BEFORE THE WEST VIRGINIA INTERMEDIATE COURT OF APPEALS

No. 23-ICA-248

ICA EFiled: Aug 28 2023
05:01PM EDT
Transaction ID 70733531

CHARLESTON GAZETTE-MAIL d/b/a
HD MEDIA, LLC,

Petitioner, Plaintiff below,

v.

WEST VIRGINIA UNIVERSITY
BOARD OF GOVERNORS,

Respondent, Defendant below.

PETITIONER'S APPEAL BRIEF

APPEAL FROM THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

Lonnie C. Simmons (W.Va. I.D. No. 3406)
Robert M. Bastress, III (W.Va. I.D. No. 9616)
DIPIERO SIMMONS MCGINLEY & BASTRESS, PLLC
P.O. Box 1631
Charleston, West Virginia 25326
(304) 342-0133
lonnie.simmons@dbdlawfirm.com

Counsel for Petitioner Charleston Gazette-Mail d/b/a HD Media, LLC

TABLE OF CONTENTS

I. Introduction 1

II. Assignments of error 4

III. Statement of the case 5

IV. Summary of the argument 8

V. Statement regarding oral argument and decision 12

VI. Argument 12

A. The Legislature's main reason for adopting the WVOGPA is to mandate that all meetings be open to the public 12

B. The June 19, 2020 Meeting Agenda violated the WVOGPA because it failed to notify the public what topics were going to be discussed 14

C. Assertion of attorney-client privilege unjustified under these facts 19

D. The exemptions under the WVFOIA are not incorporated in the WVOGPA 23

E. Commercial competition exception is inapplicable under these facts 25

F. Petitioner is entitled to an award of attorneys' fees 28

VII. Conclusion 28

TABLE OF AUTHORITIES

West Virginia Cases:

Capriotti v. Jefferson County Planning Commission,
2015 WL 869318 (No. 13-1243, 2/26/2015)
(Memorandum decision) 15-16, 18

France v. Southern Equipment Co.,
225 W.Va. 1, 689 S.E.2d 1 (2010) 5

French v. Mercer Cty. Comm'n,
2015 WL 7025292, at *4 (W. Va. 2015)(Memorandum decision) 13

In re: R.S.,
244 W.Va. 564, 855 S.E.2d 355 (2021) 22

Jackson v. State Farm Mutual Automobile Insurance Co.,
215 W.Va. 634, 600 S.E.2d 346 (2004) 5

McComas v. Board of Education of Fayette County,
197 W.Va. 188, 475 S.E.2d 280 (1996) 13-14, 18

Meadows v. Wal-Mart Stores, Inc.,
207 W.Va. 203, 530 S.E.2d 676 (1999) 26

Murray v. State Farm Fire and Casualty Co.,
203 W.Va. 477, 509 S.E.2d 1 (1998) 26-27

Parkins v. Londeree,
146 W.Va. 1051, 124 S.E.2d 471 (1962) 26

Peters v. The County Commission of Wood County,
209 W.Va. 94, 543 S.E.2d 651 (2000) 20-22

Peters v. County Commission of Wood County,
205 W.Va. 481, 519 S.E.2d 179 (1999) 4, 9, 19-20, 22

Other Jurisdiction Cases:

Evergrass, Inc. v. Town of Lexington,
2004 WL 231320 (Mass.Sup.Ct. 2004) 5

Miscellaneous:

https://www.cbsnews.com/pittsburgh/news/west-virginia-university-approves-7m-in-staff-cuts-3-tuition-increase-3/ 2

https://slate.com/human-interest/2023/08/west-virginia-university-cuts-programs.html 1-2

https://www.thenation.com/article/society/wvu-cuts-higher-education/ 2

https://westvirginiawatch.com/2023/07/20/wvu-faculty-students-organizing-amid-looming-cuts-to-programs-and-jobs/ 2

Open Meetings Advisory Opinion No. 2008-17 18

Open Meetings Advisory Opinion No. 2009-02 18

Open Meetings Advisory Opinion No. 2009-04 17-18

W.Va.Code §6-9A-1 12-13

W.Va.Code § 6-9A-3(a) 9, 13

W.Va.Code §6-9A-3(d) 14

W.Va.Code § 6-9A-4(b)(9) 4, 25

W.Va.Code §6-9A-4(11) 20

W.Va.Code § 6-9A-4(b)(12) 23

W.Va.Code §6-9A-4(12) 10, 23

W.Va.Code §6-9A-7(b) 12, 28

W.Va.Code §6-9A-11(a) 17

W.Va. Code § 29B-1-4(a) 24

BEFORE THE WEST VIRGINIA INTERMEDIATE COURT OF APPEALS

No. 23-ICA-248

CHARLESTON GAZETTE-MAIL d/b/a
HD MEDIA, LLC,

Petitioner, Plaintiff below,

v.

WEST VIRGINIA UNIVERSITY
BOARD OF GOVERNORS,

Respondent, Defendant below.

PETITIONER'S APPEAL BRIEF

APPEAL FROM THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

I. Introduction

To the Honorable Judges of the West Virginia

Intermediate Court of Appeals:

Recently West Virginia University made national news when it revealed it has a $45 million budget shortfall, which it claims will necessitate massive reductions in programs offered as well as the number of professors retained. For many, this news came as a shock and has left people to speculate what caused this financial and academic crisis in the first place. At the time this brief was written, the recommended remedy is to eliminate 9% of WVU's majors (32 programs in total), all foreign language programs, and 16% of its faculty members (169 in total).[1] There have been accusations of financial mismanagement: "WVU, like many higher-education institutions, has been

---

[1]https://slate.com/human-interest/2023/08/west-virginia-university-cuts-programs.html.

plagued by **gross financial mismanagement by administrators** and consultants who have funneled money into massive administrative bloat and **capital projects at the expense of faculty hires and support for faculty and graduate students.**"[2] (Emphasis added). In addition to allegations of financial mismanagement, many have commented on WVU's lack of transparency: "[S]ome say **they had no warning the funding shortfall was coming** before the news went public in the spring;[3] "[T]he process will damage the institution's status as a research institution and that decision making about layoffs **has not been transparent.**";[4] and "Their proposal is a result of financial mismanagement, **lack of institutional transparency**, and an astonishing failure to recognize the power of education in transforming the lives of West Virginians."[5] (Emphasis added).

So what does the financial crisis and proposed draconian cutbacks at WVU have to do with the present case? As demonstrated in this case, Respondent WVU Board of Governors has a history of excluding the public from observing its deliberations on many issues of great interest, including WVU's budget, capital improvements, tuition and fees, the business college, emergency pay policy, response to COVID-19, Title IX regulations, and matters related to a petition alleging racial discrimination at WVU. These specific topics, most of which were never listed in any of the Meeting Agendas, were discussed illegally by Respondent in executive session and are the topics at issue in this litigation. WVU's lack of transparency clearly violates the West Virginia Open

---

[2]https://www.thenation.com/article/society/wvu-cuts-higher-education/.

[3]https://westvirginiawatch.com/2023/07/20/wvu-faculty-students-organizing-amid-looming-cuts-to-programs-and-jobs/.

[4]https://www.cbsnews.com/pittsburgh/news/west-virginia-university-approves-7m-in-staff-cuts-3-tuition-increase-3/.

[5]https://slate.com/human-interest/2023/08/west-virginia-university-cuts-programs.html.

Governmental Proceedings Act (WVOGPA) and helps to explain why so many people were shocked to learn about WVU's financial and academic issues.

The WVOGPA requires all West Virginia governing bodies, including Respondent, to provide prior notice of their official meetings with a list of the issues to be addressed and to hold the meetings in public so that any interested person can witness and participate in the process of how decisions are made. During the open deliberations, the public sees the governing body present facts, ask questions, and discuss the issues. By showing "how the sausage is made," the public gains a greater appreciation and understanding of the rationale behind the decisions subsequently made. However, for reasons that never were made clear in the record, Respondent regularly chose to ignore the mandates of the WVOGPA and to go into executive session to discuss issues of great interest to the public.

Because Respondent routinely failed to hold open meetings on the foregoing issues of public interest, Petitioner Charleston Gazette-Mail d/b/a HD Media, LLC, sued Respondent in the Circuit Court of Monongalia County for injunctive and declaratory relief under the WVOGPA seeking an order requiring Respondent to abide by the law. After developing the record, Petitioner and Respondent briefed the legal issues raised and filed cross motions for summary judgment.

In two separate orders, the Honorable Judge Cindy Scott granted summary judgment for Respondent, effectively approving Respondent's actions to discuss the identified issues in executive session. Petitioner respectfully submits these orders are unprecedented, unsupported by any case law, contrary to the decisions of the West Virginia Supreme Court, and inconsistent with the WVOGPA's language. Consequently, Petitioner appeals these final orders so this Court can uphold the principles of open government mandated by the Legislature through its adoption of the WVOGPA.

II. Assignments of error

Whether the trial court erred in granting Respondent's summary judgment motion and denying Petitioner's cross motion for summary judgment based upon its interpretation of the WVOGPA where:

A. The trial court agreed with Petitioner's argument that the June 19, 2020 Meeting Agenda failed to comply with the WVOGPA's notice requirements, but ignored this violation by concluding it was merely "technical";

B. Respondent failed to follow the procedure set out in *Peters v. County Commission of Wood County*, 205 W.Va. 481, 519 S.E.2d 179 (1999), for asserting a claim of attorney-client privilege to go into executive session; therefore, this assertion of privilege cannot be sustained;

C. In an unprecedented decision, the trial court incorporated all of the exceptions under the West Virginia Freedom of Information Act (WVFOIA) as exceptions under the WVOGPA and used some of the WVFOIA exceptions to justify Respondent's decision to discuss matters in executive session that should have been open to the public;

D. The trial court's overly expansive reading of the limited "commercial competition" exception found in W.Va.Code § 6-9A-4(b)(9), was inconsistent with existing case law, where the WVOGPA exceptions must be narrowly construed, and if upheld, this exception would swallow up all of the laudatory goals the Legislature sought to achieve by ensuring the public has the right to observe the discussions and deliberations of all governing bodies under the WVOGPA; and

E. Petitioner is entitled to an award of attorneys' fees, based upon the multiple violations of the WVOGPA committed by Respondent?

III. Statement of the case

In a WVOGPA case, the governing body has made a deliberate decision to exclude the public from portions of its open meetings to discuss certain topics. When this occurs, the burden is on the governing body to explain how any of the very narrow exceptions under the WVOGPA apply. Thus, although Respondent attempted to complicate this case by providing affidavits from alleged "experts," two of whom are from other states and one of whom actually is employed by WVU employees while the other used to be a member of Respondent, there is no real dispute over the relevant facts.[6]

---

[6]Petitioner objected to Respondent's reliance on expert witnesses in its attempt to usurp the authority of the trial court to decide the issues of law, citing Syllabus Point 10 of *France v. Southern Equipment Co.*, 225 W.Va. 1, 689 S.E.2d 1 (2010), where the West Virginia Supreme Court held:

> As a general rule, an expert witness may not testify as to questions of law such as the principles of law applicable to a case, the interpretation of a statute, the meaning of terms in a statute, the interpretation of case law, or the legality of conduct. It is the role of the trial judge to determine, interpret and apply the law applicable to a case.

See also Jackson v. State Farm Mutual Automobile Insurance Co., 215 W.Va. 634, 600 S.E.2d 346 (2004); *Evergrass, Inc. v. Town of Lexington*, 2004 WL 231320, n.11 (Mass.Sup.Ct. 2004)(**"Expert testimony to `explain the intricacies of municipal law with relation to compliance with public bidding law and the open meeting law' would be inadmissable, even if the complaint alleged a violation of such laws. Issues of law are for the Court, not for expert witnesses."**). (Emphasis added).

Despite this case law, the trial court cited the "expert" affidavits provided and commented that Petitioner failed to present any expert witnesses. Respondent's "expert" witnesses included James Robert Alsop, WVU's Vice President for Strategic Affairs, and Thomas V. Flaherty, former Chair of Respondent. Because only the trial court has the authority to resolve the legal issues raised, it is improper to rely upon expert witnesses to tell the trial court how to apply the law.

Respondent also suggested below that Petitioner had failed to develop a sufficient record on what topics Respondent discussed in secret. Through this litigation, Respondent freely admitted what specific topics it discussed covertly, so there is no dispute that these identified topics were discussed in executive session. The only legal issue to be resolved is whether this secrecy is justified

Prior to the June 19, 2020 meeting of one of Respondent's committees, the published Meeting Agenda identified the following topics that might be addressed in executive session:

> (a) Deliberative matters regarding Fiscal Year 2020 and 2021 budgets, including current year retention and enrollment;
>
> (b) Matters relating to improvements to, or potential contractual relationships regarding facilities, infrastructure, and real property;
>
> (c) Potential strategic initiatives relating to academic health sciences priorities, corporate collaboration, and legislative and regulatory matters; and,
>
> (d) Confidential legal, personnel, and deliberative matters relating to West Virginia University's ongoing response to the COVID-19 pandemic. (JA at 15).[7]

During this same meeting, Respondent discussed the school's budget, the business college, emergency pay policy, federal Title IX regulations, tuition and fees, capital projects, the coronavirus pandemic, and the athletic director's comments regarding the upcoming football season. (JA at 4-5). This Meeting Agenda does not provide any notice to the public that many of these specific issues would be discussed in executive session. Elmer Coppoolse, a member of Respondent, revealed during the public part of this meeting that while they were in executive session, Respondent discussed the demands and concerns expressed by members of the black community on campus in a petition. (JA at 5). Once again, this issue was not included in the Meeting Agenda.

---

under the WVOGPA. Obviously, neither Petitioner nor any other citizen litigating a WVOGPA case is required to take the depositions of all members of the governing body to learn what topics were discussed in executive session.

[7]Respondent acknowledged that its Meeting Agendas attached to the original complaint, but which inadvertently were omitted from the Amended Complaint filed a couple of days later, are true and correct copies. (JA at 41).

In the July 24, 2020 Meeting Agenda, Respondent notified the public that one topic to be discussed would be "West Virginia University's ongoing response to the COVID-19 pandemic." In this same Meeting Agenda, Respondent listed WVU's response to the pandemic as an issue that may be discussed in executive session. (JA at 17). How WVU was going to respond to the pandemic also was listed as a possible executive session topic in the Meeting Agendas issued for the meetings held on August 14, 2020, September 4, 2020, and September 18, 2020. (JA at 19-24).

In its Answer to Petitioner's Amended Complaint, Respondent admitted "that it appropriately held portions of its meetings on June 19, 2020, July 24, 2020, August 14, 2020, September 4, 2020, and September 18, 2020 in executive session to discuss, among other things, confidential legal, personnel, and deliberative matters relating to the University's ongoing response to the COVID-19 pandemic and a petition received from the University's Black community." (JA at 000041). Respondent further admitted that during this meeting, the following were discussed in executive session: "(1) deliberative matters regarding Fiscal Year 2020 and 2021 budgets, including current year retention and enrollment; (2) matters relating to improvements to, or potential contractual relationship regarding facilities, infrastructure, and real property; (3) potential strategic initiatives relating to academic health sciences priorities, corporate collaboration, and legislative and regulatory matters; (4) matters related to the petition received from the University's Black community; and (5) confidential legal, personnel, and deliberative matters relating to the University's ongoing response to the COVID-19 pandemic." (JA at 42). Finally, Respondent admitted the following topics were discussed in the September 18, 2020 meeting: "(1) deliberative matters regarding Fiscal Year 2020 and 2021 budgets, including current year retention and enrollment; (2) matters relating to improvements to, or potential contractual relationship regarding facilities, infrastructure, and real property; (3) potential strategic initiatives relating to academic health sciences priorities, corporate

collaboration, and legislative and regulatory matters; and (4) confidential legal, personnel, and deliberative matters relating to the University's ongoing response to the COVID-19 pandemic." (JA at 43).

The public will never know what other topics may have been discussed in executive session because Respondent does not provide any transcript of these secret meetings to the public. Furthermore, the public will never know what the members of Respondent actually said about these aforementioned topics. The only way the public has any knowledge about some of the topics Respondent discussed under this "cone of silence" is based upon these after-the-fact admissions in its answer to Petitioner's Amended Complaint.

In the first round of cross motions for summary judgment, the trial court orally held at the end of the January 5, 2022 hearing that Respondent had complied with the WVOGPA when it went into executive session to discuss WVU's ongoing response to the COVID-19 pandemic, matters related to a petition received from WVU's black community, and WVU's budgets. The written order from this hearing was not entered by the trial court until more than a year later on February 27, 2023. (JA at 600-11).

On March 28, 2022, a hearing was held on the pending motions and cross motions for summary judgment relating to the remaining topics that had been discussed secretly by Respondent in executive session. At this hearing, the trial court only heard the arguments of counsel and no testimony was presented. On April 28, 2023, the trial court entered its final order upholding the ongoing secrecy of Respondent when dealing with issues of great public importance. (JA at 612-28).

IV. Summary of the argument

The people in delegating authority do not give their public servants the right to decide what is good for them to know and what is not good for them to know. The people insist on remaining

informed so that they may retain control over the instruments of government created by them. The WVOGPA clearly and forcefully mandates that the meetings of governing bodies must be open to the public. Specifically, W.Va.Code § 6-9A-3(a) broadly requires, "all meetings of any governing body shall be open to the public[,]" except as expressly and specifically provided by law or by section four of Article 9A. The WVOGPA provides that there be "only a few clearly defined exceptions," to the requirement that governing bodies of public agencies conduct their proceedings openly.

Courts should accord an expansive reading to the WVOGPA's provisions to achieve its far-reaching goals and the fundamental purpose of the open meeting law is to ensure the right of the public to be fully informed regarding the conduct of government business. When in doubt, the members of any board, agency, authority or commission should follow the open-meeting policy of the State. In applying the WVOGPA, a common sense approach is required; one that focuses on the question of whether allowing a governing body to exclude the public from a particular meeting would undermine the WVOGPA's fundamental purposes.

The plain language of W.Va.Code §6–9A–3, expressly requires a public body to make available to the public, in advance of a scheduled meeting, the agenda for said meeting. The purpose of this notice requirement is to fulfill the Legislature's stated policy of maintaining an open government and providing public access to information. Under the WVOGPA, using generic language in the agenda notice simply is not sufficient to advise the public, in advance of the meeting, about the specific topics that are going to be discussed.

Any matter requiring official action by the governing body should be listed on the agenda, employing language that will reasonably place the public and the media on notice of the particular items that will be considered during each meeting. Generic descriptions are insufficient to satisfy

this requirement. The West Virginia Supreme Court has never issued a decision under the WVOGPA concluding that the failure to comply with its notice requirements somehow can be ignored by labeling the violation as merely being "technical." The failure to provide adequate notice before a public meeting is a violation of the WVOGPA and the governing body involved must be held accountable.

A governing body is not permitted to close a meeting that otherwise would be open merely because an agency attorney is present. Although the West Virginia Supreme Court did recognize that the discussions of matters that are covered by the attorney-client privilege can be the basis for an exception from the public meeting requirement under the WVOGPA, the Court nevertheless held that such exemption must be narrowly drawn so as to not abrogate the spirit and purpose of the Act. Pursuant to both decisions in *Peters*, Respondent was required to present testimony *in camera* prior to the final hearing in this case. Because Respondent chose not to provide the trial court with any testimony to review *in camera* during the final hearing held in this case on March 28, 2022, it waived its opportunity to meet its burden on this issue.

There is no exception in the WVOGPA for matters that might be exempt under the WVFOIA, but only for matters that are not "public records," as defined by the WVFOIA. *See* W.Va.Code § 6-9A-4(b)(12). Indeed, all records exempt under the WVFOIA are "public records," for the simple reason that anything outside the definition of a "public record" is not even subject to the WVFOIA. There is a presumption of public accessibility to all public records, subject only to the following categories of information which are specifically exempt from disclosure under this article. Thus, the extremely limited reference in the WVOGPA to the WVFOIA focuses exclusively on any matter THAT IS NOT A PUBLIC RECORD.

Neither of the parties provided the trial court with any decision any where in the country holding that the exceptions to the production of public records under the FOIA are incorporated into the exceptions available under an open governmental meetings law. Respondent repeatedly suggested below that deliberative matters are exempt from the WVOGPA when, in fact, the WVOGPA specifically was designed to permit the public to have access to the deliberations of governing bodies to better understand how final decisions in issues of public import were reached. It is not enough simply for the public to learn about a final decision rendered by a governing body; the public has the right to observe the deliberations that informed the making of any final decision.

The "commercial competition" exception to the WVOGPA has never been addressed in any detail by the West Virginia Supreme Court. Because the scope of this phrase must be understood in the context of the WVOGPA, where these exceptions must be narrowly construed, this Court should apply various rules of statutory construction in an effort to understand what the Legislature meant by "commercial competition." The legislative intention is the controlling factor; significance must be given to every section, word or part of the statute; the words of a statute are to be give their ordinary and familiar significance and meaning; and the general words, under the rule of construction known as *ejusdem generis*, will be construed as applicable only to persons or things of the same general nature or class as those enumerated, unless an intention to the contrary is clearly shown.

In applying these rules of statutory construction, the words "commercial competition" are preceded by "the investment of public funds or other matters involving" and followed by "which if made public, might adversely affect the financial or other interest of the state or any political subdivision." When read in this context, this "commercial competition" exception is not the broad blanket exception Respondent and the trial court recognized, but rather is restricted to matters

involving public funds, which if made public, might adversely affect the financial or other interest of the state or any political subdivision.

Relying on this commercial competition exception to bar the public from hearing Respondent discuss WVU's ongoing COVID response, racial issues, budgets, as well as the other topics identified is far too expansive application of this exception. If the trial court's application of this "commercial competition" exception were to be accepted, then the WVOGPA would be rendered completely meaningless. The public deliberations that necessarily take place before a final decision are what the public is entitled to observe so that the ultimate decision is made in the proper context.

The Court should determine that Petitioner is entitled to an award of attorneys' fees and costs, pursuant to W.Va.Code §6-9A-7(b), and the Court should remand this case to the trial court to develop a record on these issues.

V. Statement regarding oral argument and decision

Due to the novel and unprecedented rulings by the trial court, Petitioner respectfully submits the Court should grant oral argument under Rule 20 and issue a decision authored by a Judge or Justice to make it clear to all governing bodies that the trial court's application of certain narrow exceptions to the WVOGPA was incorrect and should never be followed by any other public entity.

VI. Argument

A. The Legislature's main reason for adopting the WVOGPA is to mandate that all meetings be open to the public

> ***Open government allows the public to educate itself about government decisionmaking through individuals' attendance and participation at government functions, distribution of government information by the press or interested citizens, and public debate on issues deliberated within the government.***[8]

[8]West Virginia Code §6-9A-1.

As the Legislature noted when explaining the purposes for enacting the WVOGPA, "The people in delegating authority **do not give their public servants the right to decide what is good for them to know and what is not good for them to know. The people insist on remaining informed** so that they may retain control over the instruments of government created by them." (Emphasis added).[9]

The WVOGPA clearly and forcefully mandates that the meetings of governing bodies must be open to the public. Specifically, W.Va.Code § 6-9A-3(a) broadly requires, "**all** meetings of any governing body shall be open to the public[,]" except as expressly and specifically provided by law or by section four of Article 9A. (Emphasis added). The WVOGPA provides that there be "only a few clearly defined exceptions," to the requirement that governing bodies of public agencies conduct their proceedings openly. W.Va.Code § 6-9A-1. As explained in footnote 4 of *French v. Mercer Cty. Comm'n*, 2015 WL 7025292, at *4 (W. Va. 2015)(Memorandum decision), "While the Act neither requires the governing body to seek *approval* from the public nor affords the public any right to *participate* in the meetings, **it does assure the public's right to *observe* the deliberative process and the making of decisions.** The Act dictates that `the proceedings of public agencies be conducted openly' to allow `the public to educate itself about government decisionmaking[.]' W.Va.Code § 6–9A–1." (Italics in original; emphasis added).

In *McComas v. Board of Education*, 197 W.Va. 188, 197, 475 S.E.2d 280, 289 (1996), the West Virginia Supreme Court explained that courts should accord "an expansive reading to the Act's provisions to achieve its far-reaching goals" and "the fundamental purpose of the open meeting law is to ensure the right of the public to be fully informed regarding the conduct of government

---

[9]*Id.*

business." "When in doubt, the members of any board, agency, authority or commission should follow the open-meeting policy of the State." 197 W.Va. at 201, 475 S.E.2d at 293.

In cases challenging whether a governing body has violated the WVOGPA, Petitioner is not required to show that Respondent intended to violate the WVOGPA. Syllabus Point 3, *McComas*. In analyzing the application of the WVOGPA, the West Virginia Supreme Court has provided the following general guidance in Syllabus Point 4 of *McComas*:

> 4. In drawing the line between those conversations outside the requirements of the Open Governmental Proceedings Act, W.Va.Code, 6–9A–1, *et seq.,* and those meetings that are within it, **a common sense approach is required; one that focuses on the question of whether allowing a governing body to exclude the public from a particular meeting would undermine the Act's fundamental purposes.** (Emphasis added).

Thus, there is no precise formula for determining whether a governing body has violated the WVOGPA. For the most part, a governing body is required to hold its meetings in public, unless one of the narrowly construed exceptions is applicable. The very real danger presented in this case, if Respondent's position is upheld, is the public would be excluded from meetings discussing issues of public interest and concern at the whim of Respondent. Under Respondent's approach, the WVOGPA effectively would be rendered meaningless.

B. The June 19, 2020 Meeting Agenda violated the WVOGPA because it failed to notify the public what topics were going to be discussed

The trial court agreed that the Meeting Agenda published by Respondent prior to the June 19, 2020 meeting failed to mention with any specificity that the previously identified topics might be discussed. However, the trial court dismissed this clear violation of the WVOGPA by asserting it was just a "technical" violation. (JA at 623).

Under W.Va.Code §6-9A-3(d), "Each governing body shall promulgate rules by which the date, time, place and agenda of all regularly scheduled meetings and the date, time, place and

purpose of all special meetings are made available, in advance, to the public and news media." As found by the trial court, Respondent's June 19, 2020 Meeting Agenda violated this statute because it failed to place the public on notice that any of these six topics was going to be discussed and, therefore, this inadequate notice violated the WVOGPA.

The inadequacy of the information provided in a published meeting agenda, in violation of the WVOGPA, was addressed in *Capriotti v. Jefferson County Planning Commission*, 2015 WL 869318 (No. 13-1243, 2/26/2015)(Memorandum decision). In *Capriotti*, the plaintiff challenged the adequacy of the notice placed in the Commission's agenda, which stated "Reports from Legal Counsel and legal advice to P[lanning]C [ommission]." When the Commission came to this agenda item during the meeting, a motion to go into closed executive session was made and approved.

In deciding whether or not this particular agenda notice was adequate under the WVOGPA, 2015 WL 869318 at 5*-6*, the West Virginia Supreme Court explained the purpose behind publishing an agenda before any public meeting:

> The plain language of W. Va.Code § 6–9A–3 expressly requires a public body to make available to the public, in advance of a scheduled meeting, the agenda for said meeting. **The purpose of this notice requirement is to fulfill the Legislature's stated policy of maintaining an "[o]pen government" and providing "public access to information."** W. Va.Code § 6–9A–1 (1999) (Repl.Vol.2010). Such openness is intended to "allow[ ] the public to educate itself about government decisionmaking through individuals' attendance and participation at government functions ... and public debate on issues deliberated within the government." *Id.* By the same token,
>
> > [p]ublic access to information promotes attendance at meetings ... and encourages more ... complete discussion of issues by participating officials. The government also benefits from openness because ... public input allow[s] government agencies to gauge public preferences accurately and thereby tailor their actions and policies more closely to public needs....*Id.* (Emphasis added).

After reviewing the purposes behind publishing a notice before a public meeting, the West Virginia Supreme Court concluded this particular notice was in violation of the WVOGPA, explaining, 2015 WL 869318 at *6:

> **Despite these statutory directives aimed at providing notice to interested individuals of the topics to be discussed at the meetings of public bodies, the agenda notice provided by the Planning Commission in the case sub judice was not adequate to inform the Petitioners, and other members of the public, that it planned to discuss the FAF litigation or a proposed settlement thereof. Rather, the agenda's generic reference to "legal advice" provided no indication whatsoever that the ongoing FAF proceedings would be a topic of discussion at the Planning Commission's July 26, 2011, meeting.** Because the agenda notice did not adequately inform the public of the specific items to be considered at the Planning Commission's July 26, 2011, meeting, we find that the Planning Commission violated W. Va.Code § 6–9A–3 and reverse the circuit court's contrary ruling. (Emphasis added).

Capriotti makes it clear that under the WVOGPA, using generic language in the agenda notice simply is not sufficient to advise the public, in advance of the meeting, about the specific topics that are going to be discussed. Respondent's June 19, 2020 Meeting Agenda does not mention that it was going to discuss [1] the business college; [2]emergency pay policy; [3] federal Title IX regulations; [4]tuition and fees;[5]capital projects; and/or [6] a talk with the athletic director about the outlook for this upcoming season. Even if Respondent had listed these six items in its Meeting Agenda, the descriptions were woefully inadequate to provide the public the notice required under the WVOGPA. What specific aspect of the business college was under discussion? What about the emergency pay policy was going to be address? Which specific federal Title IX regulations are going to be discussed and what was the particular issue with respect to WVU? What about tuition and fees: increasing them, decreasing them, keeping them the same, etc.? What specific capital projects were going to be under consideration? Why was the discussion with the athletic director required to be confidential?

Respondent did not even bother listing these six topics at all. Instead, Respondent's Meeting Agenda mentions in very general terms "Deliberative matters regarding Fiscal Year 2020 and 2021 budgets," "Matters relating to improvements to, or protential (sic) contractual relationships regarding facilities," "Potential strategic initiatives relating to academic health science priorities," and "Confidential legal, personnel, and deliberative matters relating to West Virginia University's ongoing response to the COVID-19 pandemic."

The failure of a governing body to provide enough information in the agenda notice posted in advance of a public meeting often has been the topic of advisory opinions issued by the West Virginia Ethics Commission. Under W.Va.Code §6-9A-11(a), any governing body has the right to seek advice from the Ethics Commission addressing whether or not the governing body has complied with the WVOGPA, including the meeting notice requirements: "Any governing body or member thereof subject to the provisions of this article may seek advice and information from the executive director of the West Virginia Ethics Commission or request in writing an advisory opinion from the West Virginia Ethics Commission Committee on Open Governmental Meetings as to whether an action or proposed action violates the provisions of this article."

On several occasions, the Ethics Commission has issued advisory opinions addressing the inadequacy of the notice to the public provided by the published meeting agenda. Some of these advisory opinions are instructive. In Open Meetings Advisory Opinion No. 2009-04, at p. 3, the Ethics Commission noted, "[A]ny matter requiring official action by the governing body should be listed on the agenda, employing language that will reasonably place the public and the media on notice of the particular items that will be considered during each meeting. **Generic descriptions are insufficient to satisfy this requirement.**"[10] (Emphasis added). The example given in this inquiry

[10]https://ethics.wv.gov/SiteCollectionDocuments/PDF%20Open%20Meeting%20Opinions/OMAO%202009-04.pdf.

was whether an agenda notice stating "The Outside Delegations: Jane Roe and John Doe Company" clearly was insufficient under the WVOGPA to inform the public that the governing body was considering a contract with Jane Roe and John Doe Company.

In Open Meetings Advisory Opinion No. 2009-02, the Ethics Commission addressed whether a meeting agenda stating "Combining of Positions" was sufficient under the WVOGPA.[11] The Commission found this description was insufficient under the WVOGPA and that the governing body should have made reference to the specific positions under consideration. Finally, in Open Meetings Advisory Opinion No. 2008-17, the Ethics Commission concluded that simply including "unresolved personnel issues" in the meeting agenda was insufficient under the WVOGPA.[12]

The West Virginia Supreme Court has never issued a decision under the WVOGPA concluding that the failure to comply with its notice requirements somehow can be ignored by labeling the violation as merely being "technical." The failure to provide adequate notice before a public meeting is a violation of the WVOGPA and the governing body involved must be held accountable. Under the WVOGPA, *Capriotti*, *McComas,* and the foregoing Open Meetings Advisory Opinions, as a matter of law, the Meeting Agenda published prior to Respondent's June 19, 2020 failed to provide notice to the public that these six topics were going to be discussed, thus violating the "common sense" requirements of the WVOGPA. Although the trial court correctly agreed that Respondent violated this notice provision, the trial court erred in concluding this violation was "technical" and not warranting any of the injunctive or declaratory relief available under the WVOGPA.

---

[11]https://ethics.wv.gov/SiteCollectionDocuments/PDF%20Open%20Meeting%20Opinions/OMAO%202009-02.pdf.

[12]https://ethics.wv.gov/SiteCollectionDocuments/PDF%20Open%20Meeting%20Opinions/OMAO%202008-17.pdf.

C. Assertion of attorney-client privilege unjustified under these facts

Despite the failure of Respondent to follow the procedure outlined by the West Virginia Supreme Court in *Peters v. County Commission of Wood County*, 205 W.Va. 481, 519 S.E.2d 179 (1999), for closing a public hearing based upon the attorney-client privilege, the trial court nevertheless held Respondent correctly went into executive session to discuss Title IX issues. (JA at 624).

By the time Respondent filed its **REPLY IN SUPPORT OF DEFENDANT'S SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT** on March 22, 2022, Respondent specifically was on notice that Petitioner challenged its assertion of the attorney-client privilege and Respondent had knowledge of the decision in *Peters v. County Commission of Wood County*, 205 W.Va. 481, 519 S.E.2d 179 (1999), which explains the procedure that must be followed when this privilege is sought as an excuse for closing an otherwise public meeting. (JA at 493-506). In its **REPLY**, Respondent simply was content to rely upon its arguments and at the hearing, Respondent did not present or offer any witness to testify *in camera*. Thus, this ruling must be based upon the record that existed at the time of the March 28, 2022 hearing.

In his initial and supplemental affidavits, James Robert Alsop, Vice President for Strategic Initiatives at West Virginia University, claimed an attorney-client privilege exception in connection with General Counsel Stephanie D. Taylor's briefing "on changes to Title IX regulations during executive session." (JA at 357, 372-73).

In *Peters*, 205 W.Va. at 487, 519 S.E.2d at 185, the West Virginia Supreme Court observed, "[T]here appears to be no dispute that the Act **does not contain** a specifically enumerated attorney-client privilege exception. *See* W.Va.Code § 6–9A–4. The only issue is whether or not a public, governing body may close a meeting, which is otherwise required to be open under the Act, because

the discussions in that meeting are protected by the attorney-client privilege." (Emphasis added). Also, as noted in Syllabus Point 5, in part, of *Peters*, "[A] public agency is not permitted to close a meeting that otherwise would be open **merely because an agency attorney is present.**" (Emphasis added). *See also* W.Va.Code §6-9A-4(11)("Nothing in this article permits a public agency to close a meeting that otherwise would be open, **merely because an agency attorney is a participant.**" (Emphasis added)).

Although the West Virginia Supreme Court did recognize that the discussions of matters that are covered by the attorney-client privilege can be the basis for an exception from the public meeting requirement under the WVOGPA, the Court nevertheless held that "such exemption must be **narrowly drawn so as to not abrogate the spirit and purpose of the Act.**" (Emphasis added). 205 W.Va. at 489, 519 S.E.2d at 187. Where the attorney-client privilege exception is claimed, Syllabus Point 6 of *Peters* explains the procedure a trial court must follow where this exception is claimed:

> When a public body closes an open meeting on the basis that the matters to be discussed in that meeting are exempt from the Act as a result of the attorney-client privilege and that claim is challenged, **the circuit court should review *in camera* whether the communications do indeed fall within that privilege. In other words, a bare claim that the matters to be discussed in a meeting of a public body are privileged, if challenged, does not suffice to close the meeting.** (Emphasis added).

Following the remand to circuit court, the circuit court failed to consider any *in camera* testimony, concluded that the privilege should not have been asserted, but that the violation of the WVOGPA was "technical" and did not warrant an award of attorneys' fees. This decision was appealed to the West Virginia Supreme Court a second time. In *Peters v. The County Commission of Wood County*, 209 W.Va. 94, 543 S.E.2d 651 (2000), the West Virginia Supreme Court reversed

the circuit court for a second time, once again holding that the lower court failed to consider *in camera* **testimony** from individuals who had attended the meeting.

At the March 28, 2022 hearing, Respondent merely had presented an affidavit from Mr. Alsop generally asserting General Counsel Taylor "briefed the Board's subcommittee on changes to Title IX." (JA at 372). This affidavit was woefully insufficient to meet the very limited attorney-client privilege exception under the WVOGPA outlined in both *Peters*' decisions. From Mr. Alsop's general description, having a lawyer explain changes in the law relevant to the client would not ordinarily be subject to the attorney-client privilege, particularly in light of the Legislature's intent to have all meetings open so that the public can observe the deliberative process. The changes to Title IX were available to the public and simply because a lawyer was explaining what these changes are did not require the assertion of the limited attorney-client privilege under *Peters*. That simply is an informative discussion of the law, as opposed to private communications regarding a specific case between an attorney and client subject to the privilege.

In any event, for this limited exception to be upheld, Respondent was required to present the trial court with testimony to be heard *in camera* so that the trial court could make its own determination. However, Respondent chose not to provide the trial court with any testimony to review *in camera* during the final hearing held in this case on March 28, 2022, and, therefore, waived its opportunity to meet its burden on this issue.

Although the trial court did not authorize the filing of more documents, other than requesting counsel to provide proposed orders, on or about April 20, 2022, Respondent filed **DEFENDANT'S NOTICE SUBMITTING PRIVILEGED MATERIAL FOR REVIEW *IN CAMERA***. (JA at 507-99). Attached to this document is another copy of the March 1, 2022 affidavit from Mr. Alsop, the April 19, 2022 affidavit from Ms. Taylor, the Notice & Agenda for August 14, 2020, a second

Notice & Agenda for August 14, 2020 with proposed rulemaking documents, and a document explaining that Petitioner had adopted some new Title IX regulations. Respondent suggested below that the filing of these proposed rulemaking documents subsequent to the June 19, 2020 meeting somehow "fixes" the WVOGPA violation when Respondent barred the public from observing the members deliberating over the Title IX regulations and recent changes. There is no language in the WVOGPA even suggesting that a violation of the open meeting requirement can be remedied by the governing body, **after the secret meeting is over**, filing a document that shows what some of the substance of the closed meeting was about.

In Syllabus Point10 of *In re: R.S.*, 244 W.Va. 564, 855 S.E.2d 355 (2021), the West Virginia Supreme Court noted:

> "Where a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made." Syl. Pt. 2, *Newhart v. Pennybacker*, 120 W. Va. 774, 200 S.E. 350 (1938).

This Court should reject Respondent's invitation to construe the WVOGPA as authorizing a governing body to cure an open meetings violation by providing some documents, after the meeting, that relate to the substance of the closed meeting. Such an interpretation would eviscerate the WVOGPA, has no basis in the law, and would produce an absurd result that should not be countenanced by any appellate Court.

Other than asking for proposed orders, the trial court never authorized the filing of any new affidavits or documents after the hearing. Furthermore, as is made clear in both *Peters*' decisions, there has to be actual testimony heard by the trial court *in camera*. Because Respondent failed to follow the procedure outlined in *Peters*, this Court should hold that the final from Respondent were insufficient to justify the very limited attorney-client privilege explained in *Peters*. As such,

Petitioner respectfully submits Respondent once again violated the WVOGPA when it decided to close the meeting based upon the attorney-client privilege.

D. The exemptions under the WVFOIA are not incorporated in the WVOGPA

The trial court adopted wholesale all of the exemptions included in the West Virginia Freedom of Information Act (WVFOIA) into the WVOGPA. (JA at 651-52). West Virginia Code §6-9A-4(12), which is one of the exceptions to the open meeting requirement listed in the WVOGPA, provides, "To discuss any matter which, by express provision of federal law or state statute or rule of court is rendered confidential, or **which is not considered a public record within the meaning of the freedom of information act** as set forth in article one, chapter twenty-nine-b of this code." (Emphasis added). Despite Respondent's arguments to the contrary, this provision **does not in any way** incorporate into the WVOGPA all of the exemptions to the disclosure of public records under the WVFOIA.

Nevertheless, through this litigation, Respondent seeks to accomplish, without any legal basis for doing so, a major rewriting of the WVOGPA by asserting that **all** of the exemptions contained in the WVFOIA, which identify certain public documents that for the reasons stated do not have to be produced under the WVFOIA, somehow are incorporated into the WVOGPA and create exceptions from the public meeting requirement. Respondent and the trial court have confused the WVOGPA's reference to excluding matters that are not "public records" under the WVFOIA with public records that are exempt pursuant to one of the WVFOIA's exceptions.

There is no exception in the WVOGPA for matters that might be exempt under the WVFOIA, but only for matters that are not "public records," as defined by the WVFOIA. *See* W.Va.Code § 6-9A-4(b)(12). Indeed, **all records exempt under the WVFOIA are "public records,"** for the simple reason that anything outside the definition of a "public record" is not even

subject to the WVFOIA. *See also* W.Va. Code § 29B-1-4(a), which states: "(a) There is a presumption of public accessibility to all public records, subject only to the following categories of information which are specifically exempt from disclosure under this article[.]" Thus, the extremely limited reference in the WVOGPA to the WVFOIA focuses exclusively on any matter THAT IS NOT A PUBLIC RECORD.

Despite the clarity by which "a public record within the meaning of [FOIA]" is defined as "relating to the public's business," Mr. Alsop asserts in his supplemental affidavit that on June 19, 2020, when he was discussing an "internal, deliberative memorandum" he had prepared, because that memorandum is not subject to production under the WVFOIA, somehow that means this part of the meeting correctly was kept from the public. That assertion is as ludicrous as anyone suggesting that the mere presence of a lawyer in a meeting constitutes the basis for going into executive session.

Counsel for Petitioner has not found and counsel for Respondent never provided the trial court with any decision any where in the country holding that the exceptions to the production of public records under the FOIA are incorporated into the exceptions available under an open governmental meetings law. Respondent repeatedly suggested below that deliberative matters are exempt from the WVOGPA when, in fact, the WVOGPA specifically was designed to permit the public to have access to the deliberations of governing bodies to better understand how final decisions in issues of public import were reached. As noted above, it is not enough simply for the public to learn about a final decision rendered by a governing body; the public has the right to observe the deliberations that informed the making of any final decision.

Petitioner respectfully submits the decision by the trial court to incorporate all of the exemptions under the WVFOIA into the WVOGPA is unprecedented and contrary to the language of these statutes.

E. Commercial competition exception is inapplicable under these facts

Finally, the trial court gave an overly expansive reading of the "commercial competition" exception under the WVOGPA and used this narrow exception to justify Respondent secretly discussion a wide variety of issues. (JA at 654-55). This narrow exception is found in W.Va. Code § 6-9A-4(b)(9), which provides:

> **To consider matters involving or affecting the purchase, sale or lease of property, advance construction planning, the investment of public funds or other matters involving commercial competition, which if made public, might adversely affect the financial or other interest of the state or any political subdivision:** Provided, That information relied on during the course of deliberations on matters involving commercial competition are exempt from disclosure under the open meetings requirements of this article only until the commercial competition has been finalized and completed: Provided, however, That information not subject to release pursuant to the West Virginia freedom of information act does not become subject to disclosure as a result of executive session. (Emphasis added).

In its arguments, Respondent suggested that any topic discussed by Respondent that could in any way be deemed to impact "commercial competition" constitutes yet another very broad exception under the WVOGPA. Using this exception, Respondent justified, in Mr. Alsop's supplemental affidavit, whether certain capital projects already started should be continued, the impact of COVID-19 on tuition and fees, the emergency leave with pay plan for faculty, and the discussion with the athletic director on the upcoming football season. All of these topics were issues of public concern that should have been discussed in the sunshine for the public to view and consider.

The "commercial competition" exception to the WVOGPA has never been addressed in any detail by the West Virginia Supreme Court. Because the scope of this phrase must be understood in the context of the WVOGPA, where these exceptions must be narrowly construed, this Court

should apply various rules of statutory construction in an effort to understand what the Legislature meant by "commercial competition."

In any case where an appellate Court is required to review, interpret, analyze, and explain the meaning and application of a statute, the analysis is governed by the following general rules set out in Syllabus Points 1 through 4 of *Meadows v. Wal-Mart Stores, Inc.*, 207 W.Va. 203, 530 S.E.2d 676 (1999):

> 1. "Judicial interpretation of a statute is warranted only if the statute is ambiguous[.]" Syllabus Point 1, in part, *Ohio County Com'n v. Manchin*, 171 W.Va. 552, 301 S.E.2d 183 (1983).
>
> 2. In the interpretation of a statute, the legislative intention is the controlling factor; and the intention of the legislature is ascertained from the provisions of the statute by the application of sound and well established canons of construction.
>
> 3. A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute.
>
> 4. "Generally the words of a statute are to be given their ordinary and familiar significance and meaning, and regard is to be had for their general and proper use." Syllabus Point 4, *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W.Va. 137, 107 S.E.2d 353 (1959).

The words used in a statute often are interpreted by the words surrounding them. In Syllabus Point 2 of *Parkins v. Londeree*, 146 W.Va. 1051, 124 S.E.2d 471 (1962), the West Virginia Supreme Court held:

> In the construction of statutes, where general words follow the enumeration of particular classes of persons or things, the general words, under the rule of construction known as *ejusdem generis*, will be construed as applicable only to persons or things of the same general nature or class as those enumerated, unless an intention to the contrary is clearly shown.

See also Murray v. State Farm Fire and Casualty Co., 203 W.Va. 477, 485, 509 S.E.2d 1, 9 (1998)("Under the doctrine of *ejusdem generis*, 1[w]here general words are used in a contract after

specific terms, the general words will be limited in their meaning or restricted to things of like kind and nature with those specified.' ....The phrase *noscitur a sociis* literally means `it is known from its associates,' and the doctrine implies that the meaning of a general word is or may be known from the meaning of accompanying specific words.....The doctrines are similar in nature, and their application holds that in an ambiguous phrase mixing general words with specific words, the general words are not construed broadly but are restricted to a sense analogous to the specific words.").

In applying these rules, the words "commercial competition" are preceded by "the investment of public funds or other matters involving" and followed by "which if made public, might adversely affect the financial or other interest of the state or any political subdivision." When read in this context, this "commercial competition" exception is not the broad blanket exception Respondent and the trial court recognized, but rather is restricted to matters involving public funds, which if made public, might adversely affect the financial or other interest of the state or any political subdivision.

Respondent argued that every issue impacting a college potentially involves commercial competition with all other colleges. While generally speaking all colleges are in competition with each other to a certain extent, this does not mean that every decision or action by a college has to be made outside of the public's view. "Commercial competition" certainly would cover a situation where various bids are filed by competing private companies seeking to enter into a contract with Respondent. Having that bid information made public too soon may very well adversely affect the financial or other interests of Respondent.

However, Respondent relies on this exception to exclude the public from observing meetings where Respondent discussed its ongoing COVID response, racial issues, budgets, as well as the six topics that are the subject of the additional summary judgment motion. If Respondent's application of this "commercial competition" exception were to be accepted, then the WVOGPA would be rendered completely meaningless. The public deliberations that necessarily take place before a final

decision are what the public is entitled to observe so that the ultimate decision is made in the proper context. Fundamentally, Respondent and the trial court failed to explain in any detail how this narrow commercial competition exception to the WVOGPA applies to the six topics addressed in the underlying motions. Petitioner respectfully submits the overly expansive reading of the commercial competition exception to the WVOGPA must be rejected by this Court as having no basis under the applicable facts or law.

F. Petitioner is entitled to an award of attorneys' fees

Because the trial court upheld Respondent's actions in excluding the public from many of its deliberations, no award of attorneys' fees was made. West Virginia Code §6-9A-7(b) provides:

> (b) A public agency whose governing body is adjudged in a civil action to have conducted a meeting in violation of the provisions of this article may be liable to a prevailing party for fees and other expenses incurred by that party in connection with litigating the issue of whether the governing body acted in violation of this article, unless the court finds that the position of the public agency was substantially justified or that special circumstances make an award of fees and other expenses unjust.

See also McComas; *Peters*.

Pursuant to this statute, Petitioner respectfully asks the Court to hold that the multiple violations of the WVOGPA committed by Respondent justify the trial court awarding attorneys' fees and costs incurred by Petitioner and to remand this case for a development of the attorneys' fees and costs issues.

VII. Conclusion

The public had the right to understand Respondent's ongoing response to the COVID-19 pandemic, the matters raised by a petition addressing racial issues, and Respondent's budget. Similarly, the public should not have been excluded by a governing body from a meeting discussing the business college, the emergency pay policy, federal Title IX regulations, tuition and fees, capital

projects, and the athletic director's outlook for this upcoming season. The idea that these issues of great public concern somehow should be relegated to a secret discussion designed to keep the public from knowing what was discussed is unjustifiable under any of the narrow exceptions provided in the WVOGPA. While the fact that Respondent held "Campus Conversations" on COVID-19 is laudable, this after-the-fact public discussion does not remedy these multiple violations of the WVOGPA.

For the foregoing reasons, Petitioner HD Media, LLC d/b/a Charleston Gazette-Mail respectfully moves this Court to grant Rule 20 oral argument and after hearing these arguments, to issue a Judge or Justice written decision reversing the final orders issued by the trial court, explaining in new Syllabus Points that the trial court erred in expansively reading the narrow exceptions to the WVOGPA, and remanding this case to the trial court to address an award of attorneys' fees and costs to Petitioner. Furthermore, Petitioner seeks such other relief as this Court deems appropriate.

HD MEDIA, LLC d/b/a *CHARLESTON GAZETTE-MAIL*, Petitioner, Plaintiff below,

–By Counsel–

/s/ Lonnie C. Simmons
Lonnie C. Simmons (W.Va. Bar # 3406)
Robert M. Bastress III (W.Va. Bar # 9616)[13]
DiPIERO SIMMONS McGINLEY & BASTRESS, PLLC
P.O. Box 1631
Charleston, West Virginia 25326
(304) 342-0133
lonnie.simmons@dbdlawfirm.com
rob.bastress@dbdlawfirm.com

[13]Petitioner's counsel would be remiss if we failed to acknowledge the substantial contribution of our friend and law partner Sean P. McGinley, who performed the bulk of the work in this litigation.

BEFORE THE WEST VIRGINIA INTERMEDIATE COURT OF APPEALS

No. 23-ICA-248

CHARLESTON GAZETTE-MAIL d/b/a
HD MEDIA, LLC,

Petitioner, Plaintiff below,

v.

WEST VIRGINIA UNIVERSITY
BOARD OF GOVERNORS,

Respondent, Defendant below.

PETITIONER'S APPEAL BRIEF

APPEAL FROM THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

CERTIFICATE OF SERVICE

I, Lonnie C. Simmons, counsel for Plaintiff hereby certify that a copy of **PETITIONER'S APPEAL BRIEF** has been served this 28th day of August, 2023, was served electronically on all counsel of record using the File and Serve Xpress.

/s/ Lonnie C. Simmons
Lonnie C. Simmons (W.Va. Bar # 3406)