IN THE
INTERMEDIATE COURT OF APPEALS
STATE OF WEST VIRGINIA

ALEXANDER FLEMING, CAROLE CARTER, CAROL GALLANT, BARBARA HUMES, and BENJAMIN BUCKLEY,

Petitioners,

vs.

No. 23-ICA-174

MITCH CARMICHAEL, in His Official Capacity as Secretary of the West Virginia Department of Economic Development, and MIKE GRANEY, in His Official Capacity as Director of the West Virginia Department of Economic Development,

Respondents.

BRIEF FOR PETITIONERS

Robert M. Bastress, Jr.
P.O. Box 1295
Morgantown, W. Va. 26507
(304) 319-0860
rmbastress@gmail.com

Counsel for Petitioners

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ASSIGNMENTS OF ERROR

1. The circuit court erred in ruling that the prior litigation in Jefferson Circuit, *Public Asset Protection, Inc. v. Town of Harpers Ferry,* collaterally barred petitioners' special law and equal protection claims, notwithstanding the lack of privity between the plaintiffs in that case and this one.

2. The circuit court erred in ruling that the Tourism Development Act does not create a special law in violation of Article VI, §§ 39 and 39a of the West Virginia Constitution, notwithstanding its extremely narrow classification and improbability of additional application.

3. The circuit court erred in ruling that the Tourism Development Act does not violate the equal protection and due process principles in Article III, 10 of the West Virginia Constitution.

4. The circuit court erred in ruling that the Tourism Development Act does not violate plaintiffs' rights under Article III, §§ 1, 2, and 3 and Article IV, § 1 of the West Virginia Constitution.

STATEMENT OF THE CASE

Procedural History

This cases focuses on a constitutional challenge to legislation enacted in 2020, the Tourism Development District Act, now West Virginia Code § 5B-1-9. The law authorized the State Economic Development Office to designate tourism development districts in up to five towns under 2,000 for projects with a minimum investment of $25 million. Upon such designation, the districts would be immunized from virtually all aspects of municipal regulation.

The Kanawha Circuit Court granted defendants' motion to dismiss the amended

complaint. The court found that the plaintiffs' special law and equal protection claims were barred by collateral estoppel because of prior litigation in Jefferson Circuit Court. The lower court also rejected each of plaintiffs' constitutional claims on the merits. Because the case was decided on a Rule 12(b)(6) motion, the facts alleged in the amended complaint must be accepted as true. *E.g., Wiggins v. Eastern Associated Coal Company*, 178 W. Va. 63, 357 S.E.2d 745 (1987). On this appeal, all questions presented are questions of fact, which are reviewed *de novo*. *E.g., State ex rel. Frazier v. Thompson*, 243 W. Va. 46, 51, 842 S.E.2d 250, 255 (2020); *Crystal R.M. v. Charlie A.L.*, Syl Pt. 1, 194 W. Va. 138, 459 S.E.2d 415 (1995).

Statement of Facts

During the 2020 legislative session, the Legislature enacted the Tourism Development Act ("the Act"), which has been codified at West Virginia Code § 5B-1-9. The law was enacted at the behest of SWaN Hill Top Partners, LLC ("SWaN"), who was planning to construct a luxury hotel at the summit of Harpers Ferry, West Virginia. The Act authorizes the Department of Economic Development to approve up to five "tourism development districts" ("TDDs") in municipalities under 2,000 for tourism projects that cost at least $25 million. Once designated as such, a TDD is virtually insulated from municipal regulation. According to subsection (l) of the Act, TDDs "may not be subject to the following:

> (1) Municipal zoning, historic preservation, horticultural, noise, viewshed, lighting, development, or land use ordinances, restrictions, limitations, or approvals;
>
> (2) Municipal regulation of the sale of alcoholic liquor, nonintoxicating beer, or wine for consumption within the tourism development district;
>
> (3) Municipal building permitting, inspection, or code enforcement;
>
> (4) Municipal license requirements;

(5) The legal jurisdiction of the municipality in which the tourism development district is entirely or partially located, except as specifically provided in this article;

(6) The implementation of any tax, fee, or charge by the municipality, except as specifically provided in this section; or

(7) Any requirement under state law for the consent or approval of the municipality in which the tourism development district is entirely or partially located of any state or county action pursuant to this code, specifically including, but not limited to, §7-11B-1 *et seq*. of this code, for formal consent of the governing body of a municipality for county or state action regarding the establishment of tax increment financing development or redevelopment districts or the approval of tax increment financing development or redevelopment plans.

The section also expressly bars use of a municipality's home rule powers to regulate a TDD on any of the specified subjects. Respondents, the officials charged with administering the Act, have designated SWaN's hotel project as a TDD. The complaint also alleged (on information and belief) that the SWaN site contains materials that are dangerous to public health and safety, yet the site persists unregulated and unpoliced by the Town of Harpers Ferry. Complaint ¶¶ 19-21; Joint Appendix ("JA") at 23-24.

SUMMARY OF ARGUMENT

The circuit erred in concluding that prior litigation in Jefferson Circuit, *Public Asset Protection, Inc. v. Corporation of Harpers Ferry*, Civ. Act. No. CC-19-2021 (2022) ("*PAPI*"), collaterally estops the petitioners from pursuing their claims in this case. "Collateral estoppel will bar a claim if four conditions are met: (1) The issue previously decided is identical to the one presented in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action." *Haba v. Big Arm Bar and Grill, Inc.*, 196 W. Va. 129, 133, 468 S.E.2d

915, 919 (1996); *State v. Miller*, Syl. Pt. , 194 W. Va. 3, 459 S.E.2d 114 (1995). Several reasons preclude applying collateral estoppel to petitioners' claims.

First, *PAPI* attempted to *negate* the exercise of municipal power to transfer city property to a private developer. The present litigation seeks to *protect* municipal power from an overreaching state law. The two cases thus raise different issues. Second, petitioners were not parties in the *PAPI* case, and there is no privity between PAPI and the petitioners. Petitioners thus never had the "full and fair opportunity" in the PAPI litigation to advance their claims in the manner that due process requires. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 328 (1979). Third, defendants'/respondents' "invocation of collateral estoppel in the instant matter is deemed to be offensive collateral estoppel because [defendants were] not part[ies] in the [*PAPI*] action." *Holloman v. Nationwide Mutual Insurance Co.*, 217 W. Va. 269, 274, 617 S.E.2d 816, 221 (2005). "[T]he offensive use of collateral estoppel is generally disfavored in this jurisdiction." *Id.*, 217 W. Va. at 275, 617 S.E.2d at 222.

The Tourism Development Act, W. Va. Code § 5B-1-9, creates a special law in violation of Article VI, §§ 39, which prohibits the Legislature from enacting local or special laws in eighteen enumerated categories as well as in any case "where a general law would be proper, and can be made applicable to the case." Among the specific prohibitions is a ban on local or special laws regarding "regulating or changing county or district affairs." Article VI, § 39a supplements that by prohibiting special laws regarding municipal incorporation or governance. By enacting § 5B-1-9 creating Tourism Development Districts ("TDDs") for projects costing at least $25 million in only towns under 2,000 and in no more than five of them, the Legislature has seriously offended the principles of Sections 39 and 39a which promote equality and forestall special

treatment. Section 5B-1-9, however, is a product written by and for one particular developer and is framed in such narrow ("special") terms that its purpose to bestow benefits on that particular developer is patent. *City of Charleston v. Bosely*, 165 W. Va. 332, 268 S.E.2d 590 (1980), addressed the validity under § 39 of a law authorizing Class I cities – and no others – to impose a tax on hotel occupancy. The Court found that the law violated § 39: "The promotion of tourism and the development of civic facilities to stimulate community growth are statewide concerns. The legislature acts arbitrarily and unreasonably in providing a mechanism to local governments if it excludes a single municipality on the basis of population. . . . This is the fundamental meaning of W. Va. Const. Art. 6, § 39." *Id.*, 165 W. Va. at 341-42, 268 S.E.2d at 596.

Section 5B-1-9 violates the equal protection principles established by Article III, § 10 of the West Virginia Constitution. The section's classification restricting TDDs to five towns under 2,000 bears no reasonable relationship to the purported goal of promoting tourism in the State. There is also no point to the $25 million minimum. Principles of equality and fundamental fairness cannot abide singling out a particular small town in the State for dismantling its regulatory powers *and* for precluding it (and only it) from using the home rule options provided by West Virginia Code § 8-1-5a.

Article III, § 1 establishes that individuals "have certain inherent rights" embracing "the enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety." Article III, § 3 further provides that "Government is instituted for the common benefit, protection and security of the people, nation or community. Of all its various forms [the best] is capable of producing the greatest degree of happiness and safety." Interpreting those provisions, the Supreme Court has held that the term "safety . . .

conveys protection from harm." *Women's Health Center v. Panepinto*, 191 W. Va. 436, 443-44, 446 S.E.2d 658, 665-66 (1993). As alleged in the amended complaint, SWaN's TDD site contains dangerous materials, yet § 5B-1-9 precludes the town from not only acting to prevent serious harm but also from even gathering the facts to determine the nature and degree of the risks. At a minimum, plaintiffs are entitled to an opportunity to prove the risks involved and the inadequacy of the regulatory scheme created by § 5B-1-9.

Finally, by exempting SWaN from municipal regulation, § 5B-1-9 substantially dilutes the plaintiffs' right to vote in municipal elections, as guaranteed to them by Article IV, § 1 of the West Virginia Constitution. The Act seriously diminishes the effectiveness of petitioners' votes by removing from the elected municipal officials the ability to control and regulate significant and important property within their town.

STATEMENT REGARDING ORAL ARGUMENT

This case presents important constitutional issues regarding the validity of the Act and the protection of petitioners' political rights. The issues also involve matters of fundamental public importance and of first impression. The case would therefore benefit from Rule 20 oral argument.

ARGUMENT

I. PETITIONERS ARE NOT COLLATERALLY ESTOPPED FROM PURSUING THEIR CLAIMS BY THE DECISION OF THE JEFFERSON CIRCUIT COURT IN *PUBLIC ASSET PROTECTION, INC. v. CORPORATION OF HARPERS FERRY.*

The circuit court held that the Jefferson Circuit Court's ruling in *Public Asset Protection, Inc. v. Corporation of Harpers Ferry*, Civ. Act. No. CC-19-2021 (2022), JA at 51-71, collaterally estops the petitioners from pursuing their claims in this case. The court was mistaken.

"Collateral estoppel will bar a claim if four conditions are met: (1) The issue previously decided is identical to the one presented in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action." *Haba v. Big Arm Bar and Grill, Inc.*, 196 W. Va. 129, 133, 468 S.E.2d 915, 919 (1996); *State v. Miller*, Syl. Pt. 1, 194 W. Va. 3, 459 S.E.2d 114 (1995). Several reasons preclude application of collateral estoppel to petitioners' claims.

First, *PAPI* attempted to *negate* the exercise of municipal power to transfer city property to a private developer. The present litigation seeks to *protect* municipal power from an overreaching state law. The two cases thus raise different issues. The *PAPI* complaint invoked none of the claims upon which plaintiffs rely. Exhibit D to Defendants' Motion to Dismiss, JA at 78-100. Apparently, at some point in that litigation, a question was raised as to the constitutionality of the Tourism Development statute, but the issue was accorded only two and a half pages of cursory analysis in the circuit court's opinion. Exhibit A to Defendants' Motion to Dismiss, JA at 79-100. That court did not address – at all – claims that are critical to this case involving equal protection, safety, and voting rights. *See* Amended Complaint ¶'s 24-25, JA at 24; Parts III and IV, *infra*.

Second, and most importantly, the parties against whom estoppel is invoked here – the plaintiffs/petitioners – were obviously not parties to the earlier litigation, nor were they in any way in privity with Public Asset Protection, Inc., or any of its members. PAPI was a corporation that sought to nullify transactions between Harpers Ferry and SWaN, JA at 79, while petitioners

are Harpers Ferry residents seeking to protect the Town's municipal powers. Because petitioners were not parties in the PAPI litigation, they could not have had the "full and fair opportunity" in that case to advance their claims in the manner that due process requires. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 328 (1979); *Haba, supra; Conley v. Spillers*, 171 W. Va. 584, 589-90 n.6, 594, 301 S.E.2d 216, 231, 226 (1983). Nor is there any basis for finding privity between PAPI and the petitioners. Privity applies only when there is a sufficiently close relationship between the prior litigants and the present ones such as to justify estoppel, as when a non-party succeeds to the prior party's interest in property and is bound by a prior judgment or when a non-party has controlled the prior law suit and then attempts to relitigate it. *Id.*, 171 W. Va. at 594, 301 S.E.2d at 226; Restatement (Second) of Judgments, *Introduction* at 1 (1982). The only connection between PAPI or its members and the plaintiffs is, maybe, a common residency in Harpers Ferry, but that does not establish the kind of relationship that would warrant an estoppel.[1] Nor is the fact that petitioner Fleming "participated" (Trial Court Order at 4-5 and 8-9, JA at 208-09 and 212-13) in the earlier law suit by attesting to an evidentiary affidavit even relevant to determining privity and could not, in any event, have any estoppel effect on the remaining plaintiffs/petitioners.

Third, defendants'/respondents' "invocation of collateral estoppel in the instant matter is deemed to be offensive collateral estoppel because [defendants were] not part[ies] in the [*PAPI*] action." *Holloman v. Nationwide Mutual Insurance Co.*, 217 W. Va. 269, 274, 617 S.E.2d 816,

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[1]For example, if Harpers Ferry imposed a fee on a resident who challenges the assessment as unconstitutional and loses, a second resident subsequently assessed the fee would not be estopped from contesting the fee's validity. *See, e.g., Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (poll tax was unconstitutional) *overruling Breedlove v. Settles*, 302 U.S. 277 (1937) (poll tax was constitutional).

221 (2005). "[T]he offensive use of collateral estoppel is generally disfavored in this jurisdiction[,]" but "rests in the discretion of the trial court." *Id.*, 217 W. Va. at 275, 617 S.E.2d at 222; *accord, Parklane Hosiery, supra*; 439 U.S. at 331; *Conley, supra*, 171 W. Va. at 592, 301 S.E.2d at 228, *quoting Parklane*. In this case, the circuit court's exercise of discretion failed to factor in not only the unfairness of barring *these* plaintiffs, who have never had a bite at the apple, but also the facts that the case presents important constitutional questions and that most of them were not addressed by the *PAPI* court. To the extent that case did address a possibly overlapping issue – that regarding special or local legislation – it went beyond the scope of the pleadings in the litigation and the Jefferson circuit court gave the issue only a perfunctory treatment. That is not the kind of consideration to which the plaintiffs are entitled on a significant constitutional question.

The *PAPI* decision does not estop the petitioners from pursuing their claims in this litigation.

II. WEST VIRGINIA CODE § 5B-1-9 CREATES LOCAL AND SPECIAL LEGISLATION THAT VIOLATES ARTICLE VI, §§ 39 AND 39a OF THE WEST VIRGINIA CONSTITUTION.

Article VI, § 39 prohibits the Legislature from enacting local or special laws in eighteen enumerated categories as well as in any case "where a general law would be proper, and can be made applicable to the case." "'Special laws' include laws that focus on individual cases or that classify a narrow class of individuals, groups, or entities for special treatment. 'Local laws' limit their application to a specific locale within the state rather than applying statewide. Thus, special laws classify by persons, places, or things, and local laws classify by places. *State ex rel. Appalachian Power Co. v. Gainer*[, 149 W. Va. 740 143 S.E.2d 351] (1965); *Tweel v. West*

Virginia Racing Commn.[, 138 W. Va. 531, 76 S.E.2d 874] (1953)." ROBERT M. BASTRESS, JR., THE WEST VIRGINIA STATE CONSTITUTION 195 (2016). Among the specific prohibitions is a ban on local or special laws regarding "regulating or changing county or district affairs." Article VI, § 39a supplements that by prohibiting local laws regarding municipal incorporation or governance and further requires that the "Legislature shall provide by general laws for . . . the government of cities, towns, and villages." By enacting § 5B-1-9 creating Tourism Development Districts ("TDDs") for projects costing at least $25 million in only towns under 2,000 and in no more than five of them, § 5B-1-9(d)(f) and (j), the Legislature has seriously offended the principles of Sections 39 and 39a. Those sections aim "to preserve uniformity and consistency in statutory enactments," *State ex rel. Taxpayers Protective Association of Raleigh County v. Hanks*, 157 W. Va. 350, 352, 201 S.E.2d 304, 306,(1973), and to "discourage[] that private solicitation of the [legislative] members, the tendency of which is to introduce corruption and bribery as elements of legislation." *Id.*, 157 W. Va. at 353, 201 S.E.2d at 306, *quoting* III DEBATES AND PROCEEDINGS OF THE FIRST CONSTITUTIONAL CONVENTION OF WEST VIRGINIA 831. In so doing, the two sections promote equal treatment and forestall special treatment favoring or disadvantaging particular groups and locales. In modern lingo, the sections limit the effects of special interest lobbying. As alleged in the amended complaint at ¶ 14, JA at 9, § 5B-1-9 flaunts those purposes because it is a product written by and for one particular developer and is framed in such narrow ("special") terms that its purpose to bestow benefits on that particular developer is patent.

Concededly, courts have been deferential to the Legislature in applying §§ 39 and 39a. Legislatures could not function without the ability to classify. Indeed, § 39a itself requires the

Legislature to classify cities into two to five classes based on their population. *See* W. Va. Code § 8-1-3. Yet, there *are* limits. A court must determine "whether the basis of the classification is natural, reasonable and appropriate to the object sought to accomplished." *Hanks, supra*, 157 W. Va. at 358, 201 S.E.2d at 308; *accord, City of Charleston v. Bosely*, 165 W. Va. 332, 340, 268 S.E.2d 590, 595 (1980). Restricting tourism development to five towns under 2,000 – and no other sites – is on its face absurd, but *Bosely* renders its unconstitutionality unmistakable. That case addressed the validity under § 39 of a law authorizing Class I cities – and no others – to impose a tax on hotel occupancy. The Court's opinion voiding the law as special legislation decides this case.

The Court's task here is precisely the same as the Court's in *Bosely*:

> What we must determine [is] whether the legislative classification restricting the authority to tax hotel occupancy to Class I cities is natural and reasonable and is appropriate to the purpose of the statute, which is to promote tourism and to provide for economic development[.]

165 W. Va. at 340, 268 S.E.2d at 595. The classification did not meet that standard; the Court could "see no rational reason to restrict the benefits of the tax to the State's only Class I cities, Charleston and Huntington." 165 W. Va. at 341, 268 S.E.2d at 596. Other communities in the State could benefit as well:

> "It cannot be that municipal growth and development are of particular interest only to cities with populations of 50,000 or more. It is in the interest of every community, perhaps more so in the case of our smaller municipalities, to stimulate economic growth.[2]

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[2]The respondents seized on that reference to smaller municipalities possibly having a somewhat greater need for economic stimuli as a rationale for limiting TDDs to Class IV towns. Defendants' Memorandum at 15, JA at 43. Hardly. The statement is not only qualified ("perhaps"), but provides no justification for excluding *all* but five towns under 2,000 from TDD eligibility, including nearly all "smaller municipalities," which would not be limited to those under 2,000. Moreover, the statement was made in passing as speculation without any attempt to

> . . . The promotion of tourism and the development of civic facilities to stimulate community growth are statewide concerns. The legislature acts arbitrarily and unreasonably in providing a mechanism to local governments if it excludes a single municipality on the basis of population. . . . This is the fundamental meaning of W. Va. Const. Art. 6, § 39.

165 W. Va. at 341-42, 268 S.E.2d at 596; *accord, Hanks, supra*, 157 W. Va. at 358, 201 S.E.2d at 309 (legislative exemption of counties with more than 100,000 residents from statutory obligation to maintain certain minimum courthouse hours "bears no reasonable relationship to the purpose" of providing citizens with access to courthouse offices).

The only viable explanation for § 5B-1-9's classification scheme is that its drafter (SWaN) sought to avoid the political backlash that would have accompanied carving out islands of immunity from municipal regulation in all cities across the State. That fact combined with the absence of any legitimate explanation for this classification leads to the same inference that the *Bosely* Court drew: "The conclusion that the discriminatory scheme embodied in the [statute] resulted from lobbying by special interest is nearly inescapable." 165 W. Va. at 342 n.2, 268 S.E.2d at 596 n.2. The sheer breadth of the immunity granted to a TDD combined with its focus on such a narrow class of cities (statutorily five, realistically one) bespeaks a suspect statutory purpose. *See, e.g., Romer v. Evans*, 517 U.S. 620, 632 (1996).

Finally, the fact that the statute defines the targeted class in general terms – "towns under 2,000" (though not more than five of them) – does not make the law a general law. As *Bosely* held, "We simply cannot turn from this veiled attempt at special interest legislation. Courts should never condone irrational legislative classifications which set big city people above small town people or for that matter, urban people above country people." 165 W. Va. at 343-44.

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provide citation or support for it.

(Certainly, the reverse also applies.) That is, courts must look at the reality of the legislative scheme. *Id.*; *accord, Hanks*, 157 W. Va. at 354, 201 S.E.2d at 306, *citing Groves v. County Court of Grant County*, 42 W. Va. 587, 593, 26 S.E. 460, 462 (1896): "This is classification run mad. Why not say all counties of the state named 'Grant'?" Indeed, why not just say $25 million+ projects in all towns named "Harpers Ferry" to define a "Tourism Development District"?

III. WEST VIRGINIA CODE § 5B-1-9 CREATES AN ARBITRARY AND IRRATIONAL CLASSIFICATION THAT VIOLATES THE EQUAL PROTECTION PRINCIPLES EMBODIED IN ARTICLE III, § 10 OF THE WEST VIRGINIA CONSTITUTION.

The equal protection principles applicable to determining the validity of § 5B-1-9 are straightforward. The Court must inquire "whether the classification is a rational one based on social, economic, historic or geographic factors" and "whether it bears a reasonable relationship to a proper governmental purpose." *E.g.*, *Whitlow v. Board of Education of Kanawha County*, Syl. Pt. 2, 190 W. Va. 223, 438 S.E.2d 15 (1993); *Gibson v. West Virginia Department of Highways*, Syl Pt. 4, 185 W. Va. 214, 406 S.E.2d 440 (1991). Part II has already demonstrated that § 5B-1-9's classification restricting TDDs to five towns under 2,000 bears no reasonable relationship to the purported goal of promoting tourism in the State. And what's the point of the $25 million minimum? Suffice it to say that the principles of equality and fundamental fairness cannot abide singling out a particular small town in the State for dismantling its regulatory powers *and* for precluding it (and only it) from using the home rule options provided by West Virginia Code § 8-1-5a. (Harpers Ferry has been designated as a Home Rule City under the provisions of that section.) Merely stating the effects of § 5B-1-9 lays bare its arbitrariness. The section violates Article III, § 10 as well as Article VI, §§ 39 and 39a.

IV. BY DEPRIVING HARPERS FERRY RESIDENTS OF THE POLITICAL CAPACITY TO REGULATE AND CONTROL A SIGNIFICANT PORTION OF THE TOWN AND TRANSFERRING DOMINION OVER THAT DISTRICT TO A PRIVATE ENTITY, WEST VIRGINIA CODE § 5B-1-9 CONTRAVENES PETITIONERS' RIGHTS GUARANTEED TO THEM BY ARTICLE III, §§ 1 AND 3 AND ARTICLE IV, § 1 OF THE WEST VIRGINIA CONSTITUTION.

There are, to be sure, few precedents that provide guidance in measuring the limits of the State's ability to wrest away from local citizens and governments the scope of regulatory authority that § 5B-1-9 accomplishes. That is undoubtedly because that section is virtually unprecedented in its intrusion into local matters.[3] The West Virginia Constitution, however, does provide the petitioners with protection.

Article III, § 1 establishes that individuals "have certain inherent rights" embracing "the enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety." Article III, § 3 further provides that "Government is instituted for the common benefit, protection and security of the people, nation or community. Of all its various forms [the best] is capable of producing the greatest degree of happiness and safety." Grounded in the natural law writings of John Locke and the Virginia Declaration of Rights written by George Mason, BASTRESS, *supra*, at 53-55, 58-59, these sections entitle individuals to, *inter alia*, safety and security in, and the enjoyment of, their community. Interpreting those provisions, the Supreme Court has held that the term "safety . . . conveys

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[3]The only possible analogous case of which the plaintiffs are aware is *Booten v. Pinson*, 77 W. Va. 412, 89 S.E. 985 (1915), which sustained a statute that wiped out the city council of Williamson and replaced it with a new one to be appointed by the Governor. *Booten*, however, was unquestionably superseded by the Home Rule Amendment of 1936, Article VI, § 39a and its requirement that the Legislature may regulate municipalities only by general laws. The case also had a strong dissent by Justice Poffenbarger, who outlined a right to local rule, which was later vindicated in large measure by the enactment of § 39a.

protection from harm." *Women's Health Center v. Panepinto*, 191 W. Va. 436, 443-44, 446 S.E.2d 658, 665-66 (1993) (denying Medicaid funds for abortions for indigent women "necessarily impinge[s] on the health and safety of indigent women" by effectively coercing them "to have children which they might otherwise choose not to bear");[4] *accord*, *State v. Workman*, 35 W. Va. 367, 14 S.E.9 (1891) (section 1 required a defense to a charge of carrying a concealed weapon for a defendant to prove he or she was in jeopardy of serious harm and carried the weapon for protection).

As alleged in ¶'s 19-20 of the amended complaint, JA at 9, SWaN's TDD site contains dangerous materials, yet § 5B-1-9 precludes the town from not only acting to prevent serious harm but also from even gathering the facts to determine the nature and degree of the risks. The provision's subsection (c)(1) precludes the town from enacting any regulation limiting "in any way" (among other things) the "construction, equipping, development, expansion, and operation" of the TDD, while (c)(2) prevents the town from "imposing or enforcing local laws and ordinances concerning the . . . regulation of any [TDD]." Further, under subsection (l), the town cannot enforce permitting, inspection, or building code provisions against SWaN. To the same effect are the law's implementing regulations. W.V.C.S.R. § 145-16-13. The statute completely disarms the citizens of Harpers Ferry from ensuring the safety of their community and impairs right to the enjoyment of the beauty and heritage that Harpers Ferry offers. The resulting affronts to Article III, §§ 1 and 3 are patent.

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[4]The 2018 amendment adding Article VI, § 57 to the Constitution overruled the specific holding of *Panepinto* regarding the obligation to fund abortions but it did not affect the decision's interpretation of Article III, §§ 1 and 3's guarantees of safety and security in the community.

The circuit court's responses to these points were that the statute and its regulations have shifted oversight from the municipal level to the state level and that state regulation is achieved through the TDD Agreement required by W.V.C.S.R. § 145-16-9.2. Trial Court Order at 3 (¶ 10) and 14 (¶ 38), JA at 207 and 218. Assuming, without conceding, that the State can do that to a particular municipality (or five of them),[5] determining whether the TDD Agreement provides an adequate regulatory scheme for protecting the safety, security, and enjoyment of Harpers Ferry residents (or even if the Agreement exists) must await discovery and factual development. Nor is there any basis at this procedural juncture for measuring the adequacy of the State's enforcement mechanisms and performance. Standing alone, § 145-16-9.2 does not meet constitutional standards for protecting Harpers Ferry residents. The regulation does not, for example, deal with the presence and disposal of hazardous materials, a matter of pressing importance to those who live in Harpers Ferry. Amended Complaint ¶'s 19-20, JA at 23-24. The regulation refers to compliance with state law regarding historic preservation and viewshed but makes no allowance for public access and fails to accommodate particularized local concerns. The regulation mentions – but prescribes no significant standards for – land use planning, noise levels, and lighting. Of course, the scope of regulation regarding all of these subjects that is agreed to between SWaN and the defendants could be vastly different from preexisting Harpers Ferry

[5]Although the federal constitution places no restraints (other than general equal protection principles, *e.g.*,*Gomillion v. Lightfoot*, 364 U.S. 339 (1960)) on a state's authority to fashion and refashion its local governments, *e.g., Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907), the West Virginia Constitution does. Among other things and as noted above, Article VI, § 39a prohibits the State from using special or local laws to regulate its cities.

ordinances[6] and from the best interests of the town as seen by local residents. Again, there is much factual development that needs to be done.

Finally, by exempting SWaN from municipal regulation, § 5B-1-9 substantially dilutes the plaintiffs' right to vote in municipal elections, as guaranteed to them by Article IV, § 1 of the West Virginia Constitution. Petitioners, of course, can still vote in city elections, but the TDD Act seriously diminishes the effectiveness of that vote by removing from the elected municipal officials the ability to control and regulate significant and important property within their town. As to that parcel, town officials are rendered mere bystanders. The Act thus seriously dilutes the impact of the plaintiffs' votes in municipal elections, a consequence that requires as rigorous a judicial scrutiny as a vote denial. *E.g., Reynolds v. Sims*, 377 U.S. 533 (1964) (equal protection requires a vote of equal weight in state elections); *accord, Avery v. Midland County*, 390 U.S. 474 (1968) (one-person-one-vote principles apply to vote dilution cases in local government elections).

CONCLUSION

Based on the foregoing, this Court should reverse the decision of the circuit court and remand this case to allow it to proceed to trial.

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[6]Harpers Ferry had a comprehensive regulatory scheme relating to the site upon which SWaN intends to construct its hotel and to its surrounding neighborhood. *See* Harpers Ferry Ordinances, Article 1313, "Promontory District," attached as Exhibit A to Plaintiffs' Memorandum in Response to Motion to Dismiss, JA at 153-66. The TDD Act now displaces the Town's efforts.

Robert M. Bastress, Jr. (ID # 263)
P.O. Box 1295
Morgantown, W. Va. 26507-1295
(304) 319-0860
rmbastress@gmail.com

Counsel for Petitioners

CERTIFICATE OF SERVICE

I have served a copy of the foregoing Brief on respondents' counsel, Sean M. Whelan and Mark S. Weiler, Assistant Attorneys General, Room 26E, State Capitol, Charleston, W. Va. 25305, this the 28th day of July, 2023.