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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
NO. 22-0027**

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**STATE OF WEST VIRGINIA ex rel.  
WEST VIRGINIA DEPARTMENT OF  
HEALTH AND HUMAN RESOURCES,  
BILL CROUCH, SECRETARY, and  
KANAWHA COUNTY CHILD PROTECTIVE  
SERVICES DIVISION,**

*Petitioners,*

**v.**

**THE HONORABLE LOUIS H. BLOOM,  
Judge, Circuit Court of Kanawha County, and  
JENNIFER R. VICTOR and  
JENNIFER N. TAYLOR,  
*Guardians ad litem for the Circuit  
Court of Kanawha County,***

*Respondents.*

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**SUPPLEMENTAL BRIEF IN SUPPORT OF  
PETITION FOR WRIT OF PROHIBITION**

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**From the Circuit Court of Kanawha County,  
Case No. 18-P-142**

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## STATEMENT OF THE CASE

### I. Commissioner Jeffrey Pack's Hearing Testimony

At the outset, it is important to note that Petitioners did not have the benefit of the January 6, 2022, hearing transcript at the time they filed their Petition for Writ of Prohibition and, therefore, were unable to highlight any specific testimony from the witnesses at the hearing that supported the arguments set forth in the Petition, particularly as it relates to the matter of housing children who are in West Virginia Department of Health and Human Resources ("WVDHHR") custody overnight at WVDHHR offices and hotels.

As discussed in the Petition, the practice of housing such children at WVDHHR offices or hotels is reserved for those rare instances where there are no other placement options. Commissioner Jeffrey Pack of the Bureau for Social Services testified, "Well, clearly, staying in a hotel or an office is an accommodation of last resort. It's---it is because all other placement options have been exhausted and there remains no alternative." Supp.App.000495. He further explained that the situation of a child needing placement and being unable to find one is taken so seriously by the Department that, "it's all hands on deck," from the staff at the local offices up to and including Commissioner Pack himself:

Q. Okay. But what personnel are responsible for managing this situation in your office under you?

A. Well, it's, it's not an issue that is—that where there's a singular responsibility. There are many facets of this that cover a variety of different areas. There are deputies for field operations, both north and south, who oversee the, the CPS<sup>1</sup> and youth service offices throughout the state. So those are the folks who are in custody of those kids. So they deal with them.

We have a deputy for programs and policies who works to make sure that the policies that we do have are adequate and to develop new policies where that's appropriate. We have folks from all over the bureau who when we take custody of a child that needs placement and we're unable to find one, it's all hands on deck.

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<sup>1</sup> "CPS" is an acronym for Child Protective Services.

We have folks from a variety of departments who are making phone calls who are attempting to secure placement for these children. It's not as if it occurs in a county office and the executive office is totally removed from the process. You know, we, we try to offer all of the support that we can offer to our local offices.

Q. So it would include case managers, supervisors, Social Service Coordinators, CSMs,<sup>2</sup> your directors of field operations, and then anyone responsible for acquiring new beds?

A. Correct, and myself.

Supp.App.000496 – 000497.

The testimony at the hearing demonstrates that, just as was the case with regard to the staffing issues that gave rise to first the contempt motion and later the mandamus action, the WVDHHR was aware of and taking steps to attempt to avoid housing children overnight at WVDHHR offices well prior to the Guardians' November 30, 2021, Motion for Emergency Hearing:

Q. Okay. So were you aware of the problem of placing—of the children staying overnight in the DHHR offices before the motion for emergency hearing was filed on November 30, 2021?

A. Yes.

Q. And had the Department already been taking steps to try to address that problem prior to the motion for emergency hearing being filed?

A. Yes.

SuppApp.000514.

Additionally, Commissioner Pack testified at length to the continuous efforts being made to prevent having to house children in CPS offices as a last resort, or housing them in hotels, starting with, "We have been engaged since legitimately my first week on the job with the shelter providers." Supp.App.000498. One of his deputies meets with the shelter providers "to try to help

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<sup>2</sup> "CSM" stands for "Community Service Manager," and is the individual in charge of the local Department offices.

them expand their network...weekly or every other week.” *Id.* They also have “engaged with the emergency foster providers to see if we can expand the number of the children that they will accept into emergency foster care,” “sought out providers who are having staffing their current beds,” and “have requested information, to no avail, on what is preventing providers from either expanding their operations in West Virginia; or providers who do not currently operate within West Virginia, what’s preventing them from coming and operating in West Virginia.” Supp.App.000499. Commissioner Pack summed up the Department’s exhaustive efforts to find additional beds by stating, “...I’m not aware of any effort we could have made to expand either treatment or placement opportunities within West Virginia.” *Id.* Commissioner Pack also was asked if he had made any overtures to the legislature about expanding the types of facilities available to house children overnight, to which he responded, “I have indicated to them that it is in fact a problem as well as the degree to which our staffing is a problem, and beyond that the degree to which our pay scale is a problem.” Supp.App.000504 - 505.

Further, Commissioner Pack was asked why the Department was seeking to set aside the Court’s order in the *In re: M.P.* case terminating the practice of children staying in CPS offices overnight and was pointedly asked why the Department was seeking to “defend” this practice. Supp.App.000505. Commissioner Pack explained the request for relief from the Circuit Court’s order simply was due to the impossible nature of complying, as a result of having no other options:

In some instances I don’t know what alternatives there might be. I think at some point one might be put in a position where there were no other options. And I’m not suggesting that it ought to be our, our first option, but when we have no other option, I don’t know what’s left.

Supp.App.000505 - 506.

Commissioner Pack explained the complex, multi-factorial nature of the problem, in his view, in the following exchange with Guardian ad Litem Victor:

Q. Well, what would you like to see happen? What would, in your opinion, would resolve this problem and how can we get there?

A. Well, I mean, in a perfect world we wouldn't have the problem to begin with; but beyond that, certainly in, you know, within the realm of possibility, to the extent that is possible—when we had children that we had to take custody of, if in fact there were an appropriate placement immediately available, then that would eliminate any situation that would necessitate this practice. And we're certainly trying to get there. We're turning over every stone we can to identify barriers to placement beds within the state that are least restrictive for that particular child and offer the amount of services that would be necessary to provide the appropriate amount of support for these kids.

Q. And what would help you get to that point, where you had not only enough beds but the beds appropriate for the child's needs?

A. Well, we would have to have a workforce that was—and I don't—when I say “workforce,” I don't mean a state workforce. I mean a workforce within a private sector that could support those beds. And then I would imagine the business model for these private entities would have to be attractive as such that would entice them to participate in that particular market.

Supp.App.000507 - 508. Unfortunately, the situation with available placements which the Department is currently faced is not a “perfect world,” but far from it – one that includes a pandemic now stretching into year three and nationwide staffing shortages in both the government and private sector.

Commissioner Pack's testimony lays bare the impossible situation in which the WVDHHR finds itself with regard to finding placements for the children in its care and illustrates precisely why extraordinary relief in the form of mandamus is unavailable in this situation. *State ex rel. Board of Education v. Johnson*, 156 W. Va. 39, 43, 190 S.E.2d 483, 486 (1972) (“Mandamus will not be granted where compliance with the mandate of the writ is impossible”).

## **II. Activities at the Circuit Court Level Since the Filing of the Petition**

There have been several developments in the mandamus action pending in the Circuit Court since Petitioners, West Virginia Department of Health and Human Resources (“WVDHHR”),



Secretary Bill J. Crouch, and Kanawha County Child Protective Services (“CPS”) Division, filed their Petition for Writ of Prohibition that materially affect the issues raised in the Petition for Writ of Prohibition and therefore warrant additional discussion for this Court’s information and consideration.

Petitioners’ Statement of the Case in the Petition left off after Petitioners filed their “Supplemental Motion to Stay Court’s Verbal Order on January 6, 2022,” which was done on January 10, 2022. App.000409. Since then, the Circuit Court has entered three separate Orders from the January 6, 2022, hearing. On January 12, 2022, the parties submitted to the Circuit Court for entry an agreed “Order for Emergency Hearing Held January 6, 2022,” summarizing the events that transpired at the January 6, 2022, hearing, including a discussion of the evidence adduced, the Circuit Court’s findings, and the Circuit Court’s rulings/orders. 2d.Supp.App.000532.

Despite the tender of an order to which all parties agreed, however, the Circuit Court entered its own “Order regarding the Care of Children in the Custody of the West Virginia Department of Health and Human Resources” (“Order #1”) on the evening of January 12, 2022, which does not incorporate any of the language of the agreed “Order for Emergency Hearing Held January 6, 2022.” Supp.App.000528. As will be discussed in greater detail below, Order #1 is simply not supported by the evidence adduced at the hearing on January 6, 2022, and exceeds the Circuit Court’s legitimate powers.

Of note, Order #1 denied Petitioners’ “Motion to Stay Court’s Verbal Order on January 6, 2022” and ordered (1) “that no child in DHHR custody be housed in a CPS office for any measure of time [and] that this prohibition be applied to all children in DHHR custody throughout the State of West Virginia and (2) “that the DHHR be prohibited from housing a child in a hotel or motel for a period of time exceeding two nights [and] that this prohibition be applied to all children in

DHHR custody throughout the State of West Virginia.” Supp.App.000530 - Supp.App.000531. In so ruling, the Circuit Court sharply criticized the WVDHHR, stating, “Not only is this treatment inadequate for a state agency to provide, in many regards it resembles treatment that would necessitate a DHHR investigation if it were to occur in an individual home.” 2d.Supp.App.000530. The Circuit Court also noted “that it will soon enter a more detailed order containing findings of fact and conclusions of law regarding the January 6, 2022, hearing.” Supp.App.000531.

On January 19, 2022, at 3:07 p.m., Petitioners learned the Guardians had drafted a proposed “Order Granting Amended Writ of Mandamus” (“Order #2”) when the Guardians were copied on an e-mail submitting it to the Circuit Court for entry.<sup>3</sup> 2d.Supp.App.000541. Accompanying proposed Order #2 was a “Notice of Submission of Order” providing Petitioners notice pursuant to Rule 24.01 of the West Virginia Trial Court Rules that they had five days to notify the Circuit Court of any objections or exceptions to the proposed “Order Granting Amended Writ of Mandamus” and that “[t]he failure to note any objections or exceptions within that time may result in the entry of the order as prepared.” 2d.Supp.App.000542.

On the morning of January 20, 2022, the Circuit Court provided notice to the parties through its law clerk that it had signed Order #2. 2d.Supp.App.000555. Order #2 bears a time stamp of 10:02 a.m., indicating it was entered less than one day after submission. 2d.Supp.App.000557. This Order further amended the Guardians’ Petition for Writ of Mandamus to incorporate allegations regarding the housing of children in WVDHHR custody at WVDHHR offices and/or hotels, substituted the West Virginia Bureau for Social Services Child Protective Services Division as a party in lieu of the Kanawha County Child Protective Services Division, and granted the Guardians’ Amended Petition for Writ of Mandamus. *Id.* As will be explained in

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<sup>3</sup> Approximately seventeen minutes after the Guardians submitted the proposed Order to the Circuit Court via e-mail, Petitioners received a copy of the proposed order directed to them via facsimile.

greater detail below, the “Order Granting Amended Writ of Mandamus” is procedurally improper both in its path to entry and in its misapplication of the law. 2d.Supp.App.000557.

Thereafter, at nearly 4 p.m. on Sunday, January 23, 2022, the Guardians provided to Petitioners’ counsel via e-mail yet a *third* proposed order regarding the January 6, 2022, hearing, the “Amended Order for Emergency Hearing Held January 6, 2022, and Amended Order Denying Motions for Stay” (Order #3). 2d.Supp.App.000568. In their correspondence forwarding this draft Order, the Guardians advised that they understood that Judge Bloom “wishes to enter his amended order on Monday.” 2d.Supp.App.000568. Petitioners’ counsel responded to the Guardians via e-mail with a number of questions regarding the genesis of Order #3, including but not limited to what is being amended, what prompted the amendment, how they learned the Circuit Court wanted the Order entered Monday, and how they learned of the Circuit Court’s ruling contained therein that Commissioner Pack’s Affidavit was deemed a “proffer” and therefore, would not be regarded as evidence. 2d.Supp.App.000589. Petitioners also noted in their e-mail that it is unreasonable to expect a response by the next day when Order #3 was sent so late on a weekend, particularly when there are unanswered questions regarding the genesis such Order and advised that they would endeavor to respond substantively within a reasonable amount of time as to their position on the order. *Id.*

One of the Guardians advised they drafted this Order after receiving word from the Circuit Court’s law clerk that the proposed agreed “Order for Emergency Hearing Held January 6, 2022” the parties had previously submitted to the Court for entry on January 12, 2022, needed more details, including references to the transcript and etcetera. 2d.Supp.App.000589. The other Guardian advised that they had always intended to file an amended order and had been working on a more detailed Order since receiving the January 6, 2022, hearing transcript.

2d.Supp.App.000597. The Guardians also advised they contributed a proposed ruling in Order #3 finding the Affidavit submitted by Commissioner Jeff Pack was a “proffer,” and, therefore, excluded from evidence, because they assumed the Circuit Court would rule against the Affidavit. 2d.Supp.App.000592.

Before the Petitioners could respond to this additional information and note their objections to Order #3, the Guardians e-mailed Order #3 to the Circuit Court for entry along with a “Notice of Submission of Order” pursuant to Trial Court Rule 24.01. 2d.Supp.App.000602. The Circuit Court entered Order #3 the next day, making it the second time within a week the Circuit Court had so hastily entered an order in this matter in violation of Trial Court Rule 24.01.<sup>4</sup> 2d.Supp.App.000633.

Accordingly, Petitioners object to the “Amended Order for Emergency Hearing Held January 6, 2022, and Amended Order Denying Motions for Stay” as procedurally improper with regard to not being afforded adequate time to note their objections prior to its entry by the Circuit Court and in light of the fact that, unbeknownst to the parties until later that day, this Court had entered an Order staying all proceedings at the Circuit Court level nearly a week prior.

The foregoing recent developments in the mandamus proceeding pending in the Circuit Court directly impact this prohibition proceeding in which Petitioners have moved pursuant to Rule 16 of the West Virginia Rules of Appellate Procedure that this Court issue a Writ of Prohibition, prohibiting the Respondent, the Honorable Louis H. “Duke” Bloom, from permitting this mandamus action from continuing against Petitioners and broadening it to encompass statewide staffing issues within CPS as well as foster care and adoption units. Petitioners further

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<sup>4</sup> The Guardians submitted the proposed “Amended Order for Emergency Hearing Held January 6, 2022, and Amended Order Denying Motions for Stay” to the Circuit Court on January 24, 2022 at 1:47 p.m., and the Circuit Court signed the Order and had it submitted to the Circuit Clerk’s Office by 8:39 a.m. on January 25, 2022.

request that this Court issue a Writ of Prohibition, prohibiting the Honorable Louis H. “Duke” Bloom, from inserting the issues of children staying overnight at Child Protective Services offices and hotels into this mandamus action and prohibiting the Honorable Louis H. “Duke” Bloom, from enforcing his Order that, throughout the State of West Virginia, the WVDHHR shall not house any child who is in its care, temporarily or permanently, at any local WVDHHR office at any time or at any hotel for more than two consecutive nights.

### **ARGUMENT**

The three Orders entered by the Circuit Court since Petitioners filed their Petition for Writ of Prohibition are further evidence the Circuit Court committed clear error and exceeded its legitimate powers when, instead of dismissing Petitioners from the mandamus action, it granted leave to the Guardians to amend their Petition to broaden the focus of the action statewide and to include adoption and foster care units. These Orders further demonstrate the Circuit Court committed clear error and exceeded its legitimate powers when it found that the issues of children in WVDHHR custody staying overnight at WVDHHR offices and hotels overnight fell within the scope of this mandamus action and issued an Order granting the Guardians’ Amended Petition for Writ of Mandamus and effectively banning such temporary housing practices. In addition, the Orders contain troubling mischaracterizations of the evidence adduced in the mandamus action and misapply the law and applicable rules in a manner that has unfairly prejudiced Petitioners and violated their rights and the law.

#### **I. Order #1**

As mentioned above, following the hearing on January 6, 2022, the parties collaborated to develop an agreed “Order for Emergency Hearing Held January 6, 2022” that accurately summarized the events that transpired at the hearing. 2d.Supp.App.000532. Although this

proposed agreed Order was submitted to the Court for entry bearing the signatures of all counsel, the Circuit Court declined to enter the proposed agreed Order and drafted its own order, Order #1, that not only is contrary to the evidence adduced at the January 6, 2022, hearing, but astonishingly, even goes so far as suggesting that the WVDHHR is abusing and/or neglecting the children in its care by temporarily housing the children in its care at WVDHHR offices and/or hotels by stating, “Not only is this treatment inadequate for a state agency to provide, in many regards it resembles treatment that would necessitate a DHHR investigation if it were to occur in an individual home.” 2d.Supp.App.000530.

The accusatory tone and sweeping mischaracterizations contained in Order #1 suggest a lack of objectivity of the Circuit Court. Based on testimony from the Community Services Manager for the Kanawha County CPS Office Michael Hale and a Social Services Coordinator for Kanawha County, Sandra Wilkerson, regarding the particular accommodations available at the Kanawha County CPS office, the Circuit Court issued a sweeping ban on housing children at WVDHHR offices statewide without any evidence having been adduced regarding the accommodations provided at other CPS office. Supp.App.000420 - Supp.App.000531.

The Circuit Court also the found that “children are not adequately cared for while housed in CPS offices” because “[s]uch children are not bathed, are not guaranteed to regularly attend school, do not receive food from an individual certified to prepare such food, and are not certain to receive the most basic personal hygiene items such as toothbrushes.” Supp.App.000530. However, the testimony of both Mr. Hale and Ms. Wilkerson established that, while there are no bathing facilities available at the Kanawha County CPS office, CPS staff utilize facilities such as Patchwork and Davis Child Shelter for showers, which are provided on average every other day. Supp.App.000439, Supp.App.000487.



With regard to school attendance, Mr. Hale testified that, generally, the children are not at the Kanawha County CPS Office “more than a day or two before [they can ] secure placement[,] [s]o it would not be in anyone’s best interest to go to the time and get them in school and then . . . move them elsewhere in a day or two.” Supp.App.000462. Ms. Wilkerson testified there were two children housed at the Kanawha County CPS office “longer-term” and that they were able to get one of them enrolled in school but that the other child was transferred into BJS custody and was then expelled from school due to behaviors once he returned from BJS custody. Supp.App.000471 - Supp.App.000472. Although they pursued homeschooling for that child after he was expelled, the child was returned to BJS custody before that could be arranged. Supp.App.000472.

With regard to food, Mr. Hale testified that “[s]taff always ensure the children are fed regularly . . . . I’ve never witnessed them not being provided for.” Supp.App.000445. He also testified that, although the Kanawha County CPS office has a kitchen with an electric oven and microwave, the children are typically fed takeout or are taken out to eat. Supp.App.000440. Ms. Wilkerson testified that they “try to balance out the meals to make sure that [the children] had vegetables, that it wasn’t just fast food, that we tried to get more nutritious meals ordered in from actual restaurants as opposed to just running through McDonald’s.”<sup>5</sup> Supp.App.000486.

Lastly, the Circuit Court’s assertion that children housed at CPS offices “are not certain to receive the most basic personal hygiene items such as toothbrushes” whether at CPS offices or hotels is categorically refuted by the testimony of Mr. Hale: “I’m certain that none of our children have gone without a toothbrush or toothpaste being provided.” Supp.App.000530,

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<sup>5</sup> It should be noted that all restaurants are required by law to hold current permits to operate and that the staff working at such restaurants possess current food handler permits. West Virginia Code §16-2-16, 64 C.S.R. 17, W. Va. Code § 16-6-1, *et seq.* Additionally, foster parents are not required to hold food handler permits prior to being approved to have foster children placed in their homes. 78 C.S.R. 2.

Supp.App.000446 (Emphasis added). Mr. Hale and Ms. Wilkerson testified that toothbrushes, towels, and the like are not kept in inventory at the Kanawha County CPS office, but they are provided the facilities where the children are taken for hygiene purposes. Supp.App.000446.

The Circuit Court's logic is also flawed in finding that Petitioners "have had nearly two months to formulate plans and procedures to comply with the [Circuit] Court's order [and that] [a]ny argument that the DHHR has been surprised by this Order and not afforded time to prepare for its implementation is simply unfounded and lacks merit." Supp.App.000531. The Circuit Court is referring to its Order from the November 17, 2021, hearing in *In re: M.P.* wherein it first banned overnight housing children at WVDHHR offices statewide. However, with regard to housing children at hotels, the Circuit Court seemingly ignores the fact that, not only is the Circuit Court's Order from the November 17, 2021 hearing silent as to housing children at hotels, but, notably, during that hearing, the Circuit *specifically encouraged* the use of hotels as an alternative to children staying overnight at WVDHHR offices, stating, "So if y'all need to go out and rent hotel rooms, you better go do it." App.000374.

As a result of this commentary by the Court at the *In re: M.P.* hearing in November 2021, coupled with the fact the court's order from such hearing did not restrict or even mention hotel stays, Petitioners had no reason to believe it was necessary "to formulate plans and procedures to comply with the [Circuit] Court's order" with regard to hotel stays. Moreover, because of this commentary, as well as the language contained in the Order for Hearing Held November 17, 2021; the Motion for Emergency Hearing; and Notice of Emergency Hearing, Petitioners believed there was no need to introduce evidence at the January 6, 2022, hearing regarding accommodations available at hotels and what options for housing were available if this temporary housing option was unavailable. App.000383, App.000386, App.000389. Thus, Petitioners were indeed



“surprised” when the Circuit Court included a restriction on hotel stays in its ruling at the conclusion of the January 6, 2022 hearing.

There has been no evidence or testimony adduced in this matter that calls into question the testimony of the witnesses at the January 6, 2022, hearing, and that testimony does not support the Circuit Court’s Order #1 banning statewide overnight stays at WVDHHR offices and stays at hotels of more than two consecutive nights.

## **II. Order #2**

Order #2 - the “Order Granting Amended Writ of Mandamus” - is improper procedurally and substantively. Rule 24.01(b) required the Guardians to present a copy of Order #2 to Petitioners for consideration prior to submitting it to the Court for entry, as the Circuit Court had not ordered otherwise, and the Guardians cannot demonstrate good cause for not presenting said Order to petitioners in advance of presenting it to the Circuit Court for entry.<sup>6</sup> Rule 24.01(c) also mandates that the Circuit Court allow five days from its receipt before entering the Order if no objection was received by the Court.<sup>7</sup>

Petitioners also object to the entry of Order #2 on January 20, 2022, as it was entered after this Court’s January 19, 2022, “Scheduling Order and Order Granting Stay,” which dictated that “all proceedings in Kanawha County Circuit Court Civil Action No. 18-P-142 are stayed pending resolution of the petition for writ of prohibition.”<sup>8</sup>

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<sup>6</sup> Rule 24.01(b) of the West Virginia Trial Court Rules provides that “[e]xcept for good cause or unless otherwise determined by the judicial officer, no order may be presented for entry unless it bears the signature of all counsel and unrepresented parties. Clearly, the proposed Order in question did not bear the signatures of all involved counsel as a copy had not been provided to Petitioners prior to the Guardians submitting it to the Court for entry.

<sup>7</sup> Rule 24.01(c) of the West Virginia Trial Court Rules provides in relevant part that “[i]n the event this subsection is utilized, the judicial officer *shall* consider the order for entry upon approval by all counsel, or after five (5) days from its receipt, if no objection is received by the judicial officer.”

<sup>8</sup> Upon information and belief, the parties to this action did not learn of this Court’s entry of the “Order Granting Stay” until late morning on January 25, 2022. Thus, Petitioners have no reason to believe that the Circuit Court’s entry of the “Order Granting Amended Writ of Mandamus” was intentionally in violation of this Court’s stay of the Circuit Court proceedings.

Further, Order #2 does not appear to comply with West Virginia Code § 53-1-1, *et seq.* insofar as it permits the Guardians to proceed without a verified Petition for Writ of Mandamus as to this newly added claim regarding the housing of children in WVDHHR custody, and the Court has not issued any rule to show cause or afforded Petitioners a fair opportunity to appear and defend prior to granting the Guardians the extraordinary relief sought.

Most importantly, however, the Circuit Court's grant of extraordinary relief in the form of mandamus in this Order is wholly unsupported by the applicable law. The law in West Virginia is clear that the remedy of mandamus is an extraordinary one that is "available only in limited and exceptional circumstances." *State ex rel. Charleston Bldg. Comm'n v. Dial*, 198 W. Va. 185, 191, 479 S.E.2d 695, 701 (1996). "[S]ince mandamus is an 'extraordinary remedy, it should be invoked sparingly.'" *State ex rel. Billings v. City of Point Pleasant*, 194 W. Va. 301, 303, 460 S.E.2d 436, 438 (1995). "Attempting to further limit the extraordinary remedy of mandamus, [the West Virginia Supreme Court of Appeals has] established additional guidelines which a party requesting mandamus must satisfy before [the Supreme Court] will grant such relief[:]" "A writ of mandamus will not issue unless three elements coexist – (1) The existence of a clear right in the petitioner to the relief sought; (2) the existence of a legal duty on the part of respondent to do the thing which petitioner seeks to compel; and (3) the absence of another adequate remedy at law." *Dial*, 198 W. Va. at 191, 479 S.E.2d at 701 (quoting Syl. pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969)).

As discussed in the Petition filed in this matter, a key point that has fallen on deaf ears below and brings this matter before this Court is that the purpose of a mandamus action is to compel a public office or officer to discharge a legal duty that the public office or officer has either *refused* to discharge or is *unwilling* to perform; likewise, mandamus is not appropriate if a

willingness to perform the act without coercion is shown, or if the act is already begun and in good faith it appears it will be performed. “A writ of mandamus will not be issued to compel the performance of an act which the defendant has not refused to perform.” *State ex rel. Nelson v. Ritchie*, 154 W. Va. 644, 652, 177 S. E. 2d 791, 795 (1970).

As a rule, mandamus will not issue if the duty sought to be enforced has already been done or is being performed. The office of the writ is *only to compel action by the unwilling*, and if the act has already been done the writ would be fruitless. Also *the writ will not lie to compel performance of an act which respondent shows a willingness to perform without coercion.*” [Likewise,] “[m]andamus will not issue to compel a party to perform an act which he has already begun to do, and it is apparent that he will in good faith perform.”

*Nelson*, 154 W. Va. at 651, 177 S.E.2d at 795 (citing Syl. pt. 2, *State ex rel. Hall v. County Court of Mercer County*, 100 W. Va. 11, 129 S.E.2d 712 (1925))(Emphasis added.)

The Petitioners have never denied the WVDHHR is suffering from staffing problems, as is practically every industry in every state in the nation currently, which has affected the handling of abuse and neglect cases, including foster care and adoptions, in West Virginia, and Secretary Crouch in particular has been transparent in his testimony acknowledging the problem and his commitment to addressing it. Indeed, the record is replete with evidence that, over the past four and a half years during the pendency of this matter, the Petitioners have been neither “unwilling” nor “refusing” to perform their duties in any regard. To the contrary, throughout the long history of this case, Petitioners have continuously and tirelessly worked to address any staffing and efficiency issues in Kanawha County CPS and statewide, even since before Ms. Victor’s oral or written Petition for Contempt.<sup>9</sup>

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<sup>9</sup> The Petition contains an outline of Petitioners’ exhaustive efforts on CPS staffing, retention and recruitment, as well as efforts to improve child welfare in West Virginia generally, including foster care and adoptions, in the discussions on pages 3, 6, 7, 8, 9, and 10 and Footnote 3 on page 6.

Additionally, on the issue of children in DHHR custody staying at local CPS offices or in hotels, Commissioner Jeffrey Pack testified, “Well, clearly, staying in a hotel or an office is an accommodation of last resort. It’s---it is because all other placement options have been exhausted and there remains no alternative.” Supp.App.000495. Commissioner Pack outlined all of the avenues he and his staff have been and continue pursuing to address the issue and stated the situation of a child needing placement and being unable to find one is taken so seriously that, “it’s all hands on deck,” from the staff at the local offices up to and including Commissioner Pack himself. Supp.App.000496 – 000497. Additionally, Commissioner Pack testified at length to the continuous efforts being made to prevent having to house children in CPS offices as a last resort, or housing them in hotels, stating, “We have been engaged since legitimately my first week on the job with the shelter providers.” Supp.App.000498. As discussed by Commissioner Pack in his testimony, while it appears a large part of the problem necessitating children staying overnight at local CPS offices or hotels is the lack of a facility to house children with behavioral and/or mental health issues, Commissioner Pack summed up the Department’s exhaustive efforts to find additional beds to house such children, stating, “...I’m not aware of any effort we could have made to expand either treatment or placement opportunities within West Virginia.” *Id.*

As such, the Circuit Court exceeded its legitimate powers and committed clear legal error in awarding the Guardians mandamus relief as the evidence adduced in this matter does not support the same.

### **III. Order #3**

Like Order #2, Order #3 – the “Amended Order for Emergency Hearing Held January 6, 2022, and Amended Order Denying Motions for Stay” - was entered in violation of the Rule 24.01 of the Trial Court Rules and misapplies the law substantively. Although the Guardians did manage

to provide Petitioners a copy of the Order #3 prior to providing it to the Court for entry, the Petitioners were still not afforded an adequate amount of time in which to object due to the Court again entering the Order within a few short hours of its submission in violation of Trial Court Rule 24.01(c).

Order #3 is also procedurally improper insofar as they were not afforded adequate time to note their objections prior to its entry on January 25, 2022, by the Circuit Court and in light of the fact that, unbeknownst to the parties until later that day, this Court had entered an Order staying all proceedings at the Circuit Court level nearly a week prior.

Substantively, Order #3 is a haphazard amalgamation of the various Orders submitted to the Circuit Court for entry that contains many of the same mischaracterizations of the evidence adduced and misapplications of the law discussed above, along with a few new ones. For example, the Circuit Court concluded as a matter of law that the Affidavit of Commissioner Jeff Pack<sup>10</sup> should not be regarded as evidence because it was a “proffer” of evidence to which the Guardians did not agree. Although the Circuit Court cites “*State v. Karl*” [sic]<sup>11</sup> as its legal basis for this conclusion, that case involves situations where the parties’ counsel made proffers of evidence in the proceedings, and there is no mention of an affidavit. Indeed, an affidavit is sworn testimony and therefore, completely distinguishable from a “proffer” by counsel, so the ruling that Commissioner Pack’s Affidavit should be excluded from evidence as a proffer is clearly erroneous.

For the most part, Order #3’s orders are essentially the same as the Circuit Court’s prior two Orders in this matter. However, it also requires Petitioners to provide to the Guardians “copies

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<sup>10</sup> Petitioners submitted Commissioner Pack’s Affidavit in support of their “Supplemental Motion to Stay Court’s Verbal Order on January 6, 2022” to establish through sworn statement that it would be impossible to comply with the Circuit Court’s Order banning hotel stays in excess of two consecutive nights. App.000409, 416.

<sup>11</sup> The proper case style and associated citation should read “*State ex rel. Miller v. Karl*, 231 W. Va. 65, 70, 743 S.E.2d 876, 881 (2013).”

of the 2021 monthly reports regarding children staying overnight in offices, hotels and hospitals for each district office in West Virginia within ten (10) days of the hearing” and to “provide future monthly reports regarding children staying overnight in offices, hotels and hospitals for each district office in West Virginia by the tenth day of the month beginning February 10, 2022, and continuing each month until further ordered.” 2d.Supp.App.000650. Additionally, Order #3 orders that “[t]he DHHR shall develop, and, to the extent possible implement, an alternative emergency placement plan, within ninety (90) days.” 2d.Supp.App.000651.

These orders exceed the Circuit Court’s legitimate power and constitute clear legal error. This Order encroaches on the province of the other circuit courts that are a part of the judiciary in this State by tying the hands of other circuit courts ratifying emergency custody of children who have been removed from their homes when such courts cannot guarantee that a child will be placed somewhere other than at a WVDHHR office overnight or at a hotel for more than two consecutive nights. Therefore, at best, the Order runs the risk of inviting contradictory orders from other circuit courts regarding placement of children removed from abusive and/or neglectful guardians and, at worst, serves as a legally improper usurpation other Circuit Courts’ discretionary determinations regarding transfers of custody to WVDHHR in emergency abuse and neglect situations.

### **CONCLUSION**

Petitioners West Virginia Department of Health and Human Resources, Secretary Bill J. Crouch, and Kanawha County Child Protective Services Division request that this Court issue a Writ of Prohibition, prohibiting the Circuit Court from permitting this mandamus action from continuing against Petitioners and broadening it to encompass statewide staffing issues within Child Protective Services as well as foster care and adoption units. Petitioners further request that this Court issue a Writ of Prohibition prohibiting the Circuit Court from inserting the issues of

children staying overnight at Child Protective Services offices and hotels into this mandamus action and prohibiting the Circuit Court from enforcing its Order that, throughout the State of West Virginia, the Department of Health and Human Resources shall not house any child who is in its care, temporarily or permanently, at any local Department of Health and Human Resources office at any time or at any hotel for more than two consecutive nights.



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*Counsel for Petitioners*



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
NO. \_\_\_\_\_

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**STATE OF WEST VIRGINIA ex rel.  
WEST VIRGINIA DEPARTMENT OF  
HEALTH AND HUMAN RESOURCES,  
BILL CROUCH, SECRETARY, and  
KANAWHA COUNTY CHILD PROTECTIVE  
SERVICES DIVISION,**

*Petitioners,*

**v.**

**The Honorable Louis H. bloom,  
Judge, Circuit Court of Kanawha County, and  
JENNIFER R. VICTOR and  
JENNIFER N. TAYLOR,  
*Guardians ad litem for the Circuit  
Court of Kanawha County,***

*Respondents.*

**VERIFICATION**

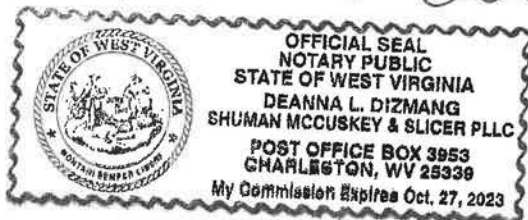
I, Emily L. Lilly, after first being duly sworn upon oath, respectfully state that I am counsel for Petitioners named in the foregoing Supplemental Brief in Support of Petition for Writ of Prohibition; that I am familiar with the contents of the related Appendix, Supplemental Appendix, and Second Supplemental Appendix; and that the facts and allegations set forth in the Supplemental Brief in Support of Petition for Writ of Prohibition are true and accurate to the best of my knowledge and belief.

  
\_\_\_\_\_  
Emily L. Lilly, Esquire (WVSB #11045)

Taken, sworn to and subscribed before me this 28<sup>th</sup> day of January, 2022.

My commissions expires:

October 27, 2023



  
\_\_\_\_\_  
Notary Public



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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
NO. 22-0027**

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**STATE OF WEST VIRGINIA ex rel.  
WEST VIRGINIA DEPARTMENT OF  
HEALTH AND HUMAN RESOURCES,  
BILL CROUCH, SECRETARY, and  
KANAWHA COUNTY CHILD PROTECTIVE  
SERVICES DIVISION,**

*Petitioners,*

**v.**

**THE HONORABLE LOUIS H. BLOOM,  
Judge, Circuit Court of Kanawha County, and  
JENNIFER R. VICTOR and  
JENNIFER N. TAYLOR,  
*Guardians ad litem for the Circuit  
Court of Kanawha County,***

*Respondents.*

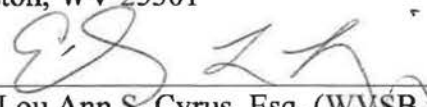
**CERTIFICATE OF SERVICE**

I, Lou Ann S. Cyrus, counsel for Petitioners, hereby certify that I have served a true and accurate copy of the foregoing “**Supplemental brief in support of Petition for Writ of Prohibition**” upon the parties whom a rule to show cause should be served by placing said copies in the United States mail, with first-class postage prepaid, on this day, January 28, 2022, addressed separately as follows:

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Hon. Louis H. "Duke" Bloom, Circuit Judge  
Thirteenth Judicial Circuit  
Circuit Court of Kanawha County  
Judicial Annex, Fifth Floor  
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