

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF WEST VIRGINIA  
CHARLESTON DIVISION

ROBIN JEAN DAVIS,

*Plaintiff,*

v.

JIM JUSTICE, Governor; ROGER HANSHAW, Speaker of the West Virginia House of Delegates; JOHN OVERINGTON, Speaker Pro Tempore of the West Virginia House of Delegates; DARYL COWLES, Majority Leader of the West Virginia House of Delegates; CHANDA ADKINS, GEORGE AMBLER, WILLIAM ANDERSON, MARTIN ATKINSON III, SAIRA BLAIR, BRENT BOGGS, JIM BUTLER, MOORE CAPITO, ROY COOPER, VERNON CRISS, MARK DEAN, FRANK DEEM, JOE ELLINGTON, PAUL ESPINOSA, ALLEN V. EVANS, ED EVANS, TOM FAST, MICHAEL FOLK, GEOFF FOSTER, CINDY FRICH, MARTY GEARHEART, DIANNA GRAVES, BILL HAMILTON, DANNY HAMRICK, JASON HARSHBARGER, KENNETH HICKS, JOSHUA HIGGINBOTHAM, JORDAN HILL, RAY HOLLEN, ERIC L. HOUSEHOLDER, GARY G. HOWELL, D. ROLLAND JENNINGS, JOHN R. KELLY, KAYLA KESSINGER, CHARLOTTE LANE, DANIEL LINVILLE, SHARON LEWIS MALCOLM, JUSTIN MARCUM, PATRICK MARTIN, ZACK MAYNARD, PAT MCGEEHAN, CAROL MILLER, RILEY MOORE, ERIC NELSON, JEFFREY PACK, TONY PAYNTER, RODNEY A. PYLES, BEN QUEEN, RALPH RODIGHIERO, MATTHEW ROHRBACH, WILLIAM R. ROMINE, RUTH ROWAN, JOHN SHOTT, KELLI SOBONYA, JOE STATLER, AMY SUMMERS, TERRI SYPOLT, JILL UPSON, DANNY WAGNER, GUY WARD, STEVE WESTFALL, BRAD WHITE, S. MARSHALL WILSON, MARK ZATEZALO, members of the West Virginia House of Delegates; STEVE HARRISON, Clerk of the West Virginia House of Delegates; RYAN FERNS, Majority Leader

Case No. 2:18-cv-1316

of the West Virginia Senate; MIKE AZINGER, ROBERT D. BEACH, CRAIG BLAIR, GREG BOSO, CHARLES H. CLEMENTS, SUE CLINE, ROBERT L. KARNES, KENNY MANN, MIKE MARONEY, MARK R. MAYNARD, RICHARD OJEDA, PATRICIA RUCKER, RANDY SMITH, DAVE SYPOLT, TOM TAKUBO, JOHN R. UNGER II, RYAN WELD, MIKE WOELFEL, members of the West Virginia Senate; LEE CASSIS, Clerk of the West Virginia Senate,

*Defendants.*

## **COMPLAINT**

### **NATURE OF THE ACTION**

1. In August 2018, the West Virginia House of Delegates voted to impeach all four active Justices of the Supreme Court of Appeals of West Virginia. The asserted grounds for impeachment were: (a) that, several years earlier, some of the Justices had spent too much money on office renovations, (b) that, years earlier, some of the impeached Justices had improperly appointed senior judges to fill vacancies within the judiciary, and (c) that the Justices collectively had failed to establish adequate policies related to spending and reporting of expenses by members of the judiciary and staff.

2. The House had no factual or legal basis for impeaching the Justices on any of these charges. The House *knew* that the information it had concerning certain of these charges was incomplete and that the legal basis for others was invalid. What is more, the facts cited purportedly to support impeachment do not remotely rise to the level of impeachable conduct. But the House was not interested in investigating whether the facts warranted impeachment. Instead, it used these charges as a pretext to remove all four Justices on West Virginia's highest

Court so that the Governor could replace the popularly elected Justices with Republican men and create a “conservative court” for years to come.

3. The House proceedings to date and the Senate trial that is being conducted of the Justices named in the Articles of Impeachment, including plaintiff retired Justice Robin Davis, are inadequate to protect former Justice Davis’s compelling interest in the right to hold office and serve the citizens of West Virginia. The Defendants must be enjoined from taking further action that degrades Justice Davis’s rights under the Constitutions of both the state of West Virginia and the United States.

### **PARTIES**

4. Plaintiff Robin J. Davis is a retired Justice of the Supreme Court of Appeals of West Virginia. Justice Davis is a resident of West Virginia who is domiciled in the State.

5. Defendant Jim Justice is Governor of the State of West Virginia. Governor Justice is sued in his official capacity. Governor Justice is a resident of West Virginia who is domiciled in the State.

6. Defendant Roger Hanshaw is Speaker of the West Virginia House of Delegates. John Overington is Speaker Pro Tempore of the House. Daryl Cowles is Majority Leader of the House. Chanda Adkins, George Ambler, William Anderson, Martin Atkinson III, Saira Blair, Brent Boggs, Jim Butler, Moore Capito, Roy Cooper, Vernon Criss, Mark Dean, Frank Deem, Joe Ellington, Paul Espinosa, Allen V. Evans, Ed Evans, Tom Fast, Michael Folk, Geoff Foster, Cindy Frich, Marty Gearheart, Dianna Graves, Bill Hamilton, Danny Hamrick, Jason Harshbarger, Kenneth Hicks, Joshua Higginbotham, Jordan Hill, Ray Hollen, Eric L. Householder, Gary G. Howell, D. Rolland Jennings, John R. Kelly, Kayla Kessinger, Charlotte Lane, Daniel Linville, Sharon Lewis Malcolm, Justin Marcum, Patrick Martin, Zack Maynard, Pat McGeehan, Carol Miller, Riley Moore, Eric Nelson, Jeffrey Pack, Tony Paynter, Rodney A.

Pyles, Ben Queen, Ralph Rodighiero, Matthew Rohrbach, William R. Romine, Ruth Rowan, John Shott, Kelli Sobonya, Joe Statler, Amy Summers, Terri Sypolt, Jill Upson, Danny Wagner, Guy Ward, Steve Westfall, Brad White, S. Marshall Wilson, Mark Zatezalo are those members of the West Virginia House of Delegates who—along with Speaker Hanshaw, Speaker Pro Tempore Overington, and Majority Leader Cowles—voted to impeach Justice Davis. Defendant Steve Harrison is Clerk of the West Virginia House of Delegates. All Defendants named in this paragraph are collectively referred to as the “House Defendants.” The House Defendants are sued in their official capacity. Each of the House Defendants is a resident of West Virginia who is domiciled in the State.

7. Ryan Ferns is Majority Leader of the Senate. Mike Azinger, Robert D. Beach, Craig Blair, Greg Boso, Charles H. Clements, Sue Cline, Robert L. Karnes, Kenny Mann, Mike Maroney, Mark R. Maynard, Richard Ojeda, Patricia Rucker, Randy Smith, Dave Sypolt, Tom Takubo, John R. Unger II, Ryan Weld, Mike Woelfel are those members of the West Virginia Senate who—along with Majority Leader Ferns—voted to persist with removal proceedings in the Senate against Justice Davis despite her retirement. Defendant Lee Cassis is Clerk of the West Virginia Senate. All Defendants named in this paragraph are collectively referred to as the “Senate Defendants.” The Senate Defendants are sued in their official capacity. Each of the Senate Defendants is a resident of West Virginia who is domiciled in the State.

#### **JURISDICTION AND VENUE**

8. The Court has subject matter jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1367.

9. Venue is proper in this district under 28 U.S.C. § 1391(b).

## FACTUAL ALLEGATIONS

### I. The Impeachment of All Remaining Justices of the West Virginia Supreme Court of Appeals

#### *The Supreme Court of Appeals of West Virginia*

10. The Supreme Court of Appeals is established by the West Virginia Constitution. W. VA. CONST. art. VIII. It consists of five Justices who, under the Constitution, “shall be elected by the voters of the state for a term of twelve years.” W. VA. CONST. art. VIII, § 2.

11. The West Virginia Constitution protects judicial independence. Separation of powers is constitutionally mandated, and the legislature is constitutionally proscribed from undertaking judicial action or attempting to alter the powers constitutionally afforded to the judicial branch. W. VA. CONST. art. V, § 1; art. VIII, § 1; art. VI, § 40.

12. Additionally, the legislature is constitutionally constrained from playing an improper role in determining the membership of the Court. It may not appoint Justices; it may not reduce judicial salaries of sitting Justices; and it may not remove any Justice except through impeachment. W. VA. CONST. art. VIII, § 7–8. Nor may the legislature interfere with or diminish the Court’s budget. W. VA. CONST. art. VI, § 51. ***No other means of removal or legislative determination of Court membership is permitted by the West Virginia Constitution.***

13. Robin Davis was first elected to the Supreme Court in 1996. She was reelected to 12-year terms in 2000 and 2012, each time running as a Democrat. She has served as Chief Justice at various times during her tenure.

14. Justice Davis never has been found to have acted unethically or improperly during her 22 years on the Court.

15. In early 2018, the sitting Justices were, in addition to Justice Davis, Menis Ketchum, Allen Loughry, Margaret Workman, and Elizabeth Walker.

16. Effective July 27, 2018, Justice Ketchum resigned from the Supreme Court, leaving four remaining members of the Court. On August 23, 2018, Justice Ketchum pleaded guilty to one charge of federal wire fraud. He is set to be sentenced on December 6.

17. On June 6, 2018, Justice Loughry was named in a judicial complaint filed by the state Judicial Investigation Commission, which alleged 32 counts of violations of the West Virginia Code of Judicial Conduct. Justice Loughry was suspended from service on the Court on June 8, 2018. Subsequently, on June 19, 2018, Justice Loughry was indicted on 22 federal criminal charges, including fraud, witness tampering, and lying to federal investigators. Justice Loughry has pleaded not guilty to those charges and is set to stand trial in October 2018.

18. Justice Workman was elected as a Democrat and took office in 2008. As of the filing of this Complaint, she remains an active Justice on the Court.

19. Justice Walker was elected in a non-partisan race in 2016 and took office on January 1, 2017. As of the filing of this Complaint, she remains an active Justice on the Court.

#### ***Articles of Impeachment***

20. On August 13, 2018 the full House of Delegates convened for hearings on Articles of Impeachment, at which all four active Justices (Justice Ketchum having resigned more than a month earlier) were named.

21. The hearings were held at the direction of West Virginia Governor Jim Justice. Under the West Virginia Constitution, “[t]he governor may convene the Legislature by proclamation ....” W. VA. CONST. art. VI, § 19. On June 25, 2018, Governor Justice issued a proclamation convening the Legislature in extraordinary session to address “[m]atters relating to the removal of one or more Justices of the Supreme Court of Appeals of West Virginia, including, but not limited to, censure, impeachment, trial, conviction, and disqualification.”

22. Article IV, Section 9 of the West Virginia Constitution provides for impeachment of any officer of the State “for maladministration, corruption, incompetency, gross immorality, neglect of duty, or any high crime or misdemeanor.” The House of Delegates has the sole power of impeachment and the Senate has the sole power to try impeachments. Section 9 further provides: “Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold any office of honor, trust or profit, under the State . . . .”

23. The House voted to name all four Justices, in various combinations, on 11 Articles of Impeachment. Articles II, IV, V, and XIV were directed to Justice Davis (among other Justices).

24. The Articles of Impeachment directed to Justice Davis did not allege any “maladministration, corruption, incompetency, gross immorality, neglect of duty, or any high crime or misdemeanor” under any common understanding of those words. To the contrary, they alleged that Justice Davis (a) years earlier, had spent more money than a majority of the House of Delegates believed to be necessary on renovations for her office in the Supreme Court, (b) years earlier, had authorized compensation of Senior Status Judges in excess of a statutory limit, and (c) did not—along with all of the other Justices of the Court—put in place certain policies related to spending and reporting of expenditures by members and staff of the West Virginia judiciary.

25. Specifically, Article II dealt with Justice Davis’s purported overspending on office renovations. It alleged that Justice Davis “unmindful of the duties of her high office, and contrary to the oaths taken by her to support the Constitution of the State of West Virginia and faithfully discharge the duties of her office as such Justice . . . did waste state funds” by engaging in “wasteful expenditure” for the renovation of her office in the Supreme Court.

26. Articles IV and V dealt with supposed improper overpayments to Senior Status Judges. Article IV alleged that, beginning in 2012, Justice Davis and Justice Workman, during their respective times as Chief Justices, had approved contracts “to overpay certain Senior Status Judges in violation of the statutory limited maximum salary for such Judges.” Article V alleged that, in 2014, Justice Davis as Chief Justice signed “certain Forms WV 48, to retain and compensate certain Senior Status Judges the execution of which forms allowed the Supreme Court of Appeals to overpay those certain Senior Status Judges.”

27. Article XIV was directed to all four sitting Justices. It contended that the Justices collectively “fail[ed] to provide or prepare reasonable and proper supervisory oversight of the operations of the Court and the subordinate courts,” by failing to establish adequate policies regarding spending and reporting of expenditures on travel, lunches, office equipment, and similar items.

28. None of the Articles of Impeachment was directed to Justice Ketchum. As the Chair of the House Judiciary Committee, Delegate Shott, explained, this was because Justice Ketchum had already resigned and thus could not be removed from office:

CHAIRMAN SHOTT: . . . I’m sure the first question on everybody’s mind is what will – what is the effect on our proceeding of the retirement of Justice Ketchum. I’ll be addressing that when I talk about the rules in a few minutes, but essentially, as all of you on the committee know, the only remedy that’s available to the House as a result of this proceeding is to recommend articles of impeachment, and ***the only remedy available to the Senate is removal from office.***

And because the retirement of Justice Ketchum effectively will result in his removal from office, we will not be spending any time dealing with the findings of any of the reports that deal with Justice Ketchum.

July 12, 2018 Tr., at 5 (emphasis added).



***Justice Davis's Retirement and Replacement on the Court***

29. On August 13, 2018—while proceedings concerning the Articles of Impeachment were continuing in the House of Delegates—Justice Davis transmitted a letter to West Virginia Governor Jim Justice announcing her retirement from the Supreme Court of Appeals. The House did not conclude its final vote to impeach all four remaining Justices until past midnight, in the early morning of August 14, after Justice Davis retired from the Court.

30. Because Justice Davis has retired, she—like Justice Ketchum—cannot be removed from the Court. Nonetheless, she—unlike Justice Ketchum—was named in the Articles of Impeachment.

31. Governor Justice has appointed two interim Justices to fill the slots of former Justices Davis and Ketchum until a special election.

32. Former House of Delegates Speaker Tim Armstead, a Republican, was named by Governor Justice, also a Republican, to replace Justice Ketchum. Justice Armstead was the Speaker of the House when the impeachment investigation began, and resigned his role on August 21, 2018, but not until after he, as a member of the House of Delegates, had voted on the Articles of Impeachment. He had previously declared his intention to run for a seat on the Supreme Court of Appeals.

33. Former U.S. Representative Evan Jenkins, also a Republican, was named by Governor Justice to replace Justice Davis. Representative Jenkins had lost a bid for the U.S. Senate in spring 2018 and was not seeking re-election to Congress.

34. Under West Virginia law, because both Justices Davis and Ketchum retired more than 84 days before the election on November 6, 2018, a special election will be held, allowing the voters of West Virginia to select their replacements beginning in 2019.

35. Had Justice Davis waited even one more day to retire, the interim Justice appointed by Governor Justice would have been in place for an additional two years, until 2021.

36. If Justices Loughry, Workman, and Walker are removed from the Court following impeachment, their replacements will be selected by Governor Justice—and will not be subject to special election in November.

37. Thus, if they are removed, all five Justices of the West Virginia Supreme Court of Appeals will be appointed by Governor Justice—instead of elected as the West Virginia Constitution requires—and three of the five Governor-appointed Justices will serve on the Court for at least two years.

**II. The Articles of Impeachment as Filed Are Unsupported, Invalid, and Do Not Warrant Impeachment.**

***The Articles of Impeachment Are Not Supported By Factual Findings in Violation of Governing Rules of the House of Delegates.***

38. In violation of its own rules, the Judiciary Committee of the House of Delegates did not include any findings of fact in the Articles of Impeachment presented to the full House.

39. On June 26, 2018, the House of Delegates adopted House Resolution 201 (referred to herein as “HR 201”) setting forth the rules and spelling out the process to be followed for the impeachment proceedings. HR 201 empowered the House Judiciary Committee to investigate allegations of impeachable offenses against the Justices of the West Virginia Supreme Court of Appeals. Without HR 201, the Judiciary Committee had no authority to investigate the issue of impeachment, to hold hearings and accept evidence, or to take any of the actions which led to its recommendation that the House adopt the Articles of Impeachment.

40. Among the duties that HR 201 imposed on the Judiciary Committee were the duties “[t]o make findings of fact” based on the Judiciary Committee’s impeachment investigation, and “[t]o report to the House of Delegates its findings of facts and any

recommendations consistent with those findings of fact which the Committee may deem proper.” The Committee never did this. No findings of fact exist in the report from the Judiciary Committee or anywhere else in the legislative record produced from the House proceedings regarding impeachment.

41. Minority members of the Judiciary Committee and the House of Delegates (*i.e.*, Democratic members) questioned this failing by the Judiciary Committee. For example, Minority Chair Fleischauer said:

MINORITY CHAIR FLEISCHAUER: Thank you, Mr. – thank you, Mr. Chairman. I think the gentleman has raised a valid point. If we look at the Resolution that empowers this Committee to act, it – it says that we are to make findings of fact based upon such investigation and hearing and to report to the House of Delegates its findings of fact and any recommendations consistent with those findings, of which the Committee may deem proper.

And normally – I know a lot of people say in here, “We’re not lawyers,” but many of us are, and I think it’s Rule 52 that requires Courts to make findings of fact and also that their recommendations for any Resolution has to be consistent with those findings of fact.

And I’m just a little concerned that if we don’t have findings of fact that there could be some flaw that could mean that the final Resolution by the House would be deemed to be not valid.

Other delegates acknowledged that HR 201 required the Judiciary Committee to make separate findings of fact:

MINORITY CHAIR FLEISCHAUER: Well, the findings of fact in House Resolution 201 are referenced separate from proposed Articles of Impeachment. Am I wrong in that observation?

MR. CASTO: I don’t believe that you’re wrong in that.

August 7, 2018 Tr., at 2014–18. Nonetheless, the Judiciary Committee failed to do so.

42. Just as Minority Chair Fleischauer stated, by failing to make findings of fact and report those findings of fact to the House of Delegates as a whole, the Judiciary Committee did

not follow its own procedures as set forth in HR 201. Accordingly, the Articles of Impeachment, passed by the House of Delegates, are invalid as a matter of law, because they were not passed in accordance with the conditions imposed by HR 201.

***The Articles of Impeachment Are Unsupported in Fact or Law.***

43. Rather than make findings of fact *before* adopting the Articles of Impeachment, the legislature procured a post hoc “audit report” that purported to support the Articles—but the audit report simply confirms that the Articles of Impeachment have no factual or legal foundation.

44. *First*, with regard to the Article concerning office renovations, the House proceeded to impeach Justice Davis on allegations concerning overspending on office renovations despite *knowing* that they had incomplete information concerning those expenses.

45. Before the House voted on this Article, Justin Robinson, acting director of the Legislative Post Audit Division, testified before the House Judiciary Committee that he did not have a complete set of all of the expenditures that were undertaken during the Justices’ office renovations, and that “there were some items omitted at the request of Justice Loughry . . . when it was prepared.” July 27, 2018 Tr., at 1585–86, 1598. Robinson offered to share additional documentation with the Judiciary Committee once it became available, but the Judiciary Committee nonetheless moved forward and presented an Article to the full House on the basis of this information despite knowing it to be inaccurate.

46. The House of Delegates also knew when it adopted this Article of Impeachment that it was doing so without the benefit of complete documentation of the renovation expenses incurred by each of the Justices, as Delegates had access to the transcripts of the Judiciary Committee proceedings. Those transcripts included uncontroverted testimony that the documentation available to the House concerning renovation expenses incurred by Justice Davis

was *not* comparable to the documentation it had on renovation expenses incurred by the other Justices, including the fact that three quarters of Justice Davis’s expenses were to repair structural issues that the other Justices did not face. *See* July 26, 2018 Tr., at 1368.

47. The post-hoc audit report reflects that—even as of almost a month after the House of Delegates filed the Articles of Impeachment—the auditors for several renovation projects still lacked “invoice documentation with sufficient detail for analysis.”

48. The limited information that was available to the auditors and the House Defendants confirms that the money spent to renovate Justice Davis’s chambers was used primarily for necessary (but expensive) infrastructure and fixtures, not cosmetic or decorative items. Indeed, the House received testimony from several witnesses that the building in which the Justices sat needed extensive renovations and that the vast majority of the expenses incurred for renovations to Justice Davis’s office in particular were structural, including rewiring the electrical system. Spending money within the budget of the Supreme Court of Appeals to improve the infrastructure of the Supreme Court building is plainly not an impeachable offense.

49. Nor is it a statutory offense or violation of any rules. Before advancing the Articles of Impeachment, the legislature passed no law or declared any other limitation on the amount that could be spent on lawful renovations of government offices. To the contrary, the House Defendants voted to impeach based on an arbitrary, unstated limit of which Justice Davis had no notice.

50. *Second*, with regard to the Articles concerning the appointment and compensation of Senior Status Judges, it is entirely consistent with the constitutionally required independence of the judiciary that the Supreme Court of Appeals would appoint and compensate judges as necessary to preserve the independent functioning of the judicial branch.

51. The West Virginia Constitution requires that “[t]here shall be at least one judge for each circuit court and as many more as may be necessary to transact the business of such court.” W. VA. CONST. art. VIII, § 5. In fulfillment of its duty to administer the courts, when exigent circumstances arise (*e.g.*, protracted illnesses, judicial suspensions, or other extraordinary circumstances) the Chief Justice may appoint Senior Status Judges to occupy vacant positions to preserve the fundamental right of the people to open courts.

52. Although there is a statutory cap on the total amount of compensation that may be made to Senior Status Judges, that statutory restriction cannot constrain the judiciary’s constitutional authority. In 2017, then-Chief Justice Loughry issued an administrative order providing that “the chief justice has authority to determine in certain exigent circumstances that a senior judicial officer may continue in an appointment beyond the limitations set forth in W. Va. Code § 51-9-10, to avoid the interruption in statewide continuity of judicial services.” To the extent that the West Virginia Code conflicts with the authority vested in the Court by the West Virginia Constitution, constitutional interests take precedence and supersede the statutory limitations.

53. The post-hoc audit report procured by the legislature actually confirms that Justice Davis’s actions were proper. The audit report states that “arguments can and have been made with respect to the legality of the Court’s practice of allowing Senior Status Judges to exceed West Virginia Code’s compensation caps,” and that “circumvention of State law” could be “legally permissible . . . [as] a matter of last resort.”

54. Thus, the supposed overcompensation of Senior Status Judges violated statutory law only if such Judges were compensated for periods when they were not necessary to ensure

the public's access to the courts. The House made no such factual finding, and its impeachment of Justice Davis on these grounds is unwarranted.

55. *Finally*, with regard to the charge that all of the Justices collectively acted improperly by failing to adopt sufficient policies related to spending and reporting of expenses, the Article does not describe an impeachable or removable offense.

56. It is improper to place blame on any Justice individually for conduct or an omission committed by the Court collectively. The Article contains no individualized allegations against specific Justices and certainly no allegations that would constitute an impeachable offense.

57. In addition, the House's impeachment of Justice Davis on this purported failure to adopt appropriate policies confirms yet again that the House neglected to investigate the factual bases for any of the charges. Had the House undertaken even a basic investigation, it would have discovered that Justice Davis voted numerous times during her tenure to improve reporting and accountability rules, but had lost most of these votes when a majority of the Justices disapproved such measures. This Article should not have been returned against any of the individual Justices—but certainly not against Justice Davis, who has consistently voted in favor of the very policies that the House Defendants believe the Court should have adopted.

58. In sum, the Articles of Impeachment returned against Justice Davis reflect no factually or legally sufficient grounds for impeachment. Had the House been interested in investigating the facts and determining whether there was a valid basis for impeachment, they could have asked Justice Davis to testify as to any of these issues. Justice Davis has consistently cooperated with state and federal agencies who seek to investigate the allegations underlying the Articles of Impeachment—and has been fully forthcoming in aiding investigators in uncovering

any potential corruption. She would have testified before the House Judiciary Committee had she been given the opportunity. But the House was the one entity that did not ask for her testimony, because it was not interested in discovering the truth.

***The Purported Misconduct Alleged in the Articles Is Not an Impeachable Offense.***

59. In addition to being factually and legally unsupported, the purported grounds for Justice Davis's impeachment are facially insufficient to support that extraordinary action.

60. Even if the facts and law supported the charges leveled against Justice Davis—which they do not—the conduct charged does not comport with the West Virginia Constitution's definition of impeachable offenses, *i.e.*, “maladministration, corruption, incompetency, gross immorality, neglect of duty, or any high crime or misdemeanor.” No West Virginia official has ever before been impeached or removed for comparable conduct—much less all Justices remaining on the State's Supreme Court of Appeals.

61. As the Articles of Impeachment reflect, the charged conduct occurred *years ago* and was known or discoverable to the Delegates at that time. If this conduct actually posed any danger to the citizens of West Virginia, then the Delegates should and would have taken action at the relevant time. Instead, however, the House of Delegates took the step of entering Articles of Impeachment only at the time that impeachment would have the highest likelihood of entrenching a conservative, male-dominated Court, contrary to the will of the voters.

***The Articles of Impeachment Are Pretextual.***

62. As the stated justifications for the impeachment proceedings were neither factually nor legally valid, it is clear that those grounds were pretext to effectuate the House Defendants' improper motives. A host of circumstances surrounding the Articles of Impeachment entered against all four remaining Justices of the West Virginia Supreme Court of Appeals confirm that the Articles were motivated by improper bias and the desire of the other



branches of the West Virginia government to exercise improper influence over the independent judiciary.

63. *First*, that the House Defendants chose to enter Articles of Impeachment against *all four remaining Justices on the Court* alone demonstrates that this action was improper. The Articles of Impeachment do not allege any conspiracy among all of the Justices to engage in any impeachable offense—far from it. The decision of the House Defendants to wipe out the entire remaining Supreme Court of Appeals makes clear that the impeachment process was not an effort to uncover misfeasance, but instead a power grab designed to remove Justices with whom the Delegates disagreed and to remake the Court in the Delegates’ and Governor’s desired image.

64. By entering Articles of Impeachment against the remaining Justices, the Republican-controlled House of Delegates sought to remove all of the Democratic and non-partisan-elected Justices on the Court—so that a Republican governor could replace them. This nakedly partisan move was an attempt to penalize Justice Davis (along with her colleagues) for her political beliefs and expression, as well as the opinions she has authored while on the Court.

65. Indeed, Governor Justice confirmed in an August 25, 2018 press conference that this was the intent of the impeachment proceedings. He announced that, after the Legislature he convened had impeached, convicted, and removed the entire remaining Court—*i.e.*, all of the Justices whom the voters of West Virginia had elected—he would be able to create a “conservative court.”

66. Notably, that “conservative court” desired by Governor Justice included former Speaker Armstead (now Justice Armstead), who cast votes to impeach Justice Davis, and necessarily influenced the proceedings of the House.

67. Moreover, by entering Articles of Impeachment against all four remaining Justices on the Court, the male-dominated House of Delegates sought to remove all of the female Justices on the Court—so that a male governor could replace them. And indeed, Governor Justice’s first two appointments have been men.

68. While the two male Justices (Ketchum and Loughry) faced criminal charges and complaints of ethics violations, no such charges were leveled against the Court’s three female Justices. Thus, the only way for the Defendants to change the gender balance of the Court from majority-female to majority- (or even exclusively) male was through the brute-force method of wholesale impeachment—and that is what they pursued.

69. *Second*, the timing of the impeachment proceedings is further evidence of improper motivation to manufacture a “conservative” and male-dominated Court. The Articles of Impeachment were filed on August 13—exactly 85 days before November 6. Thus, if any of the Justices were to be removed as a result of the impeachment, her seat could not be up for special election on November 6, as a special election is triggered only if a Justice leaves her seat more than 84 days before election day. W. Va. Code § 3-10-3(d). That means that the timing of the impeachment proceedings was designed to maximize Governor Justice’s opportunity to appoint the desired “conservative court”—with no input from the voters—for a minimum of two years.

70. Only by retiring *on the very same day* that the House began proceedings on the Articles of Impeachment—and by forgoing her own right to defend her seat in a trial before the Senate—could Justice Davis protect the right of the voters to choose their Supreme Court Justice on November 6. That is precisely what Justice Davis did.

***The Articles of Impeachment Are Invalid Because The House Failed to Authorize Them.***

71. In addition to these substantive failings, the Articles of Impeachment also are invalid because they are procedurally flawed. HR 201 empowered the House Judiciary Committee to investigate the allegations of impeachable offenses against the Justices of the West Virginia Supreme Court of Appeals. It explicitly stated that “[i]f the recommendation of the [House Judiciary] Committee be to impeach any or all of the five members of the West Virginia Supreme Court of Appeals, then [it is required] to present to the House of Delegates a proposed resolution of impeachment and proposed articles of impeachment” and if the House of Delegates “adopt[s] a resolution of impeachment and formal articles of impeachment as prepared by the Committee . . . the House of Delegates [is required to] deliver the same to the Senate in accordance with the procedures of the House of Delegates, for consideration by the Senate according to law . . . .”

72. Contrary to its own rules, the House Judiciary Committee never adopted House Resolution 202 (referred to herein as “HR 202”), the resolution of impeachment that was to have been presented to the House of Delegates. This critical procedural step was simply bypassed.

73. Because of this procedural defect, when the full House convened on August 13, 2018, there was no resolution pending on which they could vote. Certain Delegates raised questions concerning this procedural flaw on the House floor, but were told, “That ship has sailed.” Correcting the error would have required that the House recess while a Judiciary Committee meeting was called to approve HR 202, and presumably the Judiciary Committee would have had to insert each Article of Impeachment that had been amended on the House floor into the resolution. This was never done during the approximately 17 hours of debate on the Articles of Impeachment.

74. The failure by the House Judiciary Committee to adopt a resolution of impeachment means that the House did not adopt HR 202 in accordance with its own procedures. Thus, the House has not acted in compliance with its obligations under HR 201 to deliver a resolution to “the Senate in accordance with the procedures of the House of Delegates, for consideration by the Senate according to law.” Until the Senate receives a valid resolution, it cannot proceed with impeachment trials against Justice Davis or any other Justice impeached under this infirm procedure.

***The Articles of Impeachment Are Invalid Because Removal Is the Only Remedy Permitted By House Rules—But Removal Is Impossible in Light of Justice Davis’s Retirement.***

75. Finally, the Articles of Impeachment are invalid because the only remedy authorized under the House rules is impossible in light of Justice Davis’s retirement. Under Rule 12 of the Rules of Procedure for the House Committee on the Judiciary, which was adopted specifically for the impeachment of Justices Davis, Loughry, Workman, and Walker, the “sole remedy available in an impeachment proceeding is the removal from office of an officer of the State.”

76. As Chairman Shott announced to the Judiciary Committee, the *only* meaningful purpose for pursuing impeachment is to effect removal of an official who has committed an impeachable offense. But Justice Davis has already retired. Thus, under the House Rules, there is nothing left to be done and no reason for the Senate to proceed with a trial.

77. Nonetheless, on September 11, 2018, the Senate voted down a motion to dismiss the Articles of Impeachment against Justice Davis. Senators made statements suggesting that, although Justice Davis already has retired from the Court, a trial is appropriate to determine whether she should be disqualified from holding office or denied her state pension.

But the House returned Articles of Impeachment that called only for the removal of Justice Davis and the remaining Justices on the Court, not their disqualification from holding future office or denial of their pensions. Thus, in proceeding with the trial against Justice Davis, the Senate is acting outside the scope of the Articles presented by the House.

78. With respect to Justice Davis's pension, the West Virginia Constitution is express that "[j]udgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold any office of honor, trust or profit, under the state." W. VA. CONST. art. IV, § 9. Loss of a duly earned pension is not among the penalties that the West Virginia Constitution permits for impeachment. Thus, although state law authorizes termination of pension benefits for "impeachment and conviction . . . *except for misdemeanor*," W. Va. Code § 5-10A-1, *et seq.*, that statute conflicts with the Constitution and is invalid. The State cannot deny Justice Davis the pension benefits she has earned on the basis of Articles of Impeachment consistent with the West Virginia Constitution. Thus, the Senate is not legally authorized to try Justice Davis on the Articles for the purpose of terminating her pension benefits.

79. If the actual motivation of the Legislature were to prevent misconduct on the Court and promote the interests of the citizens of West Virginia, they would have no reason to take action against Justice Davis—just as they took no action against Justice Ketchum. Both Justices Davis and Ketchum retired before the final vote in which the House adopted the Articles of Impeachment, and both should have been similarly treated—neither should have been impeached. Certainly, the Articles of Impeachment against Justice Davis should have been withdrawn, and her trial before the Senate dismissed. But instead, the Articles of Impeachment were permitted to stand—and a motion to dismiss the charges against Justice Davis in the Senate was denied.

80. Justice Davis is both a former politically active Democrat who ran all three times for the Supreme Court as a Democrat, and a member of the female majority of the Court. She has never been accused, much less convicted, of any crime. Yet, she is to be tried in the Senate, even though she cannot be removed, solely to determine whether she is to be disqualified from holding any future state office in West Virginia or denied the pension that she has worked for so many years to earn. She must bear the costs, both financial and personal, of withstanding an impeachment trial (even though the other retired Justice, who unlike Justice Davis was convicted of a crime, will not) so that the Senate can pursue punitive measures that are not even authorized.

81. That the House of Delegates and Senate have persisted in pursuing impeachment and a trial against Justice Davis—even though she has retired—further confirms that their actions are improper.

### **III. The Trial Underway in the Senate Is Inadequate to Protect Justice Davis's Interests.**

82. Under the West Virginia Constitution, Justice Davis is entitled to a trial before the Senate. On August 20, 2018, the Senate adopted Senate Resolution 203, which established the Rules of the West Virginia Senate While Sitting as a Court of Impeachment During the Eighty-Third Legislature.

83. A trial conducted under these rules as adopted by the Senate, however, will be inadequate to protect Justice Davis's strong interests in the right to pursue public office in West Virginia and the pension she has earned during her 22 years of service on the Court. Again, the Senate is not authorized either to disqualify Justice Davis from future office or to interfere with her pension, but the Senate has nonetheless indicated its intention to pursue these punitive measures anyway. Because the interests at risk in a Senate trial on impeachment of a Supreme Court Justice are so serious, a trial must be conducted to provide a high degree of procedural protection of those interests.

84. The West Virginia Constitution protects the right of an individual elected to the Supreme Court to fully serve out her term, without any reduction in compensation, unless grave misconduct is proved. State law entitles justices who serve on the Court for a number of years to a pension upon their retirement. Additionally, both the United States Constitution and the Constitution of West Virginia protect the rights of individuals to run for elected office in the State. There are thus strong property and liberty interests at risk when a West Virginia Supreme Court Justice is tried in the Senate for an allegedly impeachable offense.

85. The process being afforded to Justice Davis is inadequate to protect these interests.

86. To begin, because the House Judiciary Committee never entered findings of fact, Justice Davis has inadequate notice of the factual charges against her.

87. Justice Davis also has no notice of the actual standard for an impeachable offense that will be applied in the Senate. Not only does this case present the unprecedented fact that the House of Delegates voted to impeach all remaining Justices of the Supreme Court of Appeals, but also the standard by which the Justices were impeached is not clearly established in the law. And, as Minority Chair Fleischauer noted, because the House did not identify the precise impeachable offense to which the Articles related, the Justices did not receive adequate notice of the grounds for impeachment. August 7, 2018 Tr., at 1964–66.

88. Moreover, Justice Davis had inadequate notice of the potential penalties associated with the impeachment proceedings. Under House Rules, the Articles of Impeachment returned against Justice Davis authorized the “sole remedy” of removal from office. Justice Davis had notice that she was subject to removal, and only removal—she had no notice when she

announced her retirement that she could be subject to other penalties, including disqualification from holding future office or denial of her pension.

89. When the Senate rejected a motion to dismiss the charges against Justice Davis, and decided to proceed with her trial to disqualify her from future office or deny her the pension she earned during her more than 20 years of service, Justice Davis faced an untenable position—Articles of Impeachment had been returned against her on one basis but she was now being tried on another. She did not have proper notice of the charges for which she would face trial.

90. Nor will the Senate procedures provide Justice Davis an adequate and meaningful opportunity to defend herself. Under Senate rules, Justice Davis's rights are severely curtailed. She has no fulsome right of discovery: While the rules require that she have the opportunity to view the evidence that the other side will present in its case-in-chief against her, Justice Davis has no right of discovery into exculpatory evidence that she could use in her defense.

91. The rules do not appear to give any right to subpoena the records of the House of Delegates, Governor Justice, or any other individual or entity. To meaningfully defend against the charges against her, Justice Davis must have access not only to the documents the Board of Managers intends to use in its case, but also to exculpatory documents that will demonstrate that the Articles are pretextual.

92. What is more, even if Justice Davis could secure voluntary cooperation from one of these officials, she is barred by the Senate rules from questioning Senators or the "Board of Managers," who are the members of the House of Delegates that are prosecuting impeachment against her—in other words, the individuals with the best evidence of pretext. The procedures of the Senate give Justice Davis no opportunity to pursue discovery of whether the impeachment was the result of improper political bias, gender bias, or any other improper motivation. Any



adequate defense of the politically based and politically motivated charges in the Articles of Impeachment requires that Justice Davis have a full and fair opportunity to investigate evidence with respect to bias.

93. The limitations on Justice Davis's ability to discover and present evidence of improper bias fundamentally undermines any procedural protection afforded to her by the Senate rules. In light of the substantial rights (*e.g.*, to hold elected office and receive a pension that has been earned over decades of service) that are at stake in these proceedings, the Senate's procedures do not provide a meaningful opportunity for Justice Davis to defend herself.

## COUNT I

### Fourteenth Amendment (42 U.S.C. § 1983)

#### Violation of the First Amendment to the U.S. Constitution

94. Plaintiff Davis repeats and realleges Paragraphs 1–93 above as if fully set forth herein.

95. Justice Davis was elected to the Supreme Court three times, each time running as a Democrat. During her time while on the Court, Justice Davis authored opinions and otherwise made written and oral statements that expressed her views and opinions.

96. On June 25, 2018, Governor Justice issued a proclamation convening the Legislature in extraordinary session to address the impeachment of the Justices of the West Virginia Supreme Court.

97. On August 13 and 14, 2018, the House Defendants adopted and recorded four Articles of Impeachment directed to Justice Davis, and a total of eleven Articles of Impeachment directed to the four Justices of the West Virginia Supreme Court.

98. Justice Davis's expression of her views and opinions, as well as the opinions she has authored while on the Court, were a substantial factor in motivating the House Defendants'

decision to impeach her and the other Justices who were not indicted on criminal charges, both of whom were elected as Democrats or in a non-partisan election.

99. The impeachment proceedings, which are an attempt to remove all popularly elected Justices of the West Virginia Supreme Court, may create vacancies that the governor can fill through appointment of conservative, Republican replacements.

100. The House initiated these impeachment proceedings on a date that ensured that, should any of the Justices be removed after conviction, their seats would not be eligible for special election in November. Accordingly, any individuals appointed by the governor to fill vacancies created by a Justice's removal would be entitled to serve as Justices through the end of 2020.

101. Governor Justice would not have convened the Legislature in extraordinary session to address the impeachment of Justice Davis in the absence of her political expressions and beliefs. Governor Justice declared his intention to create a "conservative court," and the totality of the relevant facts surrounding Governor Justice's proclamation make clear its retaliatory purpose.

102. The House Defendants would not have entered and recorded Articles of Impeachment against Justice Davis in the absence of her political expressions and beliefs. Their stated justifications for impeaching Justice Davis—including that she had spent more than necessary on revisions to her office, had authorized compensation of Senior Status Judges in excess of a statutory limit on total compensation to such Judges, and had failed to establish policies concerning spending by the judiciary and its staff, all years before the House adopted the Articles of Impeachment—are pretext for retaliation and do not reflect their actual motivations

for impeaching Justice Davis. The totality of the relevant facts surrounding the impeachment proceedings make clear its retaliatory purpose.

103. The adoption of Articles of Impeachment against a Justice would likely deter an ordinary person from engaging in similar political expression.

104. Governor Justice, as the official who convened the Legislature to pursue impeachment proceedings, and the individual House Defendants, as voting members of the West Virginia House of Delegates and Clerk of the House of Delegates, were personally involved in the entry and recording of Articles of Impeachment against Justice Davis, in retaliation for her political expression and beliefs.

105. At all relevant times, Governor Justice and the House Defendants acted under color of law when they misused their authority as elected officials and Clerk of the House to enter Articles of Impeachment against Justice Davis in retaliation for her political expression and beliefs.

## **COUNT II**

### **Fourteenth Amendment (42 U.S.C. § 1983)**

#### **Violation of the Due Process Clause of the U.S. Constitution**

106. Plaintiff Davis repeats and realleges Paragraphs 1–105 above as if fully set forth herein.

107. The Fourteenth Amendment to the U.S. Constitution, enforceable pursuant to 42 U.S.C. § 1983, precludes any State from “depriv[ing] any person of life, liberty, or property, without due process of law.”

108. Justice Davis has a fundamental property interest in her office as an elected Justice of the West Virginia Supreme Court under state statute, which prevents the removal of a Justice during her twelve-year term unless she is impeached for maladministration, corruption,

neglect of duty, or other similar offenses. She also has a property interest in her pension, which she has earned during her 22 years of service on the West Virginia Supreme Court of Appeals.

109. Justice Davis also has a fundamental liberty interest in her reputation, good name, and future employment prospects, including the right to run for future elected office in West Virginia.

110. The House Defendants deprived Justice Davis of her fundamental property and liberty interests by adopting and recording Articles of Impeachment against her that falsely accused her of maladministration and incompetence. Their actions forced Justice Davis to retire rather than deprive West Virginia voters of their fundamental constitutional rights, thus depriving her of her property interest in her office. In addition, the Articles of Impeachment and related statements made by Delegates in connection with the impeachment proceedings stigmatized Justice Davis and foreclosed her future opportunities for employment, thus depriving her of fundamental liberty interests.

111. The Senate Defendants, through the trial underway in the Senate, also may foreclose Justice Davis from running for or holding future elected office in West Virginia and deny her the pension she has earned. Indeed, because Justice Davis retired during the proceedings in which the House adopted Articles of Impeachment, the only possible justification for the pending trial is to disqualify Justice Davis from holding future office in West Virginia or to deny her access to her pension. This too deprives Justice Davis of her fundamental rights.

112. Before the House and Senate Defendants deprive her of fundamental property and liberty interests, Justice Davis is entitled to notice and a meaningful opportunity to be heard, including the opportunity to confront and cross-examine the witnesses who have the best evidence of bias and to review the relevant evidence.

113. The House Defendants' failure to make findings of fact, as required by their own resolutions under HR 201, deprived Justice Davis of her constitutional right to notice of the factual basis for the charges against her.

114. The Senate Defendants' failure to dismiss the charges against Justice Davis in light of her retirement and their actions in proceeding against her on penalties that were not authorized by the House in returning the Articles of Impeachment deprived Justice Davis of her constitutional right to notice as well.

115. The procedures that will be applied to Justice Davis under the Senate rules during her trial are inadequate to provide meaningful process. Under those rules, Justice Davis has no right of discovery into exculpatory evidence or evidence of bias or other improper motivation. Nor will she have the right to subpoena the records of the House of Delegates, Governor Justice, or any other individual or entity. Finally, she is barred from questioning or examining the Senators persisting in trying her on impeachment charges or the "Board of Managers" who prosecuted impeachment charges against her. Under these circumstances, Justice Davis is not given a meaningful opportunity to defend herself.

116. The House and Senate Defendants' failure to provide Justice Davis with notice and a meaningful opportunity to be heard deprive her of constitutionally protected property and liberty interests without due process of law.

117. The House Defendants, as voting members of the West Virginia House of Delegates and Clerk of the House of Delegates, were personally involved in the entry and recording of Articles of Impeachment against Justice Davis. The Senate Defendants, as voting members of the West Virginia Senate and Clerk of the Senate, are personally involved in conducting the pending impeachment trial of Justice Davis.

118. At all relevant times, the House and Senate Defendants acted under color of law when they misused their authority as legislators and Clerks of the House and Senate to pursue impeachment proceedings against Justice Davis without due process of law.

### **COUNT III**

#### **Fourteenth Amendment (42 U.S.C. § 1983)**

##### **Violation of the Equal Protection Clause of the U.S. Constitution: Diminution of Votes**

119. Plaintiff Davis repeats and realleges Paragraphs 1–118 above as if fully set forth herein.

120. The Fourteenth Amendment to the U.S. Constitution, enforceable pursuant to 42 U.S.C. § 1983, provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”

121. The right to vote is a fundamental constitutional right protected by the Fourteenth Amendment. It can be denied by abridging a citizen’s vote as effectively as by full disenfranchisement.

122. Governor Justice issued a proclamation convening the Legislature in extraordinary session to address the impeachment of all four remaining Justices of the West Virginia Supreme Court, including Justice Davis.

123. The House Defendants adopted and recorded the Articles of Impeachment, which named all four remaining Justices of the West Virginia Supreme Court, including Justice Davis.

124. The Senate Defendants are conducting impeachment trials against all four remaining Justices of the West Virginia Supreme Court against whom the House returned Articles of Impeachment, including Justice Davis, and may remove all elected Justices from office and disqualify them from running for future office.

125. After the House adopted the Articles of Impeachment, and Justice Davis retired, Governor Justice appointed Evan Jenkins and Tim Armstead—both Republicans—to fill the vacancies left by the retirements of Justices Ketchum and Davis.

126. The impeachment proceedings, which are an attempt to remove all popularly elected Justices of the West Virginia Supreme Court, may create vacancies that the governor can fill through appointment of conservative replacements.

127. The Governor, House Defendants, and Senate Defendants acted with the intent to disfavor Democratic voters who elected Democratic Justices on the basis of their political affiliation, with no legitimate or compelling reason to do so.

128. The Governor, House Defendants, and Senate Defendants would not have convened the Legislature in extraordinary session or pursued impeachment proceedings against Justice Davis in the absence of her political expressions and beliefs.

129. Governor Justice declared his intention to create a “conservative court,” and the totality of the relevant facts surrounding Governor Justice’s proclamation make clear its discriminatory purpose.

130. The stated justifications for impeaching Justice Davis—including that she had spent more than necessary on renovations to her office, had authorized compensation of Senior Status Judges in excess of a statutory limit on total compensation to such Judges, and had failed to establish policies concerning spending by the judiciary and its staff, all years before the House adopted the Articles of Impeachment—are pretext for discrimination and do not reflect their actual motivations for impeaching Justice Davis. The totality of the relevant facts surrounding the impeachment proceedings make clear their discriminatory purpose.

131. The impeachment proceedings have the discriminatory effect of degrading or restricting the voting strength of electors who support the Democratic Party and Democratic candidates, including Justice Davis.

132. The Governor, the House Defendants, and the Senate Defendants are violating the Equal Protection Clause of the Fourteenth Amendment by convening the Legislature for impeachment proceedings, and impeaching and trying all four popularly elected Justices of the West Virginia Supreme Court to favor one political segment of the community over another. As a result of their actions, the votes of electors who support Democratic candidates, including Justice Davis, are given significantly less weight than the votes of electors who support conservative candidates in state judicial elections.

133. At all relevant times, Governor Justice, the House Defendants, and the Senate Defendants acted under color of law when they misused their authority as elected officials and Clerks of the House and Senate to enter and record Articles of Impeachment and conduct an impeachment trial against Justice Davis on the charges raised in the Articles of Impeachment for her political beliefs and affiliation.

#### **COUNT IV**

##### **Fourteenth Amendment (42 U.S.C. § 1983)**

##### **Violation of the Equal Protection Clause of the U.S. Constitution: Gender Bias**

134. Plaintiff Davis repeats and realleges Paragraphs 1–133 above as if fully set forth herein.

135. The Fourteenth Amendment to the U.S. Constitution, enforceable pursuant to 42 U.S.C. § 1983, provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”



136. Justice Davis, as a woman, is a member of class that has traditionally lacked substantial power.

137. Governor Justice issued a proclamation convening the Legislature in extraordinary session to address the impeachment of all four remaining Justices of the West Virginia Supreme Court, including Justice Davis.

138. The House Defendants adopted and recorded the Articles of Impeachment, which impeached all four remaining Justices of the West Virginia Supreme Court, including Justice Davis.

139. The Senate Defendants are pursuing impeachment trials against all four remaining Justices of the West Virginia Supreme Court against whom the House returned Articles of Impeachment, including Justice Davis, and may remove all elected Justices from office and disqualify them from running for future office.

140. After the House adopted the Articles of Impeachment, and Justice Davis retired, Governor Justice appointed Evan Jenkins and Tim Armstead—both men—to fill the vacancies left by the retirements of Justices Ketchum and Davis.

141. The impeachment proceedings, which are an attempt to remove all popularly elected Justices of the West Virginia Supreme Court, including all three female Justices, may create vacancies that the governor can fill through appointment of male replacements. The sole male Justice facing an impeachment trial, Justice Loughry, had been indicted on 22 counts of federal criminal charges, including mail fraud, wire fraud, and witness tampering, among others. None of the female Justices facing impeachment trials and removal from office have been accused of or indicted on any criminal conduct.

142. The Governor, the House Defendants, and the Senate Defendants acted with the intent to remove the female Justices, including Justice Davis, from office because of their gender, with no legitimate or compelling reason to do so.

143. The Governor, House Defendants, and Senate Defendants would not have convened the Legislature in extraordinary session or pursued impeachment proceedings against Justice Davis had she not been a woman.

144. The House and Senate Defendants' stated justifications for impeaching Justice Davis—including that she had spent more than necessary on revisions to her office, had authorized compensation of Senior Status Judges in excess of a statutory limit on total compensation to such Judges, and had failed to establish policies concerning spending by the judiciary and its staff, all years before the House adopted the Articles of Impeachment—are pretext for discrimination and do not reflect their actual motivations for impeaching Justice Davis. The totality of the relevant facts surrounding the impeachment proceedings make clear their discriminatory purpose.

145. The impeachment proceedings have the discriminatory effect of depriving women, including Justice Davis, of their right to equal dignity, liberty, and autonomy.

146. The Governor, the House Defendants, and the Senate Defendants are violating the Equal Protection Clause of the Fourteenth Amendment by convening the Legislature for impeachment proceedings, entering and recording Articles of Impeachment against Justice Davis, and conducting impeachment trials of all female Justices of the West Virginia Supreme Court, none of whom have committed criminal or otherwise impeachable misconduct.

147. At all relevant times, Governor Justice, the House Defendants, and the Senate Defendants acted under color of law when they misused their authority as elected officials and as

Clerks of the House and Senate to pursue impeachment proceedings against Justice Davis on the charges raised in the Articles of Impeachment for her gender.

## COUNT V

### **Violation of the West Virginia Constitutional Requirement of Separation of Powers**

148. Plaintiff Davis repeats and realleges Paragraphs 1–147 above as if fully set forth herein.

149. This Count asserts a pendent claim under state law that arises out of the same transaction as the federal constitutional violations.

150. The West Virginia Constitution establishes three co-equal branches of government, which are to perform separate and distinct powers. W. VA. CONST. art. V, § 1. The judicial power is vested solely in the courts, and the legislature is constitutionally proscribed from undertaking judicial action or attempting to alter the powers constitutionally afforded to the judicial branch. W. VA. CONST. art. V, § 1; art. VIII, § 1; art. VI, § 40.

151. The West Virginia Constitution mandates an independent judiciary vested with the sole power to undertake judicial actions. W. VA. CONST. art. VIII, §§ 1–2. The legislature is constitutionally constrained from playing an improper role in determining the membership of the Court. It may not appoint Justices, and it may not remove any Justice except through impeachment. W. VA. CONST. art. VIII, §§ 7–8.

152. Under the West Virginia Constitution, a judicial officer may be impeached only “for maladministration, corruption, incompetency, gross immorality, neglect of duty, or any high crime or misdemeanor.” W. VA. CONST. art. IV, § 9.

153. Governor Justice issued a proclamation convening the Legislature in extraordinary session to address the impeachment of all four remaining Justices of the West

Virginia Supreme Court, including Justice Davis, on the basis of her political beliefs and gender, which are not constitutionally permitted grounds for impeachment.

154. Governor Justice declared his intention to create a “conservative court,” and the totality of the relevant facts surrounding Governor Justice’s proclamation make clear its improper purpose.

155. The House Defendants impeached Justice Davis and certain of the other Justices because of their political beliefs and gender, which are not constitutionally permitted grounds for impeachment. The stated justifications for impeaching Justice Davis—including that she had spent more than necessary on revisions to her office, had authorized compensation of Senior Status Judges in excess of a statutory limit on total compensation to such Judges, and had failed to establish policies concerning spending by the judiciary and its staff, all years before the House adopted the Articles of Impeachment—are pretext for political and gender-based discrimination.

156. The stated pretextual justifications for impeachment likewise do not constitute maladministration, corruption, incompetency, gross immorality, neglect of duty, or any other constitutionally permitted ground for impeachment.

157. Governor Justice’s proclamation convening the Legislature for improper impeachment proceedings exceeds his executive authority and usurps judicial power by facilitating the unlawful removal of Justices of the West Virginia Supreme Court, in violation of the constitutional separation of powers.

158. The Articles of Impeachment adopted by the House exceed its legislative authority and usurp judicial power by removing Justices of the West Virginia Supreme Court, in violation of the constitutional separation of powers.

## COUNT VI

### **Violation of the West Virginia Law Requiring Judicial Independence**

159. Plaintiff Davis repeats and realleges Paragraphs 1–158 above as if fully set forth herein.

160. This Count asserts a pendent claim under state law that arises out of the same transaction as the federal constitutional violations.

161. The West Virginia Constitution vests judicial power solely in the courts, and mandates judicial independence from either of the other co-equal branches. The legislature is constitutionally proscribed from undertaking judicial action or attempting to alter the powers constitutionally afforded to the judicial branch. W. VA. CONST. art. V, § 1; art. VIII, § 1; art. VI, § 40.

162. The West Virginia Constitution requires and empowers the Supreme Court to establish a budget for the judicial branch, which may not be abridged or diminished by the Legislature. W. VA. CONST. art. VI, § 51; art. VIII, § 3.

163. The House Defendants' impeachment of Justice Davis and the other Justices of the Supreme Court infringed upon the judiciary's constitutional authority to control its own budget by punishing the Justices for the manner in which they used duly-procured budgeted funds.

164. The West Virginia Constitution also grants the Judiciary plenary power to regulate the practice of law, including by promulgating and enforcing rules of judicial conduct. W. VA. CONST. art. VIII, §§ 3 and 8

165. The House's impeachment of Justice Davis and the other Justices of the Supreme Court infringed upon the Judiciary's constitutional authority to regulate the practice of law by interpreting the canons of judicial conduct and punishing the Justices for purported violations of

these judicial canons. The Judicial Investigation Commission, a body of the judiciary, previously determined that complaints against Justices Davis, Walker, and Workman would be closed with no disciplinary action. The House's interpretation of judicial canons in contravention of that determination infringed upon judicial independence.

166. The Articles of Impeachment adopted and recorded by the House Defendants exceed their legislative authority and usurp judicial power by invading the judiciary's authority to set its own budget and regulate the practice of law, in violation of the constitutional separation of powers.

## **COUNT VII**

### **Declaratory Judgment**

167. Plaintiff Davis repeats and realleges Paragraphs 1–166 above as if fully set forth herein.

168. The Declaratory Judgment Act provides: “In a case of actual controversy within its jurisdiction, ... any court of the United States ... may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.” 28 U.S.C. § 2201(a).

169. Absent a declaratory judgment, there is a substantial likelihood that Plaintiff Davis will suffer irreparable injury in the future.

170. There is an actual controversy between the parties of sufficient immediacy and reality to warrant issuance of a declaratory judgment.

171. This Court possesses an independent basis for jurisdiction over the parties.

172. A judgment declaring that (a) Governor Justice's proclamation convening the Legislature for improper impeachment proceedings, (b) the Articles of Impeachment entered and recorded by the House Defendants, and (c) the impeachment proceedings being conducted by the

Senate Defendants are improper, invalid, and contrary to law will clarify Plaintiff Davis's legal rights and will afford relief from the controversy and grave reputational harm giving rise to this proceeding.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff Davis respectfully requests that the Court:

- a) Vacate, hold unlawful, and set aside the Articles of Impeachment entered and recorded by the House Defendants against Plaintiff Davis;
- b) Declare that the Articles of Impeachment entered and recorded by the House of Delegates against Plaintiff Davis are invalid, unfounded, and contrary to law;
- c) Declare that the convocation by Governor Justice of the House of Delegates for the purpose of entering such unfounded and unlawful Articles of Impeachment against Plaintiff Davis, in furtherance of the goal of appointing replacement Justices of the Governor's choosing, was contrary to law;
- d) Grant an injunction barring any impeachment trial proceedings against Plaintiff Davis in the West Virginia Senate;
- e) Declare the impeachment trial proceedings scheduled against Plaintiff Davis in the West Virginia Senate to be invalid, unfounded, and contrary to law;
- f) Grant an injunction barring the application of the Rules of the West Virginia Senate While Sitting as a Court of Impeachment During the Eighty-Third Legislature during any impeachment trial proceedings against Plaintiff Davis in the Senate;
- g) Set aside and declare invalid and contrary to law Senate Resolution 203, adopting the Rules of the West Virginia Senate While Sitting as a Court of Impeachment During the Eighty-Third Legislature;

h) Award attorney's fees, costs, and such other and further relief as the Court may deem just and proper.

Respectfully submitted,

/s/ Robert B. Allen  
ROBERT B. ALLEN (WV Bar No. 110)  
PAMELA C. DEEM (WV Bar No. 976)  
KAY CASTO & CHANEY PLLC  
707 Virginia Street, East, Suite 1500  
P. O. Box 2031  
Charleston, WV 25327  
(304) 345-8900  
rallen@kaycasto.com  
pdeem@kaycasto.com

JAMES M. COLE (*pro hac vice* forthcoming)  
SIDLEY AUSTIN LLP  
1501 K Street, N.W.  
Washington, DC 20005  
(202) 736-8246  
jcole@sidley.com

TACY F. FLINT (*pro hac vice* forthcoming)  
HEATHER BENZMILLER SULTANIAN  
(*pro hac vice* forthcoming)  
JOHN K. ADAMS (*pro hac vice*  
forthcoming)  
SIDLEY AUSTIN LLP  
One South Dearborn  
Chicago, IL 60603  
(312) 853-7000  
tflint@sidley.com  
hsultanian@sidley.com  
john.adams@sidley.com