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**THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

Jefferson County Foundation, Inc.,  
Plaintiff Below, Petitioner

vs.) No. 21-0235

FILE COPY

West Virginia Economic  
Development Authority, and  
Roxul USA, d/b/a Rockwool,  
Defendants Below, Respondents

**BRIEF OF RESPONDENT  
WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY**

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## TABLE OF CONTENTS

ASSIGNMENTS OF ERROR.....	1
STATEMENT OF THE CASE.....	2
I.    Introduction.....	2
II.   Relevant Facts.....	3
A.   The Parties & the <i>West Virginia Economic             Development Authority Act</i> .....	3
B.   The WVEDA’s Resolution.....	5
C.   JCF’s Complaint.....	6
III.  Procedural History .....	8
A.   ROCKWOOL’s and the WVEDA’s Motions to Dismiss .....	8
B.   The Business Court’s Dismissal Orders.....	9
SUMMARY OF ARGUMENT.....	12
STATEMENT OF ORAL ARGUMENT AND DECISION.....	15
STANDARD OF REVIEW.....	15
ARGUMENT .....	16
THIS COURT SHOULD AFFIRM THE DISMISSAL OF JCF’S COMPLAINT AS BEING NON-JUSTICIABLE BECAUSE THE FINANCING ARRANGEMENT AND TAX EXEMPTION AT ISSUE ARE LEGISLATIVELY AUTHORIZED AND DO NOT VIOLATE THE CONSTITUTION’S            UNIFORM            TAXATION REQUIREMENT.....	16
I.    The Business Court correctly concluded that JCF’s Complaint raises nonjusticiable political questions about legislative tax and economic development policy.....	16

II.	This Court should affirm the dismissal of the Complaint for the separate reason that JCF lacks standing.....	18
III.	The Business Court correctly concluded that the <i>WVEDA Act</i> expressly authorizes the financing arrangement contemplated in the WVEDA’s Resolution.....	24
IV.	The Business Court correctly concluded that the WVEDA’s specific tax exemption will apply to the Project property and accords with West Virginia’s general <i>Taxation Act</i> .....	26
V.	The Business Court correctly concluded that the financing arrangement and tax exemption will not violate the equal and uniform taxation requirement of W. Va. Const. art. X, § 1.....	29
VI.	JCF misstates the record in contending the Business Court did not resolve the Complaint’s deficient Count II. ....	35
VII.	The Chief Justice did not err in referring this case to the Business Court Division. ....	36
CONCLUSION .....		39

## TABLE OF AUTHORITIES

### Constitutional Provisions

W. Va. Const. art. X, § 1 .....*passim*

### Cases

<i>Appalachian Power Co. v. State Tax Dep't of W. Va.</i> , 195 W. Va. 573, 466 S.E.2d 424 (1995).....	17
<i>Baker v. Carr</i> , 369 U.S. 186 (1962).....	18
<i>Barber v. Camden Clark Memorial Hosp. Corp.</i> , 240 W. Va. 663, 815 S.E.2d 474 (2018).....	28, 29
<i>Cogar v. Sommerville</i> , 180 W. Va. 714, 379 S.E.2d 764 (1989).....	36
<i>DaimlerChrysler Corp. v. Cuno</i> , 547 U.S. 332 (2006).....	20, 21, 23
<i>Great A &amp; P Tea Co., Inc. v. Davis</i> , 167 W. Va. 53, 278 S.E.2d 352 (1981).....	31
<i>Hinkle v. Bauer Lumber &amp; Home Bldg. Center, Inc.</i> , 158 W. Va. 492, 211 S.E.2d 705 (W. Va. 1975).....	24
<i>Huffman v. Goals Coal Co.</i> , 223 W. Va. 724, 679 S.E.2d 323 (2009).....	17
<i>In re Kanawha Valley Bank</i> , 144 W. Va. 346, 109 S.E.2d 649 (1959).....	30
<i>In re Northview Services, Inc.</i> , 183 W. Va. 683, 398 S.E.2d 165 (1990).....	30
<i>Killen v. Logan County Comm'n</i> , 170 W. Va. 602, 295 S.E.2d 689 (1982).....	17

<i>Maplewood Community, Inc. v. Craig</i> , 216 W. Va. 273, 607 S.E.2d 379 (2004).....	31
<i>Monongahela Power Co. v. Buzminsky</i> , 243 W. Va. 686, 850 S.E.2d 685 (2020).....	15
<i>Morrissey v. W. Va. AFL-CIO</i> , 239 W. Va. 633, 804 S.E.2d 883 (2017).....	17
<i>Mountaineer Fire &amp; Rescue Equip., LLC v. City Nat. Bank of W. Va.</i> , 244 W. Va. 508, 854 S.E.2d 870 (2020).....	15
<i>Musick v. University Park at Evansdale, LLC</i> , 241 W. Va. 194, 820 S.E.2d 901 (2018).....	31, 32
<i>State ex rel. Abraham Linc Corp. v. Bedell</i> , 216 W. Va. 99, 602 S.E.2d 542 (2004).....	19
<i>State ex rel. County Court of Marion County v. Demus</i> , 148 W. Va. 398, 135 S.E.2d 352 (1964).....	<i>passim</i>
<i>State ex rel. Healthport Technologies, LLC v. Stucky</i> , 239 W. Va. 239, 800 S.E.2d 506 (2017).....	14, 19, 22
<i>State ex rel. Leung v. Sanders</i> , 213 W. Va. 569, 584 S.E.2d 203 (2003).....	18
<i>State ex rel. Maloney v. McCartney</i> , 159 W. Va. 513, 223 S.E.2d 607 (1976).....	16
<i>State ex rel. Paul B. Hill</i> , 201 W. Va. 248, 496 S.E.2d 198 (1997).....	24
<i>Tug Valley Recovery Center Inc. v. Mingo County Comm’n</i> , 164 W. Va. 94, 261 S.E.2d 165 (1979).....	22
<i>Univ. Park at Evansdale, LLC v. Musick</i> , 238 W. Va. 106, 792 S.E.2d 605 (2016).....	31
<i>W. Va. Inv. Mgmt. Bd. v. Variable Annuity Life Ins. Co.</i> , 234 W. Va. 469, 766 S.E.2d 416 (2014).....	37

**Statutes**

W. Va. Code § 11-3-1..... 22, 31

W. Va. Code § 11-3-9.....*passim*

W. Va. Code § 11-3-9(a)(2) ..... 4, 13, 27, 32

W. Va. Code § 11-3-9(a)(3) ..... 28

W. Va. Code § 11-3-9(a)(30) .....*passim*

W. Va. Code § 11-3-24 ..... 32

W. Va. Code § 11-3-24a(a) ..... 31

W. Va. Code § 11-3-24a(b)..... 31

W. Va. Code § 11-3-24a(c) ..... 31

W. Va. Code § 31-15-2..... 3

W. Va. Code § 31-15-3..... 3

W. Va. Code § 31-15-5(a)..... 3, 28

W. Va. Code § 31-15-6..... 3, 5, 9

W. Va. Code § 31-15-6(ee) ..... 4, 25

W. Va. Code § 31-15-6(h)..... 4

W. Va. Code § 31-15-6(i)..... 4

W. Va. Code § 31-15-6(j)..... 4, 25

W. Va. Code § 31-15-6(u)..... 4

W. Va. Code § 31-15-6(x)..... 4, 25

W. Va. Code § 31-15-7..... 7

W. Va. Code § 31-15-10(d)..... 6

W. Va. Code § 31-15-17 .....*passim*

W. Va. Code § 31-15-33 .....	3, 24, 29
W. Va. Code § 51-2-15 .....	37, 39

**Other Authorities**

Cleckley, Davis & Palmer, <i>Litigation Handbook</i> (JURIS, 4th ed.).....	19
Robert M. Bastress, Jr., <i>The West Virginia State Constitution 287</i> (G. Alan Tarr ed.) Oxford, 2d ed. (2016).....	34
Webster’s II New College Dictionary 104 (3rd ed. 2005).....	28
Webster’s II New College Dictionary 42 (3rd ed. 2005).....	37

**Rules**

W. Va. R. Civ. P. 12(b)(1).....	39
W. Va. R. Civ. P. 12(b)(6).....	1, 39
W. Va. T.C.R. 29.01 .....	36, 37
W. Va. T.C.R. 29.04(a)(1)–(2) .....	38
W. Va. T.C.R. 29.04(a)(3).....	38
W. Va. T.C.R. 29.06(a)(4).....	36
W. Va. T.C.R. 29.06(c)(3).....	36
W. Va. T.C.R. 29.09(g) .....	38

## ASSIGNMENTS OF ERROR

Did the Business Court correctly dismiss the Jefferson County Foundation, Inc.'s ("JCF") Complaint challenging the constitutionality of a tax exemption that will apply to property the West Virginia Economic Development Authority ("WVEDA") will acquire in financing a manufacturing project, where:

- The Complaint poses nonjusticiable political questions about legislative tax and economic development policy;
- The *West Virginia Economic Development Authority Act* specifically authorizes the financing arrangement and tax exemption at issue;
- The tax exemption is in harmony with exemptions in West Virginia's separate *Taxation Act*;
- The tax exemption does not violate the uniform taxation requirement of W. Va. Const. art. X, § 1 because, among other things, that constitutional provision authorizes the Legislature to exempt public property from taxation; and
- Controlling precedent of this Court in *Demus*<sup>1</sup> recognizes that a virtually identical financing arrangement and tax exemption does not violate the Constitution's uniform taxation requirement?

Respondent WVEDA demonstrates herein that the Business Court correctly dismissed the Complaint as being nonjusticiable, pursuant to W. Va. R. Civ. P. 12(b)(6). This Court should affirm the judgment.

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<sup>1</sup> *State ex rel. County Court of Marion County v. Demus*, 148 W. Va. 398, 135 S.E.2d 352 (1964).

## STATEMENT OF THE CASE

### I. Introduction

Petitioner JCF's lawsuit stems from a Resolution the WVEDA adopted on May 2, 2019. JA 44. In the Resolution—which is detailed below—the WVEDA invokes its statutory powers to finance and acquire ownership of a commercial and industrial manufacturing facility (and related equipment) in Jefferson County, West Virginia (hereinafter, the “ROCKWOOL Project” or “Project”). The Project has been constructed and soon will be operated by the WVEDA's co-Respondent herein, Roxul USA, Inc. d/b/a ROCKWOOL (“ROCKWOOL”).

JCF's Complaint against the WVEDA and ROCKWOOL contests the reasonableness and constitutionality of a tax exemption that will apply to the ROCKWOOL Project's financing arrangement. JA 23-28. The tax exemption is codified in the *West Virginia Economic Development Authority Act* (the “*WVEDA Act*”). *See* W. Va. Code § 31-15-17. Section 31-15-17 of the *WVEDA Act* will exempt from taxation the property the WVEDA will acquire in financing the Project. As this Court recognized fifty-seven years ago in the strikingly similar *Demus* case, the Constitution of West Virginia permits the Legislature to exempt public property from taxation regardless of use. *Demus*, 148 W. Va. at 404-06, 135 S.E.2d at 357-58; *see also* W. Va. Const. art. X, § 1. JCF does not allege cognizable claims under the Constitution.

## II. Relevant Facts

### A. The Parties & the *West Virginia Economic Development Authority Act*

Respondent WVEDA is “a public corporation and government instrumentality” of the State of West Virginia. W. Va. Code § 31-15-5(a). It is enabled and governed by the *WVEDA Act* of Chapter 31, Article 15 of the West Virginia Code. The West Virginia Legislature directs that the provisions of the *WVEDA Act* “are remedial and shall be liberally construed and applied” to promote the public purposes of the WVEDA. *Id.* at § 31-15-33.

By legislative design, the WVEDA combats unemployment and the lack of business opportunities in this State by stimulating and promoting “commerce, tourism, industry and manufacturing.” *Id.* at §§ 31-15-2, -3. More specifically, the Legislature charges the WVEDA with, among other things, assisting in locating new businesses and industries to West Virginia; advancing commercial and manufacturing developments; and furnishing “money and credit” to promote and financially support new enterprises and projects. *Id.* at § 31-15-3.

Importantly, the *WVEDA Act* sets forth express and unambiguous powers the WVEDA may exercise in satisfying the Legislature’s mandate to promote and facilitate private economic development projects that serve the public purposes of creating jobs and stimulating commerce. *See generally id.* at § 31-15-6. Among other things, the Legislature empowers the WVEDA to issue revenue

bonds to facilitate economic development projects; exchange revenue bonds for projects; finance projects through loans; acquire and operate projects; acquire real and personal property; and lease property. *Id.* at §§ 31-15-6(h), -6(i), -6(j), -6(u), -6(x), -6(ee).

In addition, the Legislature vests the WVEDA with a specific “Exemption from taxation” in the *WVEDA Act*. *Id.* at § 31-15-17. Section 31-15-17 expresses the Legislature’s tax policy determination that the WVEDA is exempt from paying taxes on property it acquires or uses in financing projects under the *WVEDA Act*. *Id.* This WVEDA-specific tax exemption accords with West Virginia’s more general *Taxation Act*, which contains a “catch-all” provision exempting from taxation “[a]ny other property . . . exempted by any other provision of law.” W. Va. Code § 11-3-9(a)(30). The *Taxation Act* also contains a provision exempting from taxation “[p]roperty belonging exclusively to the state.” *Id.* at § 11-3-9(a)(2).

Respondent ROCKWOOL is a Delaware corporation. JA 24 at ¶ 5. ROCKWOOL manufactures stone wool insulation and offers insulation products for the retail, commercial, and industrial markets. *Id.* It has constructed and will operate the ROCKWOOL Project.

Petitioner JCF is a West Virginia 501(c)(3) nonprofit corporation located in Jefferson County. JA 23 at ¶ 1. It “educates and advocates for effective and accountable government, sustainable development, and the protection of health, heritage, and the environment.” JA 24 at ¶ 2.

**B. The WVEDA’s Resolution**

On May 2, 2019, the WVEDA invoked its powers under the *WVEDA Act’s* § 31-15-6 and adopted the Resolution under challenge. JA 44. The Resolution authorizes the WVEDA to issue not more than \$150,000,000 in revenue bonds to finance the ROCKWOOL Project. JA 44-45.

The Resolution contemplates ROCKWOOL conveying its interests in the Project property (the manufacturing facility and equipment) to the WVEDA in exchange for the bonds. JA 26 at ¶¶ 16-18; *see also* JA 44-45. The WVEDA then will lease the Project property back to ROCKWOOL. *Id.* ROCKWOOL’s lease payments to the WVEDA will service the debt on the bonds authorized in the Resolution. JA 45 at ¶ 4.

This financing arrangement will vest the WVEDA with absolute ownership of the Project property. JA 44 at 3rd WHEREAS; *see also* JA 45 at ¶ 4. Conversely, the arrangement will give ROCKWOOL a leasehold estate in the Project property for the term of the lease proposed in the Resolution. *Id.* When the

revenue bonds are paid-off at the conclusion of the lease, ROCKWOOL will have the option to purchase the Project property from the WVEDA for \$1. JA 45 at ¶ 4.

As of the filing of this brief, the WVEDA has not issued the bonds, and the sale-leaseback transaction has not been consummated. JA 6. When it does occur, the ROCKWOOL Project is expected to create “a minimum of 120 full-time equivalent jobs” and “provide for future potential employment opportunities.” JA 44 at 2nd WHEREAS. The Resolution contains a finding by the WVEDA that the Project “promotes economic development” and other public purposes of the *WVEDA Act*. JA 45 at ¶ 1; *see also* W. Va. Code § 31-15-10(d) (providing WVEDA’s findings as to public purpose of actions taken shall be conclusive in suits challenging validity of bonds issued).

### **C. JCF’s Complaint**

On April 17, 2020, almost one year after the WVEDA adopted the Resolution, JCF filed its Complaint for Declaratory Judgment (“Complaint”) against the WVEDA and ROCKWOOL in the Circuit Court of Kanawha County, West Virginia. JA 23. The action was referred to the Business Court Division on December 4, 2020, by Administrative Order of the Chief Justice of this Court, following joint motion by ROCKWOOL and the WVEDA, and briefing by the parties and Circuit Judge Kaufman. JA 351, 295-350.

Count I of the Complaint seeks a declaratory judgment voiding the Resolution, alleging it violates the equal and uniform taxation clause in W. Va. Const. art. X, § 1. JA 26-28 at ¶¶ 21-24 and at Relief Sought, ¶¶ A, B. This “uniformity claim” is premised on JCF’s contention that ROCKWOOL “will not have to pay the same real and personal property taxes at the same rates as are assessed and levied against all other Jefferson County citizens and businesses” because the Project property is being acquired by the WVEDA and “will be exempt from ad valorem taxation.” JA 26 at ¶ 20. The claim also alleges that the WVEDA’s § 31-15-17 tax exemption is not one of the “authorized articulated exceptions from ad valorem taxation” in § 11-3-9 of the separate *Taxation Act*. JA 26-27 at ¶ 26.

Count II of the Complaint seeks a declaration that the powers the Legislature has conferred on the WVEDA in the *WVEDA Act’s* W. Va. Code § 31-15-7 are “vague, overly broad, irrational, and unreasonable,” and likewise violate W. Va. Const. art. X, § 1. JA 27-28 at ¶¶ 25-29 and at Relief Sought, ¶ C.

JCF, however, has advised that Count II’s citation to § 31-15-7 is a typographical error. *See* JA 138 at n.4. Count II is intended to challenge the reasonableness and constitutionality of the WVEDA’s tax exemption in § 31-15-17. *Id.* Count II also alleges that § 31-15-17 violates the JCF’s constitutional right to due process. JA 27 at ¶ 26. JCF has abandoned Count II’s vagueness allegation. JA

265 (“The language of the relevant constitutional provision and statutes is clear on its face.”).

### **III. Procedural History**

#### **A. ROCKWOOL’s and the WVEDA’s Motions to Dismiss**

On May 18, 2020, ROCKWOOL filed a Motion to Dismiss the Complaint and supporting Memorandum of Law, pursuant to Rules 12(b)(1) and 12(b)(6) of the *West Virginia Rules of Civil Procedure*. JA 49, 51. ROCKWOOL’s Motion to Dismiss argues that (1) JCF’s claims are not ripe because the sale-leaseback transaction has not been completed; (2) JCF has failed to exhaust its remedies before the Jefferson County Board of Equalization and Review; (3) JCF lacks standing; (4) JCF’s claims pose non-justiciable political questions; and (5) JCF has failed to state a claim for any constitutional violations. JA 50-51.

On June 9, 2020, the WVEDA filed a separate Motion to Dismiss the Complaint and supporting Memorandum of Law, also pursuant to Rules 12(b)(1) and 12(b)(6). JA 247, 249. In addition to adopting the arguments asserted in ROCKWOOL’s Motion to Dismiss, the WVEDA’s Motion argues that (1) the WVEDA’s legislatively-granted powers and tax exemption are clear and justified for the public purposes of combating unemployment and stimulating commerce; (2) JCF’s contention that the WVEDA’s powers and tax exemption are “vague, overly broad, irrational and unreasonable” is a generalized grievance for the Legislature,

not a justiciable claim at law; and (3) JCF has failed to state a viable uniformity claim under W. Va. Const. art. X, § 1 because the financing arrangement for the Project is authorized by the Legislature and will not give rise to “unequal taxation.” JA 247-48.

JCF filed a Response to ROCKWOOL’s Motion to Dismiss on June 1, 2020. JA 127. ROCKWOOL filed a Reply on June 10, 2020. JA 147. JCF filed a Response to the WVEDA’s Motion to Dismiss on January 29, 2021. JA 264. The WVEDA filed a Reply on February 5, 2021. JA 283.

#### **B. The Business Court’s Dismissal Orders**

The Business Court directed the parties to file proposed orders as part of its review and assessment of the briefing associated with the Motions to Dismiss and the arguments and authorities cited by counsel. JA 352, 376, 391. On February 24, 2021, the Business Court entered an Order granting the WVEDA’s Motion to Dismiss and a separate Order granting ROCKWOOL’s Motion to Dismiss, both pursuant to Rule 12(b)(6). JA 2, 13. The Dismissal Orders are identical in most material respects.

In the Dismissal Orders, the Business Court first concludes as a matter of law that the financing arrangement contemplated in the WVEDA’s Resolution “is specifically authorized by the Legislature” in the *WVEDA Act*. JA 6-7, 17 (*citing* WVEDA’s express powers under W. Va. Code § 31-15-6 to assist projects; issue

bonds in exchange for projects; make contracts; acquire title to property; and issue bonds to finance projects). Second, the Business Court observes that “the ROCKWOOL project promotes economic development and serves the public purposes for which the Legislature established the WVEDA.” JA 7, 18.

Third, the Business Court notes that the Legislature granted the WVEDA “an express exemption from taxation” in W. Va. Code § 31-15-17 for any property it acquires or uses in financing projects under the *WVEDA Act*. JA 8, 18-19. The Business Court concludes that the Project property being acquired by the WVEDA falls squarely within the scope of this tax exemption. JA 8, 10, 19. Fourth, the Business Court concludes that the WVEDA’s tax exemption in § 31-15-17 is entirely consistent with the “catch-all” tax exemption in § 11-3-9(a)(30) of the separate *Taxation Act*. JA 8-9, 18-19. To reiterate, § 11-3-9(a)(30) exempts from taxation “any other property . . . exempted by any other provision of law.” W. Va. Code § 11-3-9(a)(30).

Significantly, the Business Court next observes in the Orders that JCF’s Complaint is, essentially, a challenge to the Legislature’s policy determination to exempt WVEDA-financed projects from taxation. *See, e.g.*, JA 10 (“[A] review of the Complaint makes it clear that the Plaintiff asserts that the sale-leaseback is something the law blesses when it should not.”). As the Business Court correctly recognizes:

It is not for this Court to decide whether the Legislature was right to authorize the WVEDA to take ownership and lease back property to private entities like ROCKWOOL. This judgment was made by the Legislature when it adopted the statutory scheme that created and empowered the WVEDA. To the extent [JCF] disagrees with that tax policy determination, and if [JCF] believes that the WVEDA has used its powers in a way that creates a sham on West Virginia citizens, it must petition the Legislature to correct it. However, this Court is barred from doing so under the political question doctrine and must dismiss the Complaint.

JA 10, 20. The Business Court further observes that, if JCF has grievances about the “considerable authority” the Legislature gave to the WVEDA to promote economic development, “the proper remedy” is not at law but “for [JCF] to petition the Legislature to change such authority.” JA 9-10, 20.

Finally, the Business Court concludes in the Orders that JCF’s argument that the WVEDA’s tax exemption violates Article X, § 1 of the Constitution “is not persuasive.” JA 10, 21. The Business Court notes that the Constitution permits the Legislature to exempt property [such as “public property”] from taxation. JA 5. Additionally, the Business Court cites controlling precedent of this Court and observes that the WVEDA’s freehold interests in the ROCKWOOL Project property and ROCKWOOL’s leasehold interests will be treated, for tax purposes, in the same manner as like species of property. JA 10-12, 21-22. In these circumstances, there is no violation of the Constitution’s uniform taxation

requirement. The Business Court dispenses with further analysis because of the nonjusticiable nature of the Complaint. JA 12, 22.

Based on these findings and conclusions of law, the Business Court concludes the Orders by granting the WVEDA's and ROCKWOOL's Motions and dismissing JCF's Complaint, with prejudice. *Id.* JCF filed a Notice of Appeal on March 30, 2021. JA 1.

### **SUMMARY OF ARGUMENT**

This Court should affirm the Business Court's Rule 12(b)(6) dismissal of JCF's Complaint. The financing arrangement and tax exemption at issue do not violate the Constitution of West Virginia. The Constitution explicitly provides that, "all . . . public property . . . may by law be exempted from taxation." W. Va. Const. art. X, § 1. The West Virginia Legislature has specifically exempted from taxation "any property acquired or used by" the WVEDA in financing projects under the *WVEDA Act*. W. Va. Code § 31-15-17. It is undisputed that the property the WVEDA plans to acquire from ROCKWOOL in financing the Project will fall directly within the scope of the § 31-15-17 tax exemption.

The § 31-15-17 tax exemption accords with West Virginia's separate *Taxation Act*, in which the Legislature exempts from taxation "[a]ny other property . . . exempted by any other provision of law." W. Va. Code § 11-3-9(a)(30). The

*Taxation Act* therefore recognizes and incorporates by reference the § 31-15-17 tax exemption into the list of exemptions in § 11-3-9.

The *Taxation Act's* tax exemption for “[p]roperty belonging exclusively to the state” arguably applies as well and is in harmony with the WVEDA’s § 31-15-17 tax exemption. *Id.* at § 11-3-9(a)(2). The WVEDA will acquire absolute ownership of the Project property following exchange of the revenue bonds; accordingly, the Project property indeed will belong exclusively to the State of West Virginia.

As the Business Court correctly determined, the Legislature has expressly authorized the financing arrangement for the ROCKWOOL Project in the *WVEDA Act*. JA 6-7, 17. The *WVEDA Act's* § 31-15-6 empowers the WVEDA to, among other things, issue revenue bonds, exchange them for a project, acquire title to property, and lease property. Significantly, this Court has recognized that a virtually identical financing arrangement and tax exemption under the old Industrial Development Bond Act did not violate the equal and uniform taxation requirement of W. Va. Const. art X, § 1. *State ex rel. County Court of Marion County v. Demus*, 148 W. Va. 398, 135 S.E.2d 352 (1964). *Demus* is controlling authority and it alone forecloses the claims advanced in JCF’s Complaint.

In these circumstances, the Business Court correctly concluded that the Complaint poses nonjusticiable political questions about the reasonableness and fairness of the tax and economic development policies codified in the *WVEDA Act*. To the extent JCF believes that these policy determinations are unfair or unreasonable, JCF's remedy is to petition the Legislature. It is not the role of the courts to second-guess the Legislature's decision to vest the WVEDA with broad powers in § 31-15-6 to facilitate economic development. Nor is it the role of the courts to second-guess the constitutionally authorized "Exemption from taxation" in § 31-15-17. The Business Court was correct to dismiss the Complaint on political question grounds, pursuant to Rule 12(b)(6).

Additionally, JCF's lack of standing provides a Rule 12(b)(1) basis for affirming the Business Court's judgment. "Prudential standing" bars courts from adjudicating generalized taxpayer grievances that are more appropriately addressed in the representative branches of government. Even if JCF, itself, could claim taxpayer status, which it cannot, JCF has not shown that the ROCKWOOL Project will cause "concrete and particularized" injuries-in-fact to the citizens and businesses of Jefferson County that are not "conjectural or hypothetical." *See* Syl. Pt. 2, *State ex rel. Healthport Technologies, LLC v. Stucky*, 239 W. Va. 239, 800 S.E.2d 506 (2017).

## STATEMENT OF ORAL ARGUMENT AND DECISION

The WVEDA believes the Business Court's thorough Orders provide substantial grounds and justification for affirming the judgment. JA 2-22. However, to the extent this Court has questions and believes oral argument is necessary, the WVEDA welcomes the opportunity to participate.

### STANDARD OF REVIEW

A circuit court's decision under Rule 12(b)(6) that a complaint fails to state a claim is a ruling of law that this Court reviews *de novo*. Syl. Pt. 1, *Mountaineer Fire & Rescue Equip., LLC v. City Nat. Bank of W. Va.*, 244 W. Va. 508, 854 S.E.2d 870 (2020). Likewise, this Court reviews *de novo* a circuit court's decision under Rule 12(b)(1) to dismiss a complaint for lack of subject matter jurisdiction. *Monongahela Power Co. v. Buzminsky*, 243 W. Va. 686, 850 S.E.2d 685, 688 (2020).

## ARGUMENT

**THIS COURT SHOULD AFFIRM THE DISMISSAL OF JCF'S COMPLAINT AS BEING NON-JUSTICIABLE BECAUSE THE FINANCING ARRANGEMENT AND TAX EXEMPTION AT ISSUE ARE LEGISLATIVELY AUTHORIZED AND DO NOT VIOLATE THE CONSTITUTION'S UNIFORM TAXATION REQUIREMENT.**

- I. **The Business Court correctly concluded that JCF's Complaint raises nonjusticiable political questions about legislative tax and economic development policy.**

The Constitution of West Virginia authorizes the Legislature to exempt "all . . . public property" from taxation. *See* W. Va. Const. art. X, § 1; *see also* Syl. Pt. 1, *State ex rel. Maloney v. McCartney*, 159 W. Va. 513, 223 S.E.2d 607 (1976) ("Where provisions of a constitution are plain and unambiguous they will be applied and not construed."). The Legislature has bestowed a specific tax exemption on "any property acquired or used by" the WVEDA in financing projects under the *WVEDA Act*. *See* W. Va. Code § 31-15-17. The property the WVEDA plans to acquire in financing the ROCKWOOL Project will fall squarely within the § 31-15-17 tax exemption authorized by Article X, § 1 of the Constitution.

JCF's Complaint challenges the fairness and utility of the WVEDA's tax exemption. *See, e.g.*, JA 27 at ¶ 27 (alleging § 31-15-17 "is an attempt to allow for unequal taxation and is a tax sham upon the citizens of the State"). JCF essentially asks the judicial branch to second-guess a tax policy determination made by the Legislature to promote and facilitate economic development.

But as this Court has observed, it “does not sit as a superlegislature, commissioned to pass upon the political, social, economic, or scientific merits of statutes pertaining to proper subjects of legislation. It is the duty of the Legislature to consider facts, establish policy, and embody that policy in legislation. It is the duty of this Court to enforce legislation unless it runs afoul of the State or Federal *Constitutions*.” Syl. Pt. 2., *Huffman v. Goals Coal Co.*, 223 W. Va. 724, 679 S.E.2d 323 (2009) (italics in original).

Indeed, whether a statute or policy is fair or unfair is not a question for the judicial branch. The wisdom, desirability, and fairness of a law are political questions to be resolved in the Legislature. *Morrissey v. W. Va. AFL-CIO*, 239 W. Va. 633, 636, 804 S.E.2d 883, 886 (2017). Courts “should venture into [the] thicket of [second-guessing the Legislature’s taxation policies] only with utmost trepidation and only for a very good reason.” *Appalachian Power Co. v. State Tax Dep’t of W. Va.*, 195 W. Va. 573, 596, 466 S.E.2d 424, 447 (1995). “The issue of taxation is, probably more than any other subject, first and last an issue for the legislature. It is the classic political question into which courts should not intrude themselves.” *Killen v. Logan County Comm’n*, 170 W. Va. 602, 624, 295 S.E.2d 689, 711 (1982) (Neely, J. dissenting).

According to the Supreme Court of the United States, a case involves a political question where there is “a textually demonstrable constitutional

commitment of [an] issue to a coordinate political department.” *Baker v. Carr*, 369 U.S. 186, 217 (1962). The Constitution of West Virginia commits the development and determination of State tax policy to the Legislature, not the courts. W. Va. Const. art. X, § 1.

JCF’s Complaint asks the courts to second-guess legislative tax and economic development policies codified in the *WVEDA Act*. Those policy determinations are intended to serve the public purposes of helping private enterprises create jobs and stimulate commerce. The Complaint’s request for the courts to declare the policies null and void presents a textbook nonjusticiable political question, and the Business Court was entirely correct to dismiss it under Rule 12(b)(6). This Court should affirm the Business Court’s recognition that judicial restraint is required here. JCF’s remedy for challenging the reasonableness and fairness of the *WVEDA*’s broad powers and tax exemption in the *WVEDA Act* is to petition the West Virginia Legislature, not the courts.

**II. This Court should affirm the dismissal of the Complaint for the separate reason that JCF lacks standing.**

JCF’s lack of standing provides a separate Rule 12(b)(1) basis for affirming the Business Court’s dismissal of the Complaint. West Virginia law defines standing as a party’s right to make a claim. *State ex rel. Leung v. Sanders*, 213 W. Va. 569, 578, 584 S.E.2d 203, 212 (2003). Standing is a threshold inquiry

focusing on the appropriateness of a party bringing the questioned controversy to the court. *Id.*

This Court has determined that a party attempting to establish standing must have suffered an “injury-in-fact”—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. *See* Syl. Pt. 2, *State ex rel. Healthport Technologies, LLC v. Stucky*, 239 W. Va. 239, 800 S.E.2d 506 (2017) (holding patient lacked standing to pursue claim against medical care providers for charging excessive fees for copying medical records where patient’s lawyers paid for the records and patient suffered no direct “pocketbook injury”).

Because courts are reluctant to allow parties to litigate the rights of third-parties, the notion of “prudential standing” bars courts from adjudicating generalized grievances that are more appropriately addressed in the representative branches of government. *See State ex rel. Abraham Linc Corp. v. Bedell*, 216 W. Va. 99, 112, 602 S.E.2d 542, 555 n.3 (2004) (Davis, J., concurring); *see also* Cleckley, Davis & Palmer, *Litigation Handbook* (JURIS, 4th ed.) at p. 335 (“[C]ourts should refrain from adjudicating abstract questions of wide public significance which amount to generalized grievances, because a generalized grievance, without any imminent tangible harm, cannot confer standing.”) (internal citations and quotations omitted).

Here, JCF's Complaint is a generalized grievance about legislative tax policy by an entity that has not pleaded that it pays property taxes. *See* JA 24 at ¶ 3 (alleging action brought by JCF Directors, in their capacities as taxpayers and Directors, but failing to allege JCF is, itself, a taxpayer). Succinctly put, JCF's taxpayer Directors disagree with the Legislature's policy determination that the WVEDA "shall not be required to pay any taxes or assessments" on the property it acquires or uses in financing projects under the *WVEDA Act*. JA 26 at ¶ 20. To the extent the three JCF taxpayers disagree with the Legislature's tax policy determination that the WVEDA may help and financially assist private enterprises that create jobs, they should address that generalized grievance to the Legislature, not the courts. The courts' role does not include second-guessing legislative tax and economic development policies.

In *DaimlerChrysler Corp. v. Cuno*, the Supreme Court of the United States held that taxpayer status alone does not confer standing in federal court to challenge the constitutionality of certain state and local tax credits and incentives that the State of Ohio and the City of Toledo used to entice an automobile manufacturer to expand its operations. *See* 547 U.S. 332 (2006). The taxpayers' lawsuit alleged that Ohio's franchise tax credit and Toledo's municipal property tax waiver "diminished the funds available" to the state and the city and imposed a

“disproportionate burden” on the taxpayers that the automobile manufacturer did not shoulder. *Id.* at 339.

The Supreme Court rejected this contention in a 9-0 decision, observing that the taxpayers had not sustained a “concrete and particularized injury.” *Id.* at 344. The Court reasoned that, “it is unclear that tax breaks of the sort at issue here do in fact deplete the treasury: The very point of the tax benefits is to spur economic activity, which in turn increases government revenues.” *Id.* Further, the Supreme Court determined that the taxpayers’ allegations of injury were “conjectural or hypothetical” because they could only speculate on how the Ohio Legislature would respond to a potential loss of tax revenue and its alleged impact on the taxpayers. *Id.* Recognizing that “[s]tate policymakers . . . retain broad discretion to make ‘policy decisions’ concerning state spending ‘in different ways . . . depending on their perceptions of wise state fiscal policy and myriad other circumstances,’” the Court concluded that the taxpayers’ general tax grievances were insufficient to confer standing. *Id.* at 346 (internal citations omitted).

JCF likely will argue that *Cuno* evaluates standing in the federal court context and, consequently, is not applicable here. Although *Cuno* does examine standing through a federal lens, its logic and analysis square with West Virginia law and do bear on the standing issue in the instant case: Generalized grievances about state tax and economic development policy do not give rise to a justiciable

controversy, especially where there is no concrete showing that those policies have caused or will cause “concrete and particularized” injuries that are “not conjectural or hypothetical.” *See Healthport*, 239 W. Va. at Syl. Pt. 2, 800 S.E.2d at Syl. Pt. 2.

JCF also probably will argue that this Court’s decision in *Tug Valley Recovery Center Inc. v. Mingo County Comm’n*, 164 W. Va. 94, 103, 261 S.E.2d 165, 171 (1979) provides a basis for JCF’s standing, as that decision recognizes that, “[e]very person affected by the tax base has a financial interest in seeing that all property in the county is properly taxed.” *See* 164 W. Va. 94, 103, 261 S.E.2d 165, 171 (1979). Any reliance by JCF on *Tug Valley*, however, would be inappropriate. JCF is a 501(c)(3) nonprofit corporation that pays no property taxes; therefore, JCF does not qualify as a “person affected by the tax base” for purposes of the standing inquiry.

But more importantly, *Tug Valley’s* explicit holding is that persons affected by the tax base “have standing to contest the assessment of property in their home counties by way of *statutory appeal after having appeared before the Board of Equalization and Review.*” *Id.* at Syl. Pt. 3 (emphasis added). In the instant case, the Jefferson County Assessor has not had occasion to determine, in the first instance, the “taxability” of the WVEDA’s freehold and personal property estates or ROCKWOOL’s separate leasehold estate. *See* W. Va. Code § 11-3-1. This is

because the WVEDA has yet to acquire the Project property or lease it back to ROCKWOOL.

In sum, the two counts of JCF's Complaint express generalized grievances about the tax exemption the Legislature conferred on the WVEDA to promote economic development projects and combat unemployment. JCF specifically grieves the reasonableness and utility of that tax and economic development *policy determination*. JCF has failed to allege, however, that the policy determination has caused or will cause Jefferson County taxpayers to sustain "concrete and particularized" injuries-in-fact, much less injuries-in-fact that are actual or imminent and not hypothetical. The Complaint's assertion that the WVEDA's tax exemption is "overly broad, irrational and unreasonable" is a generalized grievance about legislative tax policy that is more properly addressed to the representative branches of government, not the courts.

As the Supreme Court of the United States has counseled, it is not the judiciary's role to second-guess executive and legislative tax and spending policies absent concrete and particularized injuries-in-fact premised on more than mere conjecture and speculation about the harm that those policies *may* occasion. *See Cuno*, 547 U.S. at 344-346. The ROCKWOOL Project, in the WVEDA's view, is likely to have an economic impact opposite of that anticipated by JCF, creating

employment opportunities, expanding the tax base, and stimulating commercial activity.

Standing is an element of subject matter jurisdiction that must be established by the plaintiff. *State ex rel. Paul B. Hill*, 201 W. Va. 248, 256, 496 S.E.2d 198, 206 (1997). JCF has failed to do that here. West Virginia law provides that dismissal is appropriate where subject matter jurisdiction is lacking. Syl. Pt. 1, *Hinkle v. Bauer Lumber & Home Bldg. Center, Inc.*, 158 W. Va. 492, 211 S.E.2d 705 (W. Va. 1975). Although the Business Court correctly dismissed the Complaint on political question grounds under Rule 12(b)(6), dismissal also is appropriate for lack of standing under Rule 12(b)(1).

**III. The Business Court correctly concluded that the *WVEDA Act* expressly authorizes the financing arrangement contemplated in the *WVEDA's* Resolution.**

JCF asserts that this Court must construe the *WVEDA Act* “conservatively, not expansively” in assessing whether it authorizes the financing arrangement contemplated in the Resolution. *See* Petitioner’s Brief at p. 9. This is incorrect.

The Legislature directs that the provisions of the *WVEDA Act* “are remedial and shall be liberally construed and applied” to promote the public purposes of the *WVEDA*. *See* W. Va. Code § 31-15-33. These purposes include encouraging and assisting in the location of new business and industry; advancing

private manufacturing developments in this state; and furnishing money to promote or financially assist new projects. *Id.* at § 31-15-3. The provisions of the *Act* that are at issue here must be evaluated with this legislative directive in mind.

Contrary to JCF’s representations to this Court, the *WVEDA Act* expressly empowers the WVEDA to issue revenue bonds in exchange for the Project property. *Id.* at § 31-15-6(j) (authorizing WVEDA “[t]o issue and deliver revenue bonds or notes in exchange for [an economic development] project.”). The *WVEDA Act* also empowers the WVEDA to acquire absolute ownership of the Project property. *Id.* at § 31-15-6(x) (authorizing WVEDA “[t]o acquire . . . any real or personal property, or any right or interest therein, as may be necessary or convenient to carry out the purposes of the [WVEDA].”). Further, the *WVEDA Act* empowers the WVEDA to lease the Project property back to ROCKWOOL. *Id.* at § 31-15-6(ee) (authorizing WVEDA “[t]o . . . lease . . . its property, both real and personal or any right or interest therein to another . . . in such manner and upon such terms as [the WVEDA] deems appropriate.”). Finally, § 31-15-17 of the *WVEDA Act* provides the specific “Exemption from taxation” that will apply to the Project property that the WVEDA plans to acquire.

As the Business Court correctly concluded, the financing arrangement contemplated in the WVEDA’s Resolution “is specifically authorized by the

Legislature” in the *WVEDA Act*. JA 6-7, 17. JCF’s contention to the contrary is incorrect.

**IV. The Business Court correctly concluded that the WVEDA’s specific tax exemption will apply to the Project property and accords with West Virginia’s general *Taxation Act*.**

To reiterate, the Constitution provides that, “all . . . public property . . . may by law be exempted from taxation.” *See* W. Va. Const. art. X, § 1. The Legislature has conferred a specific “Exemption from taxation” on the WVEDA in the *WVEDA Act*. W. Va. Code § 31-15-17. This exemption expressly provides that, “the operation and maintenance of projects financed under [the *WVEDA Act*] will constitute the performance of essential governmental functions,” such that “the [WVEDA] shall not be required to pay any taxes or assessments upon any property acquired or used by the [WVEDA] or upon the income therefrom.” *Id.*

It is undisputed that the ROCKWOOL Project is being “financed under the *WVEDA Act*.” *See also* JA 44 at 1st WHEREAS. Accordingly, the Project property that will be “acquired or used by” the WVEDA as part of the financing arrangement will be exempt from taxation, per the tax policy determination expressed by the Legislature in W. Va. Code § 31-15-17.

Despite this *specific* tax exemption for WVEDA-financed projects, JCF asks this Court to focus instead—and myopically—on the Code’s general property tax exemption statute, § 11-3-9 of the *Taxation Act*. *See* Petitioner’s Brief at p. 13.

JCF characterizes the categories of properties listed in § 11-3-9 as being “exhaustive,” contending the list “does not include real and personal property owned and leased pursuant to the terms of” the Resolution at issue. *Id.* This argument is misleading and flat-out wrong for several reasons.

First, the Constitution does not require the Legislature to set forth all properties that are exempt from taxation in a single statute and § 11-3-9 does not even purport to do so. *See* W. Va. Const. art. X, § 1; *see also* W. Va. Code § 11-3-9. In fact, § 11-3-9 contains a “catch-all” provision acknowledging that it incorporates “[a]ny other property or security exempted by any other provision of law.” W. Va. Code § 11-3-9(a)(30). Accordingly, the WVEDA’s specific tax exemption in § 31-15-17 is incorporated into § 11-3-9’s list of exemptions, per the catch-all provision in § 11-3-9(a)(30). *JCF does not acknowledge the catch-all provision in its Brief.*

Second, the ROCKWOOL Project, if consummated, legally will vest the WVEDA with a freehold estate in the Project property’s real estate and with absolute ownership in Project equipment. In these circumstances, the Project property being acquired by the WVEDA will qualify as “Property belonging exclusively to the state,” and it will be entitled to tax exempt status under the *Taxation Act’s* § 11-3-9(a)(2). Sections 11-3-9(a)(2) and 31-15-17 are complementary provisions of the West Virginia Code and are not at odds. The

WVEDA is “a public corporation and government instrumentality,” *see* W. Va. Code § 31-15-5(a), and its properties do “belong exclusively to the state.” *See* Webster’s II New College Dictionary 104 (3rd ed. 2005) (defining “belong to” as “[t]o be the property . . . of”). When the WVEDA exchanges the revenue bonds for the Project, the Project will “be the property of” the WVEDA; the WVEDA will have a freehold estate or absolute ownership under West Virginia property law.

Third, the WVEDA’s *specific* tax exemption in § 31-15-17 may not be given short shrift. Article X, § 1 of the Constitution invites the § 31-15-17 tax exemption, and West Virginia’s rules of statutory construction *require* this Court to attempt to harmonize §§ 31-15-17 and 11-3-9 because they relate to the same subject matter (property tax exemptions). *See Barber v. Camden Clark Memorial Hosp. Corp.*, 240 W. Va. 663, 670, 815 S.E.2d 474, 481 (2018). It is not difficult for this Court to harmonize §§ 31-15-17 and 11-3-9 considering the “catch-all” provision in 11-3-9(a)(3). And because the financing arrangement will give the WVEDA absolute ownership of the Project property, that property will, in turn, “belong exclusively to the state” as a matter of law. *See* W. Va. Code § 11-3-9(a)(2). Sections 11-3-9 of the *Taxation Act* and 31-15-17 of the *WVEDA Act* are not at odds. They are complementary.

Fourth, the West Virginia rules of statutory construction further provide that if two statutes governing the same subject cannot be reconciled, then the more

specific statute prevails. *Barber*, 240 W. Va. at 670, 815 S.E.2d at 481. In the instant case, § 31-15-17 is the more specific statute governing the taxability of property acquired by the WVEDA in financing a project under the *WVEDA Act*. Section 31-15-17 must “be liberally construed and applied,” pursuant to the Legislature’s explicit directive in the *WVEDA Act*. W. Va. Code § 31-15-33. If this Court cannot reconcile §§ 11-3-9 and 31-15-17, the latter prevails and must be liberally construed and applied to recognize the WVEDA’s tax exemption in the Project property.

But again, the Constitution explicitly provides that the Legislature may by law exempt “all . . . public property” from taxation. W. Va. Const. art. X, § 1. The Legislature has exempted from taxation property “acquired or used by” the WVEDA in financing projects under the *WVEDA Act*. W. Va. Code § 31-15-17. Although § 11-3-9 of the separate *Taxation Act* is complementary, it really is not all that relevant here. Section 31-15-17, standing alone, authorizes the tax exemption that will apply to the WVEDA’s interests in the Project property, and § 31-15-17 was invited by and expressly authorized in Article X, § 1 of the Constitution.

In view of the foregoing points, the Business Court correctly concluded that the § 31-15-17 exemption applies and is in harmony with the non-exhaustive list of exemptions in § 11-3-9 of the separate *Taxation Act*.

**V. The Business Court correctly concluded that the financing arrangement and tax exemption will not violate the equal and uniform taxation requirement of W. Va. Const. art. X, § 1.**

Under the Constitution of West Virginia, “all property both real and personal shall be taxed *except such property as the Legislature may exempt.*” *See* Syl. Pt. 1, *In re Northview Services, Inc.*, 183 W. Va. 683, 398 S.E.2d 165 (1990) (emphasis added). Section 1, Article X of the Constitution requires, among other things, that “taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law.” Section 1, Article X further provides that “[n]o one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value.” *Id.*

This Court has interpreted the foregoing provisions to mean that, “[t]he Legislature has the power and the duty to designate the manner in which the actual value of different kinds or “species” of property may be ascertained, but when such value has been ascertained, all species of property must be taxed equally in proportion to its value.” *See In re Kanawha Valley Bank*, 144 W. Va. 346, 386-87, 109 S.E.2d 649, 672 (1959).

In the instant action, the WVEDA will take a freehold estate in the Project property. Conversely, the lease authorized in the WVEDA’s Resolution will give ROCKWOOL a leasehold estate in the Project property. West Virginia law recognizes that freehold estates and leasehold estates are separate species or classes of property for taxation purposes. *See* Syl. Pt. 3, *Univ. Park at Evansdale, LLC v.*

*Musick*, 238 W. Va. 106, 792 S.E.2d 605 (2016) (“The assessor of a county may assess the value of a leasehold as personal property separately in an amount such that when the value of the freehold subject to the lease is combined with the value of the leasehold the total reflects the true and actual value of the real property involved.”); *see also* Syl. Pt. 1, *Great A & P Tea Co., Inc. v. Davis*, 167 W. Va. 53, 278 S.E.2d 352 (1981) (same).

Moreover, it is the longstanding and well-settled law of West Virginia that, “[t]he county assessor may presume that leaseholds have no value independent of the freehold estate and proceed to tax all real property to the freeholder at its true and actual value.” *See* Syl. Pt. 3, *Musick v. University Park at Evansdale, LLC*, 241 W. Va. 194, 820 S.E.2d 901 (2018); *see also Univ. Park at Evansdale, LLC v. Musick*, 729 S.E.2d at Syl. Pt. 2; Syl. Pt. 3, *Maplewood Community, Inc. v. Craig*, 216 W. Va. 273, 607 S.E.2d 379 (2004); *Great A & P Tea Co., Inc.*, 278 S.E.2d at Syl. Pt. 2.

The Jefferson County Assessor is required by law to determine the “taxability” of the WVEDA’s freehold estate and ROCKWOOL’s leasehold estate.<sup>2</sup> W. Va. Code § 11-3-1. But here, the WVEDA’s freehold estate in the

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<sup>2</sup> A taxpayer may protest the determination by filing written objections with the assessor. W. Va. Code § 11-3-24a(a). Where the assessor refuses to grant the protest, it may be certified to the Tax Commissioner for disposition. *Id.* at § 11-3-24a(b). The disposition then may be appealed to the circuit court. *Id.* at § 11-3-24a(c). Although the Board of Equalization and Review is the proper venue for

Project property will be exempt from taxation under the *WVEDA Act* and West Virginia's *Taxation Act*. See W. Va. Code §§ 31-15-17 (specifically exempting property acquired by WVEDA from taxation); 11-3-9(a)(2) (specifically exempting from taxation property belonging exclusively to state); 11-3-9(a)(30) (exempting any property exempted by any other provision of law). Accordingly, the WVEDA's freehold estate will be treated, for tax purposes, in the same manner as other freehold estates belonging to the State of West Virginia.

ROCKWOOL's separate leasehold estate in the Project property will be treated, for tax purposes, like other leasehold "species" of property in West Virginia, *i.e.*, the county assessor may presume that ROCKWOOL's leasehold estate has no value independent of the WVEDA's freehold estate. *Musick*, 241 W. Va. at Syl. Pt. 3, 820 S.E.2d at Syl. Pt. 3. There is no uniformity violation under the Constitution of West Virginia in these circumstances, because these estates will be treated, for tax purposes, the same as like estates within the same classifications. JA 11-12, 21-22. JCF, consequently, has not alleged viable constitutional claims.

But again and even more fundamentally, the Constitution explicitly permits the Legislature to exempt "all . . . public property" from taxation without running afoul of the uniformity requirement. See W. Va. Const. art. X, § 1. The

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challenging the *value* of a tax assessment, the underlying taxability determination lies, in the first instance, with the county assessor. *Id.* at § 11-3-24 ("Review and equalization by county commission).

*Demus* decision from fifty-seven years ago confirms this point, is controlling, and provides a clear roadmap for this Court to affirm the dismissal of JCF’s Complaint. See *State ex rel. County Court of Marion County v. Demus*, 148 W. Va. 398, 135 S.E.2d 352 (1964). *Demus* assessed the constitutionality of a proposed transaction largely identical to the ROCKWOOL Project.

In *Demus*, Marion County proposed selling revenue bonds under the express authority of the Industrial Development Bond Act to finance the construction of an industrial facility that it planned to lease to a private corporation. *Id.*, 135 S.E.2d at 355. That Act specifically exempted from taxation all real and personal property “acquired by” the county in the financing arrangement, for so long as the county owned that “public property.” *Id.* at 354. The Supreme Court was tasked with, among other things, determining whether the tax exemption and the proposed financing arrangement violated the uniform taxation requirement in Article X, § 1 of the Constitution. *Id.* at 357-58. The Supreme Court held that the tax exemption and financing arrangement did *not* violate the Constitution. *Id.* at Syl. Pt. 1.

The Court in *Demus* commences its analysis by observing that the West Virginia Legislature’s powers are “almost plenary” and restricted only by the Constitution. *Id.* at 356. The Court then notes that Article X, § 1 of the Constitution provides that “public property . . . may by law be exempted from taxation.” *Id.* at

357. Focusing first on the list of tax-exempt properties in § 11-3-9, the Court remarks that § 11-3-9 is “a *general* legislative determination” of Article X, § 1’s scope. *Id.* (emphasis added).

The Court then shifts focus to the specific tax exemption the Legislature conferred on counties and municipalities in the Industrial Development Bond Act, in view of the exemption’s direct relevance to the proposed transaction at issue. *Id.* at 358. The Court reasons that Article X, § 1 empowered the Legislature to codify the Act’s specific tax exemption even though it was not included in the “milder language” of the separate § 11-3-9. *Id.* The Court then concludes, unanimously, that the tax exemption is “not in violation of Article X, Section 1 of the Constitution inasmuch as the factual findings of the legislature” in the Industrial Development Bond Act “are legislative, not juridical, findings and this Court is bound thereby.” *Id.*

In his book on the Constitution, opposing counsel cites *Demus* for the proposition that public property “may be exempted [from taxation] without regard to its use.” See Robert M. Bastress, Jr., *The West Virginia State Constitution* 287 (G. Alan Tarr ed.) Oxford, 2d ed. (2016) (observing that *Demus* reflects the Supreme Court’s conclusion that “where a county proposed to sell revenue bonds to buy real and personal property to be leased to a private industrial plant, that property would be exempt from taxation for as long as the county owned it.”); see also *Demus*, 148

W. Va. at 404-06, 135 S.E.2d at 357-58. Opposing counsel does not mention *Demus* in Petitioner’s Brief.

The instant case is, for all practical purposes, a rehash of *Demus*. The WVEDA plans to issue revenue bonds to finance the ROCKWOOL Project; exchange the bonds for the Project property; and lease the property back to ROCKWOOL, with the lease payments being used to service the debt and pay-off the bonds. The WVEDA’s Project property—like Marion County’s property in *Demus*—will be exempt from taxation for as long as the WVEDA owns it. W. Va. Code § 31-15-17. As this Court concludes in *Demus*, the financing arrangement and tax exemption do not violate Article X, § 1 of the Constitution, as the Constitution expressly permits the Legislature to exempt “public property” from taxation regardless of use. *Demus* compels this Court to affirm the Business Court’s dismissal of the Complaint. There is no real constitutional controversy here.

**VI. JCF misstates the record in contending the Business Court did not resolve the Complaint’s deficient Count II.**

The Business Court determined that the entire Complaint is non-justiciable under the political question doctrine; additionally, it recognized that the financing arrangement and tax exemption do not violate the Constitution’s equal and uniform taxation requirement. JA 12, 22. In view of these rulings, the Business Court fully resolved the Complaint’s deficient Count II. It was not necessary for the Business Court to address Count II’s vague due process allegation, considering it

already had concluded that the financing arrangement and tax exemption are legislatively authorized and compatible with the Constitution. Courts need not consider constitutional questions where they are unnecessary to the resolution of the case. *See, e.g.,* Syl. Pt. 1, *Cogar v. Sommerville*, 180 W. Va. 714, 379 S.E.2d 764 (1989).

Furthermore, JCF did not even focus on or raise the due process issue in the briefing associated with the WVEDA's and ROCKWOOL's Motions to Dismiss; instead, JCF focused exclusively on the fairness and constitutionality of the WVEDA's powers and tax exemption under W. Va. Const. art. X, § 1. JA 127-145; 264-281. JCF therefore abandoned the due process allegation below, and its assignment of error on this point is disingenuous.

**VII. The Chief Justice did not err in referring this case to the Business Court Division.**

The Business Court is a specialized division within the circuit courts to efficiently manage and resolve “litigation involving commercial issues,” as well as “disputes between businesses.” W. Va. T.C.R. 29.01; *see also* W. Va. Code 51-2-15(a). The Chief Justice serves as the gatekeeper to the Business Court and is solely empowered under the Trial Court Rules to grant or deny a referral motion. W. Va. T.C.R. 29.06(c)(3). Before the Chief Justice acts, any party or affected circuit judge has the right to challenge a referral by filing a memorandum in opposition. *Id.* at 29.06(a)(4). *Significantly, the Trial Court Rules do not provide a right to appeal the*

*Chief Justice's decision on a referral motion to this Court.* JCF's assignment of error on the Chief Justice's referral, accordingly, is improper.

Assuming *arguendo* that a referral may be appealed, W. Va. Code § 51-2-15 explains that the Business Court has specific jurisdiction over “[highly technical] commercial issues *and* disputes between businesses” (emphasis added). JCF argues that this case was improperly referred to the Business Court because it is not a “business entity.” See Petitioner’s Brief at p. 22. However, the pertinent statutory language undermines this position. The *and* in § 51-2-15 and W. Va. T.C.R. 29.01 is a function word meaning “along with” or “as well as.” Webster’s II New College Dictionary 42 (3rd ed. 2005). The Business Court may hear “highly technical commercial issues” as well as “disputes between businesses.”

JCF’s case certainly raises “highly technical commercial issues” and therefore satisfies the jurisdictional requirement. Moreover, no provision of § 51-2-15 or the Trial Court Rules requires that all parties involved in a Business Court referral be “businesses.” To the contrary, Trial Court Rule 29.04(a)(3) contemplates referrals of complex tax appeals, which always involve a government entity as one of the parties-in-interest. Moreover, there is precedent for a Business Court referral in a case involving a commercial transaction between a government entity and a private corporation. See, e.g., *W. Va. Inv. Mgmt. Bd. v. Variable Annuity Life Ins. Co.*, 234 W. Va. 469, 766 S.E.2d 416 (2014).

The Chief Justice properly referred the instant “business litigation” to the Business Court because it “involves matters of significance to the transactions, operations or governance between business entities [*i.e.*, the WVEDA (which facilitates business and commerce) and ROCKWOOL]” and “present[s] commercial . . . issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy.” W. Va. T.C.R. 29.04(a)(1)–(2). This case also is akin to a complex tax appeal, over which the Business Court has express jurisdiction. *Id.* at 29.04(a)(3). JCF’s “equal and uniform taxation” challenge to the statutory financing arrangement and tax exemption undergirding the ROCKWOOL Project is particularly appropriate for Business Court consideration and specialized expertise. This case’s outcome has the potential to impact similar economic development projects and complex commercial transactions in West Virginia. Finally, the Business Court referral was appropriate because the WVEDA and ROCKWOOL desire a speedy resolution to JCF’s case. Efficiency is an objective the Business Court promotes and facilitates. *Id.* at 29.09(g).

In view of the foregoing points, the Chief Justice’s decision to refer this matter to the Business Court was both proper and within his power and broad discretion under the governing law. The Chief Justice’s decision on a Business Court referral motion is not appealable and, even if it were appealable, there was no

improper referral here. This case presents “highly technical commercial issues” requiring specialized expertise. W. Va. Code § 51-2-15.

### CONCLUSION

WHEREFORE, based on the arguments and authorities cited herein, this Court should affirm the Business Court Division’s Orders dismissing JCF’s Complaint for Declaratory Judgment, with prejudice. The Complaint, among other things, poses nonjusticiable political questions; reflects JCF’s lack of standing; and fails to allege cognizable violations of the Constitution of West Virginia. Dismissal is warranted under W. Va. R. Civ. P. 12(b)(1) and 12(b)(6).

Respectfully submitted by,

**RESPONDENT, THE WEST  
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DEVELOPMENT AUTHORITY,  
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Jefferson County Foundation, Inc.,  
Plaintiff Below, Petitioner

vs.) No. 21-0235

West Virginia Economic  
Development Authority, and  
Roxul USA, d/b/a Rockwool,  
Defendants Below, Respondents

CERTIFICATE OF SERVICE

I hereby certify that on the 6<sup>th</sup> day of August 2021, I caused the foregoing **Brief of Respondent West Virginia Economic Development Authority** to be served on the following by United States mail, postage prepaid:

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