IN THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA

No. 33851

The HONORABLE RICHARD THOMPSON, Speaker of the
West Virginia House of Delegates, and the
HONORABLE EARL RAY TOMBLIN, President
of the West Virginia Senate,

Petitioners/Defendants Below,

V.

THE COMMITTEE TO REFORM HAMPSHIRE
COUNTY GOVERNMENT, MICHAEL HASTY,
VERA ANDERSON, FRANK WHITACRE,
KAY DAVIS, ROBERT WALKER,
SHIRLEY CARNAHAN, and MARVIN HOTT,

Respondents/Plaintiffs Below.

PETITION FOR REHEARING

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By counsel, appellees petition the Court to reconsider the decision that it rendered in this case in an opinion filed December 11, 2008. As grounds for its petition, appellees state as follows:

INTRODUCTION

Article IX, § 13 of the West Virginia Constitution provides that, if ten percent or more of the voters in a county endorse a petition to reform county government, the county commission upon receipt of such petition must request the Legislature to implement the reform, to take effect upon the assent of the county's electorate. Pursuant to § 13, appellees gathered signatures in support of a proposed reform of Hampshire County government in sufficient number to exceed the ten percent mark. After receiving the petition, the county commission requested the Legislature to initiate the referendum process for a vote on the proposal. The Legislature has never honored that request. Consequently, there has been no vote and no reform.

Appellees filed this case seeking a declaratory judgment that Article IX, § 13 of the Constitution imposes a duty on the Legislature to enact legislation that will permit the citizens of Hampshire County to vote on the proposed reform of their county government. In their complaint, the appellees also requested a declaration that the form of government proposed for Hampshire County was constitutional.

Article IX, § 13 states in its entirety:

> § 13. *Reformation of County Commissions.* The legislature shall, upon the application of any county, reform, alter or modify the county commission established by this article in such county, and in lieu thereof, with the assent of a majority of the voters of such county voting at an election, create another tribunal for the transaction of the business required to be performed by the county commission created by this article. Whenever a county commission shall receive a petition signed by ten percent of the registered voters of such county requesting the reformation, alteration or modification of such county commission, it shall be the mandatory duty of such county commission to request the legislature, at its next regular session thereafter, to enact an act reforming, altering or

> modifying such county commission and establishing in lieu thereof another tribunal for the transaction of the business required to be performed by such county commission, such act to take effect upon the assent of the voters of such county, as aforesaid. Whenever any such tribunal is established, all of the provisions of this article in relation to the county commission shall be applicable to the tribunal established in lieu of said commission. When such tribunal has been established, it shall continue to act in lieu of the county commission until otherwise provided by law.

In its prior ruling in this case, the Court concluded that § 13 did not compel the Legislature to take action on the appellees' proposal for reform of Hampshire County government. Consequently, the Court rendered no judgment on the validity of the proposed reform.

I. THE COURT'S LITERAL READING OF ARTICLE IX, § 13 WAS IN ERROR.

The Court's opinion makes much of the fact that the second sentence of Article IX, § 13, which was added by the Judicial Reorganization Amendment of 1974, provides that a county commission, upon receiving a petition for reform of county government, shall "request" the Legislature to initiate the process for a vote on the proposal. The Court concludes that, because the commission is only "requesting" legislation, that the Legislature may – apparently for any reason – say "no." That reading, however, completely takes the sentence out of context and totally defeats the clear purpose of the 1974 Amendment.

Read in context, the second sentence supplements the first sentence. The first sentence provides that the "Legislature *shall*, upon the application of any county," reform county government with the assent of its voters. Use of the word "shall" imposes a duty on the Legislature to take action when the county "applies"[1] for it. "Generally, 'shall' commands a mandatory connotation and

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[1]Like a "request," an "application" is an "act of requesting" or is "a written or spoken request or appeal for employment, admission, help, funds, etc." RANDOM HOUSE UNABRIDGED DICTIONARY 102 (defs. 4 & 5) (unabridged 2nd ed. 1987).

It is not surprising that the Framers used terms like "request" and "application" to describe the county commission's notice to the Legislature of the need for an Act to facilitate a vote on a

denotes that the described behavior is directory, rather than discretionary." *State v. Allen*, 208 W. Va. 144, 153, 539 S.E.2d 87, 96 (1999); *see also Louk v. Cormier*, 218 W. Va. 81, 93, 622 S.E.2d 788, 800 (2005); Syl. pt. 1, *Nelson v. West Virginia Pub. Employees Ins. Bd.*, 171 W. Va. 445, 300 S.E.2d 86 (1982) ("It is well established that the word 'shall,' in the absence of language . . . showing a contrary intent . . ., should be afforded a mandatory connotation."). The 1974 Amendment then added the second sentence to provide for an instance in which the county commission must make an application to the Legislature, but the Legislature's duty in response to that application is still governed by the first sentence: "the Legislature *shall*" reform the county government with the assent of the voters.

By reading § 13 as a whole, the Court can give effect to the obvious purpose of the 1974 Amendment: the framers intended to give citizens a meaningful say in the shape of their county government. Citizens who seek change and who secure the signatures of ten percent of their county's voters have a right to have their county commission to request legislation and a right to have the Legislature put the reform process into motion. By this Court's reading of § 13, however, those citizens would have no more standing regarding legislative reform than any other supplicant or lobbyist asking the Legislature for statutory enactments. If that is the case, then what is the point of § 13? It has been rendered meaningless.

II. THE COURT'S OPINION ERRONEOUSLY "CLARIFIES" *TAYLOR COUNTY COMMISSION V. SPENCER* AND, IN SO DOING, FORFEITS ITS RESPONSIBILITY AS THE ULTIMATE INTERPRETER OF THE CONSTITUTION IN PROTECTING CONSTITUTIONAL RIGHTS.

It is a fair reading of *Taylor County Commission v. Spencer*, 169 W.Va. 37, 285 S.E.2d 656

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proposed reform. The Framers could hardly have used language to the effect that a commission would "order" the Legislature to take some action.

(1981), to say that it holds that the Legislature has a duty to respond to properly submitted petitions to reform county government by initiating the referendum process. The Court's opinion in this case offers a "clarification" of *Spencer*'s holding: "*Spencer* does not require that the Legislature enact enabling legislation, only that if the Legislature chooses to enact enabling legislation, the enabling legislation must conform to the substance, spirit and intent of the petition for reformation initially presented." This reading of *Spencer* and of § 13, a reading that apparently confers complete discretion in the Legislature to reject entirely a request for the reform of county government, is wrong for several reasons.

First, it completely overturns the whole point of § 13, which is to endow in the local citizenry the right of self-determination with regards to their form of county government. (What else could its purpose be?) As appellees explained in their brief (at 9-10), a constitutional grant of supremacy in local governments concerning local affairs – immune from legislative override – is not uncommon. It is a form of home rule commonly described as *imperium in imperio* (a government within a government), which developed in many states in the latter part of the nineteenth century and the first several decades of the twentieth century.[2] The 1872 Constitution anticipated that movement when it included § 13's predecessor provision, which was the first allocation of home rule in the United States. Unfortunately, that grant of local control has been put into jeopardy by the Court's opinion in this case.

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[2]*Imperium* home rule was less commonly adopted later in the twentieth century as "legislative home rule" became more fashionable. The latter basically says that local governments can do whatever they want unless the legislature says they cannot do it. The reason explaining the trend toward legislative home rule was that courts applying *imperium* home rule had been extremely narrow in defining what were "local affairs" assigned to local supremacy. RICHARD BRIFFAULT & LAURIE REYNOLDS, STATE AND LOCAL GOVERNMENT 332-32 (2008). The majority opinion in this case seems to continue the tradition of the judicial resistance to local control.

The clarification of *Spencer*'s holding that is needed is contained in *Spencer* itself and is quoted by the Court, indeed even italicized by the Court, at page 17 of its opinion. After referring to the fact that the word "shall" in § 13 "connotes a mandatory duty on the part of the Legislature," the *Spencer* Court continued: the Legislature's "role in the reformation process is to expedite, *within constitutional parameters*, the will of the citizens of the county . . .." (Emphasis added.) That is, this Court's clarification should read that, when the Legislature is presented with a *constitutionally valid* proposal for county government reform, then it has a mandatory duty to process the request. Appellees have conceded throughout this litigation that the Legislature may, on constitutional grounds, refuse to enact a proposed reform. Indeed, appellees offered (to the circuit court) the very same illustration that the Court used to make the point: the Legislature could surely decline to enact a proposal providing for a county commission to consist of white males. Opinion at 16.

Hence, appellees agree that the Legislature must retain the capacity to make a constitutional judgment about a reform proposal, as *Spencer* itself recognized. This Court's opinion, however, goes beyond preserving that discretion. The effect of the Court's existing ruling is not only that the Legislature may exercise discretion but also that that exercise is unreviewable. According to the Court, the Legislature may reject a proposal for any reason and may do so even when the proposal is constitutional. *That* is inconsistent with both *Spencer* and § 13. If the proposed reform would be constitutional, then the Legislature must give county voters the opportunity to vote on it. No reasonable reading of § 13 would permit the Legislature to reject a bid for reform of county government for reasons unrelated to the Constitution.[3]

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[3]Section 13 simply leaves no room for legislators to conclude that a proposed reform is ill-advised or not worthy of legislative attention. The point of § 13 is that the form of county government is subject to local – not legislative – alteration. Indeed, Article VI, § 39 of the

Under the Court's interpretation of § 13, when a proposal does raise constitutional questions, the Legislature can render its judgment, reject the petition, and the reform proponents will have no opportunity to secure a judicial ruling that the legislative judgment is wrong and that the proposal is, in fact, valid. That result effects a complete abdication of the judicial responsibility to interpret the Constitution to protect constitutional rights.[4] As Justice Benjamin explained in his separate opinion in *Louk*, *supra*, the Legislature should not place obstacles in the path of judicial review of legislation, 218 W.Va. at 103, 622 S.E.2d at 810, but neither should this Court block the path to judicial vindication of citizens' right to reform their local government.

This case illustrates the point. Because this Court has ruled that § 13 places no duty on the Legislature to process a request for reform of county government, and that the Legislature may refuse to do so for any reason, the Court fails to reach the constitutional merits of appellees' proposal for the alteration of Hampshire County government. That is, the Court did not decide whether district specific elections of county commissioners – as opposed to at-large elections – would be valid. The legislative judgment – or, more accurately, a concern of some legislators – remains the final word

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Constitution *prohibits* the Legislature from altering county government. It says, "The Legislature shall not pass local or special laws in . . . [r]egulating or changing county or district affairs[.]" Indeed, by refusing to respect a constitutionally valid request for alteration of a county government, the Legislature violates at least the spirit of § 39 – the refusal to implement the reform request clearly relates to a specific and "regulates" that county's "affairs."

[4]To be sure, there are many contexts in which the Legislature or the executive branch make constitutional interpretations that are not judicially reviewable. For example, legislators may decline to enact a bill on the belief that it is unconstitutional, and the governor is free to veto a bill on similar grounds – even if this Court has reached, or subsequently reaches, an opposite conclusion on the constitutional issue. In this case, however, we deal with a specific, constitutionally created procedure that confers rights on citizens. As a consequence, the judicial obligation to render its judgment on the constitutionality of a proposed reform takes on special importance. The Legislature's refusal to follow § 13 and to enact the sought-for legislation created a live controversy that calls for judicial resolution. That is not the case with other legislative refusals to enact laws.

on the matter, and appellees are blocked from obtaining a judicial resolution of the question.

III. THE LEGISLATURE'S § 13 DUTY DOES NOT EXPIRE AT THE END OF THE LEGISLATIVE SESSION.

The Court's alternative holding that § 13 duty expires with the end of the session in which a proposal is submitted similarly seals the legislative decision on a reform proposal from judicial review.[5] Prior to the end of the session, judicial review would not be ripe, and after the session – according to the Court's opinion – the case would be moot. And even if litigation could be brought at the outset of, or during, the session, the maximum sixty days allotted to the regular session hardly provide ample opportunity to obtain meaningful and final judicial review. Certainly,§ 13 imposes a duty on the Legislature to act on a petition in the session immediately following its submission, but a legislative failure to meet that duty hardly justifies a perpetuation of the failure to satisfy its overriding obligation to give the citizens of the county in question the opportunity to vote on the

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[5]It is critical to note in this case that appellees do not seek any judicial *order* commanding the Legislature to do anything; rather, they seek only a declaration about what the constitution means. Obviously, no one, including this Court, can order the Legislature to do anything. Ultimately, only the Legislature itself can take legislative action, and to do so ordinarily requires gubernatorial agreement and action. If the Legislature fails to satisfy its Article VI duties to reapportion itself after each census (§§ 7 & 10), to meet for sixty days (§ 22), or to enact a budget bill (§ 51), this Court cannot order otherwise, but it can identify and declare the failure of legislative responsibility. *See* cases cited in footnote 9 of the Court's opinion. The Court can undo some products of legislative shortcomings. *E.g.*, *State ex rel. Smith v. Gore*, 150 W.Va. 71, 143 S.E.2d 791 (1965) (failure to properly apportion delegates to constitutional convention in violation of Article II, § 4); *Robertson v. Hatcher*, 148 W.Va. 239, 135 S.E.2d 675 (1964) (failure to abide by the requirement in Article VI, § 6 any county whose population is less than 3/5 of the average district population must be attached to another county to form a delegate district); *State ex rel. Heck's Discount Centers v. Winters*, 147 W.Va. 861, 132 S.E.2d 374 (1963) (failure to abide by 60-day limitation on length of regular legislative session). The problem in this case, as it would be with failures to comply with the other mandatory provisions cited above, is that the constitutional breach is a failure to enact a law, rather than a failure to follow constitutional requirements in the enactment of a law. There is nothing here to invalidate. On the other hand, a declaration from this Court that the Legislature has breached a constitutional duty would presumably elicit a corrective legislative response, as in fact occurred in the cases cited in the Court's footnote 9.

reform proposal. Article VI, § 10 requires the Legislature to reapportion itself "as soon as possible after each succeeding census." Surely a failure to act "as soon as possible" would not excuse the Legislature from meeting its constitutional duty to reapportion.

In fact, it is unheard of in the law that a failure to meet a deadline relieves an obligor of the underlying duty. A taxpayer who misses a deadline still owes the tax if he misses a deadline, although it may be increased by interest and penalty charges. Penalties are not an option in this case, of course, but the Legislature's obligation to enable Hampshire County residents to realize their constitutionally-conferred right to vote on their form of county government persists every bit as much as a taxpayer's obligation extends past April 15th. It simply makes no sense to say that the Constitution requires an official to take certain action, but if the official does nothing, then the requirement expires.

Finally, the purported practical problems the Court identifies regarding shifting compositions of the Legislature and of county voters are really not problems at all. What difference does it make if some part of the Legislature has changed? And as for shifts in the local electorate, that does not matter because, in the end, it is up to a majority of those voting on the referendum to decide if they want the reform. Thus, if the impetus previously existing for the reform has dissipated because of population changes, then the new electorate can simply vote "no" on the proposal.

CONCLUSION

The 1872 West Virginia Constitution included a remarkable provision to promote local control, the right of counties to decide for themselves what form of government they wanted. It was an historic enactment, both for the State and nationally. The 1974 Amendment to that provision, which became Article IX, § 13, was a progressive attempt to extend to citizens the opportunity to

initiate reform of county government as well as to vote on it. The Amendment invited citizens to involve themselves in their local government and attempted to promote the Jeffersonian model of an engaged citizenry implementing effective democracy. The Court's existing opinion in this case, however, thwarts those efforts. The prospect for meaningful reform of county government is only a glimmer when those who successfully petition must stand in line with every other supplicant at the Legislature hoping to get the lawmakers' attention and win their favor. Why bother? The Court's decision threatens to emasculate an unusual, progressive, pro-democracy grant of localism to citizens and county commissions alike. Appellees seek only the opportunity to vote on their proposed reform. They humbly and respectfully request this Court to assist them in realizing that opportunity and to restore the promise of Article IX, § 13.

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CERTIFICATE OF SERVICE

I have on this the 9th day of January, 2009, mailed a copy of the foregoing Petition for Rehearing to the following counsel for the defendants:

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