

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 24-412

SCA EFiled: Nov 15 2024
05:53PM EST
Transaction ID 75021154

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

Petitioner, Appellant below,

v.

**WEST VIRGINIA UNIVERSITY
BOARD OF GOVERNORS,**

Respondent, Appellee below.

PETITIONER'S APPEAL BRIEF

APPEAL FROM THE WEST VIRGINIA INTERMEDIATE COURT OF APPEALS

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 HD Media Company, LLC d/b/a Charleston Gazette-Mail

TABLE OF CONTENTS

I.	Introduction	1
II.	Assignments of error	6
A.	Whether the WVICA erred in affirming the trial court’s orders granting Respondent’s summary judgment motion and denying Petitioner’s cross motion for summary judgment where:	
1.	Both courts’ engaged in an overly expansive reading of the limited “commercial competition” exception found in W.Va.Code §6-9A-4(b)(9), which interpretation is inconsistent with existing case law, where the WVOGPA exceptions must be narrowly construed;	
2.	In an unprecedented decision, both courts incorporated the “internal memorandum” exemption under the West Virginia Freedom of Information Act (WVFOIA) as an exception under the WVOGPA, where no such exception exists, and found any meeting where an “internal memorandum” is discussed required the governing body to go into executive session under the WVOGPA;	
3.	Both courts approved of the procedure Respondent followed in its attempt to assert the attorney-client privilege to the WVOGPA where Respondent failed to comply with <i>Peters v. County Commission of Wood County (Peters I)</i> , 205 W.Va. 481, 519 S.E.2d 179 (1999), and <i>Peters v. County Commission of Wood County (Peters II)</i> , 209 W.Va. 94, 543 S.E.2d 651 (2000), requiring <i>in camera</i> testimony; and	
4.	Despite the fact that both courts agreed Respondent violated the pre-meeting notice provision under the WVOGPA, they held no attorneys’ fees should be awarded where such fees are justified not only based upon on this critical notice violation, but also upon the foregoing improper attempts to justify executive sessions based upon their expansive and unprecedented reading of the narrow exceptions to the WVOGPA discussed herein?	

B.	Whether the WVICA had no jurisdiction in this case because Petitioner appealed the denial of a request for extraordinary remedy, <i>i.e.</i> , injunctive and declaratory relief, where this Court has exclusive appellate jurisdiction under Rule 1(b)(10)(first paragraph) of the Rules of Appellate Procedure?	
III.	Statement of the case	7
A.	Undisputed Respondent failed to provide the required notice in one of its agendas and illegally discussed issues of public concern in executive session	7
B.	Trial court’s resolution of cross motions for summary judgment	9
C.	Petitioner’s multiple attempts to appeal these orders addressing the denial of extraordinary relief to this Court	10
IV.	Summary of the argument	11
V.	Statement regarding oral argument and decision	12
VI.	Argument	13
A.	The WVOGPA mandates that all meetings of governing bodies must be open to the public, subject to narrow exceptions	13
B.	Commercial competition exception is inapplicable under these facts	15
C.	The Legislature did not incorporate into the WVOGPA any of the exemptions available under the WVFOIA	22
D.	Respondent failed to follow the procedure mandated in <i>Peters I</i> and <i>Peters II</i> when it claimed attorney-client privilege justified executive session	26
E.	Attorneys’ fees should be awarded based upon the foregoing violations of the WVOGPA and the undisputed finding that Respondent violated the notice provision in the WVOGPA	30
F.	Only this Court has jurisdiction over appeals of extraordinary remedies	35
VII.	Conclusion	38

TABLE OF AUTHORITIES

West Virginia Cases:

<i>Ashland Oil, Inc. v. Kaufman</i> , 181 W.Va. 728, 384 S.E.2d 173 (1989)	36
<i>Camden-Clark Memorial Hospital Corp. v. Turner</i> , 212 W.Va. 752, 575 S.E.2d 362 (2002)	36
<i>Capriotti v. Jefferson County Planning Commission</i> , 2015 WL 869318 (No. 13-1243, 2/26/2015) (Memorandum decision)	33
<i>Daily Gazette Company, Inc. v. West Virginia Development Office</i> , 206 W.Va. 51, 521 S.E.2d 543 (1999)	32
<i>French v. Mercer Cty. Comm'n</i> , 2015 WL 7025292, at *4 (W. Va. 2015)(Memorandum decision)	13
<i>HD Media Company, LLC d/b/a Charleston Gazette-Mail v. West Virginia University Board of Governors</i> , 2024 WL 3007228 (No. 23-ICA-248, 6/14/2024)	<i>in passim</i>
<i>In re: R.S.</i> , 244 W.Va. 564, 855 S.E.2d 355 (2021)	29
<i>Jackson v. Harvey</i> , 2024 WL 4634934 (No. 24-387, 10/31/2024)	37
<i>Justice v. AFL-CIO</i> , 246 W.Va. 205, 866 S.E.2d 313 (2021)	36
<i>McComas v. Board of Education of Fayette County</i> , 197 W.Va. 188, 475 S.E.2d 280 (1996)	5, 14
<i>Meadows v. Wal-Mart Stores, Inc.</i> , 207 W.Va. 203, 530 S.E.2d 676 (1999)	17
<i>Murray v. State Farm Fire and Casualty Co.</i> , 203 W.Va. 477, 509 S.E.2d 1 (1998)	18
<i>National Union Fire Insurance Company of Pittsburgh, PA v. Westlake Chemical Corp.</i> , 249 W.Va. 575, 900 S.E.2d 1 (2024)	37

<i>Parkins v. Londeree</i> , 146 W.Va. 1051, 124 S.E.2d 471 (1962)	18
<i>Peters v. The County Commission of Wood County (Peters II)</i> , 209 W.Va. 94, 543 S.E.2d 651 (2000)	6, 23, 25-26, 28, 30
<i>Peters v. County Commission of Wood County (Peters I)</i> , 205 W.Va. 481, 519 S.E.2d 179 (1999)	5, 6, 23, 25-27, 30
<i>State ex rel. Suriano v. Gaughan</i> , 198 W.Va. 339, 480 S.E.2d 548 (1996)	36
<i>State ex rel. United States Fidelity & Guar. Co. v. Canady</i> , 194 W.Va. 431, 460 S.E.2d 677 (1995)	36
<i>State ex rel. Universal Underwriters Insurance Co. v. Wilson</i> , 239 W.Va. 338, 801 S.E.2d 216 (2017)	36
<i>SWN Production Company, LLC v. City of Weirton</i> <i>Board of Zoning Appeals</i> , 2024 WL 1730044 (No. 23-ICA-405, 4/22/2024)	37-38
<i>Aaron W. v. Evelyn W.</i> , ___ W.Va. ___, ___ S.E.2d __ (No. 23-488, 11/12/2024)	37
Miscellaneous:	
Brian Albert Davis, <i>City of Burlington v. Dague—Contingency Enhancement: The Court Buckles Under the Statutory Burden</i> , 42 Cath. U. L. Rev. 615, 626–27 (1993)(citations omitted).	31
https://www.wvgazettemail.com/news/education/800-plus-people-call-wvu-systemically-anti-black-school-forming-groups-to-suggest-improvements/article_399f79b5-8227-5207-ac0a-2cde6a3413e7.html	3
Rule 1(b)(1)(second paragraph), West Virginia Rules of Appellate Procedure	36
Rule 1(b)(10)(first paragraph), West Virginia Rules of Appellate Procedure	7, 10-12, 36-37
Rule 29, West Virginia Rules of Appellate Procedure	11
W.Va.Code §6-9A-1	1, 5, 13
W.Va.Code § 6-9A-3(a)	1, 13

W.Va.Code §6-9A-3(d)	3, 32
W.Va.Code § 6-9A-4(b)(9)	6, 16, 20
W.Va.Code §6-9A-4(b)(11)	27
W.Va.Code § 6-9A-4(b)(12)	23-24
W.Va.Code §6-9A-6	31
W.Va.Code §6-9A-7(b)	31
W.Va.Code §29B-1-4(a)	24
W.Va. Code § 29B-1-4(a)(8)	22
W.Va.Code §51-11-4	11

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 24-412

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

Petitioner, Appellant below,

v.

**WEST VIRGINIA UNIVERSITY
BOARD OF GOVERNORS,**

Respondent, Appellee below.

PETITIONER'S APPEAL BRIEF

APPEAL FROM THE WEST VIRGINIA INTERMEDIATE COURT OF APPEALS

I. Introduction

To the Honorable Justices of the

West Virginia Supreme Court of Appeals:

The West Virginia Open Governmental Proceedings Act (WVOGPA) explicitly mandates that "except as expressly and specifically otherwise provided by law, whether heretofore or hereinafter enacted, and except as provided in section four of this article, **all meetings of any governing body shall be open to the public.**" (Emphasis added). W.Va.Code §6-9A-3(a). The law itself provides for "only a few[12] clearly defined exceptions." W.Va.Code §6-9A-1.

Beginning in the Summer of 2020, Respondent West Virginia University Board of Governors held months of regular meetings during which the great majority of the time was spent in secret

executive sessions from which members of the public, including journalists employed by Petitioner HD Media Company, LLC d/b/a Charleston Gazette-Mail, were barred. Both the trial court and the West Virginia Intermediate Court of Appeals (WVICA) found one of the public notices of the meetings to be inadequate and a violation of the WVOGPA. However, the trial court dismissed this notice violation as being merely “technical.” (JA at 623). The WVICA had a different view, stating in *HD Media Company, LLC d/b/a Charleston Gazette-Mail v. West Virginia University Board of Governors*, 2024 WL 3007228 at *12 (No. 23-ICA-248, 6/14/2024) that:

"We do not endorse the circuit court’s characterization of a defective notice as merely “technical.” Our position is clear: “[t]he fundamental purpose of the open meeting law is to ensure the right of the public to be fully informed regarding the conduct of governmental business.” *McComas v. Bd. of Educ. of Fayette Cnty.*, 197 W. Va. 188, 197, 475 S.E.2d 280, 289 (1996) (quoting *State ex rel. Badke v. Village Board*, 173 Wis.2d 553, 494 N.W.2d 408, 414 (1993)). Governing bodies must endeavor to strictly abide by the technical requirements of WVOGPA, including notice. (JA at 769).

Notwithstanding the WVICA's view that government bodies "must strictly abide" by the law's notice requirement, it "did not find reversible error in the court’s application of the law." *Id.*

Having provided inadequate notice to the public regarding what would be discussed by Respondent at one of its meetings, Respondent proceeded to discuss in executive session issues of great interest, not only to the WVU community, but to people throughout the State and region. These secret meetings involved discussions of WVU’s budget, capital improvements, student tuition and fees, the business college, emergency employee pay policy, responses to COVID-19, changing Title IX regulations, and matters related to a petition signed by more than 800 mostly Black

students, faculty, staff and alumni of WVU of alleging racial discrimination at WVU.¹ Respondent also held executive session discussions involving the expectations and outlook concerning the then upcoming Mountaineer football season.

These specific topics, most of which were never listed in any of Respondent's Meeting Agendas, were discussed secretly in executive session by Respondent in violation of the WVOGPA and are at issue in this litigation. 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. W.Va.Code §6-9A-3(d). During the open deliberations, the public observes the governing body present facts, ask questions, and discuss the issues. In a normal meeting under the WVOGPA, members of the public often are invited to provide comments for a governing body to consider as it deliberates. By showing "how the sausage is made," the public gains a greater appreciation and understanding of the rationale behind the decisions subsequently agreed upon.

Because Respondent routinely failed to hold open meetings on the foregoing issues of public interest, thus barring the public and Petitioner's reporters, Petitioner filed a civil action against Respondent in the Circuit Court of Monongalia County seeking injunctive and declaratory relief,

¹See Ryan Quinn, *800-plus people call WVU systematically anti-black; school forming groups to suggest improvements*, CHARLESTON GAZETTE-MAIL (June 19, 2020) https://www.wvgazettemail.com/news/education/800-plus-people-call-wvu-systemically-anti-black-school-forming-groups-to-suggest-improvements/article_399f79b5-8227-5207-ac0a-2cde6a3413e7.html. Congress and the Legislature regularly discuss and have discussed the impact of COVID-19, race relations, budgets, and capital improvements in public because as representatives of the people, these legislative bodies recognize the absolute right the public has to observe all of their deliberations and discussions of issues, subject only to very narrowly defined exceptions.

which are extraordinary remedies available under the WVOGPA. 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 this Court, and inconsistent with the WVOGPA's language.

As discussed in more detail below, Petitioner made multiple efforts to appeal to this Court these final orders denying extraordinary relief, but those efforts were rejected by this Court. Petitioner then was forced to file this appeal with the WVICA, which had no appellate jurisdiction. Regardless, the WVICA assumed jurisdiction when it had none and issued its final decision affirming the trial court's orders on June 14, 2024.

In *HD Media*, the WVICA addresses some of the most consequential issues ever raised in the application of the WVOGPA. (JA at 758). However, in its decision, the WVICA gutted the laudable goals mandated by the Legislature in WVOGPA of permitting the public to witness and participate in the decision-making process of all governing bodies. Although he concurred in most of the decision, Chief Judge Thomas E. Scarr dissented to the WVICA's holding regarding the "commercial competition" exception, which he explains "**would consume, swallow, and vitiate the open meeting rule and undermine the WVOGPA's stated purpose.**" (Emphasis added). *HD Media*, 2024 WL 3007228 at *22. (JA at 775).

This case involves important issues of first impression concerning the rights of West Virginians to attend meetings of public bodies. The rights of public access and transparency were

established by the West Virginia Legislature in 1975, W.Va.Code, §6-9A-1, Acts 1975, c. 177; Acts 1999, c. 208, eff. 90 days after March 21, 1999. The legislative purposes underlying the WVOGPA are set forth in W.Va.Code, §6-9A-1. That section supplies "the Legislature's reasoning for concluding it is in the best interest of the public that the various public entities of this State conduct their respective proceedings in public." *McComas v. Board of Educ. of Fayette County*, 197 W.Va. 197-98, 475 S.E.2d 280, 289-90 (1996).

At bottom, this case involves several easily resolved issues that were, as explained below, erroneously addressed by the trial court and the WVICA majority leading to reversible error in each instance. This appeal provides the Court a perfect opportunity to provide clear guidance to bench, bar, and the public regarding important provisions of the WVOGPA that have never been subject to judicial interpretation.

If left intact, the WVICA's holdings will create confusion, limit public access to governmental proceedings, undermine the broad legislative goals of law, and negate this Court's prior precedent that "from the legislative statement of policy and its constitutional underpinnings, it is clear **this Court should accord an expansive reading to the Act's provisions to achieve its far-reaching goals.**" (Emphasis added). *McComas*, 197 W.Va. at 197, 475 S.E.2d at 289; *Peters v. County Com'n of Wood County (Peters I)*, 205 W.Va. 481, 519 S.E.2d 179 (1999).

Petitioner timely appealed the WVICA's final order to this Court so that the principles of open government mandated by the Legislature through its adoption of the WVOGPA can be recognized and reaffirmed.

II. Assignments of error

A.

Whether the WVICA erred in affirming the trial court's orders granting Respondent's summary judgment motion and denying Petitioner's cross motion for summary judgment where:

- 1. Both courts' engaged in an overly expansive reading of the limited "commercial competition" exception found in W.Va.Code §6-9A-4(b)(9), which interpretation is inconsistent with existing case law, where the WVOGPA exceptions must be narrowly construed;**
- 2. In an unprecedented decision, both courts incorporated the "internal memorandum" exemption under the West Virginia Freedom of Information Act (WVFOIA) as an exception under the WVOGPA, where no such exception exists, and found any meeting where an "internal memorandum" is discussed required the governing body to go into executive session under the WVOGPA;**
- 3. Both courts approved of the procedure Respondent followed in its attempt to assert the attorney-client privilege to the WVOGPA where Respondent failed to comply with *Peters v. County Commission of Wood County (Peters I)*, 205 W.Va. 481, 519 S.E.2d 179 (1999), and *Peters v. County Commission of Wood County (Peters II)*, 209 W.Va. 94, 543 S.E.2d 651 (2000), requiring *in camera* testimony; and**
- 4. Despite the fact that both courts agreed Respondent violated the pre-meeting notice provision under the WVOGPA, they held no attorneys' fees should be awarded where such fees are justified not only based upon on this critical notice violation, but also upon the foregoing improper attempts to justify executive sessions based upon their expansive and unprecedented**

reading of the narrow exceptions to the WVOGPA discussed herein?

B.

Whether the WVICA had no jurisdiction in this case because Petitioner appealed the denial of a request for extraordinary remedy, *i.e.*, injunctive and declaratory relief, where this Court has exclusive appellate jurisdiction under Rule 1(b)(10)(first paragraph) of the Rules of Appellate Procedure?

III. Statement of the case

A. Undisputed Respondent failed to provide the required notice in one of its agendas and illegally discussed issues of public concern in executive session

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).²

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

²Respondent 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).

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.

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 41). 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.

B. Trial court’s resolution of cross motions for summary judgment

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).

C. Petitioner’s multiple attempts to appeal these orders addressing the denial of extraordinary relief to this Court

Once the trial court issued its final orders granting summary judgment for Respondent and denying Petitioner’s cross-motion for summary judgment, Petitioner understood that the notice of appeal had to be filed with this Court and that, in fact, the WVICA had no jurisdiction. At the time the initial appeal was filed, Rule 1(b)(10)(first paragraph)³ of the West Virginia Rules of Appellate Procedure mandates that all appeals of “Extraordinary remedies and the appeal of any extraordinary remedy, including habeas corpus” must be filed with this Court and cannot be filed with the WVICA. On May 24, 2023, Petitioner filed a notice of appeal with this Court. (JA at 629). After making some technical corrections to the notice, on May 26, 2023, Petitioner again filed its appeal with this Court. (JA at 671).

On June 7, 2023, Petitioner received an email from this Court rejecting this appeal. (JA at 755). On that same date, the Clerk of the Court provided a Notice stating that somehow only the WVICA had jurisdiction in this case and gave Petitioner an additional ten days to file the notice of appeal. (JA at 756). On June 8, 2023, Petitioner filed the third notice of appeal in this case, but this

³Subsection (b) of Rule 1 defines the jurisdiction of the WVICA. The first paragraph identifies the cases where the WVICA has no jurisdiction while the second paragraph provides the appeals where the WVICA has jurisdiction. In this brief, to make it clear which section of Rule 1(b) is being cited, whether the citation is to the first or second paragraph will be noted.

time the notice was filed with the WVICA. (JA at 713). Also on June 8, 2023, Petitioner filed a motion, pursuant to Rule 29 of the West Virginia Rules of Appellate Procedure, seeking to have this Court, which is the only court with jurisdiction, to grant direct appeal. On September 7, 2023, this Court issued an order denying this motion for direct review. (JA at 757). Thus, Petitioner exhausted every legal avenue available to have this appeal resolved by this Court.⁴

IV. Summary of the argument

The governing body has the burden of proving whether or not the decision to go into executive session is justified based upon any of the exceptions.

The expansive scope of the commercial competition exception adopted by the WVICA is an extreme position unsupported by any case law that would consume, swallow, and vitiate the WVOGPA.

⁴The jurisdictional issues raised in this case prompted the Legislature in 2024 to enact W.Va.Code §51-11-4, amending and redefining, in part, appellate jurisdiction between this Court and the WVICA. However, instead of clarifying these issues, this statute only makes the distinctions between what appeals must be heard by this Court and the WVICA even more confusing. Under the statute, the WVICA has jurisdiction over appeals of all civil cases “where there is a request for legal or equitable relief.” Whether this new language was an attempt to have appeals of cases involving injunctive relief filed with the WVICA is not clear. The Court’s June 7, 2024 order states that the proposed amendment to Rule 1 provisionally was adopted, subject to the Court’s consideration of public comments. The amended version of Rule 1(b)(10)(first paragraph) provides that only this Court has jurisdiction over appeals involving “judgments or final orders issued in extraordinary remedy proceedings for a writ of prohibition, a writ of mandamus, a writ of quo warranto, a writ of certiorari, a writ of habeas corpus, a special receiver, an arrest in a civil case, or a personal safety order.” Is this list intended to be all inclusive so cases involving injunctive relief now are excluded from this Court’s jurisdiction? At the time this brief was written, although the proposed amendment to Rule 1 provisionally was adopted, counsel has not found any order where the Court formally adopted this amendment. Even if the Court has adopted this amendment permanently instead of provisionally, this amended rule still does not resolve the jurisdictional issue raised in this case. Furthermore, the appeal Petitioner filed initially in March, 2023, should be governed by the version of Rule 1 in effect at the time the appeal was filed.

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. The WVICA’s unprecedented decision judicially to incorporate the internal memorandum exemption under the WVFOIA into the WVOGPA is contrary to law and unjustified.

For the limited attorney-client exception to the WVOGPA to be applied, 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. 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.

Based upon Respondent’s repeated violations of the WVOGPA, where Respondent erroneously relied upon a here-to-fore unknown expansion of the commercial competition exception, internal memorandum exception under the WVFOIA, and failed to follow this Court’s procedures for establishing a narrowly drawn attorney-client privilege exception. Additionally, both the trial court and the WVICA agreed that Respondent violated the mandatory notice provision in the WVOGPA. All of these violations justify an award of attorneys’ fees.

The WVICA never had jurisdiction in this case involving an appeal of a final order involving a request for declaratory and injunctive relief, which are extraordinary remedies that only can be appealed to this Court under Rule 1(b)(10)(first paragraph) of the West Virginia Rules of Appellate Procedure.

V. Statement regarding oral argument and decision

Due to the novel and unprecedented rulings by the WVICA and the trial court, Petitioner respectfully submits the Court should grant oral argument under Rule 19 or 20 and issue a decision

authored by a Justice to make it clear to all governing bodies that the trial court’s application of certain narrow exceptions to the WVOGPA affirmed by the WVICA was incorrect and should never be followed by any other public entity.

VI. Argument

A. The WVOGPA mandates that all meetings of governing bodies must be open to the public, subject to narrow exceptions

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. W.Va.Code §6-9A-1.

In its opinion, the WVICA generally acknowledges how the WVOGPA is designed to allow the public to witness and participate in the decisionmaking process. 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). *Id.*

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 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 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 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).

At issue in *McComas* was whether an informal gathering of school board members, who had questions for the school superintendent regarding issues of school consolidation, had violated the WVOGPA because the public was not present for these discussions. This informal gathering

occurred in advance of a prior scheduled public meeting. The trial court held this gathering constituted a meeting that had to comply with the WVOGPA and concluded the subsequent decisions made by this board in the scheduled public meeting to be void *ab initio* because the public had the absolute right to be present when these board members questioned the superintendent. The Court affirmed the trial court's decision.

In the present case, there is no question that Respondent had several noticed scheduled public meetings. The issue here is not whether an informal gathering constitutes a public meeting, but whether Respondent correctly complied with the WVOGPA in discussing many issues of public concern in executive session that could be justified only based upon the narrowly defined exceptions available under this Act.

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.

A new point of law reached by the WVICA is its holding that in WVOGPA litigation, the governing body has the burden of proving whether or not the decision to go into executive session is justified based upon any of the exceptions. *HD Media*, 2024 WL 3007228 at *5. (JA at 764). Because this Court has not addressed this issue specifically, a similar holding by this Court would be appropriate.

B. Commercial competition exception is inapplicable under these facts

The WVICA and the trial court gave an overly expansive reading of the "commercial competition" exception under the WVOGPA and used this exception to justify Respondent secretly

discussing a wide variety of issues. 2024 WL 3007228 at *6 and *7. (JA at 654-55, 764-66). This 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).

Based upon the supplemental affidavit submitted by James Robert Alsop, Vice President for Strategic Initiatives at West Virginia University, Respondent asserted this commercial competition exception applied to Respondent's discussion of 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 comments from the athletic director on the upcoming football season. (JA at 513). 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 WVICA agreed with Respondent's reliance on this exception and rejected Petitioner's arguments that the "commercial competition" exception had to be interpreted in the context of the surrounding language used in the statute, applying the doctrines of *jusdem generis* and *noscitur a sociis*. Instead of relying upon these rules of statutory construction, the WVICA found the exception was clear and unambiguous. Under its interpretation, the WVICA concluded the catchall phrase "other matters involving commercial competition" somehow meant this exception could be applied to matters beyond the investment of public funds. 2024 WL 3007228 at *6. (JA at 765).

The WVICA majority uses cautionary language in its attempt to minimize the damage to the WVOGPA created by its expansive reading of the exceptions: “This exemption must be applied with care and restraint, and we caution lower courts to remain wary of governing bodies overclassifying matters `other matters involving commercial competition.” 2024 WL 3007228 at *7. (JA at 766).

In response to the majority’s attempt to limit this holding based in part on the unprecedented nature of the pandemic, Chief Judge Scarr commented, “[T]hat is not a valid basis to ignore the statute, its legislative intent, and the obligation it creates. In this case, the majority expands the commercial competition exception to the point that it creates a new exception that simply does not exist, an exception that ultimately swallows the rule.” 2024 WL 3007228 at *23. (JA at 776).

The “commercial competition” exception to the WVOGPA has never been addressed in any detail by the Court. Because the scope of this phrase must be understood in the context of the WVOGPA, where these exceptions must be narrowly construed, contrary to the WVICA’s holding, 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. The application of this rule is particularly critical in this statute where courts are being asked to explain what the Legislature meant by the catchall phrase "other matters involving commercial competition." In Syllabus Point 2 of *Parkins v. Londeree*, 146 W.Va. 1051, 124 S.E.2d 471 (1962), the 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*, [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.").

The word "commercial" implies that public funds or financial interests of some kind must be involved. Also, the first proviso mandates "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.” This proviso demonstrates that “commercial competition” is referencing a specific project of some sort that has a completion or end date, rather than the holding by the WVICA and trial court of ongoing general competition between WVU and other colleges.

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 approved by the WVICA, but rather is restricted to specific matters or projects involving public funds or other financial interests, which if made public, might adversely affect the financial or other interest of the state or any political subdivision.

Chief Judge Scarr found the WVICA’s interpretation of the “commercial competition” exception to be extreme and to vitiate the WVOGPA’s stated purposes:

The expansive scope of the commercial competition exception adopted by the majority is an extreme position. In this instance, the exception would consume, swallow, and vitiate the open meeting rule and undermine the WVOGPA’s stated purpose. The Gazette suggests it amounts to repeal of the rule. In either case, this type of result is generally sought to be avoided. *State v. Barefield*, 240 W. Va. 587, 599, 814 S.E.2d 250, 262 (2018) (citing *State v. Hatton*, 389 N.W.2d 229 (Minn. Ct. App. 1986)) (the application of the inevitable discovery exception to the exclusionary rule as advocated would “swallow” the entire Fourth Amendment and render its protections meaningless). **Moreover, the position adopted by the majority inevitably produces an absurd result which courts are duty bound to avoid, particularly when the results are at odds with the legislative intent.** *Vanderpool v. Hunt*, 241 W. Va. 254, 262, 823 S.E.2d 526, 534 (2019) (“Such parsing of the statutory language achieves an absurd result that is simply not permitted under

our rules of statutory construction.”); *Taylor-Hurley v. Mingo Co. Bd. of Ed.*, 209 W. Va. 780, 787, S.E.2d 702, 709 (2001) (“[I]t is this Court’s duty to avoid whenever possible a construction of a statute which leads to absurd, inconsistent, unjust or unreasonable results.... This does not mean, however, that we are at liberty to substitute their own policy judgments for those of the Legislature....”); *Click v. Click*, 98 W. Va. 419, ___, 127 S.E.2d 194, 198 (1925) (“It is always presumed, in regard to a statute, that no absurd or unreasonable result was intended by the Legislature.”) *see also In re D.K.*, 248 W.Va. 699, 704, 889 S.E.2d 781, 786 (Ct. App. 2023) (Scarr, J., dissenting). (Emphasis added). 2024 WL 3007228 at *22. (JA at 775).

Chief Judge Scarr also disagreed with the majority’s decision to reject the application of the doctrines of *ejusdem generis* and *noscitur a sociis* under its theory that the application of these rules of statutory construction were inconsistent with the legislative’s intent. “However, considering the clear legislative intent of the WVOGPA, particularly given Justice Cleckley’s guidance and commonsense approach, **the expansive definition of the ‘commercial competition’ exception adopted by the majority thwarts and undermines the WVOGPA’s fundamental purpose.** Syl. Pt. 4, *McComas v. Bd. of Educ. of Fayette Cnty.*, 197 W. Va. 188, 475 S.E.2d 280 (1996). As intended, in this case the application of these canons of statutory construction actually preserves and supports the legislative intent.” (Emphasis added). *Id.*

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. But once a bid is accepted, all of the information previously maintained as confidential under the “commercial competition” exception must be made available to the public, as mandated by the first proviso in W.Va.Code § 6-9A-4(b)(9).

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. After providing various examples that may be covered by this overly broad definition, such as a grading policy change, installation of lighting, sidewalks, and vending machines, and athletic, social and entertainment schedules and offerings, Chief Judge Scarr warned, "[B]road exceptions, might invite governing bodies to engage in avoidance tactics and evasive techniques, including overclassifying matters as involving commercial competition to avoid public disclosure, participation, and scrutiny." 2024 WL 3007228 at *21 and *22. (JA at 775).

Fundamentally, Respondent and the WVICA 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. The final part of Chief Judge Scarr's dissenting opinion agrees with this assessment and notes that although the majority held Respondent had the burden of proving the "commercial competition" exception applied under these facts, Respondent failed to meet its burden:

The only affidavit that even comes close to providing any specifics and even makes a passing attempt to explain the potential for an adverse effect is the March 1, 2022, affidavit of James Robert Alsop. Mr. Alsop indicates that premature disclosure of whether the University will proceed with certain athletic events in light of the COVID-19 pandemic might adversely affect media contracts, stadium vendor contracts, ticket sales, and athlete retention. But he fails to explain how this constitutes commercial competition or what potential effect it might have on "existing" rather than prospective contracts. Again, the Board appears to argue that, given the University's general competition with every other university or college in the world for students and faculty, any information that might affect a student's attendance decision satisfies the commercial competition exception. **This is not a reasonable standard for application of the commercial competition exception and it is**

inconsistent with the direction of the Supreme Court of Appeals to accord an expansive reading of the WVOGPA’s provisions. It frustrates the legislative intent and undermines and negates the fundamental and far-reaching goals and purpose of the WVOGPA. *See McComas*, 197 W. Va. at 197, 475 S.E.2d at 289. (Emphasis added). 2024 WL 3007228 at *24. (JA at 777).

Petitioner respectfully submits that the detailed and persuasive analysis of the “commercial competition” exception by Chief Judge Scarr is consistent with this Court’s analysis of other exceptions included in the WVOGPA and should be incorporated in the Court’s decision reversing the WVICA.

C. The Legislature did not incorporate into the WVOGPA any of the exemptions available under the WVFOIA

In another unprecedented ruling, the WVICA concluded that the internal memorandum exemption under the WVFOIA, W.Va.Code §29B-1-4(a)(8), must be incorporated into the WVOGPA. 2024 WL 3007228 at *8 through *10. (JA at 766-68). Thus, if an internal memorandum happens to be in the room when a governing body is deliberating, the mere presence of that document, which by definition is a public record, but is exempt from disclosure under the WVFOIA, justifies the governing body’s decision to go into executive session. This new expansive exception to the WVOGPA once again could consume, swallow, and vitiate the open meetings rule and undermine the WVOGPA’s stated purposes.

Again, after the WVICA judicially added this unprecedented “internal memorandum” exception to the WVOGPA, it attempts to limit the damage to the WVOGPA by stating this “exception is only relevant in a very narrow context—where a public body meets to discuss a document that itself would be exempt from disclosure under the internal memoranda exemption under WVFOIA.” 2024 WL 3007228 at *10. (JA at 767). Through this judicial amendment incorporating the internal memorandum exemption under the WVFOIA into the WVOGPA, the

WVICA has created a brand new exception that far exceeds the scope of the attorney-client privilege. Because an internal memorandum could be drafted by anyone, lawyer or not, the WVICA automatically has imposed a cloak of secrecy over the memorandum's contents, regardless of whether or not such confidentiality is needed.

In the two decisions by this Court addressing whether the attorney-client privilege should be the basis for an exception under the WVOGPA--*Peters v. County Commission of Wood County* (*Peters I*), 205 W.Va. 481, 519 S.E.2d 179 (1999), and *Peters v. County Commission of Wood County* (*Peters II*), 209 W.Va. 94, 543 S.E.2d 651 (2000)—the Court first noted that no such exception was provided by the Legislature in the WVOGPA. The same rationale applies with respect to whether or not an internal memorandum exception under the WVFOIA should be read or incorporated into the WVOGPA.

The WVFOIA is mentioned specifically only once in the WVOGPA. West Virginia Code §6-9A-4(b)(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). This exception applies only to matters rendered confidential by state or federal law or to matters not considered to be a public record under the WVFOIA.

In justifying Respondent going into executive session when an internal memorandum was present in the room, the WVICA ignores the specific reference to the WVFOIA in W.Va.Code §6-9A-4(b)(12), which clearly does not justify the WVICA's newly created exception to the WVOGPA, and instead focuses on the initial language “To discuss any matter which, by express provision of federal law or state statute or rule of court is rendered confidential.” Based upon this more general

language, the WVICA concludes that because internal memoranda, which are public records, are exempt under WVFOIA, the WVFOIA is a state statute that renders matters relating to the internal memoranda confidential. The WVICA's interpretation reads the WVFOIA into both of these clauses and completely ignores the fact that the Legislature's specific inclusion of the WVFOIA into the WVOGPA was limited to matters that **are not public records** under the WVFOIA.

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.

The WVICA was concerned that permitting a governing body to have a public discussion that in any way relates to issues or information in an internal memorandum would create friction between the WVFOIA and the WVOGPA. 2024 WL 3007228 at *10. (JA at 767). As with all of these issues, whether or not there is any real concern is based upon the specific facts. An internal memorandum may simply recite publicly known facts, where there would not be any prejudice discussing those facts in a forum where the public can observe. Thus, the topics or issues mentioned in an internal memorandum easily could be discussed in a public meeting.

Despite the clarity by which "a public record within the meaning of [FOIA]" is defined as "relating to the public's business," Mr. Alsop, who is a lawyer, asserts in his supplemental affidavit

that on June 19, 2020, when he was discussing an “internal, deliberative memorandum” he had prepared, because that memorandum, which is a public record, is not subject to production under the WVFOIA, somehow that means this part of the meeting correctly was kept from the public. (JA at 514). This assertion is as ludicrous as anyone suggesting that the mere presence of Mr. Alsop or any other lawyer in a meeting constitutes the basis for going into executive session. The Court made this point in Syllabus Point 5 of *Peters I*, which provides, in relevant part, “[A] public agency is not permitted to close a meeting that otherwise would be open **merely because an agency attorney is present.**” (Emphasis added).

While the attorney-client privilege exception this Court read into the WVOGPA is limited to matters discussed between attorneys and their clients, the real danger with recognizing this internal memorandum exception to the WVOGPA is that **any person** can draft an internal memorandum. Thus, to bar the public from observing discussions regarding issues of public concern, all the governing body would have to do is have someone on the staff draft an internal memorandum discussing those issues.

By analogy, the Court may want to consider mandating that the procedures set out in *Peters I* and *Peters II* must be followed when a governing body goes into executive session because the confidential portion of an internal memorandum was going to be discussed. Under *Peters I* and *Peters II*, that governing body would have the burden, under the WVOGPA, to justify why that portion of the meeting had to be closed to the public. Otherwise, governing bodies could use the mere presence of an internal memorandum to engage in avoidance tactics and evasive techniques to avoid public disclosure, participation, and scrutiny. As noted in *Peters I*, 205 W.Va. at 489, 519 S.E.2d at 187, the recognition of any exception to the WVOGPA must be “narrowly drawn so as to not abrogate the spirit and purpose of the Act.”

For the foregoing reasons, Petitioner respectfully asks the Court to reverse the WVICA’s decision to incorporate the internal memorandum exemption under the WVFOIA into the WVOGPA and to provide guidance on how this issue should be addressed.

D. Respondent failed to follow the procedure mandated in *Peters I* and *Peters II* when it claimed attorney-client privilege justified executive session

The WVICA held that Respondent had followed the procedures outlined by this Court in *Peters I* and *Peters II* when Respondent made a broad assertion of attorney-client privilege to justify going into executive session. 2024 WL 3007228 at *10 through *12. (JA at 768). In his initial and supplemental affidavits, Mr. Alsop 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). Based upon its analysis, the WVICA affirmed the trial court’s decision that Respondent correctly went into executive session to discuss Title IX issues. (JA at 624).

The WVICA and the trial court ignored the procedural posture of this litigation when Respondent made its attempt to make a record consistent with the procedure mandated by the Court in *Peters I* and *Peters II*. 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 had challenged its assertion of the attorney-client privilege and Respondent had knowledge of the two *Peters* decisions. (JA at 493-506). In its **REPLY**, Respondent simply was content to rely upon its arguments and at the subsequent final 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.

Because the WVOGPA does not specifically include an exception based upon the attorney-client privilege, the Court in *Peters I* had to decide whether such an exception must be read into the

WVOGPA. In *Peters I*, 205 W.Va. at 487, 519 S.E.2d at 185, the 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 I*, “[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(b)(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 Court did recognize that the discussions of matters 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 I* 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 Court. In *Peters II*, the Court reversed the circuit court **for a second time**, once again holding that the circuit 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 the March 1, 2022 supplemental 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 Point 10 of *In re: R.S.*, 244 W.Va. 564, 855 S.E.2d 355 (2021), the 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*. The WVICA rejected the specific

holdings by this Court in the *Peters*’ decisions and concluded after-the-fact and untimely-filed affidavits were sufficient. 2024 WL 3007228 at *11. (JA at 768). Because Respondent failed to follow the procedure outlined in *Peters*, this Court should hold that the final filing from Respondent was insufficient to justify the very limited attorney-client privilege recognized by this Court.⁵

Petitioner respectfully submits Respondent once again violated the WVOGPA when it decided to close the meeting based upon the attorney-client privilege and the WVICA erred in failing to apply this Court’s controlling decisions in *Peters II* requiring *in camera* testimony.

E. Attorneys’ fees should be awarded based upon the foregoing violations of the WVOGPA and the undisputed finding that Respondent violated the notice provision in the WVOGPA

When enacting the WVOGPA, the Legislature included a statutory fee shifting provision that abrogates the general “American Rule” that each party in litigation pay its own counsel fees and costs. Such attorney fee shifting provisions are included in a wide variety of federal and state statutes including, *inter alia*, securities, civil rights, consumer protection, and environmental laws. Plaintiffs who file suit under such laws are often referred to as “private attorneys general” because they have

⁵After noting this Court’s holdings in *Peters I* and *II*, where this Court remanded the case for *in camera* testimony, Chief Judge Scarr observed:

While an *in-camera* evidentiary hearing with in-person testimony may not be a required procedure in all cases, in many, if not most instances, such a practice and procedure would be beneficial to the circuit court in conducting a meaningful evaluation of the privilege assertion, particularly given the usual factual nature of such an evaluation. Moreover, such a procedure would provide the circuit court with the opportunity for meaningful follow up inquiry not readily available when reliance is limited exclusively to meeting minutes or attorney prepared affidavits that do not include specifics of the actual communications at issue. 2024 WL 3007228 at *17. (JA at 772).

been enlisted and authorized by Congress or a state legislature to file suit to enforce statutory goals.

One commentator has succinctly explained the purpose of statutory fee shifting provisions:

The presence of fee-shifting provisions in statutory enactments is a reflection of a congressional determination that private enforcement is essential to full implementation of and compliance with the law. Fee-shifting recognizes that the availability of an attorney's fee award is necessary to ensure private enforcement. In the most basic sense, fee-shifting provisions acknowledge that if private litigants are to be encouraged to bring enforcement actions, they must be able to recover the costs of bringing such actions. Congress, however, did not intend this encouragement to be a mere token gesture.

It is Congress's intent that fee awards serve as a “remedy,” ensuring that citizens proceeding as private attorneys general have a “meaningful opportunity” to enforce the law and thereby help effectuate congressional policy. In many situations, however, private fee arrangements prove insufficient to encourage effective enforcement because few injured parties can shoulder the cost of litigation. In this sense, statutory fee awards are designed to fully compensate attorneys for time reasonably expended on litigation, thus attracting competent counsel to represent citizens acting to facilitate compliance with statutory policies.⁶

The WVOGPA specifically provides that the enforcement of its open meetings provisions are enforceable through any citizen filing a complaint seeking declaratory and injunctive relief within 120 days after the governing body has violated the Act. W.Va.Code §6-9A-6. While any citizen can file such an action, often as demonstrated in this case the issues raised can be complex and the citizen may be represented by counsel. In that event, as part of the enforcement mechanism created by the Legislature, W.Va.Code §6-9A-7(b), provides for an award of attorneys’ fees:

(b) A public agency whose governing body is adjudged in a civil action to have conducted a meeting in violation of the provisions

⁶Brian Albert Davis, *City of Burlington v. Dague--Contingency Enhancement: The Court Buckles Under the Statutory Burden*, 42 Cath. U. L. Rev. 615, 626–27 (1993)(citations omitted).

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.

Like so many other similar fee-shifting statutes, the West Virginia Legislature makes clear its strong intention that the WVOGPA be enforced so as to advance its overarching goal of government transparency. The WVOGPA attorney fee shifting provision is intended to encourage citizens to enforce the WVOGPA and to provide an incentive for members of the bar to represent them.

As the Court explained with regard to the WVFOIA, its goal, like the WVOGPA is government transparency, the fee shifting provision constitutes “a marked departure from the general rule that each party bears his/her own litigation costs, [and] is intended to relieve some of the burden associated with the public's pursuit of the right to access public records and to encourage the cooperation of public officials when requests for such records are made.” *Daily Gazette Company, Inc. v. West Virginia Development Office*, 206 W.Va. 51, 58, 521 S.E.2d 543, 550 (1999).

From the foregoing discussion, Petitioner has demonstrated how the WVOGPA repeatedly was violated by Respondent. Respondent erroneously relied upon the commercial competition exception, a never before recognized internal memorandum exception, and failed to follow this Court’s procedures for establishing a narrowly drawn attorney-client privilege exception. These violations alone justify an award of attorneys’ fees under the WVOGPA.

Additionally, the WVICA and the trial court agreed that Respondent violated the WVOGPA in connection with the Meeting Agenda published prior to the June 19, 2020 meeting. Respondent violated the notice provision in the WVOGPA, specifically W.Va.Code §6-9A-3(d), which provides,

“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 and affirmed by the WVICA, Respondent’s June 19, 2020 Meeting Agenda violated this statute because it failed to place the public on notice of what topics were going to be discussed and, therefore, this inadequate notice violated the WVOGPA.

However, the trial court held this clear violation of the WVOGPA was just a “technical” violation and concluded this violation did not justify an award of attorneys’ fees. (JA at 623). The WVICA disagreed with the trial court labeling this violation as being merely “technical,” but nevertheless held the trial court had not abused its discretion because, according to the WVICA, Respondent was substantially justified in its actions. 2024 WL 3007228 at *13. (JA at 769).

Chief Judge Scarr explained the significance of this notice violation:

Obviously, if the notice does not include a specific and adequately detailed description of the topics and issues to be discussed at the meeting, it is impossible for members of the public to discern if something will be discussed at the meeting about which they have an interest, and possibly have something to contribute to the discussion. Without adequate notice, they are prevented, in the first instance, from making an informed decision whether to attend the meeting, thereby undermining the fundamental purpose and goals of the WVOGPA. **It is not a technical violation of the WVOGPA notice requirements when it relates to providing information to the public about the purpose of the meeting and the specific topics that will be considered and discussed.** (Emphasis added). 2024 WL 3007228 at *15. (JA at 771).

The inadequacy of the information provided in a published meeting agenda, in violation of the WVOGPA, was addressed by this Court in *Capriotti v. Jefferson County Planning Commission*, 2015 WL 869318 (No. 13-1243, 2/26/2015)(Memorandum decision). *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 addressed? 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?

While the WVICA and the trial court agreed that Respondent had violated the WVOGPA in this instance, this violation was found not to warrant an award of attorneys' fees. Thus, while Petitioner agrees with the finding by the WVICA and the trial court that Respondent had violated this notice provision, Petitioner disagrees with the attorneys' fees analysis applied by these courts.

This litigation seeking to require Respondent to comply with the WVOGPA began in 2020 and still is ongoing four years later. Through its willingness to litigate the failure of Respondent to comply with the WVOGPA, Petitioner has provided this Court with the opportunity to expand upon all of the issues raised and to provide much needed guidance for all governing bodies to consider the next time they go into executive session claiming commercial competition, internal memorandum, or attorney-client privilege exceptions under the WVOGPA. While Petitioner does not personally receive any benefit from this clarification of the law, the public in general will benefit

from this Court's decision reaffirming the Legislature's mandate that the public is entitled to observe and participate in open meetings held by governing bodies.

The Court has not analyzed in any detail what a litigant represented by counsel involved in a successful action filed pursuant to the WVOGPA has to prove to justify an award of attorneys' fee. This Court long has recognized the appropriateness of an attorneys' fee award where a citizen has to file an action to require governmental officials or an agency to comply with the law.

Petitioner respectfully submits its efforts to require Respondent to comply with the WVOGPA justifies a reasonable attorneys' fees award under the facts of this case. A ruling by this Court refusing to award reasonable attorneys' fees would be inconsistent with the Legislature's intent to have the WVOGPA enforced by citizens through litigation, would encourage governing bodies to ignore the WVOGPA by relying on the broadest possible definition of the exceptions, and would discourage other future litigants from engaging in this type of litigation.

Petitioner seeks a ruling from this Court reversing the decision by the WVICA and trial court denying Petitioner's request for a reasonable attorneys' fee award. Once the Court reverses this denial of attorneys' fees, the case would need to be remanded to the trial court to develop a record on this issue.

F. Only this Court has jurisdiction over appeals of extraordinary remedies

When the Court amended the Rules of Appellate Procedure establishing the procedures governing the newly created WVICA, the goal was to distinguish what types of cases first had to be appealed to the WVICA from those cases that had to be appealed to this Court. It was inevitable that some appeals arguably may fall into two separate categories, where a genuine question is raised over which appellate court has jurisdiction. This case provides the Court with yet another opportunity to explain how these jurisdictional conflicts should be resolved.

In the present case, an argument could be made that the WVICA had jurisdiction, under Rule 1(b)(1)(second paragraph), which mandates that the WVICA has appellate jurisdiction in all appeals from a final order entered in a civil case. The complaint Petitioner filed against Respondent is a civil case and could be covered by this provision.

However, in Rule 1(b)(10)(first paragraph), only this Court has appellate jurisdiction in appeals from cases involving extraordinary remedies. Because Petitioner requested injunctive and declaratory relief under the WVOGPA, which are extraordinary remedies, only this Court had jurisdiction over the initial appeal.⁷

In Syllabus Point 2 of *State ex rel. Universal Underwriters Insurance Co. v. Wilson*, 239 W.Va. 338, 801 S.E.2d 216 (2017), this Court noted that jurisdictional issues can be raised at any time:

“This Court, on its own motion, will take notice of lack of jurisdiction at any time or at any stage of the litigation pending therein.” Syl. Pt. 2, *In re Boggs’ Estate*, 135 W.Va. 288, 63 S.E.2d 497 (1951).

⁷This Court repeatedly has held that injunctive relief is an extraordinary remedy. Syllabus Point 3, *Camden-Clark Memorial Hospital Corp. v. Turner*, 212 W.Va. 752, 575 S.E.2d 362 (2002)(“An *ex parte* preliminary **injunction is an extraordinary remedy** which is justified only under extraordinary circumstances.” Syl. pt. 1, *Ashland Oil, Inc. v. Kaufman*, 181 W.Va. 728, 384 S.E.2d 173 (1989)”) (Emphasis added); *State ex rel. Suriano v. Gaughan*, 198 W.Va. 339, 345, 480 S.E.2d 548, 554 (1996)(“We limit our exercise of original jurisdiction because “ ‘ ‘ [m]andamus, prohibition and **injunction against judges are drastic and extraordinary remedies.... As extraordinary remedies, they are reserved for really extraordinary causes.**’ ” “ ” *State ex rel. United States Fidelity & Guar. Co. v. Canady*, 194 W.Va. 431, 436, 460 S.E.2d 677, 682 (1995), quoting *State ex rel. Doe v. Troisi*, 194 W.Va. at 31, 459 S.E.2d at 142, quoting *Ex parte Collett*, 337 U.S. 55, 72, 69 S.Ct. 944, 953, 93 L.Ed. 1207, 1217 (1949), quoting *Ex parte Fahey*, 332 U.S. 258, 259–60, 67 S.Ct. 1558, 1559, 91 L.Ed. 2041, 2043 (1947).”) (Emphasis added); *Justice v. AFL-CIO*, 246 W.Va. 205, 866 S.E.2d 313 (2021)(“It frequently is observed that a **preliminary injunction is an extraordinary and drastic remedy**, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.”) (Emphasis added).

In Syllabus Point 1 of *National Union Fire Insurance Company of Pittsburgh, PA v. Westlake Chemical Corp.*, 249 W.Va. 575, 900 S.E.2d 1 (2024), this Court explained the jurisdiction of this Court must be found either in the Constitution or conferred by statute:

“This Court’s jurisdictional authority is either endowed by the West Virginia Constitution or conferred by the West Virginia Legislature.” Syl. Pt. 2, in part, *Smith v. Andreini*, 223 W. Va. 605, 678 S.E.2d 858 (2009).

Recent decisions from the Court and the WVICA have begun the process of interpreting these new rules governing appellate jurisdiction. Just three days ago the Court issued its decision *Aaron W. v. Evelyn W.*, ___ W.Va. ___, ___ S.E.2d ___ (No. 23-488, 11/12/2024). The procedural issues raised in *Aaron W.* are remarkably similar to the procedural machinations Petitioner has endured in the present litigation. Although the Court rejected his original appeal, in *Aaron W.* the Court affirmed the WVICA’s order dismissing the appeal because the order challenged was interlocutory.

In *SWN Production Company, LLC v. City of Weirton Board of Zoning Appeals*, 2024 WL 1730044 (No. 23-ICA-405, 4/22/2024), the WVICA was faced with an appeal of a circuit court ruling based upon a writ of certiorari, **which, similar to the present case, is an extraordinary remedy**. After citing the original version of Rule 1 of the Rules of Appellate Procedure, as opposed to the version of this rule provisionally adopted by this Court on June 7, 2024, the WVICA concluded this appeal had been improvidently accepted and the case was dismissed because the WVICA does not have jurisdiction in cases of appeals involving extraordinary remedies. *See also Jackson v. Harvey*, 2024 WL 4634934 (No. 24-387, 10/31/2024)(Appeals from orders under W.Va.Code §6-6-7, must be filed with this Court).

Petitioner respectfully submits under the version of Rule 1(b)(10)(first paragraph) in existence in March, 2023, this Court should have accepted jurisdiction of this appeal and the

WVICA did not have jurisdiction, just as the WVICA acknowledged it lacked jurisdiction in the *SWN Production* case. However, because the Court rejected Petitioner's appeal, an explanation from the Court providing the rationale for permitting the WVICA to have jurisdiction over an appeal involving extraordinary remedies would be beneficial to the members of the Bar, who have to decide whether or not in any given case, the notice of appeal must be filed with the WVICA or this Court.

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 Company, LLC d/b/a Charleston Gazette-Mail respectfully moves this Court to grant Rule 19 or 20 oral argument and after hearing these arguments, to issue a Justice written decision reversing the WVICA's decision, explaining in new Syllabus Points that the WVICA 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 COMPANY, 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)⁸

DiPIERO SIMMONS McGINLEY & BASTRESS, PLLC

P.O. Box 1631

Charleston, West Virginia 25326

(304) 342-0133

lonnie.simmons@dbdlawfirm.com

rob.bastress@dbdlawfirm.com

⁸Petitioner'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 SUPREME COURT OF APPEALS

No. 24-412

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

Petitioner, Appellant below,

v.

**WEST VIRGINIA UNIVERSITY
BOARD OF GOVERNORS,**

Respondent, Appellee below.

PETITIONER’S APPEAL BRIEF

APPEAL FROM THE WEST VIRGINIA INTERMEDIATE COURT OF APPEALS

CERTIFICATE OF SERVICE

I, Lonnie C. Simmons, counsel for Plaintiff hereby certify that a copy of **PETITIONER’S APPEAL BRIEF** has been served this 15th day of November, 2024, 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)