IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

No. 34768

THE ASSOCIATED PRESS,

Appellant,

v.

Kanawha County Civil Action N. 08-C-835
(Hon. Louis H. Bloom, Judge)

STEVEN D. CANTERBURY,

Administrative Director of the
West Virginia Supreme Court
of Appeals,

Respondent.

BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE AMERICAN CIVIL LIBERTIES UNION OF WEST VIRGINIA, THE ASSOCIATION OF CAPITOL REPORTERS AND EDITORS, THE RADIO AND TELEVISION NEWS DIRECTORS ASSOCIATION, THE SOCIETY OF PROFESSIONAL JOURNALISTS, AND THE WEST VIRGINIA PRESS ASSOCIATION IN SUPPORT OF APPELLANT, THE ASSOCIATED PRESS

Terri S. Baur, Esq. (WV # 9495)
ACLU of West Virginia Foundation
405 Capitol Street, Suite 507
P.O. Box 3952
Charleston, WV 25339
Telephone (304) 345-9246
Counsel for Amici

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INTEREST OF *AMICI*

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and freedom of information litigation since 1970. The Reporters Committee's interest in this case is in preserving the news media's right to access public records for the purpose of reporting the news and facilitating the media's role in providing oversight on government.

The American Civil Liberties Union of West Virginia (ACLUWV) is the state affiliate of the American Civil Liberties Union (ACLU). Like its parent the ACLU, the ACLUWV is a nonprofit, nonpartisan membership organization dedicated to protecting and advancing civil liberties. The ACLUWV has more than 1,400 members throughout West Virginia, and a long history of legal advocacy on behalf of the First Amendment, open government, and freedom of information.

The Association of Capitol Reporters and Editors was founded in 1999 and has approximately 200 members. It is the only national journalism organization for those who write about state government and politics.[1]

The Radio-Television News Directors Association is the world's largest and only professional organization devoted exclusively to electronic journalism. RTNDA is made up of news directors, news associates, educators, and students in radio, television, cable, and electronic media in more than 30 countries. RTNDA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

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[1] Lawrence Messina, a reporter for the Associated Press, is a member of the ACRE board of directors and filed one of the records requests at issue in this case.

The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

The West Virginia Press Association represents 86 newspaper members in the state.

SUMMARY OF ARGUMENT

All of the records requested in this case are public and should be released by this Court under West Virginia's open records law. The public interest in the records and policy of access to judicial records that underlies that statute also warrant their release. The Associated Press submitted requests in January and February of 2008 for communications between then Justice Elliot Maynard of this Court and Donald E. Blankenship (and his associates), from the period in which Justice Maynard was campaigning for reelection. During that same time period, the company Mr. Blankenship is the CEO of, Massey Energy Co.,[2] had an appeal pending before this Court. (Order of Sept.16, 2008 at 2-3).

The West Virginia Freedom of Information Act (hereinafter, "FOIA") requires that records of the judicial department be made accessible to the public, including the news media. The publicly available records are defined as "any writing containing information relating to the conduct of the public's business, prepared, owned and retained by a public body." W.Va. Code § 29B-1-2(4). Even where the statute protects personal information, it makes an exception for

[2] Massey Energy is the largest coal producer in the Central Appalachian region, according to its company profile. It operates 16 mines in West Virginia. *See* http://www.masseyenergyco.com/about/operations.shtml. In 2008, according to its most recent annual report filed with the Securities and Exchange Commission, Massey employed almost 7,000 people. Also in West Virginia, Massey Energy owns natural gas drilling rights on about 27,000 acres.

personal information that must be released because the public interest requires it. W.Va. Code § 29B-1-4(a)(2).

The requested records — effectively, communications between the court and a party before it — constitute both public records and court records that must be disclosed to the requester. The public interest in disclosure is significant, as these records will shed light on a judicial officer's campaign for reelection; the Court's thinking as communicated, ex parte, to a party immediately following the oral arguments of the party's case; and the effectiveness of the state's rule on judicial recusals. Therefore, the Court should release the requested records because they fall within the provisions of West Virginia's Freedom of Information Act and because the public interest in the release of the records is significant enough to overcome any arguments against the need to keep the records private.

ARGUMENT

A. The requested e-mail messages are public records under West Virginia's Freedom of Information Act and should be released.

The e-mail messages the AP requested fit within the open records statute's definition of public records and are not covered by an exemption that would allow this Court to withhold the records. West Virginia's FOIA is an expansive statute that has been liberally interpreted by this Court. *See Daily Gazette Company, Inc. v. Withrow,* 177 W. Va. 110, 115; 350 S.E.2d 738, 748 (1986). Unlike many states, West Virginia's FOIA applies to the "judicial department" and makes its records public, with limited exceptions. W.Va. Code § 29B-1-3(1); 29B-1-2(3). In turn, the statute defines public records as, "any writing containing information relating to the conduct of the public's business, prepared, owned and retained by a public body." W.Va. Code § 29B-1-2(4). Relying on this statute, The Associated Press requested communications, most notably e-mail messages, between Justice Maynard and Mr. Blankenship, the CEO and chairman

of Massey Energy and A.T. Massey Coal, in January 2008. (Order of Sept.16, 2008 at 2-3). The request targeted communications from January 1, 2006 through February 28, 2008. *Id.* During that period Justice Maynard was campaigning for reelection and *Caperton v. A.T. Massey Coal Inc.* was pending before this Court. 2008 WL 918444 (W. Va. 2008) *cert. granted*, 129 S.Ct. 593 (U.S. Nov. 14, 2008) (08-22). The *Caperton* case is now pending before the U.S. Supreme Court on the question of whether it is a constitutional due process violation for a judge to refuse to recuse himself from a case when a party has made substantial contributions to his election campaign. *Id.* In the present case, the trial court eventually granted the AP's request in part, deciding several of the requested communications were "public records" within the meaning of FOIA while several others were not. (Order of Sept.16, 2008). However, this Court should grant AP's request in full because the lower court incorrectly interpreted the definition of "public record" to exclude certain communications.

1. The e-mail messages are writings related to the conduct of the public's business, as defined by West Virginia's FOIA.

The communications between Justice Maynard and Mr. Blankenship are without question writings "relating to the conduct of the public's business." W.Va. Code § 29B-1-2(4). The trial court divided the e-mail messages into two categories — those "regarding" and "concerning" Justice Maynard's campaign for re-election and those that did not pertain to it. (Order of Sept.16, 2008 at 13). The former constituted public records in the trial court's opinion, but the latter did not. This is a distinction without merit here. While the trial court is correct in holding that the conduct of the public's business includes communications that go to the method by which "people 'retain control over the instruments of the government they have created,'" this is not an all-encompassing definition. (Order of Sept.16, 2008 at 13) (citation omitted). The statute does not require the public's business be *conducted* in the record at issue, only that the record *relate* to

the public's business. This is a much lower standard. The conduct of the public's business includes the methods by which the courts of the state engage in the fair and impartial administration of justice. The messages were communications between the head of a company that was a party to pending litigation and a state Supreme Court justice who was one of the ultimate arbitrators of that litigation's outcome. *Any* communication between two such individuals *relates* to how the Court conducted the public's business in the administration of justice. Because of his role in the case, it was not an option for Justice Maynard to have merely been communicating with Mr. Blankenship on a personal matter, having casual conversation; between the Court and a party there can never be such casual conduct. Every communication, every document relates to how the Court is administrating justice — the portion of the public's business that it carries out under West Virginia's system of government on behalf of all of the citizens of West Virginia.

The trial court said as much when it stated:

> It is important to note that had Justice Maynard not recused himself from the *Caperton* case, and other cases involving Massey, these e-mails would have been placed into the public's business by Caperton's Motion to Recuse and the public release of the photographs of Justice Maynard and Don Blankenship. Because the information contained within the e-mail communications would have shed light on the extent of Justice Maynard's relationship with Don Blankenship and whether or not that relationship may have affected or influenced Justice Maynard's decision-making in Massey cases, the public would have been entitled to that information.

(Order of Sept.16, 2008 at n.9).

2. The requested communications are public records regardless of Justice Maynard's decision later to recuse himself and are not exempt from disclosure as personal information.

The trial court held that Justice Maynard's decision to recuse himself somehow changed the nature of the e-mail communications from public records to records that now may be kept

secret. But the FOIA in no way provides for the nature of documents to be recategorized from public record to private record based on a recusal decision, particularly in a factual situation such as this. Justice Maynard's withdrawal came after oral arguments in the *Caperton* case, after he had a chance to shape the tenor of the arguments with his questions, after he had a chance to influence other members of this Court with his thinking on the issues, after he sent e-mail messages to Mr. Blankenship within hours of the arguments, and after he cast a vote in the case. Justice Maynard was conducting the public's business during all of those activities, including his communications with Mr. Blankenship. The effect of Justice Maynard's conduct did not end the moment he recused himself from the *Caperton* case — the effect is ongoing today even as the U.S. Supreme Court considers the federal constitutional implications of this state's recusal practices.

The Respondents argue that the communications are not public records because they do not constitute prohibited ex-parte communications under the Code of Judicial Ethics. (Resp't Br. at 11) ("[I]t is well settled that a judge's communications with even parties to litigation that does not concern pending or impending litigation is not prohibited"). But whether the communications were prohibited is not the core issue here. Unprohibited communications still fit within the expansive definition of writings related to the conduct of public's business under FOIA. Justice Maynard's contacts with Mr. Blankenship, including their travels together, created enough of an appearance of impropriety that the justice recused himself from the *Caperton* case. If the contacts and communications between the two were not at least tangentially related to the case — and thus also related to the administration of the public's business — then the recusal would have been unnecessary to remove the appearance or prevent the actual occurrence of impropriety.

Additionally, this Court has said, "The term 'public record' should not be manipulated to expand the exemptions to the State FOIA; instead, the burden of proof is upon the public body to show that one (or more) of the express exemptions applies to certain material in the document." *See Daily Gazette Co.,* 177 W. Va. at 115, 350 S.E.2d at 738. Here, the Respondent wants exactly that manipulation which this Court has deemed improper. Moreover, in *Daily Gazette Co.* this Court ordered the release of a litigation settlement document, which it held contained elements of both personal and official conduct. *Id.* The mingling of official and personal conduct did not change the public nature of the document, the Court held. *Id.* The analysis also applies to the e-mail messages at issue in this case to any extent that the requested messages mingle official and personal conduct. The requested records are thus public records that the Respondent has failed to show can be withheld under a state FOIA exemption.

The only exemption that the trial court considered as possibly applicable to the requested records is that protecting personal information. That provision in FOIA exempts:

> Information of a personal nature such as that kept in a personal, medical or similar file, if the public disclosure thereof would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance . . . .

W.Va. Code § 29B-1-4(a)(2). The court held the e-mail messages it ordered disclosed did not contain the type of information this exemption protects and that under that exemption nothing in the e-mail messages would constitute an unreasonable invasion of privacy. (Order of Sept.16, 2008 at 15). This rationale is also applicable to the withheld e-mail messages. The messages apparently have links to online articles and make references to the linked articles on various Web sites. (Resp't Br. at 10, n. 10). Information disseminated widely online is inherently non-private information and cannot be withheld.

Were the Court to apply a different construction of the definition of “conduct of the public’s business,” then many types of communications would be outside the ambit of FOIA, to the detriment of the broad purpose and policy of access toward information that underlies the law. Scholars have warned about this, saying that too fine a line between personal and official communications “threatens to shield from disclosure e-mails that do not necessarily memorialize the performance of required government functions but that could nevertheless reveal official malfeasance, misfeasance, or nonfeasance.” Peter S. Kozinets, *Access to the e-mail records of public officials: Safeguarding the public’s right to know,* 25 Comm. Law. 17 (2007). West Virginia should not fall into this trap. Thus, the Court must release the requested records because they are writings related to the conduct of the public’s business by a public official of the judicial department. Such records clearly fall within the bounds of the state’s FOIA law and are not exempt under any provisions, as the lower court partially recognized.

B. Disclosure of the e-mail message is in the public interest when the policies underlying FOIA, the First Amendment, and the common law right of access to judicial records are considered.

West Virginia’s legislature has recognized the importance of the public interest in access to records in the policy underlying FOIA and in the test which allows personal information to be released when there is a significant public interest in records. *See* W.Va. Code § 29B-1-4(a)(2) (allowing for the weighing of public interest for release). Here, that public interest is parallel to the public purpose in access to judicial records and proceedings under the First Amendment and common law. The communications at issue are akin to court records that are deemed public under the First Amendment. *See e.g. Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very

nature of a criminal trial under our system of justice); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249 (4th Cir. 1988) (finding a rigorous First Amendment standard applies to access of court records in civil cases); *The Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93 (2nd Cir. 2004) ("As the plaintiffs and amici emphasized both in their briefs and at oral argument, the ability of the public and press to attend civil and criminal cases would be merely theoretical if the information provided by docket sheets were inaccessible."); *NBC Subsidiary, Inc. v. Superior Court*, 980 P.2d 337, 358 (Cal. 1999) "[A]lthough the high court's opinions in *Richmond Newspapers, Globe, Press-Enterprise I, and Press-Enterprise II* all arose in the criminal context, the reasoning of these decisions suggests that the First Amendment right of access extends beyond the context of criminal proceedings and encompasses civil proceedings as well."); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1066 (3rd Cir. 1984) ("However, an examination of the authority on which the Supreme Court relied in these cases reveals that the public's right of access to civil trials and records is as well established as that of criminal proceedings and records."); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983) ("Simply showing that the information would harm the company's reputation is not sufficient to overcome the strong common law presumption in favor of public access to court proceedings and records."). Likewise the public interest in access to judicial records under the common law support the release of the requested e-mail messages. *Nixon v. Warner Communications, Inc.,* 435 U.S. 589, 597 (1978) (recognizing a common law right of access to judicial records). At minimum, the public policy and common law basis for the First Amendment right of access extend to accessing the types of judicial records the AP has requested. The First Amendment itself also extends to these records as they are properly thought of as court records related to the underlying *Caperton* case. Moreover, the failure of a justice to treat the requested e-mail

messages as court records should not restrict this Court's analysis on the constitutional right of access to those messages under the First Amendment.

1. The nature of these communications as de facto judicial records tilts the public interest in favor of disclosure.

Any time a judge communicates with a party to a pending case, and then subsequently recuses himself from the case because of his personal relationship, a court should see that as a highly questionable ex parte communication. *See People v. Lester*, 2002 WL 553844, *1 (N.Y.Just.Ct. 2002) ("The Code of Judicial Conduct and the Uniform Court Rules for all the trial courts proscribe ex parte or unilateral communications with the Court. These rules are in effect to avoid prejudice to one side because the other has 'the ear of the Court'. Our adversarial system of jurisprudence cannot co-exist with actual or apparent conflicts of interest; bias and prejudice; bribery and deceit or other below the belt tactics by one side over the other.").

Any record of those communications should be treated as part of the court record so that the parties and the public may fully understand the extent to which the judge's personal relationship was at play in the case. It is the common practice of judges, as recognized in a variety of cases, court rules, and federal agency regulations, when receiving questionable communications to enter them into the relevant case's docket and file them with the court clerk. *See e.g. Moran v. Guerreiro*, 37 P.3d 603, 618, n.14 (Haw. Ct. App.2001) ("We gather from a review of the record in this case that it is a circuit court administrative practice that when ex parte communications are received in a judge's chambers, the communications are routinely filed in the back portion of the case folders."); *Warns v. Barker,* 2006 WL 436189, *4 (N.D. Cal. 2006) (Holding with regard to ex parte communications outside the statutorily prescribed process, "[I]f such a communication is received by the judge, he should announce on the record its receipt to all parties prior to sentencing. If he intends to wholly disregard such communication

he should so state on the record."); Cook County, Ill. Circuit Court Rule 17.2 ("If an ex parte communication in connection with any matter pending before the judge occurs, the judge shall disclose the circumstances and substance of said communication to all parties of record at the next hearing in open court and, if a court reporter is available, on the record."); 38 C.F.R. § 18b.95 (2008) ("A prohibited communication in writing received by the Secretary, the reviewing authority, or by the presiding officer, shall be made public by placing it in the correspondence file of the docket in the case and will not be considered as part of the record for decision."). These examples provide instruction which this Court can rely on in interpreting its own law, as the trial court did in this instance where West Virginia law was not clear.

When communications are filed in the court record, the communications are then presumptively public under the standards set out by the common law and First Amendment. *See FTC v. Standard Fin. Management Corp.,* 830 F.2d 404, 409 (1st Cir. 1987) ("[W]e rule that relevant documents which are submitted to, and accepted by, a court of competent jurisdiction in the course of the adjudicatory proceedings, become documents to which the presumption of public access applies."). Here, Justice Maynard's failure to act within the bounds of the profession's common practice by disclosing his personal relationship and the communications does not change the question of access to the communications once they have been made and he has had the opportunity to influence the Court's judicial process. Keeping these ex parte communications secret compounds the problem and highlights the impropriety in this instance.

Moreover, the Court is in a unique position to exercise its discretion to release its own records in this case. This case is not like one in which a court is ordering an agency of the executive branch to release information. Here, the records and the interpretation of the law which governs access to them are both within the hands of this Court. The Court has supervisory power

over its own records and can order their release at will. In *In re Knight Pub. Co.*, 743 F.2d 231, 235 (4th Cir. 1984) the court outlined the factors for courts to consider when releasing its records. "The trial court has supervisory power over its own records and may, in its discretion, seal documents if the public's right of access is outweighed by competing interests. The Supreme Court has suggested that the factors to be weighed in the balancing test include whether the records are sought for improper purposes, such as promoting public scandals or unfairly gaining a business advantage; whether release would enhance the public's understanding of an important historical event; and whether the public has already had access to the information contained in the records." *Id*. Given that the e-mail messages would shed substantial light on the activities of this Court, its exercise of judicial power in previous cases of great significance to the public, and contribute to a greater public understanding of the controversy at hand, the Court should use its discretion, at minimum, to order the release of its own records.

2. The public interest and the public's faith in the judicial system will benefit from disclosure of the communications.

A right of public access to civil court records under the First Amendment has been recognized by a multitude of federal appellate courts. *See Hartford Courant Co.,* 380 F.3d at 86, 93; *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.,* 998 F.2d 157, 165 (3d Cir. 1993). This right of access stems from the application of the logic and experience test set out by the U.S. Supreme Court that requires a court consider whether this information should logically be public and if experience has dictated it is public. *See Press-Enterprise Co. v. Superior Court,* 478 U.S. 1, 9 (1986) ("If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches.") This is true regardless of whether the Court is balancing the public interest in disclosure under the statutory scheme regarding personal information or considering whether these are public records under the policy

of West Virginia's FOIA. A communication between a judge and a party cannot be withheld from the public if there is to be trust in the judicial system, if the policy underlying the state's open records laws is to be served, and if the public interest in the fair and impartial administration of justice tends toward such disclosure. *See* Paul J. Nyden, *Elected Judges, Americans doubt impartiality claims, poll finds,* Charleston Gazette, Feb. 23, 2009 at 5A ("Seven of every 10 people polled believe judges are likely to be biased in cases involving major campaign supporters. Nearly 85 percent believe those judges should step down from hearing those cases.").

Indeed, it is clear not only that the communications are of great interest to the public but also that their disclosure is in the public interest. Massey is a large employer in West Virginia and responsible for a substantial amount of the state's economy. News stories about Justice Maynard's personal relationship with Mr. Blankenship have appeared in news outlets locally and across the country. *See* Andrew Clevenger*, E-mails Maynard sent to Massey exec released,* Charleston Gazette, Sept. 18, 2008 at 1A; Maddy Sauer, *Hard-Charging CEO Rakes in Millions, Blankenship Earned More Than $23 Million in 2007* ABC News, Apr. 22, 2008, http://www.abcnews.go.com/Blotter/story?id=4704680&page=1; Lawrence Messina, *W.Va. small-town nature cited in Blankenship, Maynard controversy State's successful people bound to have interactions, some say,* Charleston Daily Mail, Jan. 17, 2008 at 10A ("The release of vacation photos, showing the two men in Monaco during the summer of 2006, has Maynard facing allegations that their relationship has swayed him in a $76.3 million case before the court"); Adam Liptak, *West Virginia Judge Steps Out of Case Involving a Travel Companion,* The New York Times, Jan. 19, 2008 at A15; Adam Liptak, *Trip to Europe has Repercussion in West Virginia,* The New York Times, Jan. 15, 2008 at A12.

It is not this country's tradition to administer justice in secret. To do so runs afoul of the very foundations on which the United States government was built. Justice is administered in public, in the light of day to ensure the government is acting on behalf of the people it represents. When individuals are allowed to secretly influence that administration of justice with money, with favors, or with friendship, the foundations of democracy weaken. Even the appearance that this may be occurring is offensive to basic notions of justice. Concerns about such appearances and actual improprieties are what form the basis of ethical codes such as the American Bar Association's Model Judicial Conduct (and this state's counterpart), campaign finance laws such as the Bipartisan Campaign Reform Act (Mc-Cain Feingold), 2 U.S.C. § 434, the Hatch Act, 5 U.S.C. §§ 7321-7326 and the Ethics in Government Act, 5 U.S.C. § 501 et seq., that requires members of Congress to disclose the most intimate details of their personal finances. These same ethical concerns are why the requested e-mail messages in this case must be released.

Moreover, the U.S. Supreme Court is now debating questions of constitutional importance surrounding the due process guarantees in the *Caperton* case. 2008 WL 918444. But this is not the only case that involves Massey Energy or its various corporate incarnations that has come or will come before this Court. For the appearance of propriety in future cases, it is in the interest of all parties and the public for this Court to operate transparently with regard to its past actions toward Massey. Thus, for the public's faith in the West Virginia judicial system to not be further undermined, the records must be released.

CONCLUSION

The requested e-mail communications between Justice Maynard and Mr. Blankenship should be released in full. Not only does the extreme public interest demand this, so does the West Virginia Freedom of Information Act and the First Amendment. Nothing in the e-mail messages is of a personal nature that would warrant protection — the e-mail messages instead amount to the conduct of the public's business, and thus the statutory and public policy standards for releasing the messages have been met. To allow these communications to remain secret will adversely affect this Court's ability to govern effectively, potentially undermine the First Amendment rights of West Virginia's citizens, and run afoul of this state's statutes. The AP's request for these records should be fulfilled in full.

Respectfully submitted,

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Terri S. Baur, Esq. (WV # 9495)
ACLU of West Virginia Foundation
405 Capitol Street, Suite 507
P.O. Box 3952
Charleston, WV 25339
Telephone (304) 345-9246
Counsel for Amici

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing *amici curiae* brief was sent by United States first class mail, postage prepaid, on this 28th day of April 2009, to each of the following:

Rudolph L. DiTrapano, Esq.
Sean P. McGinley, Esq.
DiTrapano, Barrett, & DiPiero, PLLC
604 Virginia Street, East
Charleston, WV 25301

Patrick C. McGinley, Esq.
737 South Hills Drive
Morgantown, WV 26505

Ancil G. Ramey Esq.
William D. Wilmoth, Esq.
Steptoe & Johnson, PLLC
P.O. Box 1588
Charleston, WV 25326

Robert P. Fitzsimmons, Esq.
1609 Warwood Ave.
Wheeling, WV 26003

Daniel J. Guida, Esq.
3374 Main Street
Weirton, WV 26062

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Terri S. Baur