey, WV State Bar No. 0202
Michael W. Taylor, WV State Bar No. 11715
Adam K. Strider, WV State Bar No.
Bailey & Wyant, PLLC
P. O. Box 3710
Charleston, WV 25337-3710
Telephone: (304) 345-4222
Facsimile: (304) 343-3133
E-mail: mtaylor@baileywyant.com
Counsel for West Virginia State Treasurer's Office and John Perdue, State Treasurer

William E. Murray, WV State Bar No. 2693
Anspach Law
900 Lee Street E., Suite 1700
Charleston, WV 25301
Telephone: (304) 205-8063
Facsimile: (304) 205-8062
E-mail: wmurray@anspachlaw.com
Counsel for West Virginia Office of the Secretary of State and Mac Warner, Secretary of State

William Slicer, WV State Bar No. 5177
Philip B. Sword, WV State Bar No. 10435
Shuman McCuskey & Slicer, PLLC
1411 Virginia Street East
Suite 200
P. O. Box 3953
Charleston, WV 25339-3953
Telephone: (304) 345-1400
Facsimile: (304) 343-1826
E-mail: wslicer@shumanlaw.com
Counsel for West Virginia Office of the Attorney General and Patrick Morrisey, Attorney General

Bryan R. Cokeley, WV State Bar No. 774
Steptoe & Johnson, PLLC
P. O. Box 1588
Charleston, WV 25326-1588
Telephone: (304) 353-8000
Facsimile: (304) 353-8189
E-mail: bryan.cokeley@steptoe-johnson.com
Counsel for West Virginia Supreme Court of Appeals and Chief Justice Tim Armstead, in his official capacity as Chief Justice

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II. Petitioners' second assignment of error lacks merit because (A) it contains argument not raised below, (B) Petitioners provide no legal support for their contention that wages earned in a calendar or fiscal year must be paid in the same year, and (C) the pay conversion resulted in no additional arrearage, but rather, an overpayment to Petitioners.

III. Petitioners' third assignment of error fails because (A) it is not supported with any legal authority, (B) elected officials and Petitioners were paid every dollar due, and (C) the difference in elected officials' pay schedule is supported by a rational basis.

IV. Petitioners' fourth assignment of error fails for the same reasons demonstrated in §§ I, II, and III *supra*.

V. Respondents are entitled to absolute and qualified immunities because Respondents' implementation of the bi-weekly pay conversion (A) involved legislative, administrative, and executive policy-making actions, and (B) violated no clearly established laws.

STATEMENT OF THE CASE

Respondents agree with Petitioners' "Procedural History" except in the following areas: Petitioners aver that the arrearage required by W. Va. Code § 6-7-1 increased to fifteen days upon conversion to bi-weekly pay from semi-monthly or bi-monthly pay.[1] To the contrary, as explained in Argument § II below, the arrearage shortened to ten days upon conversion to bi-weekly pay.

Regarding Petitioners' "Background" section beginning on page four of Petitioners' *Brief*, Petitioners refer to W. Va. Code § 6-7-1 as creating "contractual obligations."[2] Petitioners cite to no authority for this assertion. The State of West Virginia neither had nor has any such contract

[1] The terms "semi-monthly" and "bi-monthly" have been used interchangeably in this case to mean twice-per-month.
[2] Pet'rs' Br. at 4; *see also* Pet'rs' Br. at 6, 22.

with its employees, and Petitioners have cited to no authority indicating otherwise.[3] Also, Petitioners incorrectly state in a footnote that elected officials' pay is governed by W. Va. Code § 6-7-1.[4] However, the code section includes an express exception for elected officials, stating,

> All full-time and part-time salaried and hourly officials, officers and employees of the state . . . shall be paid at least twice per month . . . : Provided, That on and after July 1, 2002, all new officials, officers and employees of the state, . . . except elected officials, shall be paid one pay cycle in arrears.

Unlike State employees, the salaries of this State's elected and constitutional officers are not controlled by W. Va. Code § 6-7-1, but rather, are set by W. Va. Code § 6-7-2.

Regarding Petitioners' Background subsection "A. 1997 Amendment to West Virginia Code § 6-7-1," Respondents offer the following clarification. W. Va. Code § 6-7-1 no longer states that employees shall be paid twice per month. As Petitioners state in the preamble of their *Brief*, the current version of W. Va. Code § 6-7-1 requires employees to be paid at least twice per month.

Regarding Petitioners' Background subsection "B. Lag Payroll," Respondents clarify that State employees being paid one-pay-cycle after they perform their work is a natural and necessary effect of West Virginia's payment in arrears system required under W. Va. Code § 6-7-1.

Regarding Petitioners' Background subsection, "C. 2014 Amendment to West Virginia Code § 6-7-1" beginning on page five, Petitioners again aver that that the arrearage required by W. Va. Code § 6-7-1 increased to fifteen days upon conversion to bi-weekly pay from semi-monthly or bi-monthly pay. As explained in Argument § II *infra*, however, the arrearage indeed shortened to 10 days, and the conversion to bi-weekly pay did not result in any "taking" of wages.

Regarding Petitioners' Background subsection "D. Third Wave Fiscal Year 2016-2017, Affecting Calendar Year 2017 A/K/A 'The Taking'" beginning on page 6, again, the conversion

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[3] *See* Reply Mem. of Def. Sup. Ct. of Appeals of W. Va. to Pls' Resp. to Disp. Mots, J.A. 623–625.
[4] Pet'rs' Br. n. 1.

did not result in any "taking" of wages. Contrary to Petitioners' assertion that the State must pay "employees their full contracted salaries within the Fiscal year," as explained in Argument §§ II–III *infra*, payment in arrears under W. Va. Code § 6-7-1 requires that State employees be paid one-pay-cycle in arrears, which naturally results in employees receiving payment one-pay-cycle after their work is performed, *i.e.*, one-pay-cycle into the next year. Payment in arrears neither results in any surplus nor does it short State employees' pay. State employees are paid every dollar earned one-pay-cycle in arrears. As explained in Argument § III *infra*, elected officials received a "gap payment" because they are paid current and not in arrears; in any event, State employees and elected officials were paid every dollar owed. Elected officials have not "prospered" any more than Petitioners. Elected officials have not been overpaid, and Petitioners point to no evidence in the record of their overpayment.

Regarding Petitioners' Background subsection "E. Implementation of 'the taking wave 3'" beginning on page 7, Respondents demonstrate in Argument § II *infra* that Petitioners received their full salaries one-pay-cycle in arrears. Further, under the semi-monthly system, Petitioners *appeared* to receive their salaries *within* the fiscal year due to the timing of their pay; specifically, the semi-monthly system aligned with the calendar year as Petitioners received their pay at the middle and end of each month.[5] As Petitioners concede,[6] Petitioners have been paid one-pay-cycle in arrears long before the bi-weekly conversion took effect. Thus, Petitioners have never received their salaries within the calendar or fiscal year. While the conversion to bi-weekly pay changed the timing of Petitioners' pay, it did not short them pay.

Regarding Petitioners' Background subsection "F. Direct Evidence of Non-Payment" beginning on page ten, Respondents did not underpay Petitioners, as further demonstrated in

[5] *See* Pet'rs' Br. at 4.
[6] Pet'rs' Br. at 4.

Argument § II *infra*. Petitioners rely on a Table attached to an affidavit of Chief Financial Officer of the Supreme Court of Appeals of West Virginia, Sue Racer-Troy, to argue that Petitioner Stumpf was shorted pay.[7] However, as shown *infra* in Argument § II, the Table demonstrates Petitioner was paid every dollar earned.

Regarding Petitioners' Background subsection "G. Wages Individually Withheld" beginning on page twelve, Petitioners contend Respondents cannot pay State employees in arrears. Petitioners' eschewed understanding of payment-in-arrears is succinctly stated here: "The Defendants attempted to show payment by physically taking money from wages earmarked for 2018 and applying them to 2017." Here, Petitioners describe the natural and necessary effect of payment in arrears. Payment in arrears, by definition, results in pay delayed by one pay cycle. Thus, pay earned at the end of one fiscal or calendar year will be paid the following fiscal or calendar year, insofar as the arrearage period extends into that next year. This is demonstrated in Argument § II *infra*. Again, Petitioners' contention that Petitioners were paid their salaries within the fiscal or calendar year prior to conversion to bi-weekly pay is incorrect, and the affidavit of Sue Racer-Troy does not demonstrate any underpayment. Also, in their footnotes fourteen and fifteen, Petitioners misrepresent the *Final Order Granting Summary Judgment for All Defendants* as the Honorable Thomas Evans' "forgiving" five days of wages or "reducing" the arrearage.[8] As demonstrated *infra*, upon conversion to bi-weekly pay, Petitioners were paid every other week on a ten-work-day arrearage. The Circuit Court forgave no wages owed, because no wages are due.

Respondents offer the following additional background information for Respondents' Statement of the Case to explain the impetus for and general mechanics of the bi-weekly pay conversion. In May 2010, the State of West Virginia initiated an analysis of the State's systems

[7] *See* Pet'rs' Br. at 11; J.A. 349–353, 361–362.
[8] Pet'rs' Br. at n.14; *see id.* 19 ("he actual [sic] eliminates 5 days of pay . . . .").

and business processes. The State's Business Case Analysis Report ("Report") issued as a result of that evaluation, provided an in-depth analysis of the State's processes and it concluded that standardization and integration were essential best practices that would result in a net ten-year savings to the State of $181.3 million dollars.[9] The majority of these savings are associated with process improvements recommended by the Report.

One of the significant process improvement recommendations was to move to a bi-weekly pay system. The Report noted, "Currently, policies and rules associated with time, pay, and leave accrual and usage are inconsistent across the State of West Virginia workforce, and at times inconsistencies exist within agencies."[10] The Report suggested eight process improvements to correct this deficiency, one of which was bi-weekly payroll.

> The majority of State governments that have implemented an ERP system or HR/Payroll system pay their employees on a biweekly basis. Having the same number of days and hours in each pay cycle produces multiple operational benefits for the State. The calculation of the hourly rate and daily rate is constant since the same number of days is in each pay period. The hourly and daily labor cost rate is utilized to determine separation payment for annual leave and pro rata payment for increment pay and other leave balances. The current practice of semi-monthly payroll results in unequal days in a pay cycle depending on the number of days of the month. This has resulted in variations in calculations of the hourly rate and daily rate, and creates the situation where the timing of separation from the State can have a direct financial impact depending on the number of days in the working month[11]

With these issues and considerations as a backdrop, the Legislature adopted West Virginia Code §12-60-1, *et seq.*, in 2011 creating the Enterprise Resource Planning Board ("ERP Board") in order to achieve, through the implementation of software applications, a "comprehensive integration of data sources and processes of State agencies into a unified system that includes the

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[9] Second Am. Compl. Ex. D – Letters, J.A. 72.
[10] *Id.*
[11] *Id.*

State's financial management, procurement, personnel, payroll, budget development and other administrative business processes."[12] The Legislation also created a three-member board comprised of the Governor, Auditor and Treasurer and a sixteen-member Steering Committee charged with providing routine oversight of the system.[13]

During the design and implementation process, the question of pay frequency was reviewed and analyzed by numerous stakeholders. Bi-weekly pay was recommended to the Board by the State's consultant as well as the sixteen-member Steering Committee, comprised of the Secretaries of Administration, Revenue, Transportation, Health and Human Resources, representatives of higher education, the Legislature and other appointees made by the Governor, Auditor, Treasurer, and a state employee representative.[14]

In 2014, the Legislature passed Senate Bill 322 for the purpose of allowing the State to change to bi-weekly pay.[15] The ERP System was then configured to pay exclusively on a bi-weekly schedule. The following year, beginning in May 2015, State employees were transitioned from semi-monthly to bi-weekly pay. The transition occurred over three years and in three waves: Wave 1 – 2015, Wave 2 – 2016, and Wave 3 – 2017.

Beginning in May 2015, approximately 9,000 Wave 1 employees transitioned and received their first bi-weekly check on June 12, 2015. The Wave 2 transition happened in 2016 and the Wave 3 transition occurred in 2017. Although the transition occurred over three years and in three waves, each transition was handled in a similar manner. For each Wave, a date was selected whereby employees would receive their last full semi-monthly paycheck. The following semi-monthly paycheck was shortened by the number of days necessary to line up with the bi-weekly

[12] W. Va. Code § 12-6D-1(a).
[13] W. Va. Code §§ 12-6D-1, 12-6D-3.
[14] Second Am. Compl. Ex. D – Letters, J.A. 72.
[15] Exhibit 1 – Senate Bill, J.A. 271–273.

pay schedule. Within that smaller paycheck was an adjustment payment that allowed the new bi-weekly paycheck to be in an amount that would both pay out the employees' earnings for the balance of that calendar year and would be the right-sized bi-weekly check for the next calendar year. After the transition pay period, the next paycheck employees received was their first bi-weekly paycheck.

Of note, on May 19, 2015, approximately 24 State employees filed grievances concerning the transition alleging that the conversion would result in payment shortages during the year of the conversion. After an administrative Level One hearing, the former State Auditor received a Letter of Joinder dated August 13, 2015. On October 15, 2015, mediation occurred and at that mediation the former State Auditor explained the bi-weekly pay system to the grievants. Thereafter, one or more of the grievants withdrew.

Petitioner Lisa M. Wilkinson works on the Joint Commission on Government Finance; Petitioner Kathryn A. Bradley works for the West Virginia Department of Health and Human Resources; Petitioners Heather L. Morris (Ewaskey), Pamela A. Stumpf, and Lulu V. Dickerson work for the West Virginia Supreme Court.

SUMMARY OF ARGUMENT

The Circuit Court did not err when it granted Respondents summary judgment. Petitioners articulated no basis for any additional discovery. The Circuit Court properly relied on Petitioners' pay records, and Petitioners did not dispute and have not disputed their pay records. Petitioners were not shorted any money when the payroll conversion took place. Rather, the conversion merely altered the pay frequency of Petitioners from twenty-four pay periods a year to twenty-six pay periods a year. There is no provision in West Virginia law that prohibits the State from changing the frequency that it pays its employees from semi-monthly to bi-weekly; nor is there

any law that requires State employees to be paid on a calendar or fiscal year basis. Additionally, Respondents have a reasonable basis for paying elected officials as they do.

Moreover, Respondents are entitled to (1) absolute immunity as the pay conversion was implemented pursuant to a legislative, administrative, and executive policy-making function, and (2) qualified immunity as Petitioners have identified no clearly established laws that Respondents violated.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents state that the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process will not be significantly aided by oral argument. Respondents further assert that pursuant to Rule 21(c) of the West Virginia Rules of Appellate Procedure, disposition by issuance of a memorandum decision affirming the ruling of the circuit court is appropriate. Petitioners do not support their contentions with legal support and thus fail to articulate a substantial question of law; the Circuit Court did not commit prejudicial error; and just cause exists for summary affirmance.

ARGUMENT

STANDARD OF REVIEW

"Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove."[16] A party may move for summary judgment at any time.[17] Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together

[16] *Setser v. Browning*, 214 W.Va. 504, 507, 590 S.E.2d 697, 700 (2003) (quoting syl. pt. 4, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994)).
[17] W. Va. R. Civ. P. 56(b).

with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[18] A motion for summary judgment should be granted when it is clear that no genuine issue of fact exists to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.[19]

A dispute about a material fact is "genuine" only when a reasonable jury could render a verdict for the nonmoving party if the record at trial were identical to the record compiled in the summary judgment proceedings before the circuit court.[20] Of course, "material facts" are those necessary to establish the elements of a party's cause of action.[21] Summary judgment is a device designed to effect a prompt disposition of controversies on their merit without resort to a lengthy trial if, in essence, there is no real dispute as to salient facts or if only a question of law is involved.[22] The nonmoving party cannot create a genuine issue of material fact through mere speculation or building of one inference upon another.[23]

While a court must view the underlying facts and all inferences in the light most favorable to the nonmoving party "the nonmoving party must nonetheless offer some concrete evidence from which a reasonable finder of fact could return a verdict in its favor or other significant probative evidence tending to support its complaint."[24] "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which a jury could reasonably find for the plaintiff."[25]

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[18] W. Va. R. Civ. P. 56(c).
[19] *See, e.g.*, syl. pt. 2, *Swears v. R.M. Roach & Sons, Inc.*, 225 W.Va. 699, 696 S.E.2d 1 (2010); syl. pt. 3, *Aetna Cas. & Surety Co. v. Fed. Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).
[20] *Powderidge Unit Owners Ass'n v. Highland Props.*, 196 W. Va. 692, 698, 474 S.E.2d 872, 878 (1996).
[21] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).
[22] *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 58, 459 S.E.2d 329, 335 (1995).
[23] *See, e.g.*, *Crum v. Equity Inns, Inc.*, 224 W.Va. 246, 254, 685 S.E.2d 219, 227 (2009); *Williams*, 194 W.Va. at 60, 459 S.E.2d at 337.
[24] *Williams*, 194 W.Va. at 60, 459 S.E.2d at 337 (citing *Anderson*, 477 U.S. at 256) (internal quotations omitted).
[25] *Anderson*, 477 U.S. at 252.

Summary judgment is not a remedy to be exercised at the circuit court's option; it must be granted when there is no genuine disputed issue of material fact.[26] While the application of law to facts may be complicated or even difficult at times, this is not a bar to a summary judgment.[27] When a motion for summary judgment is made and supported, an adverse party may not rest upon the mere allegations or denials of his pleading. His or her response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he or she does not so respond, summary judgment, if appropriate, shall be entered in the moving party's favor.[28]

This Court's review of a circuit court's order granting summary judgment is *de novo*.[29]

I. PETITIONERS' CANNOT SEEK REVERSAL AND RESIST SUMMARY JUDGMENT BY REQUESTING DISCOVERY WHEN PETITIONERS FAIL TO SATISFY THE REQUIREMENTS OF W. VA. R. CIV. P. 56(f) AND FAIL TO SUPPORT THEIR FIRST ASSIGNMENT OF ERROR

In Assignment of Error No. 1, Petitioners contend that the Circuit Court erred in not allowing discovery before granting summary judgment. However, in their *Brief* and in Circuit Court, Petitioners failed to show that discovery is needed and failed to identify what needs discovered.

Under West Virginia law, "[w]here a plaintiff opposes a motion to dismiss under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure and claims that discovery would enable him or her to oppose such a motion, the plaintiff may request a continuance for further discovery pursuant to Rule 56(f) of the West Virginia Rules of Civil Procedure."[30] Rule 56(f) provides:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts

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[26] *Williams*, 194 W. Va. at 59, 459 S.E.2d at 335–36 n.7; *Anderson*, 477 U.S. at 248.
[27] *Johnson v. Farmers & Merchants Bank*, 180 W. Va. 702, 713, 379 S.E.2d 752, 763 (1989).
[28] W. Va. R. Civ. P. 56(e); *Williams*, 194 W. Va. at 59, 459 S.E.2d at 336.
[29] Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).
[30] Syl. pt. 6, *Harrison v. Davis*, 197 W. Va. 651, 478 S.E.2d 104 (1996).

> essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.[31]

Although Rule 56(f) indicates that the party requesting a continuance of a summary judgment motion must file an affidavit demonstrating that the continuance is needed to obtain essential facts to oppose the motion, the Supreme Court of Appeals has held that "substantial compliance with Rule 56(f), rather than strict adherence . . . , may suffice in certain situations."[32] Therefore, in the absence of an affidavit, a continuance may be requested through written representations of counsel.[33] At a minimum, the written representations of counsel must:

> (1) articulate some plausible basis for the party's belief that specified "discoverable" material facts likely exist which have not yet become accessible to the party; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good cause for failure to have conducted the discovery earlier.[34]

Here, Petitioners submitted no affidavit to request that any of the dispositive motions be held in abeyance. Instead, Petitioners made their request through written representations of counsel in their *Response* below.[35] "A party may not simply assert in its brief that discovery was necessary and thereby overturn summary judgment when it failed to comply with the requirement of Rule 56(f) to set out reasons for the need for discovery in the [written representation]."[36] But that is all Petitioners have done here. On appeal, Petitioners continue to fail to satisfy the requirements in *Powderidge*.

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[31] W. Va. R. Civ. P. 56(f).
[32] *Harrison*, 197 W. Va. at 651, 478 S.E.2d at 115.
[33] Syl. pt. 5, *Hinerman v. Rodriguez*, 230 W. Va. 118, 736 S.E.2d 351, 353 (2012).
[34] Syl. pt. 1, in part, *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd*, 196 W. Va. 692, 474 S.E.2d 872 (1996); *see also Harrison*, at syl. pt. 6.
[35] Pls' Resp. to Defs' Mots. to Dismiss Pls' Compl., or in the alt., Summ. J., J.A at 506.
[36] *Powderidge*, 196 W. Va. at 702, 474 S.E.2d at 882.

The first requirement under *Powderidge* directs Petitioners to "articulate some ***plausible basis*** for [their] belief that specified 'discoverable' material facts likely exist which have not yet become accessible to [them]."[37] Petitioners' first Assignment of Error contains no legal citations and mentions discovery twice and only generally. In an *Administrative Order Re: Filings That Do Not Comply With The Rules Of Appellate Procedure* entered December 10, 2012, this Court warned that "[b]riefs that lack citation of authority, fail to structure an argument applying applicable law, fail to raise any meaningful argument that there is error, or present only a skeletal argument" do not comply with the Rules of Appellate Procedure. "A skeletal 'argument,' really nothing more than an assertion, does not preserve a claim. . . . Judges are not like pigs, hunting for truffles buried in briefs.'"[38] Petitioners identify no discoverable material facts and articulate no basis for their existence.[39] Petitioners were made aware of the requirements under *Powderidge* below,[40] but persist to ignore its requirements. Rather than articulate what needs discovered and why it matters, Petitioners identify all the evidence they presented to support their claims in Circuit Court.[41]

Elsewhere in Petitioners' *Brief*, Petitioners mention the need for discovery on matters not at all relevant to their claims and on matters that, even if discovered, would not warrant reversal of the Circuit Court's *Final Order*. For instance, Petitioners aver in footnote six of their *Brief*, "[s]ince the plaintiffs do not have any discovery it is impossible to identify who put 'the Plan' in place." Petitioners fail to explain how naming a specific State employee or official is material to

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[37] *Id.* (emphasis added).
[38] *State Dept. of Health v. Robert Morris N.*, 195 W.Va. 759, 765, 466 S.E.2d 827 (1995) (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir.1991)).
[39] Pet'rs' Br. 16–17.
[40] *See* Def. W. Va. State Auditor's Ofc. and John B. McCuskey's Reply to Pls' Resps. to Defs' Mots. to Dismiss Pls' Compl., or in the alt., Summ J., J.A. at 562; Reply Mem. of Def. Sup. Ct. of Appeals of W. Va. to Pls' Resps. to Disp. Mots., J.A. 635–636.
[41] Pet'rs' Br. at 17.

their case or would warrant a different outcome. Petitioners mention in passing, "[t]he actual way elected officials were treated will not be known until full discovery is completed." Petitioners' averment does not satisfy *Powderidge* and does not demonstrate the need for discovery. The method in which elected officials were paid was not disputed below, and Petitioners based their claim, and continue to base their claim, on the undisputed method in which elected officials were paid. As shown in § III *supra*, elected officials, like Petitioners, were paid every dollar owed them but on a different schedule as required under the law.

To satisfy the second requirement, Petitioners must "demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period." Not only do Petitioners fail to identify what "material facts" are discoverable, but they also fail to propose a time period for such discovery. As for the third requirement, Petitioners must "demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material." Again, Petitioners have not identified what "discoverable" facts exist. Rather, Petitioners argue blanketly that the evidence presented to the Circuit Court should have thwarted summary dismissal.[42] Indeed, the Petitioners' pay records were presented to the Court, and the Court needed no other information to adjudicate the questions presented below—namely whether the transition from semi-monthly to bi-weekly pay violated any West Virginia law and shorted Petitioners any pay. Petitioners have not demonstrated, nor can they, that such *unidentified* facts produce a genuine and material issue.

Petitioners fail to cite to any legal authority to support their first Assignment of Error and fail to identify in their *Brief* where they requested discovery in the record below. Under this Court's December 2012 *Administrative Order*, the Rules of Appellate Procedure do not allow "[b]riefs with arguments that do not contain a citation to legal authority to support the argument presented

[42] Pet'rs' Br. at 17.

and do not 'contain appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal' as required by rule 10(c)(7)." Without legal citation and without citations to the record, Petitioners have failed to support their first Assignment of Error.

In any event, the joint appendix record demonstrates that Petitioners did not make a showing that discovery was needed. Petitioners filed their *Response to Defendants' Motions to Dismiss Plaintiffs' Complaint, or in the alternative, Summary Judgment*, stating generally that they needed full discovery to address their constitutional claims;[43] however, Petitioners failed to state the basis for this belief—a failure highlighted by Respondents below.[44] Moreover, Petitioners have not specified what "'discoverable' material facts likely exist." Petitioners fail to articulate how, why, or what discovery is needed to support their claims. Thus, Petitioners' first Assignment of Error lacks merit, and the Circuit Court did not err in granting the Respondents summary judgment.

II. PETITIONERS' SECOND ASSIGNMENT OF ERROR LACKS MERIT BECAUSE (A) IT CONTAINS ARGUMENT NOT RAISED BELOW, (B) PETITIONERS PROVIDE NO LEGAL SUPPORT FOR THEIR CONTENTION THAT WAGES EARNED IN A CALENDAR OR FISCAL YEAR MUST BE PAID IN THE SAME YEAR, AND (C) THE PAY CONVERSION RESULTED IN NO ADDITIONAL ARREARAGE, BUT AN OVERPAYMENT TO PETITIONERS

Throughout this litigation, the manner in which Petitioners allege they were shorted pay has been a moving target. In Circuit Court, Petitioners alleged the bi-weekly pay conversion resulted in a fourteen-day arrearage. Now, Petitioners allege that the bi-weekly pay conversion should have resulted in a ten-day pay arrearage (it did) instead of a fifteen-day arrearage (it didn't). Petitioners also allege, without any legal support and contrary to longstanding West Virginia law,

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[43] Pls' Resp. to Defs' Mot. to Dismiss Pls' Compl., or in the alt., Summ. J., J.A. 506 (averring generally that "Plaintiffs need full discovery to address their constitutional claims").

[44] *See* Def. W. Va. State Auditor's Ofc. and John B. McCuskey's Reply to Pls' Resps. to Defs' Mots. to Dismiss Pls' Compl., or in the alt., Summ J., J.A. at 562; Reply Mem. of Def. Sup. Ct. of Appeals of W. Va. to Pls' Resps. to Disp. Mots., J.A. 635–636.

that State employees must be paid within a calendar or fiscal year what they earned within that calendar or fiscal year. This is not and has never been the law in West Virginia.

A. PETITIONERS' SECOND ASSIGNMENT OF ERROR CONTAINS ARGUMENT NOT RAISED BELOW; FOR THE FIRST TIME IN THIS LITIGATION, PETITIONERS AVER THAT A TEN-DAY ARREARAGE IS PROPER UNDER WEST VIRGINIA LAW.

By way of background, in their *Second Amended Complaint*, Petitioners asserted that an arrearage violated West Virginia law because State employees were required to be paid within the calendar or fiscal year what they earned in the same year.[45] When faced with longstanding West Virginia law supporting the State's arrearage-based pay schedule, Petitioners, perhaps realizing their initial attack on the one-pay-cycle arrearage was deleterious to their claim, asserted that a *second* arrearage was created by the bi-weekly pay conversion.[46] Petitioners explained:

> Before the change to bi-weekly pay, the State paid employees twice a month. Since an employee pay cycle was every 15 days employees received all monthly salary for time worked in the current year by the 15/16 of the next month or within "one pay cycle". Once the bi-weekly pay system was implemented, the one pay cycle was 14 days.
> This means that within 14 days of months end (January 14) all employees must receive all pay earned in the prior month. However, the year in which the bi-weekly pay program was implemented, the State immediately created a 2nd wage gap or arrearage.[47]

Relying on Petitioners' undisputed pay records, Respondents demonstrated, and the Court found, that no second arrearage was created, and that Petitioners were not shorted pay. Now, on appeal, Petitioners allege a different theory:

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[45] Pls' Second Am. Compl. ¶¶ 23, 34, 97–99, J.A. 9, 11, 22–23.

[46] Pls' Resp. to Defs' Mot. to Dismiss Pls' Compl., or in the alt., Summ. J., J.A. 480. Petitioners also appeared to abandon their Wage Payment Collection Act basis for their claim as Petitioners did not directly respond to Respondents' arguments that nothing in the Act prohibits the State from changing the frequency with which it pays its employees, *i.e.*, from semi-monthly to bi-weekly. *See* Mot. of Def. Sup. Ct. of Appeals of W. Va. to Dismiss Pls' Compl. or in the alt., for Summ. J., J.A. 323, 327. Rather, Petitioners only argued that they did not have to exhaust administrative remedies under the Act. Pls' Resp. to Defs' Mot. to Dismiss Pls' Compl., or in the alt., Summ. J. at 23–24, J.A. 500–501.

[47] Pls' Resp. to Defs' Mot. to Dismiss Pls' Compl., or in the alt., Summ. J., J.A. 480.

> Since employees were bi-monthly, they were in arrears 10.8 days of pay. This meant that when an employee terminated employment with the State of West Virginia they would be owed one additional paycheck consisting of 10.8 days of pay. When the pay period was changed from bi-monthly to bi-weekly [sic] the number of workdays changed to 10 days. The arrearage being held by the State of West Virginia and the amount to be paid at the time of termination should have decreased by .8 days.
>
> . . .
>
> As the defendants noted, changing from bi-monthly to bi-weekly should cause the amount being owed being reduced from ten point eight (10.8) days under bi-monthly to ten (10) days under bi-weekly. It should not have gone up to fifteen (15) days.[48]

For the first time in this litigation, Petitioners assert that the arrearage post-pay conversion should have been ten days instead of fifteen days. Contrary to Petitioners' newfound theory and as demonstrated below, the pay conversion indeed resulted in a consistent ten-day arrearage.

Pinpointing a basis for Petitioners' claims has proven as elusive as finding any legal support for the claims. On appeal, Petitioners have again maneuvered the basis for their claims. "[W]hen nonjurisdictional questions have not been decided at the trial court level and are then first raised before this Court, they will not be considered on appeal."[49] Below, Petitioners never advocated for a 10-day arrearage. Rather, Petitioners argued that any arrearage was improper under West Virginia law and later that the pay conversion created a fourteen-day arrearage.[50] Thus, the issues raised in Petitioner's second Assignment of Error are not properly before the Court.

In any event, as demonstrated below and *infra*, the bi-weekly pay conversion did not create an additional arrearage and did not short Petitioners' pay.

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[48] Pet'rs' Br. at 2, 18–19.
[49] *Whitlow v. Bd. of Educ.*, 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993).
[50] Pls' Resp. to Defs' Mot. to Dismiss Compl. Pls' Compl., or in the alt., Summ. J., J.A. 480.

B. PETITIONERS PROVIDE NO LEGAL SUPPORT FOR THEIR CONTENTION THAT WAGES EARNED IN A CALENDAR OR FISCAL YEAR MUST BE PAID IN THE SAME CALENDAR OR FISCAL YEAR, AND LONGSTANDING WEST VIRGINIA LAW PLAINLY HOLDS TO THE CONTRARY

In their second Assignment of Error, Petitioners posit, "[t]he claim of the State is that while plaintiffs were not paid their full wages in 2017, they have been paid if one considers that payments are in arrears. The plaintiffs' position is that the State cannot take wages earned in 2017 and then add it to the initial arrearage created at the time of employment." Thus, Petitioners claim that they were shorted wages because they are entitled to be paid what they earned within the fiscal or calendar year. However, payment in arrears requires payment of wages one-pay-cycle after they are earned. Accordingly, wages earned at the end of December will necessarily be paid into January the next year.

Petitioners acknowledge elsewhere in their *Brief* that West Virginia law requires an arrearage, but then ignore the arrearage in their annual salary calculations.[51] In this regard, Petitioners' second Assignment of Error is perplexing and legally unsupported. As Petitioners concede, W. Va. Code § 6-7-1 requires an arrearage and, as Respondents demonstrated and the Circuit Court explained in its *Final Order*, West Virginia law has long required an arrearage.[52] Petitioners even assert that W. Va. Code § 6-7-1 "has been in place since the early 1900's at least."[53] Making these concessions, Petitioners nonetheless assert that it is improper for employees to be paid in January 2018 for work performed in December 2017. Here, Petitioners provide no

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[51] Pet'rs' Br. at 2, 4, 12, 19.

[52] Final Order Granting Summ. J. for All Defs. ¶ 19–21, J.A. 733–734; Defs. W. Va. State Office of the Governor and Jim Justice's Mot. to Dismiss and Joinder in W. Va. Sup. Ct. of Appeals Mot. for Summ J. § III, J.A. 252–257; Def. W. Va. State Treasurer's Office and John Perdue's Supp. Mot. to Dismiss Pls' Second Amended Compl. § II, J.A. 236; Defs. W. Va. Office of the Attorney General and Patrick Morrisey's Mot. to Dismiss § III, J.A. 166–171; Defs. W. Va. State Auditor's Office and John B. McCuskey's Mot. to Dismiss, J.A. 220; Mot. of Def. Sup. Ct. of Appeals Of W. Va. to Dismiss Pls' Compl. or in the alt. for Summ. J., J.A. 323 (incorporating Defs. W. Va. State Office of the Governor and Jim Justice's Mot. to Dismiss and Joinder in W. Va. Sup. Ct. of Appeals Mot. for Summ J.).

[53] Pet'rs' Br. n. 1.

legal support and ignore W. Va. Code § 6-7-1 and West Virginia's long history of payment in arrears.

To summarize West Virginia's long history of arrearage-based pay, thoroughly briefed below,[54] since 1921, it has been the law of the State that "[n]o money shall be drawn from the Treasury to pay the salary of any officer or employee before his services have been rendered."[55] Since at least 1997, W. Va. Code § 6-7-1 required State employees to be paid twice per month and one pay cycle in arrears. In 2014, the statute was amended to require payment "at least twice per month" and still "one pay cycle in arrears." Thus, under the current, 2014 version of W. Va. Code § 6-7-1,

> All full-time and part-time salaried and hourly officials, officers and employees of the state, state institutions of higher education and the Higher Education Policy Commission **shall be paid at least twice per month**, and under the same procedures and in the same manner as the State Auditor currently pays agencies: Provided, That on and after July 1, 2002, all new officials, officers and employees of the state, a state institution of higher education and the Higher Education Policy Commission, statutory officials, contract educators with higher education and any exempt official who does not earn annual and sick leave, except elected officials, **shall be paid one pay cycle in arrears**. The term "new employee" does not include an employee who transfers from one state agency, a state institution of higher education or the Higher Education Policy Commission to another state agency, another state institution of higher education or the Higher Education Policy Commission without a break in service: Provided, however, **That, after July 1, 2014, all state employees paid on a current basis will be converted to payment in arrears**. For accounting purposes only, any payments received by such employees at the end of the pay cycle of the conversion pay period will be accounted for as a credit due the state. Notwithstanding any other code provision to the contrary, any such credit designation made for accounting of this conversion will be accounted for by the Auditor at the termination of an employee's employment and such accounting shall be documented in the employee's final wage payment. Nothing contained in this section is

[54] *See* Defs. W. Va. State Office of the Governor and Jim Justice's Mot. to Dismiss and Joinder in W. Va. Sup. Ct. of Appeals Mot. for Summ J. § III, J.A. 252–257.
[55] W. Va. Code § 12-3-13.

> intended to increase or diminish the salary or wages of any official, officer or employee.[56]

In accordance with W. Va. Code § 6-7-1, it is undisputed that Petitioners were paid at least twice per month. Specifically, under the bi-weekly schedule, Petitioners receive twenty-six paychecks annually, and on some occasions, three paychecks per month, rather than two under the old semi-monthly system.[57]

By its ordinary meaning, payment in arrears means employees are paid their wages a pay-cycle after the wages are earned.[58] This means, and has always meant, that Petitioners are paid a pay cycle after their wages are earned. Never has payment in arrears been deemed unconstitutional on equal protection grounds or otherwise. Never has payment in arrears been deemed to short employees pay. Petitioners cannot, and could not below, cite any law that requires all payment to be issued within a calendar or fiscal year because West Virginia law clearly requires the contrary.

Petitioners' contention that wages earned in a year cannot be paid during the beginning of the next year appears to be based on a misunderstanding or misperception of West Virginia's arrearage-based pay schedule. Under the old semi-monthly system, the end of every half-month pay-cycle aligned with the middle or end of the calendar month. Thus, under that semi-monthly structure, each pay cycle aligned with the middle and end of each month, and thus aligned flush within the calendar year. So, prior to the bi-weekly conversion, it *appeared* that Petitioners were paid what they earned *within* the calendar year, when in fact, one pay cycle carried over to the next year. In other words, under the old system, even though Petitioners were paid on January 15 for

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[56] W. Va. Code § 6-7-1 (2014) (emphasis added).

[57] *See* Ex. 2 – Chart, J.A. 279 (the month of September includes three paychecks).

[58] The Code did (and does) not define "pay cycle," so the term took (and takes) its ordinary meaning. *See, e.g., Hereford v. Meek*, 132 W. Va. 373, 387, 52 S.E.2d 740, 747 (1949) ("The words of a statute are to be given their ordinary and familiar significance and import and they should be accorded their general and proper use and their usual and common acceptation."); *Cavendish v. Blume Coal & Coke Co.*, 72 W. Va. 643, 78 S.E. 794, 796 (1913) ("The general rule in the construction of statutes is that unless a different meaning is given or plainly and necessarily implied from the context, the words of a statute are to be given their usual and ordinary meaning.").

work performed on December 16–31, the wages paid within 2017 appeared to be the same as what they earned in 2017, but this has never been the case. West Virginia has long paid its employees in arrears.

Petitioners have confused an effect of a right with the right itself. Petitioners mistakenly have convinced themselves that they have a specific *right* to receive, at one pay cycle after the end of each calendar month and year, their pay for that calendar month or year (which "right" they then ask the Court to read into the new bi-weekly system). Employees must not be paid "every calendar month." They must be paid "at least twice per month." The State is not merely permitted to pay 'one pay cycle in arrears' on the monthly payment due. The State is *required* to pay its employees exactly one two-week "pay cycle in arrears" of—*i.e.*, after the end of—the previous two-week pay cycle. Thus, the law does not require the State to pay employees what is due on the first pay cycle after the end of the month. The law requires the State to pay its employees exactly one two-week pay cycle after the end of the previous two-week pay cycle, whenever it ends. All wages for work performed in a two-week pay cycle are due two weeks after the end of that two-week pay cycle, whenever it ends. Petitioners' misunderstanding or misconstruction of arrearages does not provide them grounds for appeal. Petitioners' misunderstanding of bi-weekly payment schedule does not warrant reversal.

Petitioners point to nothing supporting their proposition that under either pay system, they had any *right* to receive by one pay cycle after the end of either a calendar month or year their pay for the previous calendar month or year, as there was and is no such right. Section 6-7-1 no longer requires that Petitioners be paid twice a month. Instead, under the new bi-weekly system, as the

current § 6-7-1 contemplates, Petitioners are now paid every two weeks.[59] It is a mathematical certainty that two-week pay cycles do not coincide with calendar month (or year) boundaries. Under the new system, Petitioners therefore have only the same two rights that they ever had under the old system: (1) they still have the right to be paid at a specified frequency (every two weeks under the new system, instead of every half month under the old system), and (2) they still have the right to be paid exactly one of those pay cycles after the end of the pay cycle encompassing the days that they are being paid for, *whenever it ended.*

As West Virginia law has long recognized and required, Petitioners do not receive, and have never received, in a calendar or fiscal year the pay for the work they performed in that same calendar or fiscal year. Petitioners' second Assignment of Error lacks merit.

C. THE PAY CONVERSION RESULTED IN NO ADDITIONAL ARREARAGE, BUT AN OVERPAYMENT TO PETITIONERS

In their second Assignment of Error, Petitioners also allege that the bi-weekly conversion increased the arrearage to 15 days. Petitioners contend that the arrearage exceeds one-pay-cycle; however, Petitioners point to no support in the record for this assertion. The Court and Respondents are left to wonder where Petitioners have located an additional five days between wages earned and received. A look at each Petitioner's pay records and a calendar demonstrate the falsity of Petitioners' contention.

As Petitioners state, under the old semi-monthly system, one pay-cycle equaled 10.83333 days. The pay-cycle can be calculated as follows: Under the semi-monthly system, the 2017 year consisted of 260 workdays and 24 pay periods; divide 260 by 24 and one gets 10.83333 days per pay period. Under the bi-weekly system, one pay cycle equals 10 days. This pay-cycle can be

[59] *See also* Pls.' Resp. at 10–11, J.A. 487–488 ("The significant change to West Virginia Code § 6-7-1 [in 2014] is it now permitted the State to pay "at least twice a month." This gave the State the ability to pay employees more than twice a month.") (emphasis omitted)).

calculated as follows: Under the bi-weekly system, the 2017 year consisted of 260 and 26 pay periods; divide 260 by 26 and you get 10 days per pay period.

The current, ten-day arrearage is demonstrated by Petitioners' pay records. Petitioners have not disputed the accuracy of their pay records presented below, and Petitioners have not disputed that each Petitioner's pay schedule is now the same under the bi-weekly system.[60] Respondents refer to Petitioner Pamela Stumpf's pay records for ease of analysis and as Petitioners have relied on the same example.[61] Before the conversion to bi-weekly pay, Petitioner Stumpf received pay twice per month.[62] For example, on January 31, 2017, Petitioner Stumpf received pay for work performed on January 1–15, 2017; and on February 14, 2017, Petitioner Stumpf received pay for work performed on January 16–31, 2017. Thus, pre-conversion, Petitioner was paid one-pay-cycle, or an average of 10.8 work days, in arrears.

The semi-monthly schedule continued until May 31, 2017, when Petitioner Stumpf received pay for the first bi-weekly pay period, running from May 1–12 (ten work days or two work weeks).[63] Petitioner was paid next on June 9 (ten work days or two work weeks from May 31) for work performed on May 13–26, 2017, (again, ten work days or two work weeks from May 12).

This is where Petitioners' second Assignment of Error fails as Petitioners allege they were shorted pay because an additional arrearage was added to the initial arrearage. As the bi-weekly pay schedule does not align flush with a calendar year—and thus does not provide the illusion that all pay earned in a year was paid in the same year—Petitioner Stumpf was paid on January 5, 2018,

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[60] *Compare* Chart, J.A. 289 & Ex. A – Aff. Sue Racer Troy and attachments, J.A. 361–362, *with* Ex. 3, J.A. 520–521. The salary columns are identical, and the only difference is Plaintiff's Ex. 3 does not account for Petitioners receiving pay in January for work performed in December.

[61] Pet'rs' Br. 7.

[62] Chart, J.A. 289; Ex. A – Aff. Sue Racer Troy and attachments, J.A. 361–362.

[63] *Id.*

for work performed on December 9–22, which is two-work-weeks-worth of pay following a two-week, or ten-work-day, arrearage (December 22, 2017, to January 5, 2018, is two work weeks or ten work days). And on January 19, 2018, Petitioner was paid for work performed December 23, 2017, to January 5, 2018.[64] Thus, as Petitioner Stumpf's pay records reflect, under a one-pay-cycle (ten-day) arrearage, Petitioner was paid for every day worked in 2017.

As demonstrated, West Virginia law authorizes payment in a one-pay-cycle arrearage; no West Virginia law prohibits such an arrearage; likewise, no West Virginia law prohibits payment in January for work performed in December; and Petitioners were paid every dollar owed them. Petitioners have mistakenly convinced themselves that they had a specific *right* to receive, at one pay cycle after the end of each calendar month and year, their pay for that calendar month or year.

Petitioners' contention is not only demonstrably false according to their pay records and West Virginia law, but also, Petitioners were *overpaid* according to their records.[65] Petitioners' overpayment was a result of the following. Under both the semi-monthly and bi-weekly systems, Petitioners' paychecks were calculated by averaging the employee's salary or annual pay over 24 and 26 pay periods, respectively. The 2017 calendar year consisted of 260 workdays, so daily pay was calculated by dividing the annual pay by 260. The 2017 calendar year consisted of 9 pay periods under the semi-monthly system (2 pay periods per month from January to April with one pay period extending into May). As explained *supra,* each pay period averaged 10.83333 days. The average pay period (10.83333 days) was multiplied by the number of semi-monthly pay periods in 2017 (9) to calculate how much Petitioners were to be paid before the conversion to bi-

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[64] *Id.*

[65] *See* Ex. 3 - Bradley Pay Information 2017, J.A. 281 (Petitioner Bradley), 284 (Petitioner Wilkinson), 287 (Petitioner Ewaskey), 290 (Petitioner Stumpf), 293 (Petitioner Dickerson); Ex. A – Aff. Sue Racer Troy and attachments, J.A. 349–477; Mot. of Def. Sup. Ct. of Appeals of W. Va. to Dismiss Pls' Compl. or in the alt., for Summ. J. at 9–15, J.A. 329–335 (charts incorporated therein).

weekly pay. Using this calculation, the State paid Petitioners for 97.5 workdays under the semi-monthly system in 2017. However, Petitioners only worked 95 actual workdays under the semi-monthly schedule in 2017. By using the average pay period to calculate pay rather than the actual number of days worked, the State overpaid Petitioners.[66]

Lastly, Petitioners scatter misrepresentations and unfounded assertions throughout their *Brief* that Respondents will address here. Petitioners assert it "is not in dispute" that their wages were shorted,[67] which is a puzzling proclamation as Respondents disputed this claim below, demonstrated its falsity, and were granted summary judgment.[68]

Petitioners cite to no authority for and do not explain the significance of their proposition that "[a]bsent the appropriate executive or legislative order or a judicial order [sic] State Employees have no recourse to recover the extra 5 days taken from their salary" and "the money taken in 2017 is not protected by any executive or judicial order that approved the additional taking of employee wages."[69] Petitioners' propositions here are legally dubious, and nonetheless inconsequential. As demonstrated, the bi-weekly pay conversion resulted in no taking, no additional taking, and no additional arrearage.

Petitioners assert that the Circuit Court erred by ignoring a "factual dispute," namely that "the State remained only 10 days in arrears instead of the 15 days asserted by the plaintiffs."[70] As demonstrated above and as the Circuit Court found, Petitioner's assertion is demonstrably false and not a *genuine* issue of material fact.[71] Accordingly, the Circuit Court's *Final Order* should be affirmed as Respondents are and were entitled to summary judgment.

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[66] Ex. 3 – Bradley Pay Information 2017, J.A. 281–317.
[67] Pet'rs' Br. at 9 (emphasis omitted).
[68] *See* Final Order Granting Summ. J. for All Defs., J.A. 725–756.
[69] Pet'rs' Br. at 16, 19.
[70] Pet'rs' Br. at 14.
[71] *See Final Order*, J.A. 725–756.

III. PETITIONERS THIRD ASSIGNMENT OF ERROR FAILS BECAUSE (A) IT IS NOT SUPPORTED WITH ANY LEGAL AUTHORITY, (B) ELECTED OFFICIALS AND PETITIONERS WERE PAID EVERY DOLLAR DUE, AND (C) THE DIFFERENCE IN ELECTED OFFICIALS' PAY SCHEDULE IS SUPPORTED BY A RATIONAL BASIS

In their Third Assignment of Error, Petitioners aver that Petitioners, as State employees, must be paid on the same schedule as elected officials. Per W. Va. Code §§ 6-7-1 and 6-7-2, elected officials are not paid in arrears, but are paid current. Thus, elected officials normally receive their annual salaries within the calendar year. Petitioners base their equal protection claim on elected officials being issued a "gap payment," which allowed officials to receive their annual salary within the calendar year.[72] Petitioners agree that W. Va. Code § 6-7-2 puts elected officials on a different pay schedule than non-elected State employees, but contend again that "[a]ll employees must be paid their annual salary annually with the exclusion of the first year for state employees."[73] Thus, the facts are not disputed: elected officials are paid on a different schedule than State employees. The only question remaining is the question of law, *i.e.*, whether different pay schedules supports an equal protection claim.

Fatal to their claim here as it was in Circuit Court,[74] Petitioners cite to no legal support whatsoever for their contention that a difference in pay schedules supports an equal protection claim under Article III § 10 of the West Virginia Constitution. Section 10 of Article III of the West Virginia Constitution provides that, "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers."[75] "Equal protection of the law is implicated when a classification treats similarly situated persons in a disadvantageous manner."[76] It is well-settled that "if the challenged classification does not affect a fundamental right or some

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[72] Pet'rs' Br. at 15.
[73] *Id.* at 29.
[74] *See* Pls' Resp. to Defs' Mot. to Dismiss Pls' Compl., or in the alt., Summ. J., J.A. 506–507.
[75] W. Va. Const. Art. III, §10.
[76] Syl. pt. 3, *MacDonald v. City Hosp., Inc.*, 227 W. Va. 707, 715 S.E.2d 405 (2011).

suspect or quasi-suspect criterion, the governmental classification will be sustained so long as it is 'rationally related to a legitimate state interest.'"[77] Suspect and quasi-suspect classes include race, national origin, alienage, gender, and illegitimacy.[78] Indeed, none of these classes are at issue here. Accordingly, the rational basis test applies to the State's decision to pay elected officials on a slightly different pay schedule.

The rational basis test is a "highly deferential standard" under which "social or economic legislation must be affirmed 'if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'"[79] Furthermore,

> Where economic rights are concerned, we look to see whether the classification is a rational one based on social, economic, historic or geographic factors, whether it bears a reasonable relationship to a proper governmental purpose, and whether all persons within the class are treated equally. Where such classification is rational and bears the requisite reasonable relationship, the statute does not violate Section 10 of Article III of the West Virginia Constitution, which is our Equal Protection Clause.' Syllabus Point 7, [as modified,] *Atchinson v. Erwin*, [172] W.Va. [8], 302 S.E.2d 78 (1983)." Syllabus Point 4, as modified, *Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co.*, 174 W.Va. 538, 328 S.E.2d 144 (1984).[80]

A disproportionate impact on a classification, alone, does not violate West Virginia's equal protection provision.[81] There must be some proof of a discriminatory purpose.[82] Moreover,

> If a classification has some "reasonable basis," it does not offend the Constitution simply because it is not made with mathematical nicety or because in practice it results in some inequality. The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific. If any

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[77] *Morgan v. City of Wheeling*, 205 W. Va. 34, 43, 516 S.E.2d 48, 57 (1999) (quoting *Appalachian Power Co. v. State Tax Dept. of West Virginia*, 195 W. Va. 573, 594, 466 S.E.2d 424, 445 (1995)).
[78] *See id.*
[79] *Appalachian Power Co.*, 195 W. Va. at 594, 466 S.E.2d at 445 (quoting *Federal Communications Com'n v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)).
[80] Syl. pt. 4, *MacDonald*, 227 W. Va. 707, 715 S.E.2d 405; Syl. pt. 6, *Hartley Hill Hunt Club v. County Com'n of Ritchie County*, 220 W. Va. 382, 647 S.E.2d 818 (2007); Syl. pt. 3, *Gibson v. West Virginia Dept. of Highways*, 185 W. Va. 214, 406 S.E.2d 440 (1991).
[81] Syl. pt. 6, *Citizens Bank of Weston, Inc. v. City of Weston*, 209 W. Va. 145, 544 S.E.2d 72 (2001).
[82] *Id.*

> state of facts reasonably may be conceived to justify it, a statutory discrimination will not be set aside.[83]

Elected officials, such as Circuit Court judges, are paid in current status. W. Va. Code § 6-7-1 provides an exception to payment in arrears: "officials, officers and employees of the state, a state institution of higher education and the Higher Education Policy Commission, statutory officials, contract educators with higher education and any exempt official who does not earn annual and sick leave, ***except elected officials***, shall be paid one pay cycle in arrears."[84] Moreover, elected officials have been historically treated as current pay employees.[85]

The rationale for the different pay schedules was succinctly explained by the Circuit Court,

> An elected official has a salary that is fixed by statute. The payment of his or her monthly salary is not dependent upon the nature or quantum of the services provided by him or her. Elected officials do not accrue vacation and do not accrue sick leave. There is no need for a time lag to review the elected official's hours of work or to account for leaves of absence and such. On the other hand, unelected employees have all of those variables in play and a delay in pay after services are performed is a practical way to do the State's business. The Court finds that having the benefit of a look back at the pay period allows for adjustments and the prevention of errors in accounting or, for that matter, in counting. All of such is a rational basis for a difference in treatment—albeit, a very slight difference.[86]

Ignoring the controlling rational basis test and ignoring the practical reasons elected officials are paid current status, Petitioners rely on the theory or allegation, debunked above, that they were underpaid while elected officials were not. Again, Petitioners, like elected officials, were paid every dollar owed them, but on different schedules for practical reasons.[87]

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[83] *Morgan*, 205 W. Va. at 45-46, 516 S.E.2d at 59-60 (internal citations omitted).
[84] W. Va. Code §6-7-1; *see also* Op. W. Va. Att'y Gen. 2016 WL 3035136 (May 23, 2016) (noting that the only exception to §6-7-1 is for elected officials).
[85] Op. W. Va. Att'y Gen. 2016 WL 3035136 (May 23, 2016).
[86] *Id.* at ¶ 58, J.A. 752.
[87] Final Order Granting Summ. J. for All Defs. ¶¶ 54–59, J.A. 749–753.

Respondent Supreme Court of Appeals of West Virginia produced a chart showing the flow of pay to a circuit court judge in 2017.[88] (All active judges would have been paid on the same schedule.) Petitioners base their equal protection claim on the same circuit court judge salaries.[89] An "adjustment" of $807.00 was paid in March 2017 in anticipation of the conversion to a bi-weekly pay system, but that payment is a red herring. Circuit Court judges were not paid for a shortfall; it was not "catch up pay." Rather, it was merely a matter of simple math. For calendar year 2018, the circuit court judges would receive bi-weekly pay checks of $4,846.20. In order to start issuing checks in that amount on June 9, 2017 (and pay the judges their salaries of $126,000), the Court made a payment of $807 to the judges' pay in March 2017. This payment was no different than the pay adjustment made to the pay of unelected employees in May 2017.

The elected officials in the Court system were paid every dollar due; the unelected employees were paid every dollar due. Elected officials received their final pay for the year in December. For some, their term ends in December. Unelected employees, in contrast, as explained above, receive their final pay in January. Thus, the situation is *not* one where one class of employees is being paid and another class is not. Everyone is being paid. It is just a question of timing—a few days difference. This timing difference does not sustain an Equal Protection Clause claim, especially considering the deference which is provided on economic matters and the Petitioners failure to support their claim. Thus, Petitioners' third Assignment of Error fails.

IV. PETITIONERS' FOURTH ASSIGNMENT OF ERROR FAILS FOR THE SAME REASONS DEMONSTRATED IN §§ I, II, AND III *SUPRA*

Without providing any legal support or citations to the record, Petitioners declare that their "Wage Payment or [sic] Collection Claim, a complaint about a second arrearage, an equal

[88] Mot. of Def. Sup. Ct. of App. of W. Va. to Dismiss Pls' Compl. or in the alt., for Summ. J., J.A. 344.
[89] Pet'rs' Br. 19–24.

Protection [sic] claim or a need for a Writ of Mandamus" are supported because they were underpaid.[90] As referenced in § I *supra*, Petitioners support this assignment of error with skeletal arguments, no legal authority, and no citations to the record pinpointing an error below.

The sum of Petitioners' claims are woven with a loose thread. Pull at the thread and the whole cloth unravels. As demonstrated in §§ II and III *supra*, Petitioners were not underpaid. Petitioners were not required to be paid in the same calendar or fiscal year in which the work was performed. And bi-weekly pay did not create any additional arrearage.

V. RESPONDENTS ARE ENTITLED TO ABSOLUTE AND QUALIFIED IMMUNITIES BECAUSE RESPONDENTS' IMPLEMENTATION OF THE BI-WEEKLY PAY CONVERSION (A) INVOLVED LEGISLATIVE, ADMINISTRATIVE, AND EXECUTIVE POLICY-MAKING ACTIONS, AND (B) VIOLATED NO CLEARLY ESTABLISHED LAWS

Respondents raised absolute and qualified immunities below.[91] Having decided the matter on the merits, the Circuit Court did not rule on immunities, but stated,

> The Court notes that all of the Defendants have asserted, in one form or another, either absolute or qualified immunities as defenses to this action. The Court finds no reason to address these defenses; rather, the Court decides this case on the merits under Rule 56. Nothing herein, however, precludes any Defendant from asserting immunity in an appeal where a *de novo* standard is applied.[92]

Respondents are entitled to immunity for the following reasons.

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[90] Pet'rs' Br. 24.

[91] Defs' W. Va. Office of the Atty. Gen. and Patrick Morrisey's Mot. to Dismiss, J.A. 155–188; Mot. to Dismiss (*filed by Def. W. Va. Ofc. of Secretary of State and Mac Warner*), J.A. 189–204; Defs' W. Va. State Auditor's Ofc. and John B. McCuskey's Mot. to Dismiss, J.A. 205–231; Def. W. Va. State Treasurer's Ofc. and John Perdue's Supp. Mot. to Dismiss Pls' Second Am. Compl., J.A.232–240; Defs. W. Va. State Ofc. of the Governor and Jim Justice's Mot. to Dismiss and Joinder in W. Va. Sup. Ct. of App. Mot. for Summ. J., J.A. 241–317; Mot. of Def. Sup. Ct. of Appeals of W. Va. to Dismiss Pls' Compl. or in the alt., for Summ. J., J.A. 323

[92] Final Order Granting Summ. J. for All Defs. ¶ 60, J.A. 754.

A. RESPONDENTS ARE ENTITLED TO ABSOLUTE IMMUNITY AS RESPONDENTS' IMPLEMENTATION OF THE BI-WEEKLY PAY SCHEDULE INVOLVED LEGISLATIVE, ADMINISTRATIVE, AND EXECUTIVE POLICY-MAKING ACTIONS

Petitioners claimed below that "sometime during the aforementioned fiscal year[,] the current Administration of the executive branch decided to change the ways employees were paid."[93] Petitioners base their claims on a pay-schedule conversion introduced and approved in the West Virginia Legislature as Senate Bill 322 and House Bill 4150. The Committee Substitute for Senate Bill No. 322, states:

> A BILL to amend and reenact §6-7-1 of the Code of West Virginia, 1931, as amended, relating to authorizing state agencies, state institutions of higher education and the Higher Education Policy Commission to transition all employees, officers and officials, except elected officials, into payment in arrears and to pay employees biweekly as part of the standardization of the state's accounting and payroll functions under the Enterprise Resource Planning Board.[94]

The Governor signed the Bill into law on March 14, 2014, pursuant to his constitutional authority. Under Article VII, § 14 of the Constitution of West Virginia:

> Subject to the provisions of section fifteen of this article, every bill passed by the legislature shall, before it becomes a law, be presented to the governor. If he approves, he shall sign it, and thereupon it shall become a law; but if not, he shall return it, with his objections, to the house in which it originated . . . .[95]

Said Bill amended W. Va. Code § 6-7-1 to require bi-weekly instead of semi-monthly pay and became effective July 1, 2014. The entirety of Petitioners' case is based on the pay-schedule conversion now required under W. Va. Code § 6-7-1. Consequently, Petitioners' case is contingent on the Governor signing the Bill into law, and Respondents' administrative and executive policy-making functions flowing therefrom.

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[93] Second Am. Compl. ¶ 33, J.A. 11.
[94] Exhibit 1 – Senate Bill, J.A. 271–273.
[95] W. Va. Const. Art. VII, § 14.

Under West Virginia law, Respondents are entitled to absolute immunity for any claim based on the legislative function or executive policy-making acts. This Court has held in syllabi:

> 6. Unless the applicable insurance policy otherwise expressly provides, a State agency or instrumentality, as an entity, is immune under common-law principles from tort liability in W.Va. Code § 29-12-5 actions for acts or omissions in the exercise of a legislative or judicial function and for the exercise of an administrative function involving the determination of fundamental governmental policy.
>
> 7. The common-law immunity of the State in suits brought under the authority of W.Va. Code § 29-12-5 (1996) with respect to judicial, legislative, and executive (or administrative) policy-making acts and omissions is absolute and extends to the judicial, legislative, and executive (or administrative) officials when performing those functions.[96]

Here, Petitioners' claims hinged on a legislative function performed by the Governor and his Office and followed and implemented by the remaining Respondents as part of their administrative functions. Thus, the Respondents are entitled to absolute immunity from Petitioners' claims.

Under United States Supreme Court jurisprudence, "officials outside the legislative branch are entitled to legislative immunity when they perform legislative functions."[97] "Absolute legislative immunity attaches to all actions taken "in the sphere of legitimate legislative activity."[98] "[T]he exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability."[99]

Under Fourth Circuit jurisprudence, "[a]ctions that qualify as legislative typically involve the adoption of prospective . . . rules that establish a general policy affecting the larger population. They also generally bear the outward marks of public decisionmaking."[100] Certainly, the signing

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[96] Syl. pts. 6–7, *Parkulo v. W. Va. Bd. of Prob. & Parole*, 199 W. Va. 161, 164, 483 S.E.2d 507, 510 (1996).
[97] *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998).
[98] *Id.* at 54.
[99] *Id.* at 52.
[100] *McCray v. Md. DOT*, 741 F.3d 480, 485 (4th Cir. 2014) (internal citations and quotations omitted).

of a bill into law is an integral part of the legislative process. The United States Supreme Court has long-recognized that the role of an executive, whether a governor, mayor, or president, in signing or vetoing a bill is a crux of the legislative process, and any claim based on a function of the legislative process must be barred by legislative immunity.[101] Other Circuit Courts of Appeal have so found and have therefore applied absolute immunity.[102]

This Court has stressed, "[i]n absolute statutory immunity cases, the lower court has little discretion, and the case must be dismissed if one or more of the provisions imposing absolute immunity applies."[103]

Petitioners' claims were based on a legislative enactment that requires bi-weekly pay, instead of twice-monthly or bi-monthly pay. As such, the Respondents are immune from any claim based on legislative and/or executive (or administrative) policy-making acts and omissions.[104] Because the immunity is absolute, no exception applies and Respondents are entitled to immunity.

B. RESPONDENTS ARE ENTITLED TO QUALIFIED IMMUNITY BECAUSE RESPONDENTS VIOLATED NO CLEARLY ESTABLISHED LAWS IN IMPLEMENTING THE BI-WEEKLY PAY CONVERSION

Respondents are also entitled to qualified immunity for discretionary acts carried out in the scope of their duties. Petitioners claimed that Respondent Office of the Governor and Jim Justice has the duty to oversee the payment of all wages due to the employees of the State of West Virginia" and "directs all decisions regarding the payment of employees."[105] Petitioners claimed that each Respondent "is charged with the duty and responsibility of the correct and proper

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[101] *See Smiley v. Holm*, 285 U.S. 355, 369 (1932) (discussing a governor's actions in signing or vetoing a bill as part of the legislative process); *Edwards v. United States*, 286 U.S. 482, 490 (1932) (noting "the legislative character of the President's function in approving or disapproving bills"); *Bogan v. Scott-Harris*, 523 U.S. 44 (1998) (affording legislative immunity to a mayor who performed functions that were substantively and procedurally legislative).
[102] *Baraka v. McGreevey*, 481 F.3d 187, 196 (3d Cir. 2007) (finding that "when a governor and a governor's appointee advocate bills to the legislature, they act in a legislative capacity").
[103] *State ex rel. City of Bridgeport v. Marks*, 233 W. Va. 449, 456, 759 S.E.2d 192, 199 (2014).
[104] Syl. pts. 6 and 7, *Parkulo v. W. Va. Bd. of Probation and Parole*, 199 W. Va. 161, 483 S.E.2d 507 (1996).
[105] Second Am. Compl. ¶¶ 9, 10, J.A. 3.

payment of wages to the salaried employees of the State of West Virginia."[106] Petitioners claimed, "the West Virginia Constitution requires that a budget be approved by the West Virginia Legislature for the fiscal year" and that it is the "duty and responsibility of the Governor and the Chief Justice of the West Virginia Supreme Court to submit a budget for approval by the West Virginia Legislature."[107] Taking the claims as true, there is no question Petitioners' claims are based on Respondents' official, decision-making authority imbued to their offices and agencies by the laws and Constitution of West Virginia.

The Respondents are entitled to qualified immunity for any claim based on a decision made in the scope of their authority. As the West Virginia Supreme Court of Appeals set forth in syllabus point 4 in *Clark v. Dunn*:

> 4. If a public officer is either authorized or required, in the exercise of his judgment and discretion, to make a decision and to perform acts in the making of that decision, and the decision and acts are within the scope of his duty, authority, and jurisdiction, he is not liable for negligence or other error in the making of that decision, at the suit of a private individual claiming to have been damaged thereby.[108]

"Qualified immunity is an immunity afforded to government agencies, officials, and/or employees for discretionary activities performed in an official capacity."[109] Qualified immunity serves as a mechanism to protect public officials in their official duties so that they are not fearful of the harassment of potential litigation as a result of their duties.[110] As stated by Justice Cleckley: "Immunities under West Virginia law are more than a defense to a suit in that they grant governmental bodies and public officials the right not to be subject to the burden of trial at all."[111]

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[106] Second Am. Compl. ¶¶ 11, 13, 15, 17, 19, J.A. 7, 8, 9.
[107] Second Am. Compl. ¶¶ 24–25.
[108] *Clark v. Dunn*, 195 W.Va. 272, 465 S.E.2d 374 (1995).
[109] *Maston v. Wagner*, 236 W. Va. 488, 499, 781 S.E.2d 936, 947 (2015).
[110] *Crouch v. Gillispie*, 240 W. Va. 229, 236, 809 S.E.2d 699, 706 (2018).
[111] *Hutchison v. City of Huntington*, 198 W. Va. 139, 148, 479 S.E.2d 649, 658 (1996).

"The very heart of the immunity defense is that it spares the defendant from having to go forward with an inquiry into the merits of the case. In this vein, unless expressly limited by statute, the sweep of these immunities is necessarily broad."[112]

Here, as Petitioners claimed, it was clearly in the Governor's discretion and authority to sign the bill that became the amendment to W. Va. Code § 6-7-1, and it was clearly in Respondents' discretion and authority to implement the mandates of § 6-7-1. Because Petitioners base their claims on this discretionary act, the Respondents are immune from said claims. As established, the Respondents play an integral role in the legislative process and in complying with and enforcing laws duly enacted.

Only in the narrowest instances does qualified immunity not apply to bar suit against a public official acting in an official capacity. Qualified immunity "is broad and protects 'all but the plainly incompetent or those who knowingly violate the law.'"[113] The West Virginia Supreme Court has stated in syllabus:

> A public executive official who is acting within the scope of his authority and is not covered by the provisions of W. Va. Code, 29-12A-1, et seq., is entitled to qualified immunity from personal liability for official acts if the involved conduct did not violate clearly established laws of which a reasonable official would have known. There is no immunity for an executive official whose acts are fraudulent, malicious, or otherwise oppressive.[114]

Equally, "[g]overnment officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[115] A litigant may only

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[112] *Id.*

[113] *W. Va. State Police v. Hughes*, 238 W. Va. 406, 411, 796 S.E.2d 193, 198 (2017) (quoting *Hutchison v. City of Huntington*, 198 W. Va. 139, 148, 479 S.E.2d 649, 658 (1996)); *Crouch v. Gillispie*, 240 W. Va. 229, 809 S.E.2d 699 (2018).

[114] Syl., *State v. Chase Sec.*, 188 W. Va. 356, 357, 424 S.E.2d 591, 592 (1992).

[115] Syl. pt. 4, in part, *Maston v. Wagner*, 236 W. Va. 488, 492, 781 S.E.2d 936, 940 (2015).

pierce the shield of qualified immunity by showing that a government official has violated a clearly established statutory or constitutional right.[116] This Court employs a two-part test to determine whether qualified immunity has been pierced. The Court determines "first, whether the government officer violated a plaintiff's statutory or constitutional right, and if so, then second, whether that right was clearly established in light of the specific context of the case at the time of the events in question."[117] "[T]he question of whether the constitutional or statutory right was clearly established is one of law for the court."[118]

Here, Petitioners have failed to establish that Respondents violated any laws, and Petitioners have failed to identify any clearly established laws that require all payments to State employees be made within the same calendar year they were earned. As established in Argument §§ I–IV above, Petitioners claims are unsupported by law and disproven by their pay records. Petitioners' contention that State employees must be paid their salaries by the end of the fiscal and/or calendar year is not supported by any law. Petitioners' contention that they were underpaid is demonstrably false. For the sum of Petitioners' allegations, Petitioners have identified no clearly established law that the Respondents violated. Indeed, there is no clearly established law that requires payment be issued within a calendar or fiscal year. Rather, as discussed, clearly established, longstanding law requires that employees be paid in an arrearage. "In arrears," by its ordinary meaning, means employees are paid a pay cycle after their services are rendered. This is required by—not contrary to—West Virginia law. Petitioners have identified no conduct of Respondents that violates a clearly established law. Therefore, Respondents are entitled to qualified immunity.

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[116] *Id.* at 501, 949.
[117] *Hutchison v. City of Huntington*, 198 W. Va. 139, 149, 479 S.E.2d 649, 659 (1996).
[118] *Id.*

CONCLUSION

Respondents request that this Honorable Court affirm the Circuit Court's *Final Order Granting Summary Judgment for All Defendants*.

RESPONDENTS,
By counsel,

WEST VIRGINIA STATE OFFICE OF THE GOVERNOR and JIM JUSTICE,
in his official capacity as Governor,
By Counsel

Evan S. Olds

Anna F. Ballard, WV State Bar No. 9511
Evan S. Olds, WV State Bar No. 12311
Kelly G. Pawlowski, WV State Bar No. 12795
PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC
JamesMark Building
901 Quarrier Street
Charleston, WV 25301
Telephone: (304) 344-0100

WEST VIRGINIA STATE AUDITOR'S OFFICE and JOHN B. MCCUSKEY,
in his official capacity as State Auditor,
By Counsel

David P. Cook

John L. MacCorkle, WV State Bar No. 2286
David P. Cook, Jr., WV State Bar No. 9905
MacCorkle Lavender, PLLC
300 Summers Street, #800
Charleston, WV 25301
Telephone: (304) 344-5600

WEST VIRGINIA STATE TREASURER'S OFFICE and JOHN PERDUE, in his Official capacity as State Treasurer,
By Counsel

Michael W. Taylor

Charles R. Bailey, WV State Bar No. 0202
Michael W. Taylor, WV State Bar No. 11715
Adam K. Strider, WV State Bar No.
Bailey & Wyant, PLLC
P. O. Box 3710
Charleston, WV 25337-3710
Telephone: (304) 345-4222

WEST VIRGINIA OFFICE OF THE SECRETARY OF STATE and Mac Warner in his official capacity as Secretary of State,
By Counsel

William E. Murray

William E. Murray, WV State Bar No. 2693
Anspach Law
900 Lee Street, E., Suite 1700
Charleston, WV 25301
Telephone: (304) 205-8063

WEST VIRGINIA OFFICE OF THE ATTORNEY GENERAL and Patrick Morrisey, in his official capacity as Attorney General,
By Counsel

William Slicer

William Slicer, WV State Bar No. 5177
Philip B. Sword, WV State Bar No. 10435
Shuman McCuskey & Slicer, PLLC
1411 Virginia Street East
Suite 200
P. O. Box 3953
Charleston, WV 25339-3953
Telephone: (304) 345-1400

WEST VIRGINIA SUPREME COURT OF APPEALS AND CHIEF JUSTICE TIM ARMSTEAD, in his official capacity as Chief Justice,
By Counsel

Bryan R. Cokeley
Bryan R. Cokeley, WV State Bar No. 774
Steptoe & Johnson, PLLC
P. O. Box 1588
Charleston, WV 25326-1588
Telephone: (304) 345-1400

No. 20-0295

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Lisa Wilkinson, Heather Morris, Kathryn A. Bradley, Pamela Stumpf, and Lula V. Dickerson,

Plaintiffs Below, Petitioner,

v.

West Virginia Office of the Governor and Jim Justice, Governor, West Virginia State Auditor's Office and John B. McCuskey, State Auditor, West Virginia State Treasurer's Office and John Perdue, State Treasurer, West Virginia Office of the Secretary of State and Mac Warner, Secretary of State, West Virginia Office of the Attorney General and Patrick Morrisey, Attorney General; and West Virginia Supreme Court of Appeals and Chief Justice Tim Armstead,

Defendants Below, Respondents.

From the Circuit Court of Kanawha, West Virginia

The Honorable Thomas Evans III

Civil Action No. 18-C-549

CERTIFICATE OF SERVICE

The undersigned counsel for Defendants, the West Virginia State Office of the Governor and Jim Justice, in his official capacity as Governor, does hereby certify on this 27th day of July, 2020, that a true copy of the foregoing ***"Respondents' Joint Response to Petition for Appeal"*** was served upon opposing counsel by depositing the same in the U.S. Mail, postage prepaid, sealed in an envelope, and addressed as follows:

J. Michael Ranson
Cynthia M. Ranson
Ranson Law Offices, PLLC
1562 Kanawha Blvd., E.
Charleston, WV 25311

G. Patrick Jacobs
Jacobs Law Office
7020 MacCorkle Avenue, SE
Charleston, WV 25304

Teresa C. Toriseva
Toriseva Law
1446 National Road
Wheeling, WV 26003

Robert G. McCoid
McCamic, Sacco & McCoid, PLLC
P. O. Box 1
Wheeling, WV 26003
Counsel for Plaintiffs

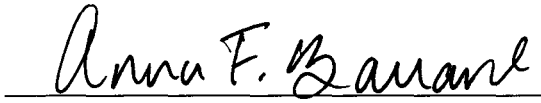
John L. MacCorkle
David P. Cook, Jr.
MacCorkle Lavender, PLLC
300 Summers Street, #800
Charleston, WV 25301
Counsel for West Virginia State Auditor's Office and John B. McCuskey, in his official capacity as State Auditor

Charles R. Bailey
Michael W. Taylor
Adam K. Strider
Bailey & Wyant, PLLC
P. O. Box 3710
Charleston, WV 25337-3710
Counsel for West Virginia State Treasurer's Office and John Perdue, in his official capacity as State Treasurer

William R. Slicer
Philip B. Sword
Shuman McCuskey & Slicer, PLLC
1411 Virginia Street East
Suite 200
P. O. Box 3953
Charleston, WV 25339-3953
Counsel for West Virginia Attorney General's Office and Patrick Morrisey, in his official capacity as Attorney General

Bryan R. Cokeley
Steptoe & Johnson, PLLC
P. O. Box 1588
Charleston, WV 25326-1588
Counsel for West Virginia Supreme Court of Appeals and Chief Justice Tim Armstead, in his official capacity as Chief Justice,

William E. Murray
Anspach Law
900 Lee Street, E., Suite 1700
Charleston, WV 25301
Counsel for West Virginia Office of the Secretary of State and Mac Warner, in his official capacity as Secretary of State



Anna F. Ballard, WV State Bar No. 9511
Evan S. Olds, WV State Bar No. 12311
Kelly G. Pawlowski, WV State Bar No. 12795

PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC
JamesMark Building
901 Quarrier Street
Charleston, WV 25301
Telephone: (304) 344-0100
Facsimile: (304) 342-1545
E-mail: eolds@pffwv.com
Counsel for West Virginia Office of the Governor and Jim Justice, Governor