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OF WEST VIRGINIA

No. 25-587 - *State of West Virginia ex rel. Mike Pushkin, Stephen Willingham, and The West Virginia Democratic Party v. Patrick Morrisey, in his Official Capacity as Governor of West Virginia, and Roger Hanshaw, in his Official Capacity as Speaker of the West Virginia House of Delegates*.

TRUMP, Justice, concurring, joined by Senior Status Justice Walker:

I concur with the majority that the extraordinary relief the petitioners seek in this case must be denied. I agree with the majority that the petitioners lack standing and that this Court cannot provide redress for their claimed injuries for all of the reasons the majority has identified in its opinion. I write separately, however, because as to the petitioners' claims against Speaker Hanshaw, there is an even more important reason why this Court cannot grant the relief that the petitioners request—a reason firmly grounded within the fundamental constitutional structure of West Virginia's government.

Generally, appellate courts should decide cases upon the narrowest grounds possible, and the majority has adhered to that time-honored principle here. But the petition places a fundamental constitutional issue squarely before this Court that necessitates reinstating our prior holding in Syllabus Point 3 of *State ex rel. Holmes v. Clawges* (hereinafter the "*Holmes* holding"), that "[u]nder [West Virginia's] Separation of Powers doctrine" the "courts have no authority—by mandamus, prohibition, contempt or otherwise—to interfere with the proceedings of either house of the Legislature." 226 W. Va. 479, 702 S.E.2d 611 (2010), *disapproved of by State ex. rel. Workman v. Carmichael*, 241 W. Va. 105, 819 S.E.2d 251 (2018). In 2018, this Court disapproved of the *Holmes*

holding when it unconstitutionally enjoined a legislative impeachment proceeding against one of the Court's own justices. *Workman*, 241 W. Va. 105, 819 S.E.2d 251, Syl. Pt. 3. Reinstating the constitutionally "sound"[1] *Holmes* holding would allow this Court to decide the matter before us narrowly and definitively, on the basis that this Court lacks the constitutional authority to issue *any* form of coercive relief against the Legislature and, therefore, cannot redress the petitioners' claimed injuries as they request. That approach would also allow this Court to correct the constitutional errors embedded in the *Workman* opinion, errors that have charted a path for the judicial branch of our state's government to wield unchecked power.

The Separation of Powers

Article V of the Constitution of West Virginia provides that

> [t]he legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the Legislature.

[1] "Remaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the values of stare decisis than would following a more recently decided case inconsistent with the decisions that came before it; the latter course would simply compound the recent error and would likely make the unjustified break from previously established doctrine complete." *State v. Guthrie*, 194 W. Va. 657, 676, 461 S.E.2d 163, 182 (1995) (quoting *Adarand Constr., Inc. v. Pena,* 515 U.S. 200, 231 (1995)).

W. Va. Const. art. V, § 1. The importance of this single sentence is evident in the fact that it comprises the entirety of Article V. Describing the separation of powers principles enshrined in both West Virginia's and the United States' constitutions,[2] this Court has proclaimed that

> [t]he separation of these powers; the independence of the one from the other; the requirement that one department shall not exercise or encroach upon the powers of the other two, is fundamental in our system of government, State and Federal. Each acts, and is intended to act, as a check upon the others, and thus a balanced system is maintained.

State v. Huber, 129 W.Va. 198, 209, 40 S.E.2d 11, 18 (1946).

Indeed, the Framers of the United States Constitution viewed that architecture—the *trias politica*—as the bulwark against governmental encroachment on popular sovereignty.[3] James Madison famously wrote that "[t]he accumulation of all

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[2] "The separation of powers doctrine expressly stated in [West Virginia's] [C]onstitution is a core principle of our system of government, whose roots can be traced back to the founding of this country." *State ex rel. Meadows v. Hechler*, 195 W. Va. 11, 14, 462 S.E.2d 586, 589 (1995) (footnotes and internal citation omitted).

[3] In his 2011 remarks to members of the United States Congress, the late Justice Antonin Scalia illustrated the primacy of the constitutional separation of powers in guaranteeing the freedom of the American people. He described how countries with oppressive government regimes often have a Bill of Rights similar to that of the United States, but that the United States' government *structure* is what prevents our Bill of Rights from becoming what the constitutional Framers would call a mere "parchment guarantee." In other words, he explained, "the real key to the distinctiveness of America is the structure of our government" in its ability to prevent the centralization of power in one person or party. *Hearing on Considering the Role of Judges Under the Constitution of the United States Before the S. Comm. on the Judiciary*, at 37:00, 112th Cong. (2011) (statement of Antonin Scalia, Associate Justice, Supreme Court of the United States),

powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self[-]appointed, or elective, may justly be pronounced the very definition of tyranny." FEDERALIST No. 47 (Madison). For that reason, Madison deemed the "separate and distinct exercise of different powers of government" as "essential to the preservation of liberty" such that the government should be designed to prevent a "gradual concentration of the several powers in the same" branch, by constitutionally granting "to those who administer each [branch] the necessary constitutional means and personal motives to resist encroachments of the others." THE FEDERALIST No. 51 (Madison). This Court has long observed the significance of that design when it comes to West Virginia's government structure, holding as early as 1884 that "[t]he legislative, executive and judicial departments of the government must be kept separate and distinct, and each in its legitimate sphere must be protected." Syl. Pt. 1, *State ex rel. Miller v. Buchanan,* 24 W.Va. 362 (1884).[4] Later, this Court definitively stated that the "plain

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https://www.judiciary.senate.gov/committee-activity/hearings/considering-the-role-of-judges-under-the-constitution-of-the-united-states (last visited November 12, 2026).

[4] *See also, e.g.*, Syl. Pt. 1, *State ex rel. Barker v. Manchin*, 167 W. Va. 155, 279 S.E.2d 622 (1981) ("Article V, section 1 of the Constitution of West Virginia which prohibits any one department of our state government from exercising the powers of the others, is not merely a suggestion; it is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed."); *State ex rel. Brotherton v. Blankenship,* 158 W.Va. 390, 402, 214 S.E.2d 467, 477 (1975) ("The system of 'checks and balances' provided for in American state and federal constitutions and secured to each branch of government by 'Separation of Powers' clauses theoretically and practically compels courts, when called upon, to thwart any unlawful actions of one branch of government which impair the constitutional responsibilities and functions of a coequal branch."); and *Danielley v. City of Princeton,* 113 W.Va. 252, 167 S.E. 620, 622 (1933) ("The legislative, executive and judicial powers, under the Constitution (article 5), are each in its own sphere of duty, independent of and exclusive of the other; so that, whenever a

language of [A]rticle 5" of our state's Constitution "calls, not for construction, but only for obedience." *Hodges v. Pub. Serv. Comm'n*, 110 W. Va. 649, 159 S.E. 834, 836 (1931).

Holmes' Observance of Constraints on Judicial Power

In 2010, in keeping with its long history of strictly enforcing the separation of powers, this Court granted the West Virginia Senate a writ of prohibition against a circuit court order requiring the Senate to remove information from its legislative journals. *Holmes*, 226 W. Va. 479, 702 S.E.2d 611. The *Holmes* Court explained that Article VI, Section 41 of the Constitution of West Virginia vests the function of compiling legislative journals in the Legislature, requiring each chamber to keep and publish a journal of its respective proceedings. *Id.* at 483-84, 702 S.E.2d at 615-16. The *Holmes* Court observed that the keeping of legislative journals was a discretionary activity performed "by the Clerks [and] daily subjected to correction and approval by the members of each house," concluding that the circuit court could not "compel a member or officer of the Legislature to insert entries into, or remove entries from, the official journals documenting the proceedings of the Legislature[.]" *Id.* at 486-87, 702 S.E.2d at 618-19. With respect to the separation of powers principles driving its decision, the *Holmes* Court adopted its holding that "courts have no authority—by mandamus, prohibition, contempt or otherwise—to interfere with the proceedings of either house of the Legislature." *Id.*, Syl. Pt. 3. The *Holmes* holding is the correct exposition of our state Constitution's constraints upon a

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subject is committed to the discretion of the legislative or executive department, the lawful exercise of that discretion cannot be controlled by the judiciary.").

court's authority to interfere with constitutionally committed legislative functions. *Holmes* is also consistent with federal separation of powers jurisprudence, as I am aware of no instance in which a federal court has issued a coercive writ against the United States Congress.[5]

In the petition before us, the petitioners seek the type of coercive judicial relief that the *Holmes* holding eschewed—a writ of mandamus compelling the presiding officer of a legislative chamber to act with respect to functions that are constitutionally committed to the Legislature.[6] Under basic separation of powers principles, it should be unthinkable that the Court has *any* authority to interfere with the House of Delegates' exercise of those functions. I can only suspect that the petitioners believe this Court has the power to issue the relief they request due to the Court's erroneous holdings in *Workman v. Carmichael*, 241 W. Va. 105, 819 S.E.2d 251. When this Court issued a writ of prohibition enjoining the West Virginia Senate from trying the impeachment of one of the Court's own justices in *Workman*, the Court claimed for the judicial branch the unfettered authority to control the ways in which the West Virginia Senate exercised one of its most definitively exclusive constitutional powers—the power to try impeachments. While the petition before

[5] The Supreme Court of the United States has heard an action for declaratory judgment against Congress, but that matter did not involve a request for the Supreme Court to issue a coercive writ. *See Powell v. McCormack*, 395 U.S. 486, 517 (1969) ("We need express no opinion about the appropriateness of coercive relief in this case, for petitioners sought a declaratory judgment, a form of relief the District Court could have issued.").

[6] Those specific functions are described on pages 12-13, *infra*.

us does not involve the Legislature's impeachment powers, the petitioners request this Court to interfere once again with functions and powers that are constitutionally committed to the Legislature. To explain why *Workman* should not impede this Court from refusing such a petition outright by resurrecting the *Holmes* holding, it is necessary to touch upon why *Workman* is constitutionally unsound.

The Path Charted by Workman v. Carmichael

When it comes to powers that our state's Constitution commits *exclusively* to the Legislature, the impeachment power is among the clearest of those—it is commensurate with the "power of the purse" and the power to enact laws. Like the United States Constitution with respect to the federal impeachment power, Article IV, Section 9 of the Constitution of West Virginia vests the power to impeach public officials in the legislative branch of government, stating, in part, that

> [t]he House of Delegates shall have the sole power of impeachment. The Senate shall have the sole power to try impeachments and no person shall be convicted without the concurrence of two thirds of the members elected thereto. When sitting as a court of impeachment, the president of the supreme court of appeals, or, if from any cause it be improper for him to act, then any other judge of that court, to be designated by it, shall preside; and the senators shall be on oath or affirmation, to do justice according to law and evidence.

The writings of our nation's constitutional Framers offer valuable insight into the rationale behind placing the impeachment power in the legislative rather than judicial branch of government. During the Constitutional Convention of 1787, our nation's founders specifically debated whether the power to try impeachments should be vested in the

Supreme Court of the United States. That idea was rejected in favor of vesting the power to try impeachments in the Senate.[7] Alexander Hamilton later commented on that deliberate institutional choice, describing the important constitutional check of placing "the power of instituting impeachments in one part of the legislative body, and of determining upon them in the other" as "alone a complete security" against "judiciary encroachments on the legislative authority." FEDERALIST No. 81 (Hamilton). He elaborated that

> [t]here never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with it, while this body was possessed of the means of punishing their presumption, by degrading them from their stations. While this ought to remove all apprehensions on the subject, it affords, at the same time, a cogent argument for constituting the Senate a court for the trial of impeachments.

Id. Hamilton viewed the impeachment power as the *sole* check on judicial power.[8]

The Supreme Court of the United States has respected the constitutional constraints on its own power. In *Nixon v. United States*, a federal judge sought a declaratory judgment that his impeachment conviction was void and that his judicial salary and

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[7] *See Nixon v. United States*, 506 U.S. 224, 233 (1993) (recounting how "in at least two considered scenarios the [impeachment] power was placed with the Federal Judiciary").

[8] The Supreme Court of the United States has noted that "impeachment was designed to be the *only* check on the Judicial Branch by the Legislature." *Nixon*, 506 U.S. at 235 (citing FEDERALIST No. 79). Therefore, the Supreme Court wrote, "[j]udicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counterintuitive because it would eviscerate the 'important constitutional check' placed on the Judiciary by the Framers." *Id.* (citing FEDERALIST No. 81).

privileges should be reinstated based on arguments that the United States Senate followed improper impeachment trial procedures. 506 U.S. 224. Citing the aforementioned historical debates and institutional choices by our nation's founders, the Supreme Court held that Judge Nixon's legal challenge was a nonjusticiable political question that the Court could not review. *Id*. In other words, it involved a "textually demonstrable constitutional commitment of the issue to a coordinate political department" and "a lack of judicially discoverable and manageable standards for resolving it." *Id.* at 228 (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

When the West Virginia Supreme Court was presented with a similar nonjusticiable challenge to impeachment proceedings involving one of its own justices in 2018, it failed to exercise similar restraint or heed the state Constitution's commitment of the "sole power" of trying impeachments to the West Virginia Senate. *Workman*, 241 W. Va. 479, 702 S.E.2d 611. In its opinion issuing a writ of prohibition against the pending impeachment proceedings, the *Workman* Court decided that the West Virginia Senate, sitting as the Court of Impeachment, "may be subject to a proceeding under the original jurisdiction of th[e] Court" based on the fact that Article IV, Section 9 of the Constitution of West Virginia specifies that, in exercising its sole impeachment power, "the senators shall be on oath or affirmation, to do justice according to law and evidence." *Id.* at 118, 702 S.E.2d at 264. Finding that the oath that senators must take when sitting as a court of impeachment "impose[d] a mandatory duty on the Court of Impeachment to follow the law," the Court created a "right of an impeached official to have access to the courts to seek

redress, if he or she believes actions or inactions by the Court of Impeachment violate his or her rights under the law." *Id.* at 119, 702 S.E.2d at 265 (footnote omitted). The *Workman* Court then held that "[a]n officer of the state who has been impeached . . . may seek redress for an alleged violation of his or her constitutional rights in the impeachment proceedings, by filing a petition for an extraordinary writ under the original jurisdiction of this Court." *Id.*, Syl. Pt. 2, in part. Finally, as noted above, the *Workman* Court issued its sweeping disapproval of the *Holmes* holding to the extent that it could "be interpreted as prohibiting this Court from exercising its ['']constitutional authority['] to issue an extraordinary writ against the Legislature *when the law requires*[.]" *Id.*, Syl. Pt. 3, in part (emphasis added).

Under the unsound and dangerous logic of *Workman*, this Court may now judicially review and prohibit *any* aspect of a legislative impeachment proceeding, even when judicial officials are the subject of the proceeding. Considering the Framers' view of impeachment as the *sole* check on the judicial branch's exercise of power (a view to which our state's governmental structure also lends itself), the *Workman* Court claimed for the judicial branch boundless, unrestrained power to control the Legislature's exercise and discharge of even its most exclusive constitutional functions. *Workman* represents an unprecedented judicial encroachment upon the separation of powers among West Virginia's coordinate branches of government, and the opinion remains an outlier compared to other jurisdictions that have examined the judiciary's authority to intervene in legislative impeachment proceedings.

Of course, it is well-established that this Court, in exercising its power of judicial review, is the final arbiter of the constitutionality of all acts of the Legislature. *See, e.g.*, *Kanawha County Pub. Library v. County Court of Kanawha County,* 143 W.Va. 385, 391, 102 S.E.2d 712, 716 (1958) (explaining that "the principle was long ago established that the determination of whether a legislative act was in conflict with a constitutional provision was a question to be determined by the judicial branch of the government") (citing *Marbury v. Madison,* 5 U.S. 137 (1803)).[9] However, prior to *Workman*, this Court's power of judicial review was never imagined to include the power to order the Legislature, by extraordinary writ or otherwise, to do anything or *not* to do anything. One of the most troubling aspects of the *Workman* decision, further demonstrating how unmoored it is from our state's Constitution, is its classification of the West Virginia Senate (acting as the Court of Impeachment) as an "inferior" tribunal. *Workman*, 241 W. Va. at 126, 819 S.E.2d at 272. The Constitution of West Virginia's text does not place the judiciary in some exalted station as the supervisor or director of the operations of the coordinate branches of our state's government.

[9] *See also State ex rel. Armbrecht v. Thornburg,* 137 W.Va. 60, 72, 70 S.E.2d 73, 80 (1952) (explaining that "the Court is charged with the solemn duty of determining what acts of the Legislature are constitutional, and what acts have been passed by the Legislature in conformity with the demands of the Constitution, when such questions are properly presented to the Court").

The Need for Correction

This Court's unconstitutional usurpation in *Workman* is perhaps why the petitioners mistakenly believe that the Court now has the authority to coerce the House of Delegates or the Speaker of the House to perform the various actions that the petitioners demand in their petition, such as to order the Speaker to "seat" Mr. De Soto. Seeking to extend the usurpation of legislative power this Court accomplished in *Workman*, the petitioners urge the Court to again issue an extraordinary writ interfering with powers that the Constitution of West Virginia commits exclusively to the Legislature. Specifically, Article VI, Section 18 requires the Legislature to "assemble annually at the seat of government . . . on the second Wednesday of January of each year." Article VI, Section 16 requires members elected to the Legislature to take the oath prescribed by the Constitution "before they enter upon their duties," which oath "shall be administered in the hall of the house to which the member is elected[.]" That section of the Constitution also provides that "[a]ny member who shall refuse to take the oath herein prescribed, shall forfeit his seat[.]" Article VI, Section 24 further commits to each chamber of the Legislature the authority to "be the judge of the elections, returns and qualifications of its own members[,]" and this Court has recognized that taking an oath of public office is generally treated as a "qualification" for holding office.[10] As evident from the constitutional commitment of

[10] *See Hertzog v. Fox*, 141 W. Va. 849, 857, 93 S.E.2d 239, 243 (1956) (explaining that "taking of the requisite oath, after a person has been appointed or has been declared to have been elected to a public office, is the essential requirement to his qualification for the office"); *accord Calwell's Ex'r v. Prindle's Adm'r*, 19 W. Va. 604, 642 (1882) (recounting how the Declaration of the People of Virginia specified that those elected to legislative vacancies in the newly formed government of our state "should

these powers to the Legislature, this Court lacks any authority to review or otherwise interfere with the House of Delegates' determination as to the qualifications of one of its members-elect. Yet this Court would have to do just that in order to grant the relief the petitioners request.

In its response brief, the Attorney General's Office correctly argues that the constitutional separation of powers prevents this Court from reviewing the House of Delegates' qualification of its members, a position that should be undeniable. Yet the Attorney General's Office was forced to take unnecessary pains to distinguish the constitutional issues before the Court in this matter from the issues before the Court in *Workman*. Prior to *Workman*, this Court consistently respected and enforced the separation of powers and, if not *for Workman*, this Court could simply refuse the petition before us outright based on our axiomatic holding in *Holmes*. As such, this matter squarely presents an opportunity to restore what the decision in *Workman* eviscerated—the separation of powers principles this Court once sought to protect in holding that "[u]nder the Separation of Powers doctrine, Article V, Section 1 of the *Constitution of West Virginia,* courts have no authority—by mandamus, prohibition, contempt or otherwise—to interfere with the proceedings of either house of the Legislature." *Holmes*, 226 W. Va. 479, 702 S.E.2d 611, Syl. Pt. 3.

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qualify by taking the oath prescribed by the convention [and] should constitute the [first] Legislature of the State"); *Slater v. Varney*, 136 W. Va. 406, 428, 68 S.E.2d 757, 770 (1951) (noting with respect to certain office that an elected candidate cannot "qualify for the office until he takes the oath prescribed by law").

For the foregoing reasons, in addition to those so thoughtfully articulated by my colleagues, I concur in the majority's decision to deny the writ sought by the petitioners in this case. However, with respect to the relief requested against Speaker Hanshaw, I would have reached that decision upon the separation of powers grounds set forth herein by reinstating the *Holmes* holding and, thereby, restoring the constitutional constraints on judicial power that the *Workman* Court ignored. I am authorized to state that Senior Status Justice Walker joins in this concurrence.