

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

Appeal No. 24-412

SCA EFiled: Dec 30 2024  
04:01PM EST  
Transaction ID 75339874

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

*Petitioner,*

v.

WEST VIRGINIA UNIVERSITY BOARD OF GOVERNORS,

*Respondent.*

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**BRIEF OF RESPONDENT**  
**WEST VIRGINIA UNIVERSITY BOARD OF GOVERNORS**

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Appeal from the West Virginia Intermediate Court of Appeals

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## **I. INTRODUCTION**

This appeal arises from a lawsuit brought by a local newspaper against the governing body of a public university. Petitioner HD Media claims that West Virginia University's Board of Governors improperly closed portions of five of its meetings during the COVID-19 pandemic. The Board met in executive session to preliminarily discuss, among other things, the University's ability to fulfill its contractual obligations, whether to withdraw from dedicated capital projects, possible extension of emergency leave for faculty and staff, and federal regulatory updates in a briefing by the Board's general counsel. No decisions were made during any closed meeting.

Petitioner did nothing to discover its case. No depositions were taken. Petitioner never served any discovery requests. The Board, on the other hand, supported its motions for summary judgment below with expert testimony and affidavits from fact witnesses present at each of the Board's challenged meetings. This testimony was and is un rebutted. On this uncontested factual record, Petitioner's argument that the Board improperly held portions of its meetings behind closed doors was rejected initially and on appeal. Petitioner now implores this Court to do what the circuit court and intermediate appellate court would not—find that the Board broke the law by receiving private, preliminary briefings from University administration during an unprecedented and ongoing public health emergency.

Petitioner's allegations center on two exceptions to the West Virginia Open Governmental Proceedings Act: West Virginia Code § 6-9A-4(b)(9), which permits a governing body to enter executive session to discuss matters of commercial competition, and §6-9A-4(b)(12), which allows closed session discussion of certain confidential matters. The Board invoked *both* exceptions in discussing most of the topics at issue in this case. For that reason, the Court need only uphold the lower courts' favorable findings on one of the two exceptions for the Board to prevail.

## **II. COUNTERSTATEMENT OF THE CASE**

Petitioner filed suit on October 19, 2020, alleging the Board violated the West Virginia Open Governmental Proceedings Act, § 6-9A-1 *et. seq.* (“WVOGPA”) by entering executive session for portions of its meetings, special meetings, and committee meetings on June 19, 2020; July 24, 2020; August 14, 2020; September 4, 2020; and September 18, 2020. JA 3–13. Petitioner amended its complaint on October 21, 2020. JA 25–35. The Amended Complaint alleges that the Board unlawfully discussed the following topics in executive session: (1) the University’s ongoing response to the COVID-19 pandemic, (2) the University’s budgets, (3) a petition signed in the wake of George Floyd’s murder and accusing the University of being “systemically anti-Black”; (4) “a talk with the athletic director about the ‘outlook for this upcoming season’”; (5) the business college; (6) emergency pay policy; (7) federal Title IX regulations; (8) tuition and fees; and (9) capital projects. JA 26–27.

The Court receives this appeal on an undisputed factual record. Petitioner did not participate in discovery. It served no document requests or interrogatories, never requested the deposition of the Board’s fact witnesses or experts, and presented no affidavits in response to the Board’s summary judgment motions. When Petitioner moved for partial summary judgment on October 28, 2021, it did so with no supporting affidavits or evidence. JA 126–159; *see also* JA 602 (Circuit Court Order I at 3).<sup>1</sup>

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<sup>1</sup> The Monongalia County Circuit Court issued two summary judgment orders in this case. The first, “Order Granting in Part Defendant’s Motion for Summary Judgment,” was entered on February 27, 2023. JA 600–11 (“Circuit Court Order I”). The second, “Order Resolving the Motion for Summary Judgment and the Cross Motion for Summary Judgment on all Remaining Claims,” was entered on April 28, 2023. JA 612–28 (“Circuit Court Order II”).

By contrast, the Board’s own summary judgment motions were supported by the testimony of University witnesses who were present for each of the meetings at issue. The Board also designated expert witnesses in support of its positions: James Moeser, Ph.D., former chancellor of the University of North Carolina at Chapel Hill; Nathan Dickmeyer, Ph.D., a higher education consultant; Tom Flaherty, former chair of the Board, and Rob Alsop, former Vice President of Strategic Initiatives at the University. JA 53–125. JA 351–58; JA 368–73. Their testimony demonstrated that the topics discussed in closed session were in fact commercially sensitive and involved the University administration’s deliberative, pre-decision process, which includes getting feedback from the Board on management decisions.<sup>2</sup>

**A. June 19, 2020 Subcommittee Meeting.**

The majority of Petitioner’s contentions below centered on the closed portion of the Board’s joint finance committee meeting on June 19, 2020. Board member Elmer Coppoolse summarized the private discussion when the Board convened its regular meeting later in the day. In this impromptu statement, Mr. Coppoolse described the topics discussed during executive session as follows:

1. “[A] talk with the [University’s] athletic director about the ‘outlook for this upcoming season,’”
2. The business college,
3. Emergency pay policy,
4. Federal Title IX regulations,
5. Tuition and fees, and
6. Capital projects.

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<sup>2</sup> The Board delegates “the power and control over the day-to-day business affairs and operations of West Virginia University” to its President, who in turn is authorized to make further delegations of managerial authority to other University administrators. W. Va. University Bd. of Governors Finance and Admin. R. 5.1 Section 2.2. The WVOGPA’s open meeting requirements do not apply to managerial deliberations and decisions.

See JA 369–70; JA 644 (Circuit Court Order II at 3). Each of the six discussion items described by Mr. Coppoolse correlates to an agenda item listed on the Committee’s June 19, 2020 public agenda. *See id.* This table, supported by the un rebutted testimony of Vice President Alsop, demonstrates how each of these topics is described in the agenda:

| <b><u>Mr. Coppoolse’s Comment</u></b>                                                             | <b><u>Corresponding Agenda Item</u></b>                                                                                                                                                                                                                                                   |
|---------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| “[A] talk with the [University’s] athletic director about the ‘outlook for this upcoming season’” | Confidential legal, personnel, and deliberative matters relating to West Virginia University’s ongoing response to the COVID-19 pandemic.                                                                                                                                                 |
| “The business college”                                                                            | Matters relating to improvements to, or potential contractual relationships regarding facilities, infrastructure, and real property; and<br><br>Confidential legal, personnel, and deliberative matters relating to West Virginia University’s ongoing response to the COVID-19 pandemic. |
| “Emergency pay policy”                                                                            | Deliberative matters regarding Fiscal Year 2020 and 2021 budgets, including current year retention and enrollment; and<br><br>Confidential legal, personnel, and deliberative matters relating to West Virginia University’s ongoing response to the COVID-19 pandemic.                   |
| “Federal Title IX regulations”                                                                    | Potential strategic initiatives relating to academic health sciences priorities, corporate collaboration, and legislative and regulatory matters.                                                                                                                                         |
| “Tuition and fees”                                                                                | Deliberative matters regarding Fiscal Year 2020 and 2021 budgets, including current year retention and enrollment; and<br><br>Confidential legal, personnel, and deliberative matters relating to West Virginia University’s ongoing response to the COVID-19 pandemic.                   |
| “Capital Projects”                                                                                | Matters relating to improvements to, or potential contractual relationships regarding facilities, infrastructure, and real property; and<br><br>Confidential legal, personnel, and deliberative matters relating to West Virginia University’s ongoing response to the COVID-19 pandemic. |

The Board did not make any final decision in executive session while discussing these topics in executive session. *See* JA 646, 657 (Circuit Order II at 5, 16). These were preliminary discussion items only; any decisions made by the Board in relation to these topics were later discussed, vetted, and decided in public. *See id.*

## **B. Executive Summary of Court Rulings.**

To aid the Court’s review of Petitioner’s assignments of error, the following table summarizes the issues raised and rulings made in this case:

|                                                                                                                                       | Circuit Court Order 1                                                                                | Circuit Court Order 2                                                                                                       | ICA                                                                                                                                                            |
|---------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Did the Board violate the WVOGPA by discussing the University’s response to COVID-19 in executive session?                            | <b>No.</b> Commercial competition exception, W. Va. Code 6-9a-4(b)(9), applies. <sup>3</sup> JA 609. |                                                                                                                             | <b>Affirmed.</b> The Board’s un rebutted factual evidence proved that this is a matter of commercial competition within the meaning of the statute. JA 764–66. |
| Did the Board violate the WVOGPA by discussing University budgets in executive session?                                               | <b>No.</b> Commercial competition exception, W. Va. Code 6-9a-4(b)(9), applies. JA 609.              |                                                                                                                             | <b>Affirmed.</b> The Board’s un rebutted factual evidence proved that this is a matter of commercial competition within the meaning of the statute. JA 764–66. |
| Did the Board violate the WVOGPA by preliminarily discussing social justice issues in executive session?                              | <b>No.</b> Commercial competition exception, W. Va. Code 6-9a-4(b)(9), applies. JA 609.              |                                                                                                                             | <b>Affirmed.</b> The Board’s un rebutted factual evidence proved that this is a matter of commercial competition within the meaning of the statute. JA 764–66. |
| Did the Board violate the WVOGPA by discussing with the athletic director the outlook for the “upcoming season” in executive session? |                                                                                                      | <b>No.</b> Commercial competition exception, W. Va. Code 6-9a-4(b)(9), and internal memoranda exception, <i>id.</i> § 6-9a- | <b>Affirmed.</b> The Board’s un rebutted factual evidence proved that both exceptions apply. JA 764–68.                                                        |

<sup>3</sup> The Board’s discussion of the University’s COVID-19 response, University budgets, and the social justice petition were all presented in a confidential memorandum prepared by the administration. The Board invoked both the “commercial competition” and “internal memoranda” exceptions in entering executive session to discuss these topics. Circuit Court Order I did not address whether the “internal memoranda” exception applied.

|                                                                                                  | Circuit Court Order 1 | Circuit Court Order 2                                                                                                                                       | ICA                                                                                                                                    |
|--------------------------------------------------------------------------------------------------|-----------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------|
|                                                                                                  |                       | 4(b)(12), apply. JA 624–25, 626–27.                                                                                                                         |                                                                                                                                        |
| Did the Board violate the WVOGPA by discussing the “business college” in executive session?      |                       | <b>No.</b> Commercial competition exception, W. Va. Code 6-9a-4(b)(9), and internal memoranda exception, <i>id.</i> § 6-9a-4(b)(12), apply. JA 625, 626–27. | <b>Affirmed.</b> The Board’s un rebutted factual evidence proved that both exceptions apply. JA 764–68.                                |
| Did the Board violate the WVOGPA by discussing an emergency pay policy in executive session?     |                       | <b>No.</b> Commercial competition exception, W. Va. Code 6-9a-4(b)(9), and internal memoranda exception, <i>id.</i> § 6-9a-4(b)(12), apply. JA 625, 626–27. | <b>Affirmed.</b> The Board’s un rebutted factual evidence proved that both exceptions apply. JA 764–68.                                |
| Did the Board violate the WVOGPA by discussing changes to Federal Title IX in executive session? |                       | <b>No.</b> Exception for privileged matters, W. Va. Code 6-9a-4(b)(12), applies. JA 624.                                                                    | <b>Affirmed.</b> The circuit court did not err in finding the attorney-client privilege applied to general counsel’s briefing. JA 768. |
| Did the Board violate the WVOGPA by discussing tuition and fees in executive session?            |                       | <b>No.</b> Commercial competition exception, W. Va. Code 6-9a-4(b)(9), and internal memoranda exception, <i>id.</i> § 6-9a-4(b)(12), apply. JA 625, 626–27. | <b>Affirmed.</b> The Board’s un rebutted factual evidence proved that both exceptions apply. JA 764–68.                                |
| Did the Board violate the WVOGPA by discussing capital projects in executive session?            |                       | <b>No.</b> Commercial competition exception, W. Va. Code 6-9a-4(b)(9), and internal memoranda exception, <i>id.</i> § 6-9a-4(b)(12), apply. JA 625, 626–27. | <b>Affirmed.</b> Both WVOGPA exceptions apply. JA 764–68.                                                                              |
| Was the Board’s June 19, 2020 agenda                                                             |                       | <b>Yes, but fees unwarranted.</b>                                                                                                                           | <b>Affirmed in part.</b> Violation was not “technical,” but no                                                                         |

|                                                                                    | Circuit Court Order 1                             | Circuit Court Order 2                                                    | ICA                                                                                                                                 |
|------------------------------------------------------------------------------------|---------------------------------------------------|--------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------|
| deficient under the WVOGPA?                                                        |                                                   | Deficient agenda notice was a technical violation of the WVOGPA. JA 623. | reversible error. JA 768–69.                                                                                                        |
| Did the Board follow procedure for submitting in camera testimony of its attorney? |                                                   |                                                                          | <i>Yes.</i> <i>Peters</i> does not require the circuit court to hear live testimony; the attorney may testify by affidavit. JA 768. |
| Did the circuit court err by not awarding fees?                                    |                                                   |                                                                          | <i>No.</i> Circuit court did not abuse its discretion by declining to award fees.                                                   |
| Did the ICA have jurisdiction to hear the case?                                    | Not addressed–Petitioner did not raise the issue. | Not addressed–Petitioner did not raise the issue.                        | Not addressed–Petitioner did not raise the issue.                                                                                   |

**C. The Circuit Court Granted Summary Judgment in Favor of the Board.**

**i. Circuit Court Order I: preliminary deliberations over the University’s COVID-19 response, University budgets, and social justice petition.**

As summarized above, the first sound of summary judgment briefing centered on Petitioner’s claims about three topics discussed in executive session – the University’s response to the COVID-19 pandemic, University budgets, and preliminary discussions of social justice concerns raised on campus after George Floyd’s murder. The circuit court ruled that each of these three topics were appropriately discussed in executive session because they concerned “matters involving commercial competition” under West Virginia Code § 6-9A-4(b)(9). JA 600-11, Circuit Court Order I.

The circuit court’s findings were careful and thorough. The Board submitted un rebutted evidence that during the ongoing pandemic, “every line item of the University’s budget was in question.” JA 603. The pandemic had an unprecedented and direct impact on whether the University could compete for students, faculty, and governmental research grants, and the Board met to discuss the administration’s preliminary ideas about addressing these concerns. *Id.* The

circuit court reviewed the statutory and regulatory framework by which the Board delegates the day-to-day management of the University to its senior management, noting that managerial deliberations and decisions are not subject to the WVOGPA. JA 602, Circuit Court Order I at 3.

The court emphasized the unrebutted factual testimony of Vice President Alsop. JA 602–04, Circuit Court Order I at 3–4. As Vice President Alsop explained, the University’s administration sought the Board’s counsel on the three topics at issue during a closed meeting in June 2020. The Board entered executive session to receive a briefing on the administration’s preliminary deliberations over these matters. JA 603–04, Circuit Court Order I at 4–5. No votes were taken in executive session, and the Board fully addressed these matters – the University’s COVID-19 response, University budgets, and social justice concerns – during subsequent meetings.

The circuit court conducted a detailed analysis of the WVOGPA’s statutory scheme, JA 605–08, Circuit Court Order I at 6–9, noting the need to balance the law’s preference for open meetings against the government’s legitimate concern in maintaining confidentiality for some government functions. *Id.* The court then applied the facts as established through Mr. Alsop’s unrebutted testimony to the statutory framework. Relying on the “commercial competition” exception to the WVOGPA, the court ruled that the Board appropriately entered executive session for preliminary briefings by the administration on the University response to the ongoing pandemic, a petition calling for increased racial diversity on campus, and the University’s budget. JA 608–10, Circuit Court Order I at 9–11.

**ii. Circuit Court Order II: preliminary discussions over University football, the business college, emergency pay policy, Title IX regulations, tuition, and capital projects.**

After entering its initial summary judgment order, the circuit court asked the parties to provide further briefing on Petitioner’s claim that the Board violated the WVOGPA by discussing six other topics in executive session: “a talk with the athletic director about the ‘outlook for this upcoming season’; the business college; emergency pay policy; federal Title IX regulations; tuition and fees, [and] capital projects.” *See* JA 26–27, Am. Compl. ¶ 7; JA 613, Circuit Court Order II at 2. These discussion items were mentioned in a comment made by a Board member during a meeting with the public portion of a meeting held on June 19, 2020. *See id.*

Following a second round of briefing, a final hearing was held on March 28, 2022. At the hearing, Petitioner complained that the Board had not properly disclosed the confidential communication of the Board’s general counsel, which had been discussed in executive session on June 19, 2020. Following the hearing, and in response to Petitioner’s concern, the Board submitted the affidavit of Stephanie Taylor, general counsel for the University, for *in camera* review. *See* JA 507–11; JA 520–23. The affidavit explained that the Board closed its meeting to receive an update on Title IX regulations and suggestions for implementing the regulations at the University.<sup>4</sup> *Id.*

On April 28, 2023, the circuit court entered a final order. JA 612–28, Circuit Court Order II. The circuit court found that the Board’s June 19, 2020, meeting agenda was insufficient to give notice of the topics that would be addressed in executive session. JA 623, 627–28, Circuit Court Order II. This technical misstep did not warrant any relief to Petitioner. *Id.* at 623, Circuit Court

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<sup>4</sup> A redacted version of Ms. Taylor’s affidavit is included in the joint appendix. JA 507–99. The Board will file a motion to supplement the record with Ms. Taylor’s unredacted affidavit and the privileged memorandum she presented to the Board on June 19, 2020. The Board asserts attorney client privilege as to both the unredacted affidavit and the memorandum, which will be hand-delivered to the Court to be placed under seal.

Order II at 12. The court reasoned that Ms. Taylor’s briefing to the Board regarding changes to the federal Title IX regulations was privileged and properly discussed in a closed meeting. JA 624, Circuit Court Order II at 13. As to the other five topics – the talk with the athletic director, the discussion of capital projects and the new business college, the briefing on the emergency pay policy and tuition and fees – the court found that these were all matters involving commercial competition and were exempt from the public meetings requirements. JA 624–25, Circuit Court Order II at 13–14.

The court did not limit its findings to the “commercial competition” exception, but also addressed the Board’s suggestion that these topics were exempted from the open meetings law because they were presented to the Board in an internal, deliberative memorandum prepared by the administration. JA 626–27, Circuit Court Order II at 15–16. The West Virginia Freedom of Information Act (“WVFOIA”) exempts pre-decisional, deliberative memoranda from public disclosure, *see* W. Va. Code § 29B-1-4(a)(8), and the circuit court held that executive session discussion of the University’s WVFOIA-protected memorandum was lawful. *Id.*

Petitioner appealed.<sup>5</sup>

**D. The Intermediate Court of Appeals Upheld the Circuit Court’s Findings.**

Petitioner presented four assignments of error to the West Virginia Intermediate Court of Appeals (“ICA”). Petitioner argued that the circuit court erred by (1) endorsing an overly broad reading of the “commercial competition” exception; (2) finding that the WVOGPA incorporates the Freedom of Information Act exceptions, such that discussion of a FOIA-protected document

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<sup>5</sup> Petitioner first lodged its appeal in this Court, claiming that this case involves an extraordinary remedy allowing it to bypass the ICA. After having its initial appeal and a subsequent petition for direct review rejected, Petitioner presented its appeal to the ICA. Petitioner raised no jurisdictional challenge to the ICA.

can occur in executive session; (3) not following proper procedure in considering whether attorney-client privilege applied, and (4) finding that the Board’s insufficient meeting agenda was a “technical” violation of the WVOGPA which did not warrant relief.

The ICA agreed that the closed session matters all fell within exceptions to the WVOGPA. On the commercial competition exception, the ICA held that the plain language of the statute allows a governing body to discuss both financial and non-financial matters in executive session, so long as these “involve[e] commercial competition . . . [and] might adversely affect” the State’s interests if discussed openly. *HD Media Company, LLC v. W. Va. Univ. Bd. of Governors*, --- S.E.2d ---, 2024 WL 3007228, at \*6 (W. Va. Int. Ct. App. June 14, 2024). Next, the ICA held that the WVOGPA and WVFOIA must be read in harmony, and a governing body may properly enter executive session to discuss internal memoranda protected from disclosure under the WVFOIA. *Id.* at 8–9. On attorney-client privilege, the ICA held that the lower court committed no error by allowing the University’s counsel to testify by affidavit, and that Petitioner did not contest the University’s substantive claim of privilege. *Id.* at 11–12. The ICA agreed that the University’s meeting agenda was inadequate but upheld the circuit court’s decision not to award attorney fees. *Id.* at 12–13.

By separate opinion, Chief Judge Scarr concurred with the majority’s analysis and conclusions on three of the four assignments of error. *Id.* at \*14–18. He parted ways with the majority in its analysis of the “commercial competition” exception to the WVOGPA. *Id.* at \*24–25 (reasoning in dissent that the Board did not meet its burden in establishing how the commercial competition exception applies to the topics discussed in executive session).

Petitioner appeals each of the majority’s unfavorable findings. In a new argument not raised before the ICA, Petitioner also challenges the ICA’s jurisdiction to hear the case.

### III. SUMMARY OF ARGUMENT

Between June 2020 and September 2020, portions of five of the Board’s meetings or subcommittee meetings were held in executive session. *See* JA 600–01, Circuit Court Order I at 1–2. The meetings took place in an unprecedented context—during a global public health emergency. The Board entered executive session to receive initial briefings from University administration on matters in which the Board had previously delegated authority. The Board made no decision in closed session, took no votes, and thoroughly discussed these matters in open session once the administration had concluded its deliberations.

The WVOGPA, W. Va. Code § 6-9A-1 *et seq.*, generally requires that “meetings conducted by government entities should be open to the public.” “[T]he benefits of openness inure to both the public affected by governmental decisionmaking and the decision makers themselves.” W. Va. Code § 6-9A-1. Recognizing that open government as an absolute rule is impractical, however, the Legislature created twelve limited exceptions to the general rule. *See* W. Va. Code §§ 6-9A-3, 6-9A-4.

As relevant here, the WVOGPA’s exceptions permit government bodies to hold closed meetings (a) “[t]o 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,” but only until the matter has been “finalized and completed” (the “commercial competition” exception); and (b) “[t]o 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 [West Virginia Freedom of Information Act]” (the “deliberative process” exception). W. Va. Code §§ 6-9A-4(b)(9) & (12). The West

Virginia Freedom of Information Act (“WVFOIA”), in turn, expressly provides that internal, deliberative memoranda prepared by a public body are not subject to public disclosure requirements. *See* W. Va. Code § 29B-1-4(a)(8). For each meeting at issue, the Board entered executive session in reliance on one or both of these exceptions.

Two courts have now found, in response to the Board’s un rebutted factual evidence, that it was entitled to invoke the WVOGPA’s exceptions to discuss each matter:

- **The University’s response to the COVID-19 pandemic:** The Board’s discussion of the administrative response to the COVID-19 pandemic involved issues that were commercially competitive in nature such that premature disclosure would harm the financial interests of the University. The pandemic was an abrupt and unprecedented threat to student enrollment, faculty retention, and the University’s ability to fulfill its contractual obligations, just by way of example. “[E]very line item of the University’s budget was in question.” JA 176. The Board’s discussion was based on a pre-decisional, deliberative memorandum provided by University administration (which is not considered a public record within the meaning of WVFOIA) and was not subject to the open meetings requirements for this independent reason. These conversations allowed the Board to provide advice and counsel on operational decisions reserved for the administration, and the Board took no formal action while in executive session.
- **University budgets:** The Board’s preliminary discussion of University budgets was closely related to the unique challenges posed by the COVID-19 pandemic, and implicated the same commercial concerns. This discussion was likewise based on internal memoranda supplied by the administration.
- **Social justice concerns:** The Board’s limited discussion about a petition raising concerns about social justice on campus following George Floyd’s murder was a matter “involving commercial competition.” If made public prematurely, the University’s response to the petition and the concerns it expressed might adversely affect the financial interests of the University.
- **Talk with the athletic director:** The University’s athletic director made a presentation to the Board’s finance subcommittee during the executive session held on June 19, 2020. The presentation focused on planning for athletic events during the ongoing COVID-19 pandemic. At the time, whether the University could even hold a football season—with anticipated revenue between \$3 to \$6 million for each home game—was an open question. JA 515. Premature disclosure of University deliberations could impact media contracts, contracts with stadium vendors, ticket sales, and athlete retention. Both lower courts held that this preliminary discussion

involved matters of a commercially competitive nature which would harm the University if prematurely disclosed.

- **Business college and capital projects:** The Board reviewed information while in executive session about the impact of COVID-19 on various capital projects, including the new business college. This briefing fell under the commercial competition exception of the WVOGPA. As with the other topics, concerns about capital projects were presented to the Board’s committee by the administration in an internal, deliberative memorandum.
- **Emergency pay policy and tuition and fees:** The administration’s preliminary deliberations over the COVID-19 pandemic included consideration of whether to extend an emergency pay policy. The administration also briefed the Board on Fiscal Year 2020 and 2021 budgets while in executive session, within the context of considering the University’s response to the ongoing pandemic. These preliminary discussions were commercially competitive in nature and based on information set forth in the administration’s internal memoranda.
- **Title IX regulations:** The Board entered executive session to receive counsel from its attorney, the general counsel for the University. The discussion was privileged in nature and centered on updates to Title IX regulations and recommendations for their implementation at the University. Privileged communications are exempted from the open meetings requirement.

Like the circuit and intermediate appellate courts below, this Court should reject Petitioner’s narrow reading of the WVOGPA’s exception for commercial competition. The statute allows the governing body of a public agency to discuss in closed session “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*.” W. Va. Code § 6-9A-4(b)(9) (emphasis added). Petitioner argues that “matters of commercial competition” should be limited to the specific examples preceding this general clause. Such a reading is inconsistent with the plain statutory text, which contemplates “commercial competition” being given its ordinary meaning.

The Court should similarly dismiss Petitioner’s textual challenge to the “deliberative process” exception of the WVOGPA, W. Va. Code § 6-9A-4(b)(12). Pet. Br. 23–24. The WVFOIA exempts “internal memoranda or letters received or prepared by any public body” from public

disclosure. W. Va. Code § 29B-1-4(a)(8). The WVOGPA allows a governing body to discuss documents exempted from the WVFOIA in closed session. W. Va. Code § 6-9A-4(b)(12). The circuit court and ICA have ruled that if a document is not subject to public disclosure under WVFOIA, a public body's discussion of that document may occur in executive session. JA 626, Circuit Court Order II at 15; *HD Media*, 2024 WL 3007226, at \*9. The Board did not violate the WVOGPA when it entered executive session to discuss the internal, deliberative memorandum prepared by Vice President Alsop.

Next, Petitioner's argument that the circuit court failed to follow proper procedure in evaluating the Board's claim of attorney-client privilege is utterly without merit. The WVOGPA expressly permits a public body to close its meetings to receive the legal advice of its attorney. W. Va. Code § 6-9A-4; Syl. Pt. 2, *Peters v. Cnty. Comm'n of Wood Cnty.*, 209 W. Va. 94, 543 S.E.2d 651 (2000). The Board lawfully entered executive session on June 19, 2020, to receive a briefing from its attorney on regulatory changes impacting the University. When Petitioner challenged the Board's claim of privilege, the Board submitted an affidavit from the University's general counsel, along with the privileged memorandum, for *in camera* review. JA 507–11; JA 520–23. As any first-year law student knows, an affidavit is “testimony.” W. Va. R. Civ. P. 56(e). Petitioner's suggestion that “affidavits are insufficient to establish a factual basis for the assertion of the attorney-client privilege” finds no support in the law. *HD Media*, 2024 WL 3007228 at \*11.

The **only** issue on which Petitioner prevailed in the lower courts is its allegation of inadequate notice in the June 19, 2020 subcommittee meeting agenda. *See* JA 615, Circuit Court Order II at 4. The Board provided a public agenda in advance of the meeting, JA 349, which the lower court found to lack sufficient detail. Even if the agenda was deficient (the Board does not concede it was), the lower court did not commit reversible error in refusing to award attorney fees.

*See* W. Va. Code § 6-9A-7; *Capriotti v. Jefferson Cnty. Planning Comm’n*, No. 13-1243, 2015 WL 869318, at \*8 (W. Va. Feb. 26, 2015) (memorandum decision) (noting the remedies provided for violations of the WVOGPA are left to the discretion of the trial court); *HD Media*, 2024 WL 3007228, at \*12–13 (upholding the lower court’s finding that the Board was substantially justified in its actions and attorney fees were unnecessary).

In fact, based on the success the Board has achieved in this case, Petitioner should be paying the Board’s attorney fees, not the other way around. The WVOGPA permits an award of the governing body’s attorney fees where the complaining party (HD Media here) is denied relief, and a finding is made that the action was “frivolous,” “commenced with the primary intent of harassing the governing body,” or brought “in the absence of good faith.” W. Va. Code § 6-9A-7(c). Petitioner’s claims are utterly meritless, and the Court should remand with direction for the circuit court to consider awarding fees to the Board.

Petitioner has waived its final assignment of error. Petitioner asks the Court to clarify the jurisdictional reach of the ICA in civil cases. Pet. Br. 35–39. Petitioner did not raise any jurisdictional challenge in the ICA despite the opportunity to do so. It has therefore waived this issue. *See Tudor’s Biscuit World of America v. Critchley*, 729 S.E.2d 231, 237 n.7 (W. Va. 2012) (assignments of error not briefed in the lower court are waived). Further, because this Court already rejected Petitioner’s request for direct appeal, this is an improper request for an advisory opinion. “West Virginia courts do not issue advisory opinions,” *See State ex. rel. v. Perdue v. McCuskey*, 836 S.E.2d 441, 445 (W. Va. 2019), and the Court should decline to do so here.

#### **IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The ICA’s thorough opinion fully addresses each claim of error raised by Petitioner. The Board submits that oral argument is unnecessary.

## V. ARGUMENT

### A. West Virginia Law Expressly Authorizes Governing Bodies to Hold Closed Sessions When Necessary to Carry Out the Business of Government.

Not all governmental meetings can or should be open to the public. W. Va. Code § 6-9A-1. Despite its preference for transparency, the WVOGPA recognizes that it would be “unrealistic, if not impossible, to carry on the business of government should every meeting, every contact and every discussion seeking advice and counsel in order to acquire the necessary information, data[,] or intelligence needed by a governing body were required to be a public meeting.” *Id.* The WVOGPA allows the governing body of a public agency to enter executive session in certain delineated circumstances when necessary to conduct the business of government. *See* W. Va. Code § 6-9A-4 (setting out exceptions to the open meetings requirement). The circumstances in which a public agency may properly enter executive session are written into the WVOGPA as exceptions to the general rule favoring open meetings. *See* W. Va. Code § 6-9A-4. When a matter for discussion falls within an exception, the Act allows the governing body to enter executive session to discuss the matter in a closed meeting. *Id.*

Only two of the WVOGPA’s twelve exceptions are relevant to Petitioner’s appeal: subsections (b)(9) and (b)(12). *See* W. Va. Code § 6-9A-4. The ICA did not err in finding the Board’s actions in compliance with each exception. Though the Board invoked both exceptions in entering executive session, only one need apply for the Board to prevail.

### B. The ICA and Circuit Court did not Err in Their Construction of the “Commercial Competition” Exception.

The “commercial competition” exception to West Virginia’s open meetings laws is codified in subpart (b)(9), which states that a public body may enter executive session:

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. . . .

W. Va. Code § 6-9A-4(b)(9).

Subsection (b)(9) provides necessary, limited protection to a public agency's sensitive commercial interests. It allows a governing body to convene in closed session to discuss matters of commercial competition which might adversely impact the public's interest if exposed prematurely. "[M]atters involving commercial competition" are defined broadly. *HD Media*, 2024 WL 3007228, at \*6. As the ICA noted, "the provision . . . recognizes the need to offer protection even when non-financial interests are at stake: "which . . . might adversely affect the financial **or other interest** of the state." *Id.* (emphasis in original). A generous construction of "matters involving commercial competition" is consistent with the purposes of the WVOGPA because the exception allows the governing body to privately confer on matters of commercial competition only until "the commercial competition has been finalized and completed." *Id.*

i. **With the exception of the privileged discussion with its counsel, all topics at issue fit within the "commercial competition" exception.**

The University's response to the COVID-19 pandemic, including preliminary discussions relating to University budgets, tuition and fees, and University athletics, and an emergency leave policy sufficiently implicate matters of commercial competition that premature disclosure could have adversely affected the University's interests. The Board's closed discussion of a petition raising concerns about social injustice on campus, in the unique environment following George Floyd's death, was exempt from the public meetings rules for the same reason. These preliminary closed sessions were held to assist the University in its deliberations on managerial decisions. JA

352–53; JA 382; JA 602. Every decision which required a Board vote was made publicly. *See* JA 627 (finding “no Board decisions were made in executive session”).

*COVID-19 Response.* As set forth above, the WVOGPA authorizes the Board to enter executive session to discuss “matters involving commercial competition, which if made public, might adversely affect the financial or other interest of the state.” W. Va. Code § 6-9A-4(b)(9). The University Administration’s response to the COVID-19 pandemic is such a matter, as are its preliminary discussions over the University budget and issues relating to social justice on campus. JA 608–10; JA 624–25; *see also* JA 351–57, 368–72. The COVID-19 pandemic was a public health crisis of unprecedented scale. The uncontroverted evidence below demonstrates that the University was diligent in working to preserve the health of its students, faculty, and staff and produced a flood of information detailing its efforts in doing so. *See* JA 355–56. The issue here is whether the University’s response to COVID-19 sufficiently implicates matters of commercial competition so premature disclosure could adversely affect the University’s interests. W. Va. Code 6-9A-4(b)(9). The lower court and ICA have both held that it did. JA 608–10; JA 624–25.

Indeed, the undisputed facts demonstrated that the University’s COVID-19 response significantly implicated commercial considerations, so as to warrant closed session preliminary discussions. The nationwide lockdowns during the pandemic had an unprecedented impact on every aspect of the University’s operations, including student enrollment, faculty and staff retention, the University’s business relationships, and research. *See* JA 176–77. Decisions made by the University administration such as whether to cut employee pay, how to successfully implement remote learning, the budget implications of the COVID-19 pandemic and options for addressing them, its implications on enrollment and retention strategies, and how to respond to any outbreaks of the virus upon return to campus all directly impacted the University’s ability to compete against

other colleges and universities. *See* JA 351–57, 368–72; *see also* JA 423–24. The ICA recognized the uniqueness of the moment when it held “[t]he circuit court did not abuse its discretion in finding that, during this formative stage, premature disclosure risked undermining the University’s response to and recovery from a national crisis.” *HD Media*, 2024 WL 3007228, at \*7.

*Deliberative Matters Concerning Capital Projects (Including the New Business College), Tuition and Fees, and the Emergency Pay Policy*: During an executive session on June 19, 2020, the University’s administration briefed the Board’s finance committee on its deliberations concerning ongoing capital projects, Fiscal Year 2020 and 2021 budgets, and a special emergency leave pay plan implemented during the pandemic. JA 370–72.

The administration briefed the committee on the economic feasibility of moving forward with the construction of the new business college and other capital projects in light of the pandemic. The decision had serious consequences, including legal ramifications of postponing or terminating the University’s contracts with third-party vendors. JA 371. The pandemic also placed the University’s ability to retain high enrollment numbers at risk, thereby requiring the administration to explore new enrollment and retention strategies for covering anticipated budgetary shortfalls. *Id.* at 371–72. As part of the June 19, 2020 closed session, the Board engaged in a limited discussion of the University’s tuition and fees as part of a larger COVID-19 related budgetary discussion. *Id.* at 372. A similar discussion occurred with respect to the University’s emergency pay policy, which the administration planned to ask the Board to extend.

These discussions were all part of the administration’s deliberations over the ongoing pandemic and exempted from West Virginia’s open meetings requirements under West Virginia Code § 6-9A-4(b)(9). The discussions also centered on an internal memorandum provided by the administration to the Board. *See* JA 371–72.

Conversation with Athletic Director. These commercial considerations extended to University athletics. On June 19, 2020, the University’s athletic director gave a presentation during the closed session of the Board’s finance committee to address plans for athletic events during the ongoing pandemic. JA 370. Vice President Alsop testified that it was unknown at this time whether the University’s football season could proceed as planned. *Id.* With each home football game representing \$3 to \$6 million in revenue, the University’s Athletics Department was facing the prospect of large financial losses if football games were played without fans or not played at all. *Id.* Vice President Alsop presented unrebutted testimony that “[p]remature, public disclosure could adversely affect our media contract and contracts with stadium vendors, as well as ticket sales and athlete retention.” *Id.*

Social Justice Petition. The Board presented unrebutted evidence that its preliminary discussion of social and racial justice issues was commercially sensitive in nature. *See* JA 62. Occurring almost simultaneously with the COVID-19 pandemic, the death of George Floyd and the cultural movement affected “every college and university in the nation.” JA 62. On June 19, 2020, the University Administration briefly consulted with the Board in closed session about its planned response to a petition calling for greater racial equity on campus. JA 177. The petition “implicated [the University’s] ability to compete with similar educational institutions.” *Id.* As Vice President Alsop testified, “As the nation reeled from Mr. Floyd’s murder, social unrest affected every college and university in the nation. Current and future students, faculty, and staff cared deeply about how [the University] responds to concerns about racism and diversity.” JA 177. After bringing the petition to the Board’s consideration while in closed session, the administration concluded its deliberations and publicly announced measures to address the concerns raised in the petition. JA 177–78. Based upon the Board’s unrebutted evidence, the circuit court appropriately

ruled that this preliminary discussion involved matters of such a commercially sensitive nature so as to meet the (b)(9) exception. *HD Media*, 2024 WL 3007228 at \*7.

ii. **Judge Scarr’s limited reading of the (b)(9) exception is inconsistent with the plain language of the statute.**

Judge Scarr writes in his dissenting opinion that the ICA and circuit court’s construction of the (b)(9) exception is “expansive” and “extreme.” *HD Media*, 2024 WL 3007228, at \*22. Respectfully, Judge Scarr’s concern is unfounded.

Judge Scarr adopts Petitioner’s view that rules of statutory construction require the phrase “other matters involving commercial competition” to be limited by the immediately preceding examples of commercially competitive activity: “the purchase, sale or lease of property, advance construction planning, [and] the investment of public funds.” W. Va. Code § 6-9A-4(b)(9). “[T]he fact that the three examples on this list clearly contemplate by their nature a specific decision, transaction, or action in process or under consideration which is subject to ‘finalization and completion,’” Judge Scarr writes, “supports the view that the ‘commercial competition’ exception must also involve a specific decision, transaction, or contemplated action, subject to finalization and competition, not simply some amorphous general competition that is constant.” *HD Media*, 2024 WL 3007228, at 21.

Judge Scarr’s reading of the “commercial competition” exception is wrong for four reasons. **First**, construing the phrase “other matters involving commercial competition,” to be limited by the specifically enumerated examples would thwart legislative intent. *See HD Media*, 2024 WL 3007228, at \*6. The word “other” means apart or separate—something unlike “the purchase, sale or lease of property,” “advance construction planning,” or “the investment of public funds.” W. Va. Code § 6-9A-4(b)(9). If the Legislature had intended “matters involving

commercial competition” to be limited to these examples, it would not have expanded the exception to include “other matters.”

**Second**, the term “commercial,” as it is commonly used, broadly refers to business activity. Black’s Law Dictionary (12th ed. 2024); *see Osborne v. United States*, 567 S.E.2d 677, 684 (W. Va. 2002) (“Undefined words and terms used in a legislative enactment will be given their common, ordinary and accepted meaning.”) (citation omitted). By leaving the statutory phrase “commercial activity” undefined, the Legislature expected courts to give the words their regular and accepted meaning.

**Third**, the Legislature crafted the exception to protect discussion of commercially competitive matters “even when [the government’s] non-financial interests are at stake.” Allowing a governing body to hold private discussions of commercially competitive matters which could adversely affect the State’s “financial **or other interest**” indicates that the exception applies to matters beyond the purchase, sale, or lease of property, advance construction planning, or investment of public funds. “The rule of construction . . . limiting the scope or meaning of general words . . . has no application when the context manifests intention to give them a more extensive meaning and effect.” *HD Media*, 2024 WL 3007228, at \*6 (citing *Syl.*, *Gauley Coal Land Co. v. Koontz*, 87 S.E. 930 (1916)).

**Fourth**, written into the statutory exception is an important limitation on the discussion of commercially competitive activity behind closed doors. A governing body’s discussion of matters involving commercial competition is “exempt from disclosure . . . only until the commercial competition has been finalized and completed.” W. Va. Code § 6-9A-4(b)(9). As the ICA noted, “subsection (b)(9) is unique in that it only provides a *temporary* exception; once the matter of

competition has been finalized, its protections fall away.” *HD Media*, 2024 WL 3007228, at \*7 (emphasis added).

The Board met its burden to demonstrate that it entered executive session to discuss specific deliberative matters involving commercial competition which would adversely affect the University’s interest if prematurely disclosed. This Court should adopt the reasoning of the ICA and uphold the lower court’s finding that the (b)(9) exception covers the Board’s consideration of preliminary, managerial deliberations over the COVID-19 pandemic (including preliminary discussions of budgets, athletics, tuition and fees, capital projects, and an emergency pay policy) and the social justice petition.

**C. The ICA Correctly Held that the Open Meetings Law Does Not Apply to Discussions of Internal, Deliberative Memoranda Exempt from WVFOIA.**

Subsection (b)(12) preserves the privacy of confidential government matters, including discussions protected by the attorney-client privilege, and the discussion of documents appropriately designated as confidential. W. Va. Code § 6-9A-4(b)(12). Petitioner’s assignment of error invites the Court to consider whether an “internal memorandum,” as defined by WVFOIA, is the type of confidential document which a governing body may enter executive session to discuss. The ICA held that it is. *HD Media*, 2024 WL 3007228, at 8–9. The Board relied on subsection (b)(12) as an independent reason to close the portions of its meetings; thus, even if the Court does not agree with the ICA’s interpretation of the “commercial competition” exemption, the Board will still prevail if subsection (b)(12) applies.

The (b)(12) exception applies to matters “rendered confidential” or “not considered a public record” within the meaning of the WVFOIA. JA 626–27. The WVOGPA recognizes that if a document is not suitable for public disclosure under the WVFOIA, a public body’s discussion of the same document should not occur in public. W. Va. Code § 6-9A-4(b)(12); *HD Media*, 2024

WL 3007228, at \*8–9. Upon a majority vote of all members present, a governing body may enter executive session to discuss a document not considered a “public record” under the WVFOIA. W. Va. Code § 6-9A-4(b)(12).

WVFOIA grants the public a right to inspect or copy any public record of a West Virginia public body. W. Va. Code § 29B-1-3-1(1). A “public record” includes “any writing containing information prepared or received by a public body, the content or context of which, judged either by content or context, relates to the public’s business.” W. Va. Code 29B-1-2(5). Certain documents are exempted from disclosure under WVFOIA, including “[i]nternal memoranda or letters received or prepared by any public body.” W. Va. Code § 29B-1-4(a)(8).

WVFOIA’s “internal memoranda exemption” “specifically exempts from disclosure only those written internal government communications consisting of advice, opinions and recommendations which reflect a public body’s deliberative, decision-making process; written advice, opinions and recommendations from one public body to another; and written advice, opinions and recommendations to a public body from outside consultants or experts obtained during the public body’s deliberative, decision-making process.” *Daily Gazette Co. v. West Virginia Dev. Office*, 198 W. Va. 563, 575, 482 S.E.2d 180, 192 (1996). The primary purpose of the exemption, also called the “deliberative process exemption,” is to encourage the free exchange of ideas and information within government agencies. *Id.* at 571; *see also United States Fish and Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 785 (2021) (“To encourage candor, which improves agency decisionmaking, the [deliberative process] privilege blunts the chilling effect that accompanies the prospect of disclosure.”).

The deliberative process exemption applies to all public bodies subject to WVFOIA, not just to administrative agency policy making. In *Highland Mining Co. v. West Virginia University*

*School of Medicine*, 235 W. Va. 370, 774 S.E.2d 36 (2015), the Court recognized public bodies are engaged in an immensely diverse range of endeavors related to government service and their internal deliberations will relate to a wide range of topics. The deliberative process exemption covers all these activities, so long as the documents are both pre-decisional and deliberative in the context in which they are prepared or considered. *Id.* at 385. “Pre-decisional” means the documents were “prepared in order to assist a public body decisionmaker in arriving at his or her decision,” *id.* at 383, while deliberative materials are those that “reflect[] the give-and-take of the consultative process, by revealing the manner in which the public body evaluates possible alternatives relevant to the decisional process.” *Id.*

The University’s administration may assert the internal memoranda exemption to deny a WVFOIA request for documents revealing its deliberative, decision-making process. *Id.* at 385. Further, the ICA has held that “where a document is exempt from disclosure pursuant to the internal memoranda exception as defined by West Virginia Code § 29B-1-4(a)(8), a public body’s direct discussion of such internal memoranda constitutes a confidential, nonpublic matter for the purposes of West Virginia Code § 6-9A-4(b)(12). *HD Media*, 2024 WL 3007228, \*9.

On June 19, 2020, the Board’s finance committee entered executive session to discuss an internal, deliberative memorandum provided in advance of the meeting by Vice President Alsop and others. JA 369; *see also* JA 616, Circuit Court Order II at 5. This internal, deliberative memorandum covered information relating to the capital projects, including the business school and budgetary analysis relating to the COVID-19 pandemic, including discussions regarding tuition and fees, enrollment and retention strategies, and the emergency pay policy. JA 369, 372; *see also* JA 616–18, Circuit Court Order II at 5–6.

Petitioner does not dispute that the memorandum was both pre-decisional and deliberative. JA 626–27 (Circuit Court Order II). The memorandum advised the committee on various matters where the University’s administration was contemplating a decision but had not yet taken action, *see* Syl. Pt. 5, *Highland Mining*, 235 W. Va. at 376, and described the administration’s proposed course of action as well as alternative options for resolution. *See* JA 369. Because the memorandum was decisional, deliberative, and not subject to disclosure under the WVFOIA, the Board’s committee appropriately entered executive session to discuss it. W. Va. Code § 6-9A-4(b)(12); JA 626–27 (Circuit Court Order II); *HD Media*, 2024 WL 3007228, at (8–9).

The (b)(12) exception harmonizes the open government law and the WVFOIA, thereby preserving the protections extended to public documents. *HD Media*, 2024 WL 3007228, at \*9. The ICA “note[d] that the primary objective of an open and efficient government is at the core of both statutes, demonstrating that the two statutes should be read consistently with one another, rather than in conflict.” *Id.* The Court should bear in mind that the University’s pre-decisional, deliberative memorandum concerned day-to-day managerial decisions delegated to the administration by the Board, and there is no legal requirement that the administration discuss its decisions publicly. *See* W. Va. Bd. of Governors Finance and Admin. R. 5.1. The University’s practice of briefing the Board on pre-decisional, deliberative matters fosters better decision-making by the administration on many issues that are not subject to Board approval.

The Court should find there is no factual dispute on the applicability of the internal memoranda exemption and uphold the lower court’s finding that a governing body’s discussion of internal memoranda may occur in closed session.

**D. Attorney-Client Privileged Discussions are Not Subject to the WVOGPA's Rule Requiring Open Meetings.**

Petitioner is simply incorrect when it claims that “[t]he WVOGPA does not specifically include an exception based upon the attorney-client privilege.” Pet. Br. 26. The WVOGPA excepts privileged discussions from the open meetings rule. W. Va. Code § 6-9A-4(b)(12); *see HD Media*, 2024 WL 3007228, at \*10–12; *Peters*, 519 S.E.2d at 181. The lower court followed the proper procedure in determining whether the Board was justified in relying on this exception.

West Virginia law recognizes an attorney-client privilege where (1) both parties contemplate that an attorney-client relationship exists, (2) the client is seeking advice from the attorney in her capacity as a legal advisor, and (3) the communication between attorney and client is intended to be confidential. *State ex rel. United Hosp. Ctr., Inc. v. Bedell*, 484 S.E.2d 199, 209 (W. Va. 1997) (citation omitted). A governing body may not close a meeting “merely because an agency attorney is a participant.” *See* W. Va. Code § 6-9A-4(b)(11).

There is no question that the Board’s communication with its general counsel was privileged. *First*, an existing attorney-client relationship exists between the Board and the University’s general counsel. JA 372–73; 520–21. *Second*, the Board sought legal advice from its attorney concerning the content of the updated Title IX regulations and counsel’s recommendations for implementing the regulations at the University. JA 372–73; 520–21. This was not a simple recitation of the law. *See HD Media*, 2024 WL 3007228, at \*17 (Scarr, J. dissenting) (finding the attorney-client communication at issue here involved more than a mere recitation of regulatory changes). *Third*, the Board’s discussions with its attorney were intended to remain confidential, as evidenced by the fact that the discussion took place in executive session. *See* JA 520–23; JA 654 (Circuit Court Order II at IV.B.). The Board’s decision to close a portion

of its meeting to receive regulatory updates and legal counsel from Ms. Taylor fits squarely within the WVOGPA's exemption.

This Court's decision in *Peters* directs:

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.

205 W. Va. 481, 489–90, 519 S.E.2d 179, 187–88. The Board became aware that Petitioner challenged its assertion of privilege when Petitioner filed its second summary judgment response. *See* JA 472–74. The Board responded by submitting the testimony of the University's general counsel, Stephanie Taylor, for *in camera* review by the circuit court. JA 507–11; JA 520–23. Vice President Alsop also submitted an affidavit speaking to the privileged nature of Ms. Taylor's discussion. JA 517–18. The circuit court reviewed the materials submitted for review *in camera* before upholding the Board's claim of privilege and ruling against Petitioner. JA 507–11; JA 520–23.

The circuit court committed no procedural misstep in reviewing Ms. Taylor's privileged communication. Despite Petitioner's assertion to the contrary, *Peters* does not require in-person testimony. *HD Media*, 2024 WL 3007228, at \*11. “[S]worn affidavits are acceptable as testimonial evidence, within the discretion of the trial court.” *Id.* (citing W. Va. R. Civ. P. 43, 56). As was also true before the ICA, Petitioner “fails to cite authority indicating that, under *Peters*, affidavits are insufficient to establish a factual basis for the assertion of the attorney-client privilege.” *Id.*; *see generally* Pet. Br. 27–30.

The circuit court followed *Peters* in reviewing the substance of Ms. Taylor's communications and ruling that the Board did not violate the WVOGPA. This Court should reject Petitioner's challenge to the Board's claim of attorney-client privilege.

**E. The Circuit Court Did Not Abuse its Discretion by Not Awarding Fees.**

Of all its allegations lodged below, HD Media has found marginal success in only one—its contention that the Board’s June 19, 2020 meeting agenda was deficient. *See* W. Va. Code § 6-9A-3 (directing governing bodies to make meeting agendas available in advance to the public). The circuit court made a factual finding that the Board’s failure to provide sufficient notice of topics to be discussed during the closed meeting was merely a “technical” violation of the WVOGPA. JA 741–42. After noting that the Board acted in good faith and was “substantially justified” in its actions, the circuit court declined to award fees. JA 623. The ICA did not disturb this ruling. *HD Media*, 2024 WL 3007228, at \*12–13.

Even if the Board’s meeting agenda was deficient (the Board does not concede that it was), the circuit court’s decision not to award fees is entitled to deference. *See* W. Va. Code § 6-9A-7(b) (“A public agency whose governing body is adjudged in a civil action to have conducted a meeting in violation of the provisions of this article *may* be liable to a prevailing party for fees and other expenses . . .”) (emphasis added); *Capriotti v. Jefferson Cty. Planning Comm.*, No. 13-1243, 2015 WL 869318, at \*8 (W. Va. Feb. 26, 2015) (memorandum decision) (“The remedies provided in [the WVOGPA] are left to the discretion of the circuit court.”). Fees are inappropriate where, as here, the governing body’s actions are substantially justified, and Petitioner has failed to demonstrate how the lower court abused its discretion in making that finding. *See Capriotti*, 2015 WL 869318 at \*9; *see also HD Media*, 2024 WL 3007228, at \*13 (finding no abuse of discretion in the circuit court’s decision). Furthermore, because the decision to award fees rests with the lower court, it would be inappropriate for this Court to provide this remedy. *See Capriotti*, 2015 WL 869318, at \*9 (remanding “to determine the remedy, *if any*, the circuit court may deem appropriate”).

Finally, it is the Board, not Petitioner, who is entitled to an award of fees. If a court, “upon denying the relief sought by the complaining person in the action, finds that the action was frivolous or commenced with the primary intent of harassing the governing body,” that court “may require the complaining person to pay the governing body’s necessary attorney fees and expenses.” W. Va. Code § 6-9A-7(c). The Board has substantially prevailed on each of Petitioner’s claims in the lower court and on appeal. With respect to the one minor issue where Petitioner was successful (the alleged notice violation), Petitioner was denied relief. Petitioner has raised and continues to raise frivolous arguments, such as asking the Court to find that an affidavit is not “testimony” or to overturn the lower court’s factual findings on an undisputed factual record. At this point, Petitioner’s continued pursuit of its claims—particularly where there is no public action to overturn—is harassing and frivolous. If the Court upholds the decision of the ICA, it should remand the case for an award of attorney fees in favor of the Board.

**F. Petitioner’s Challenge to the ICA’s Jurisdiction is a Request for an Advisory Opinion and Has Been Waived.**

As its final assignment of error, Petitioner claims the ICA “had no jurisdiction in this case” because this suit involved a request for injunctive relief. Pet. Br. 7. This Court previously denied Petitioner’s motion for direct review without discussion. Petitioner now asks the Court for “an explanation . . . providing the rationale for permitting the [ICA] to have jurisdiction over an appeal involving extraordinary remedies.” *Id.* at 38. Petitioner essentially requests an advisory opinion which this Court typically refuses to render. *Id.* at 37–38; *see State ex. rel. v. Perdue v. McCuskey*, 836 S.E.2d 441, 445 (W. Va. 2019).

It is curious that Petitioner did not raise its jurisdictional argument before the ICA. Whatever Petitioner’s reasoning for doing so, the Court should decline to address this argument for the additional reason that it has been waived. *See Tudor’s Biscuit World of America v.*

*Critchley*, 729 S.E.2d 231, 237 n.7 (W. Va. 2012) (assignments of error not briefed in the lower court are waived).

## **VI. CONCLUSION**

For these reasons, the Court should find the Board committed no violation of West Virginia law by closing portions of its meetings between June and September 2020, decline to award fees, affirm the judgment of the ICA, and dismiss Petitioner's appeal.

Dated: December 30, 2024

West Virginia University Board of  
Governors, Defendant Below, Respondent.

By Counsel,

/s/ Natalie B. Atkinson

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioner,

v.

Appeal No. 24-412

West Virginia University Board of Governors,

Respondent.

**CERTIFICATE OF SERVICE**

I, Natalie B. Atkinson, counsel for Defendant, West Virginia University Board of Governors, hereby certify that I served the foregoing ***BRIEF OF RESPONDENT WEST VIRGINIA UNIVERSITY BOARD OF GOVERNORS*** has been served this 30th day of December, 2024, was served electronically on all counsel of record using the File and Serve Xpress.

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