

IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

DOCKET NO. 25-68

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County Commission of Fayette County,
Petitioner

v.)

Pardee and Curtin Realty LLC,
Respondent

PETITIONER'S OPENING BRIEF

On Order of Certification entered in the United States District Court for the Southern District of
West Virginia on January 22, 2025, Civil Action No. 2:21-cv-00307

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OPENING BRIEF OF THE PETITIONER

Petitioner, County Commission of Fayette County, West Virginia, *ex rel.* Anthony Ciliberti, Jr., Esq., Fayette Co. Prosecuting Attorney (“Governmental Plaintiff”), by counsel, hereby submits this brief On Order of Certification entered in the United States District Court for the Southern District of West Virginia on January 22, 2025, Civil Action No. 2:21-cv-00307. The United States District Court for the Southern District of West Virginia certified to this Court the following question of law: “Is a West Virginia political subdivision that brings a “Citizen Suit” under the Resource Conservation and Recovery Act, 42 U.S.C. § 6972, entitled to prosecutorial immunity from being assessed a prevailing opponent’s attorney fees and costs?” For the reasons that follow, this Court should answer this question in the affirmative.

I. BACKGROUND:

The federal case from which the question was certified, *County Commission of Fayette Co., WV, ex rel. Anthony Ciliberti, Esq., Fayette Co. Prosecuting Attorney v. National Grid NE Holdings 2, LLC, et al.*, Case No. 2:21-cv-00307 (S.D. WV) (Johnston, C.J.), is a remedial

environmental case in which the Governmental Plaintiff, the County Commission of Fayette County, West Virginia, represented by the Fayette Co. Prosecuting¹ Attorney, who also served as the Governmental Plaintiff's Relator, sought judicial abatement of the conditions existing at, and the alleged, toxic "Solid Waste" and Acid Mine Drainage-contaminated Leachate that has been and is continuing to be released into the public environment from, five (5) unlined and unpermitted coal refuse piles, commonly referred to as "Gob Piles²," in the Johnson Fork-Loop Creek watershed located wholly within Fayette County, West Virginia.

Amongst other claims, the Governmental Plaintiff's Second Amended Complaint ("SAC") asserts a "Citizen Suit" claim under the "Imminent & Substantial Endangerment" Abatement provisions of RCRA § 7002(A)(1)(b), 42 U.S.C. § 6972(a)(1)(B)³, against several defendant

¹ W. Va. Code § 7-4-1 [“**Duties of the Prosecuting Attorney**”] provides, in relevant part:

(a) The prosecuting attorney shall attend to the criminal business of the state in the county in which he or she is elected and qualified . . . **The prosecuting attorney shall also . . advise, attend to, bring, prosecute, or defend, as the case may be, all matters, actions, suits, and proceedings in which such county or any county board of education is interested.**

[Bolding emphasis added].

² "Gob" is an acronym for "garbage of bituminous." *Va. Elc. & Power Co. v. Bransen Energy, Inc.*, 850 F.3d 645, 651 (4th Cir. VA 2017). "Gob piles are piles of waste comprised of coal mixed with mining byproducts." (*Id.*).

³ RCRA § 7002(a)(1)(B) provides:

(a) **In general.** Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf—

(1)

*** *** *** ***

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment;

entities alleged to have contributed to “the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment” at the 5 Gob Pile sites within the meaning of that federal statute. For relief, the Governmental Plaintiff’s SAC seeks:

an Order of this Court requiring each of the **Remedial Defendants**, jointly and severally, and subject to appropriate oversight and monitoring by the Fayette Co. Code Enforcement Agency: **(a)** to undertake at their sole cost a Remedial Investigation and Feasibility Study (“**RI/FS**”) of the **Subject Property** and the **Subject Watershed** in full compliance with the applicable requirements of the **NCP**, **(b)** timely and competently to implement at their sole cost such immediate or interim removal or remedial actions as the Court may determine to be necessary and proper to appropriate abatement of any **Public Nuisance** condition(s) or imminent and substantial endangerments to health or the **Environment** within the **Subject Watershed**; **(c)** following filing of the required final **RI/FS** report with this Court, and after conduct of such hearings as the Court determines to be appropriate, to timely and competently implement at their sole cost the **Remedial Action** Plan, if any, for the **Subject Watershed** selected and approved by the Court; and **(d)** periodically and timely to reimburse the **Governmental Plaintiff** for the **Abatement Action Costs** it has incurred in overseeing and monitoring the Defendants’ performance of the **Abatement Action** ordered by this Court;

Section **VI.B** [“**Prayer for Relief**”] of the Governmental Plaintiff’s SAC [bolding in original]. JA 185. The Governmental Plaintiff also sought, pursuant to the provisions of RCRA § 7002(e), 42 U.S.C. § 6972(e)⁴, recovery of its “costs of litigation (including reasonable attorney and expert witness fees)” incurred in bringing its RCRA § 7002(a)(1)(B) claim before the Court.

42 U.S.C. § 6972(a)(1)(B) [bolding in original].

⁴ RCRA § 7002(e) provides:

(e) Costs. The court, in issuing any final order in any action brought pursuant to this section or section 7006, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

42 U.S.C. § 6972(e) [bolding in original].

The Governmental Plaintiff's SAC names owners of surface rights appertaining to the real property upon which the five (5) Gob Piles are located as "remedial defendants." Defendant Pardee and Curtin Realty LCC ("Pardee") is named as a defendant upon the County's allegation that Pardee owned surface property that included the coal refuse piles from 2003 to 2013. According to the County, Defendant Pardee failed to remediate the refuse during its period of ownership of the surface rights at those sites as is clearly required by applicable W. Va. Law⁵ of any owner of the real property on which such an unpermitted and illegal "Open Dump" of mining waste is located and was, therefore, liable under RCRA § 7002(a)(1)(B) as a "past owner or operator of a disposal facility, who contributed to the past or present handling or disposal of a solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment" within the meaning of that section of federal law.

However, Pardee disputed having any ownership interest in the real property upon which the Gob Piles are located. According to Pardee, when it took ownership of surrounding land under a 2003 Deed recorded in the Office of the Clerk of the Fayette Co. Commission, that source deed excepted and reserved certain tracts of real property that encompassed each of the five (5) Gob Piles sites within the Johnson Fork – Loop Creek Watershed. With respect to that 2003 Deed, it contained the following language: "Grantor EXCEPTS and RESERVES the surface and timber only of real property depicted on Exhibits C-1 to C-8 attached hereto (the 'Reserved Surface Tracts').". However, the very next sentence of the deed provides "Grantor and Grantee agree to obtain surveys or otherwise develop mutually acceptable metes and bounds descriptions of each Reserved Surface Tract within 90 days after the date hereof, and to execute and deliver a corrected Deed reflecting such description." No such 'corrective Deed' was ever filed, and therefore the

⁵ See: Sections 1.6 and 7.2 of the W. Va. Solid Waste Management Rule, W. Va. C.S.R. § 33-1-1.6 and 7.2.

County asserted that the expressed condition for the reservation was never completed. Further, the County asserted that the purported reservation of the “Reserved Surface Tracts” solely by hand-drawn circles on a contour map attached to the 2003 Deed was inadequately defined. According to the County, the reservation in the Deed that purported to exempt from the conveyance of real property otherwise effected by the 2003 deed all of the “Reserved Surface Tracts,” had no legal force or effect because it failed to meet the “Definiteness” requirement of W. Va. Real Property law, and, accordingly, the areas contained in the purportedly exempted tracts of real property were, in fact and at law, transferred to Defendant Pardee. The District Court found the County’s contentions against Pardee to be without merit under West Virginia law and granted summary judgment in Pardee’s favor on the County’s RCRA § 7002(a)(1)(B) claims against it.

Following the granting of its motion for summary judgment on the County’s RCRA § 7002(a)(1)(B) claim against it, Defendant Pardee moved for an award of its fees and costs as a prevailing defendant pursuant to RCRA § 7002(e), 42 U.S.C. § 6972(e). In order to avoid adversely impacting on the clear congressional goal of encouraging enforcement of RCRA’s provisions by state and local governments and private parties, applicable federal law limits the authority of the United States District Courts award fees and costs to a prevailing defendant to those circumstances where the “the plaintiff’s action was frivolous, unreasonable, or without foundation,” or if the plaintiff “continued to litigate after it clearly became so.” *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, at 421-22 (1978). Defendant Pardee contends that happened here, and requests an award of \$225,498.36 of attorney’s fees, expert witness fees, and costs Pardee incurred as a result of the County’s prosecution of its remedial environmental and public health protection claim under RCRA § 7002(a)(1)(B) against Defendant Pardee.

In opposition, the County argues that the Governmental Tort Claims and Insurance Reform Act, W. Va. Code, Chapter 29, Article 12A, immunizes political subdivisions from liability

stemming from “judicial, quasi-judicial or prosecutorial functions.” W. Va. Code § 29-12A-5(a)(2)⁶. The County contends that “at all times, this case was prosecuted by Anthony Ciliberti, Esq, Fayette County Prosecuting Attorney, Relator, by duly-appointed Assistant Fayette County Prosecuting Attorneys performing prosecutorial functions.” Moreover, the County has asserted that pursuant to W. Va. Code § 29-12A-5(a)(8) political subdivisions are immune from “other fees or charges imposed by law.” Pardee disputes that this case arises out of the County’s prosecutorial functions and argues that the County is estopped from asserting immunity.

II. LEGAL ARGUMENT:

a. The Governmental Plaintiff, the County Commission of Fayette County, and Its Relator, the Fayette Co. Prosecuting Attorney, Have Prosecutorial Immunity.

The question certified is whether the Governmental Plaintiff herein is entitled to prosecutorial immunity. As this Court has recognized, “[i]mmunity law can be difficult to understand under the best of circumstances, as it involves three separate and distinct legal analyses which apply to claims against three separate and distinct categories of entities and individuals.” *launija v Sullivan*, 249 W. Va. 747, *751; 901 S.E.2d 500, **504; 2024 W. Va. LEXIS 204, ***9 (2024). This Court established a two-step analysis for addressing immunity claims: **1)** categorize the party claiming immunity; and **2)** determine whether the party is entitled to immunity under the facts and circumstances presented. *Id.*

⁶ W. Va. Code § 29-12A-5 [“**Immunities from Liability**”] provides, in relevant part:

(a) A political subdivision is immune from liability if a loss or claim results from:

*** *** *** ***

(2) Judicial, quasi-judicial or prosecutorial functions;

*** *** *** ***

(5) Civil disobedience, riot, insurrection or rebellion or the failure to provide, or the method of providing, police, law enforcement or fire protection.

With respect to the first prong:

The first step is to properly categorize the party claiming immunity. In this regard, there are three sources of immunity in our jurisprudence: constitutional or "sovereign" immunity, common law "qualified immunity," and statutory immunity as set forth in the Tort Claims Act. It is well established that claims for both constitutional and common law qualified immunity are available only for the State, its agencies, officials, and/or employees. See W. Va. Const. art. VI, § 35; see also A.B., 234 W. Va. at 502; 766 S.E.2d at 761 ("In West Virginia, however, the Governmental Tort Claims and Insurance Reform Act, West Virginia Code § 29-12A-1 *et seq.*, is limited to political subdivisions and their employees and does not cover claims made against the State or its agencies.");

Id. In this case, the Governmental Plaintiff's Relator, the Fayette County Prosecuting Attorney, is an instrumentality of the State of West Virginia representing the political subdivision Fayette County Commission (authority for representation is set forth in Footnote 1.) which is covered by the Governmental Tort Claims and Insurance Reform Act, West Virginia Code § 29-12A-1 *et seq.*

The Governmental Plaintiff's Relator, acting as an Officer of the State and County Governments, has absolute prosecutorial immunity. This Court has frequently held that absolute prosecutorial immunity attaches to protect prosecutors from civil liability that otherwise would often arise by virtue of the functions they perform for the State. Public Prosecutors enjoy absolute immunity from civil liability for prosecutorial functions such as initiating and pursuing a criminal prosecution, presenting a case at trial, and other conduct that is intricately associated with the judicial process. And absolute prosecutorial immunity cannot be defeated by showing that the prosecutor acted wrongfully or even maliciously. *Launi v. Hampshire Cty. Prosecuting Attorney's Off.*, 2023 W. Va. LEXIS 457, *1, 249 W. Va. 262, 265, 895 S.E.2d 117, 120 (2023). While this is a Governmental civil Public Nuisance abatement case, the Fayette County Prosecuting Attorney presented this case in the United States District Court and litigated it in the judicial process.

Regarding common law prosecutorial immunity, the following has been stated by this Court:

Prosecutors enjoy absolute immunity from civil liability for prosecutorial functions such as, initiating and pursuing a criminal prosecution, presenting a case at trial, and other conduct that is intricately associated with the judicial process. . . . It has been said that absolute prosecutorial immunity cannot be defeated by showing that the prosecutor acted wrongfully or even maliciously, or because the criminal defendant ultimately prevailed on appeal or in a habeas corpus proceeding.

The absolute immunity afforded to prosecutors attaches to the functions they perform, and not merely to the office. Therefore, it has been recognized that a prosecutor is entitled only to qualified immunity when performing actions in an investigatory or administrative capacity. Franklin D. Cleckley, *et al.*, *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 8(c), at 213 (3d ed. 2008). *See Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L. Ed. 2d 128 (1976) (extending absolute immunity to prosecutors from civil rights claims);

Mooney v. Frazier, 225 W. Va. 358, 370 Footnote 12, 693 S.E. 2d 333, 345, 2010 W. Va. LEXIS 21, *36-40. This Court has repeatedly recognized that Prosecuting Attorneys in W. Va. are Executive Officers of State of West Virginia as well as Executive Officers of the County in which they are elected. *See: State ex rel. Games-Neely v. Sanders*, 220 W. Va. 230 (2006), *State ex rel. Ginsberg v. Naum*, 173 W. Va. 510, 512, 318 S.E.2d 454, 456 (1984) ("a prosecutor, *as part of the executive department*, must enforce . . . criminal laws." (emphasis added) (citing *State ex rel. Hamstead v. Dostert*, 173 W. Va. 133, 313 S.E.2d 409 (1984))); Syl. pt. 7, *State ex rel. Skinner v. Dostert*, 166 W. Va. 743, 278 S.E.2d 624 (1981) ("The prosecutor, *like any other executive officer*, must have sound reasons for his actions." (emphasis added)); *State ex rel. Miller v. Smith*, 168 W. Va. 745, 755-56, 285 S.E.2d 500, 506 (1981) ("Prosecuting attorneys are executive officers, *see W. Va. Const. art. VII, § 1; Code 5-3-2* (1979 Replacement Vol.), § 7-4-1," (footnote omitted)). While these holdings by this Court have generally been made in the context of the enforcement of

the criminal law of this State, both the U.S. Supreme Court⁷ and this Court⁸ have recognized the very close relationship between the criminal law and the authority of designated Governmental Agencies and Public Prosecutors to investigate and prosecute the abatement of Public Nuisances within their jurisdiction. Thus, the Fayette Co. Prosecuting Attorney, acting pursuant to statutory authority⁹ as the Governmental Plaintiff's Relator and Lead Trial Counsel, has absolute prosecutorial immunity under W. Va. common law.

The County Commission of Fayette County likewise has immunity, but by statute. The West Virginia Legislature enacted The Governmental Tort Claims and Insurance Reform Act (the "Act") in 1986. W. Va Code §29-12A-1 *et. seq.* Its purposes are to limit liability of political subdivisions and provide immunity to political subdivisions in certain instances and to regulate the costs and coverage of insurance available to political subdivisions for such liability. W. Va Code §29-12A-1. The Act does not grant blanket immunity to political subdivisions. Rather, it

⁷ Recognizing the historic and continuing close legal relationship between the public policies involved in the enforcement of the criminal law and those that attend Public Prosecutions to abate Public Nuisances, the U.S. Supreme Court, in its seminal decision in *Huffman v. Pursue, Ltd.*, 420 U.S. 592; 95 S. Ct. 1200; 43 L. Ed. 2d 482 (1975), extended the federal *Younger Abstention Doctrine* (that had previously been applied only to state criminal cases) to protect against federal injunctive proceedings that could improperly interfere with Public Civil Prosecutions of Public Nuisance abatement case.

⁸ When considering matters involving the abatement of Public Nuisances under W. Va. law, this Court has consistently recognized that "Ordinarily, a suit to abate a public nuisance cannot be maintained by an individual in his private capacity, **as it is the duty of the proper public officials to vindicate the rights of the public.**" *Sharon Steel v. Fairmont*, 175 W. Va. 479 (1985) (citing to *Hark v. Mountain Fork Lumber Co.*, 127 W. Va. 586 (1945) and to the *Restatement (Second) of Torts* § 821B(1)). More recently, this same recognition of the very close relationship between the Public Policies involved in criminal prosecutions and those involved in Public Prosecutions of Public Nuisance abatement matters led this Court to hold in *State ex rel. Discover Fin. Servs. v. Nibert*, 231 W. Va. 227 (2013) that when state or local governments retain private counsel on a part-time basis to assist full-time Public Prosecutors in Public Nuisance Abatement matters those private counsel must be duly appointed and confirmed as sworn Asst. Prosecuting Attorney and their conduct (including prosecution and settlement) of Public Nuisance Abatement cases supervised by full-time Public Prosecutors.

⁹ W. Va. Code § 7-4-1.

establishes numerous situations when political subdivisions are subject to liability. W. Va. Code § 29-12A-4. Further, the Act provides that political subdivisions may be held liable for damages when liability is expressly imposed upon the political subdivision by a provision of the West Virginia Code. §29-12A-4(c)(5). However, “[l]iability shall not be construed to exist ... because of a general authorization that a political subdivision may sue and be sued.” *Id.*

West Virginia Code §29-12A-5 provides “Immunities from liability. (a) A political subdivision is immune from liability if a loss or claim results from: ... (2) Judicial, quasi-judicial or prosecutorial functions.” Unquestionably, the County Commission of Fayette County is a political subdivision of the State of West Virginia and subject to this statute.

At all times, this case was prosecuted by Anthony Ciliberti, Jr., Esq, the duly-elected Fayette County Prosecuting Attorney, acting as the Governmental Plaintiff’s Relator, by Assistant Fayette County Prosecuting Attorneys appointed and supervised by him performing prosecutorial functions. At the direction and under the supervision of the Fayette County Prosecuting Attorney, Assistant Fayette County Prosecuting Attorneys filed the Governmental Plaintiff’s complaint and litigated the case in front of a judicial body. County Public Prosecutors performed prosecutorial tasks on behalf of the Fayette County Commission, falling squarely within “prosecutorial functions” triggering immunity pursuant to West Virginia Code §29-12A-5(a)(2).

Moreover, among other causes of action, the case was filed pursuant to Fayette County’s “police powers” as granted by the West Virginia Legislature.¹⁰ JA 144, 149. Exercising police

¹⁰ By its enactment of W. Va. Code § 7-1-3kk in 2002, the West Virginia Legislature vested County Commissions with the following broad “Police Powers” of the State of West Virginia:

In addition to all other powers and duties now conferred by law upon county commissions, **commissions are hereby authorized to enact ordinances, issue orders and take other appropriate and necessary actions for the elimination of hazards to public health and safety and to abate or cause to be abated anything which the**

powers falls within the County's public prosecutorial function, the gravamen of this federal case being in the nature of a governmental civil action to abate public nuisance conditions existing within Fayette County. As such, the Governmental Plaintiff is immune from Defendant Pardee's claim for attorney fees and costs. *See, Manbeck v. Austin Indep. Sch. Dist.*, 381 S.W.3d 528, 531 (Tex. 2012) (no right to attorneys' fees against government entity where no explicit waiver of such immunity in the Texas Tort Claims Act) ("Further, *Barfield* indicates that the remedies available to a claimant under the Political Subdivisions Law are limited to those available under the Tort Claims Act, which does not provide for an award of attorney fees.").

It is important for this Court to note that the West Virginia Act contains no express waiver of immunity from claims for attorney's fees. In fact, it expressly states the contrary: "A political

commission determines to be a public nuisance. The ordinances may provide for a misdemeanor penalty for its violation. The ordinances may further be applicable to the county in its entirety or to any portion of the county as considered appropriate by the county commission.

Id. [Bolding and underscoring emphasis added]. Earlier in 1989 (and substantially amended in 1996, 1998, and 2002) the W. Va. Legislature conveyed to County Commissions the legal authority to address by ordinance and to abate the limited subset of public nuisance conditions involving the "accumulation of refuse and debris . . . and toxic spillage or toxic seepage **located on private lands.**" Va. Code § 7-1-3ff:

(b) Plenary power¹⁰ and authority are hereby conferred upon every county commission to adopt ordinances regulating the removal and clean up of **any accumulation** of refuse or debris, overgrown vegetation **or toxic spillage or toxic seepage located on private lands** which is determined to be unsafe, unsanitary, dangerous, or detrimental to the public safety or welfare, whether the result of natural or manmade force or effect.

(e) Any ordinance adopted pursuant to the provisions of this section shall provide fair and equitable rules of procedure and any other standards considered necessary to guide the enforcement agency, or its agents, in the investigation of dwelling or building conditions, accumulation of refuse or debris, overgrown vegetation, or toxic spillage or toxic seepage and shall provide for fair and equitable rules of procedure for instituting and conducting hearings in the matters before the county commission. . . .

[Bolding emphasis added].

subdivision is immune from liability if a loss or claim results from: . . . (8) Assessment or collection of taxes lawfully imposed or special assessments, license or registration fees or other fees or charges imposed by law[.]” W.V. Code §29-12A-5(a)(8). A claim for attorneys’ fees under RCRA would be “fees imposed by law” and is therefore barred.

b. Compelling Public Policy Supports Immunity for the Fayette Co. Prosecuting Attorney and the County Commission of Fayette County:

The West Virginia legislature declared that the purposes of the Act are to limit liability of political subdivisions and provide immunity to political subdivisions in certain instances. W. Va Code §29-12A-1. In order to accomplish the Legislature’s clearly expressed intent, those declared purposes should be interpreted broadly by this Court.

When a political subdivision such as the Fayette County Commission loses a public prosecuting in court, awarding attorney fees against it raises significant public policy concerns. While the principle of accountability is essential, the broader implications of such a policy must be carefully considered, as it can undermine the effectiveness and functionality of public services.

The Fayette County Commission operates with limited public resources. Awarding attorney fees against it will create a significant financial burden, diverting resources away from essential public services such as infrastructure, healthcare, and public safety; a fact recognized by the West Virginia Legislature when enacting the Act. W. Va Code §29-12A-1. These public funds, which could be used to benefit the public, would instead be spent on legal fees benefiting a private party. This has the potential to negatively impact taxpayers, as money that should go toward critical public services would be allocated to legal fees.

Opening the floodgates to awards of attorney fees not authorized by the West Virginia Code or common law would create a chilling effect on governmental public prosecutions of a wide range of environmental and public health protections statutes and rules. West Virginia Political

Subdivisions are often required to make difficult, complex decisions that affect the public at large. Awarding attorney fees against them could create a chilling effect, where public officials become overly cautious in decision-making. This would hinder the ability of government entities to fulfill their public role and make necessary, sometimes controversial, public policy and related public prosecutorial decisions. The fear of personal or institutional financial consequences might lead to indecision or avoidance of necessary actions, ultimately harming the public interest. Penalizing West Virginia political subdivisions for losing cases may discourage transparency and make it difficult for them to properly serve their public constituencies.

There are already other methods of holding the Fayette County Commission accountable. These include internal checks and balances, public accountability through elections, and judicial oversight. Additionally, governments are subject to oversight by taxpayers and the media, providing natural accountability without the need to further burden them with financial penalties. Awarding attorney fees against political subdivisions may also result in an increase in frivolous lawsuits. Private party claimants may be motivated to pursue cases against public agencies, knowing that the government might be forced to settle or incur substantial legal costs even if the case lacks merit. This can lead to a rise in litigation designed to exploit the government's financial vulnerabilities, undermining the legal process and making it more difficult for political subdivisions to effectively carry out their public responsibilities. Precisely the concern expressed by the West Virginia Legislature in the Act.

While individuals and private entities can generally be expected to bear the costs of their legal fees, political subdivisions have been tasked by West Virginia Law with representing the collective interests of the public in a wide range of environmental and public health protection matters. Penalizing them with attorney fees for losing a public prosecution could create an imbalance in how the law treats governmental bodies versus private parties.

In conclusion, while it is important for governments to be held accountable, awarding attorney fees against political subdivisions that lose a case could have harmful consequences, including financial strain on public resources, a chilling effect on governance, and an increase in frivolous litigation. Public policy should focus on preserving the effective functioning of government.

CONCLUSION

For the above reasons, this Court should answer in the affirmative the United States District Court for the Southern District of West Virginia's certified question of law:" Is a West Virginia political subdivision that brings a citizen suit under the Resource Conservation and Recovery Act, 42 U.S.C. § 6972, entitled to prosecutorial immunity from being assessed a prevailing opponent's attorney fees and costs?"

Respectfully submitted:

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CERTIFICATE OF SERVICE

I, Michael O. Callaghan, hereby certify that on March 31, 2025, I served the above
PETITIONER'S OPENING BRIEF, on counsel by WV efile.

/s/ Michael O. Callaghan

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