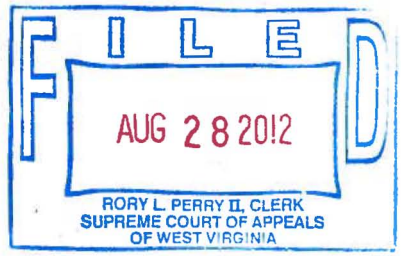

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August 28, 2012

Rory L. Perry II, Clerk of Court
State Capitol Rm E-317
1900 Kanawha Blvd. East
Charleston WV 25305

Re: ***State of West Virginia, ex rel, Allen H. Loughry II, candidate for the Supreme Court of Appeals of West Virginia v. Natalie E. Tennant, et al.***
No. 12-0899

Dear Clerk Perry:

Enclosed please find the ***"Petitioner Allen H. Loughry's Response to West Virginia Attorney General Darrell V. McGraw, Jr.'s Motion to Intervene"*** and ***"Certificate of Service,"*** for filing in the above referenced matter.

If you have any questions or comments, please do not hesitate to call me.

Very truly yours,

Jenna E. Hess/lae

Enclosures
cc: The Honorable Darrell McGraw
Silas Taylor, Esq.
Lisa A. Hopkins, Esq.
Diana Stout, Esq.
Anthony J. Majestro, Esq.
Anthony J. Delligatti

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-0899

STATE OF WEST VIRGINIA, ex rel, ALLEN H. LOUGHRY II,
candidate for the Supreme Court of Appeals of West Virginia,

Petitioner,

v.

NATALIE E. TENNANT, in her official capacity as West Virginia Secretary of State; NATALIE E. TENNANT, GARY A. COLLIAS, WILLIAM N. RENZELLI, and ROBERT RUPP, in their official capacities as members of the West Virginia State Election Commission; GLENN B. GAINER, III, in his official capacity as the West Virginia State Auditor; and JOHN PERDUE, in his official capacity as the West Virginia State Treasurer,

Respondents.

PETITIONER ALLEN H. LOUGHRY'S RESPONSE TO WEST VIRGINIA ATTORNEY GENERAL DARRELL V. McGRAW, JR.'S MOTION TO INTERVENE

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ALLEN H. LOUGHRY II

Pursuant to W. Va. Rev. R. App. P. 32 and this Court's Order of August 25, 2012, Petitioner Allen H. Loughry II respectfully submits this Response to the Attorney General of West Virginia Darrell V. McGraw's Motion to Intervene.

Petitioner Loughry seeks an order compelling Respondents to release funds to which he is statutorily entitled under W. Va. Code § 3-12-11(e), a provision of the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program (the "Pilot Program") that calls for the release of funds based on the campaign expenditures of a nonparticipating candidate. The Attorney General seeks leave to intervene based on an asserted interest in ensuring that the proceedings be "tested . . . through adversarial proceedings," Motion to Intervene ¶ 5, and relies on a decision of this Court which recognized the Attorney General's right to intervene where his participation is necessary to vindicate "the interest of the State," *see* Motion to Intervene at 1 (citing *State ex rel. McGraw v. Burton*, 212 W. Va. 23, 569 S.E.2d 99 (2002)); *Burton*, Syl. Pt. 7.

The Attorney General's reliance on *Burton*, *supra*, is misplaced. The intervention is inappropriate because the only parties with purportedly adverse interests are three private citizens who have chosen not to assert those interests—either in this proceeding or in a federal court action involving the Pilot Program. *See Callaghan v. Tennant*, No. 2:12-cv-0349 (S.D. W. Va. 2012). If the nonparticipating candidates believed that the law unconstitutionally infringed upon their First Amendment rights, they of course could have come forward to contest this matter in their own names. However, all have remained silent. The Attorney General's constitutional duty to represent the interests of the State does not vest him with authority to litigate on behalf of private citizens who claim no constitutional injury.

The Attorney General's participation might be appropriate in a case where there were no party defending West Virginia's citizens' interest in the enforcement of laws passed by their

democratically elected representatives and signed into law by West Virginia's Governor, but this is not that case. Here, the only interests that could conceivably be adversely affected by an order granting the relief sought in the Petition are those of the three private citizens seeking seats on this Court who have chosen not to participate in the Pilot Program. The Attorney General does not seek party status to defend a duly enacted law of the State of West Virginia when no state officer has chosen to do so. Instead, he seeks party status to argue that a duly enacted law should be struck down—and in doing so seeks to oppose state officials who have chosen to defend a provision of state law that no affected party has complained about. To grant the Attorney General's request to do so would be an extraordinary and misguided expansion of his powers. The fact that allowing intervention would give rise to conflicts of interest within the Attorney General's office that implicate foundational provisions of the *Rules of Professional Conduct* only underscores why intervention here would be inappropriate and unprecedented.

Accordingly, Petitioner Loughry respectfully urges the Court to deny the Motion to Intervene.

I. The Attorney General's Constitutional Role Does Not Encompass the Power to Litigate on Behalf of Private Citizens Who Claim No Injury.

Petitioner does not dispute that our justice system is adversarial, not inquisitorial, and that adversarial proceedings are "the foundation of our system of justice." Motion to Intervene ¶ 5. Nonetheless, our adversarial system is designed to resolve actual disputes between parties with adversarial interests—not to generate advisory opinions on questions that parties with adverse interests have not presented in actual cases or controversies. *See, e.g., Huston v. Mercedes-Benz USA, LLC*, 227 W. Va. 515, 711 S.E.2d 585, 593-94 (2011) (citing *Harshbarger v. Gainer*, 184 W. Va. 656, 403 S.E.2d 399, Syl. Pt. 2 (1991) ("[C]ourts are not constituted for the purpose of making advisory decrees or resolving academic disputes"); *State ex rel. ACF Indus., Inc. v.*

Vieweg, 204 W. Va. 525, 533 n. 13, 514 S.E.2d 176, 184 n. 13 (1999) ("[T]his Court cannot issue an advisory opinion with respect to a hypothetical controversy."); *Farley v. Graney*, 146 W.Va. 22, 29–30, 119 S.E.2d 833, 838 (1960) ("[C]ourts will not . . . render mere advisory opinions which are unrelated to actual controversies.") (citations omitted).

Although *amici* describe putative constitutional injuries that will allegedly befall the three candidates for seats on this Court who are not participating in the Pilot Program, not one of those candidates has complained of any constitutional injury, nor have the candidates sought to participate in the related federal action. Where any interests that could conceivably be affected by the relief Petitioner seeks are possessed by three individual citizens—and not by the citizens of West Virginia as a whole—the Attorney General may not invoke abstract notions of adversity to claim the "interest of the State" necessitates his litigating on behalf of those three individual citizens.

This Court has already made clear, through its denial of Michael Callaghan's motion to intervene, that citizens of West Virginia, *other than the three nonparticipating candidates*, do not have a sufficient interest in the enforcement of W. Va. Code § 3-12-11(e) to intervene in this action. *See* Order Denying Michael Callaghan's Motion to Intervene (August 15, 2012); Petitioner Allen H. Loughry's Response to Movant Michael Callaghan's Motion to Intervene (August 14, 2012). Thus, there exists no "interest of the State" sufficient to justify the Attorney General's intervention.

Simply put, the class that *amici* contend could suffer a constitutional injury in this mandamus proceeding consists of precisely three private individuals: Judge John Yoder, Justice Robin Davis, and Letitia "Tish" Chafin. These three candidates constitute the entire universe of candidates for a seat on this Court who are not participating in the Pilot Program. The only

statutory provision at issue herein, W. Va. Code § 3-12-11(e), is concerned exclusively with campaign spending by candidates who are not participating in the Pilot Program. Even assuming *arguendo* the veracity of *amici*'s contention that Yoder, Davis, or Chafin could be injured by an order enforcing Section 3-12-11(e), it is clear that they are the *only* parties who could be injured.

Yet, neither Yoder, nor Davis, nor Chafin has complained that they would suffer *any* constitutional injury if this Court were to grant the relief that Petitioner Loughry seeks. These candidates for a seat on this Court are sophisticated lawyers with extensive legal training. Each is fully capable of understanding the issues at stake in this proceeding, and each is fully capable of asserting, in their own names, any interests they have in this proceeding. These individuals do not require the Attorney General of West Virginia to represent them in this proceeding or any other case. Indeed, to suggest that a lawyer qualified to serve as a Justice of the Supreme Court of Appeals of West Virginia would be incapable of litigating on his or her own behalf, if the candidate perceived a threat of constitutional injury, would be an insult to these experienced attorneys. They do not need the Attorney General to serve, in effect, as their private counsel. Allowing the Attorney General to intervene here would have precisely that effect. Thus, intervention is clearly inappropriate.

The Attorney General's role as "chief legal officer" of the State of West Virginia, *Manchin v. Browning*, 170 W.Va. 779, 787, 296 S.E.2d 909, 917 (1982), does not bestow the office with the power to intervene to vindicate the narrow interests of private citizens—particularly when those citizens themselves claim no interest in the proceeding in which intervention is sought. "The Attorney General is not authorized . . . to place himself in the position of a litigant so as to represent his concept of the public interest," *Manchin*, 170 W.Va. at 791, 296 S.E.2d at 921. The point is especially compelling when the supposed "conception of the

public interest" would undermine the interest of West Virginia's citizens in the enforcement of duly enacted laws in order to further the interests of three private attorneys fully capable of representing themselves.

This Court has already determined that citizens other than Yoder, Davis, and Chafin lack a sufficiently particularized interest in this case to necessitate intervention to vindicate any generalized public interest. Granting the Attorney General the power to litigate on behalf of private litigants in the absence of any broader State interest would be an unprecedented, and unwise, expansion of the Attorney General's power. This Court should decline the invitation.

II. Intervention In This Action Is Especially Inappropriate Because It Would Give Rise to Impermissible Conflicts of Interest.

Allowing the Attorney General to intervene in this action is inappropriate for the additional reason that intervention would give rise to impermissible conflicts of interest that implicate fundamental provisions of the *Rules of Professional Conduct.* It is axiomatic that the Attorney General's right to intervene to assert the broad interests of the State "must always be exercised with restraint" and that the Attorney General must "respect the *Rules of Professional Conduct*" in doing so. *Burton*, 212 W. Va. at 41, 569 S.E.2d at 117 & n.27. It is not a restrained exercise of power to seek to intervene to further the parochial interests of specific citizens—and no broad State interests—particularly when such intervention would give rise to impermissible conflicts of interest.

The Attorney General asserts that in its current posture, this proceeding lacks adversity. Petitioner disagrees: Petitioner seeks to compel Respondents to release funds to which he is statutorily entitled and Respondents refuse to do so absent an order from this Court. This conflict creates the adversity required of our justice system.

Considering the Attorney General's theory of adversity on its own terms reveals that an order permitting intervention would give rise to significant and troubling conflicts of interest. The Attorney General's theory is that he should be permitted to intervene to create adversity. That is, the Attorney General seeks party status so that his office may proceed to litigate in an adverse relationship to the State Respondents who are represented by his office. In short, the office of the Attorney General seeks permission to litigate against its own clients. An order from this Court permitting the Attorney General to do so would give rise to serious questions about the ability of that office to comply with the basic rules of professional responsibility.

It cannot be disputed that "[t]he Attorney General has the duty to conform his conduct to that prescribed by the rules of professional ethics." *Manchin*, Syl. Pt. 4.[1] The Attorney General's request for permission to litigate against his own clients implicates that duty in several ways. As a threshold matter, asserting party status to take positions adverse to existing clients would implicate Rule 1.7 of the *West Virginia Rules of Professional Conduct*. Rule 1.7 provides that a "lawyer shall not represent a client if the representation of that client will be directly adverse to another client," unless the lawyer first obtains the informed consent of the existing client after consultation. Curiously, while the Attorney General's motion to intervene expressly states that the sole basis for intervention is the desire to take positions directly adverse to existing clients, the motion does not mention Rule 1.7. Similarly, the motion does not state that the office has obtained informed consent from the existing clients to the conflicting representation. Indeed, the motion does not even enumerate whether the Attorney General's office provided its existing

[1] *See also Manchin*, 170 W.Va. at 790, 296 S.E.2d at 920 ("It is well settled that in the control of litigation, the Attorney General has the duty to conform his conduct to that prescribed by the rules of professional ethics. 7A C.J.S. Attorney General § 12 (1980) ... Among the codified rules of this Court to which the Attorney General must conform his conduct is the Code of Professional Responsibility which is applicable to all lawyers in this state.").

clients with *advance notice* of its decision to seek party status to litigate against their interests—to say nothing of having received their consent.

In any event, notwithstanding the procedural obligations that were incumbent on the Attorney General's office before it sought leave to intervene, it is clear that if this Court granted the motion, it would give rise to unavoidable, and impermissible, conflicts of interest. Among the ethical obligations the Attorney General must follow is the duty to avoid any improper conflicts, and indeed, to "*avoid even the appearance of professional impropriety.*" *Manchin*, Syl. Pt. 6. That is, "it is the duty of the Attorney General . . . to avoid even the appearance of impropriety *by appearing to be in conflict with the desires of his client.*" *Manchin*, 170 W. Va. at 790, 296 S.E.2d at 920 (emphasis added). Of course, resolving the instant motion does not require this Court to assess whether the Attorney General's intervention would *appear to be in conflict* with his clients. The Attorney General's motion itself expressly states that it would be in conflict. Indeed, the motion clearly asserts that the sole, exclusive basis on which intervention is sought is the desire to litigate positions in direct conflict with those of his existing clients.

Thus, even if the Attorney General's existing clients consented to the request, the Attorney General's office could not create additional adversity in this proceeding by litigating against itself. This Court has unambiguously held that if, "in the course of advising or counseling a state officer involved in litigation, it becomes apparent that the Attorney General is unable to adequately represent the officers as required by law *or that such representation would create professional conflicts or adversity*, the Attorney General must appoint counsel to represent such officer"—the Attorney General cannot simultaneously represent both adverse sides given such conflicts. *Manchin*, 170 W. Va. at 792, 296 S.E.2d at 922.

The Attorney General could have required the Kanawha County prosecuting attorney to represent his existing clients under W.Va. Code § 5-3-2, or he could have "hire[d], out of his own appropriate budget, outside counsel as assistant attorneys general . . . if the conflict or adversity is of such magnitude that the Attorney General's staff and the prosecuting attorneys are unable to represent adequately" his existing clients. *Manchin*, 170 W.Va. at 792, 296 S.E.2d at 922. Having failed to do so, the Attorney General may not assume party status to advocate positions directly adverse to his existing clients on behalf of three private attorneys who would be fully capable of defending their interests in their own names if they believed is necessary.

Finally, Petitioner notes that this Court has already resolved any possible concerns regarding robust adversarial argument. By inviting the Attorney General to appear as *amicus curiae* through briefing and participation in oral argument, this Court has ensured that it will have the benefit of robust argument on the fullest range of viewpoints. Further, by inviting the Attorney General to appear as *amicus curiae*, rather than as a party, this Court has wisely avoided a situation in which the Attorney General would be taking part as a party directly adverse to his own clients. Petitioner believes this Court's previous determination was prudent when it was made, and that it remains so.

CONCLUSION

Because permitting the Attorney General to intervene would broaden the power of that office to represent the interests of private litigants to an unprecedented degree and because it would give rise to impermissible ethical conflicts this Court should deny the Attorney General's "eleventh hour" request to intervene. The Court has ensured that its consideration of this Petition will be informed by the broadest range of arguments by inviting not one, but two, *amici curiae* to file briefs explaining why they believe W. Va. Code § 3-12-11(e) is unconstitutional. Indeed, the

proposed intervenor has already filed an *amicus* brief and will participate in oral argument. The Court will have every opportunity to consider the full range of arguments in resolving this matter. Petitioner Loughry respectfully submits that, under the circumstances, intervention by the Attorney General at this late stage is unnecessary to allow this Court to resolve this case after a full and fair hearing on the issues.

This Court should deny the motion to intervene.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 12-0899

ALLEN H. LOUGHRY II, candidate for West Virginia Supreme Court of Appeals,
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Respondents.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that she served the foregoing **Petitioner Allen H. Loughry's Response to West Virginia Attorney General Darrell V. McGraw, Jr.'s Motion to Intervene** upon the following individuals via hand delivery, on the 28th day of August, 2012 to:

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