

**Exhibit 1**

**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS** **DO NOT REMOVE  
FROM FILE**

**STATE OF WEST VIRGINIA ex rel.  
DARRELL V. McGRAW, JR., in  
his official capacity as the Attorney  
General for the State of West  
Virginia,**

**Case No. 011873**

*Petitioner,*

**v.**

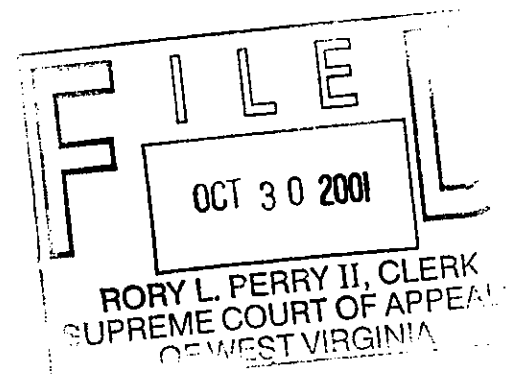
**GREGORY BURTON, Secretary  
of the West Virginia Department of  
Administration, and NICHELLE  
PERKINS, Director of Personnel  
of the Department of Administration,**

*Respondents,*

**BRIEF OF THE AFFILIATED CONSTRUCTION  
TRADES FOUNDATION AS  
AN AMICUS CURIAE**

Presented by:

Vincent Trivelli #8015  
Stuart Calwell #0595  
The Law Offices of Stuart Calwell, PLLC  
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Suite 607  
Charleston, WV 25301  
(304) 343-432



**Table of Points and Authorities**

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## I. Introduction

As referenced in the attached *Motion for Leave of the Court to File a Brief as an Amicus Curiae*, the Affiliated Construction Trades Foundation, a division of the Building and Construction Trades Council, AFL-CIO (ACT) is a labor organization that represents thousands of construction workers in West Virginia. ACT is asking this Court leave to file this *Memorandum* in support of the *Petition for Writs of Mandamus and Quo Warranto* filed by Darrell V. McGraw, Jr., in his official capacity as Attorney General for the State of West Virginia. This is ACT's *Brief as Amicus Curiae* conditionally filed pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure.

## II. Argument

The fundamental reason for the filing of this Brief, is to support the *Petition of the Attorney General* in this matter, particularly with regard to the importance of re-establishing in this State the input and expertise of an elected Attorney General into critical legal decisions.

As this Court is aware, on May 20, 1999, then Commissioner of the Bureau of Employment Programs, William F. Vieweg, announced his decision to dismiss a series of lawsuits and causes of action then pending against a number of coal companies for the unpaid workers' compensation premiums, penalties and interest totaling approximately \$200 million. In response to that action ACT filed a *Writ of Prohibition/Mandamus* before this Court in an effort to prevent the former Commissioner from implementing his decision. This Court denied ACT's Writ on July 19, 1999. State ex rel. the Affiliated Construction Trades Foundation v. William F. Vieweg et al., 205 W. Va. 687, 520 S.E.2d 854, (1999)).

In the *Response* of the Attorney General filed with this Court during that proceeding, the Attorney General urged this Court to prohibit Commissioner Vieweg from dismissing the lawsuits in question. In addition he stated the following:

The instant case is a good example of what happens when a state's Attorney General is not free to fulfill his or her historical role, which role was cogently summarized by then-New York Attorney General Louis J. Lefkowitz:

[A]n elected Attorney General has a measure of independence and a sense of personal and direct responsibility to the public. The elected official has a natural and impelling desire to be creative and to exercise broader initiative in the service to the public. He is free of the fear of dismissal by a superior official should he exercise contrary independent judgment. He is in the best position to render maximum service to the People and impartial advice to the Governor, the Legislature and State departments and agencies, He can appear in Court without fear or favor – an attorney in the fullest and finest sense of the word. Louis J. Lefkowitz Position Paper of Louis J. Lefkowitz, Attorney General to Constitutional Convention on the Executive Branch (June 1, 1967, Albany, N.Y.)

In this case, there was no “input and expertise of the State’s chief legal officer” and no “consideration of the impact of decisions on these issues upon a wide variety of government agencies.” W. Va. Division of Environmental Protection v. Kingwood Coal Co., 200 W.Va. 735, 755 490 S.E.2d 823,m 844 (1997)

The Attorney General also stated that the lack of input from Attorney General, who developed the underlying cases, permitted the public to reasonably question the decision of the former Commissioner to dismiss the lawsuits and causes action.

As detailed in the attached Motion, on October 23, 2001, Chief Justice Booker T. Stephens of the Circuit Court of McDowell County issued an Order in the case of West Virginia Bureau of Employment Programs, Workers’ Compensation Division v. Bluestone Coal Corporation et al., (Civil Action No. 96-C-323-S), which held that by

dismissing the lawsuits and causes of action against the coal defendants, the former Commissioner violated his fiduciary duty – in essence confirming the questions of the public referenced by the Attorney General.

As stated above, it is clear that the former Commissioner did not turn to the Office of Attorney General for advice concerning the dismissal of the lawsuits. The record in Bluestone case makes it additionally clear that in fact he did not even turn to the attorneys who had been hired to prosecute the cases at issue. Instead he turned to attorneys of his own choosing<sup>1</sup>, failed to provide those attorneys with the facts of the cases in question, was essentially unaware of the facts of the underlying case and hired an attorney in a manner that bypassed the Office of the Attorney General to defend his actions before this Court. In turn, Mr. Vieweg, relied on the opinion of these attorneys in justifying his decision to dismiss the lawsuits and causes of action in question. This decision, was at odds with the position of the Attorney General.

It is this type of situation that the framers of the Constitution of the State of West Virginia sought to avoid when they provided for a diffusion of executive power by the election of independent Attorney General<sup>2</sup>. It is precisely this type of situation that allows the Attorney General to, as stated by the Attorney General, “exercise detached and

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<sup>1</sup> The record in the Bluestone case reflects that on June 25, 1999, the BEP hired Mr. Ancil Ramey, Esq. to defend the actions of Mr. Vieweg before this Court in State ex rel. the Affiliated Construction Trades Foundation v. William F. Vieweg et al. The record in the Bluestone case also reflects that Mr. Ramey's employer, Steptoe & Johnson, has represented, in other matters, at least two of the coal defendants sought to be dismissed as a result of the actions of Mr. Vieweg.

<sup>2</sup> Justice Workman stated with regard to the BEP's agreement with outside counsel for the prosecution of the cases at issue, “Indeed, it appears that these payments for recommendations [regarding whether administrative and/or judicial action should be taken against one or more entities] bolster the Attorney General's argument that the potential for harm and damage to the State when the power to coordinate the State's legal services is stripped from the Attorney General is immense.” (*Id.*, Concurring Opinion of Justice Workman, fnt.6)

independent legal judgment as a moderating influence on the actions of others.”  
(*Memorandum in Support of Petition for Writs of Mandamus and Quo Warranto*, page 2).

### III. Conclusion

Wherefore, for the reasons stated, ACT respectfully requests entry of an order granting the Petition for Writs of Mandamus and Quo Warranto sought by the Attorney General of the State of West Virginia.

Respectfully submitted this 29<sup>th</sup> day of October, 2001.

The Affiliated Construction Trades  
Foundation, a division of the West  
Virginia State Building  
and Construction Trades Council,  
AFL-CIO,

By Counsel



Vincent Trivelli (WV Bar #8015)  
Stuart Calwell (WV Bar #0595)  
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405 Capitol Street  
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(304) 343-4323

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CERTIFICATE OF SERVICE

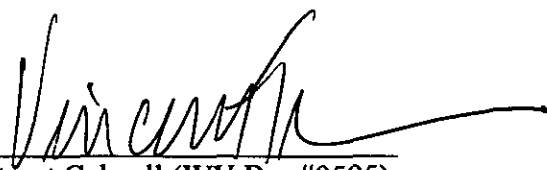
The undersigned counsel for the Affiliated Construction Trades Foundation, a division of the West Virginia State Building and Construction Trades Council, AFL-CIO hereby certifies that service of the foregoing *Motion for Leave of the Court to File a Brief as an Amicus Curiae* has been made on this 29th day of October, 2001, via first class, U.S. Mail, postage prepaid to the following:

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Stuart Calwell (WV Bar #0595)  
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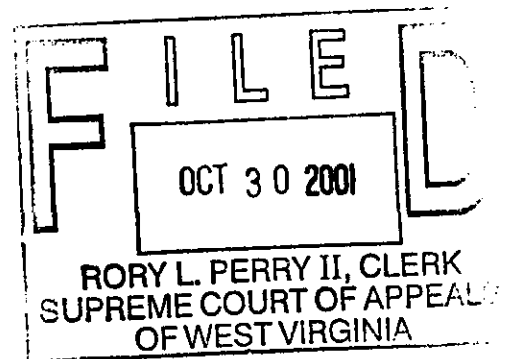
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of the Department of Administration,**



*Respondents,*

**MOTION FOR LEAVE OF THE COURT TO FILE A BRIEF AS  
AN *AMICUS CURIAE***

**TO: THE HONORABLE JUSTICES OF THE WEST VIRGINIA  
SUPREME COURT OF APPEALS**

Now comes the Affiliated Construction Trades Foundation, a division of the West Virginia State Building and Construction Trades Council, AFL-CIO ("ACT"), by counsel, Vincent Trivelli and Stuart Calwell, Law Offices of Stuart Calwell, PLLC, pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure, requests leave of this Court to file an *amicus curiae* brief in this matter, and in support thereof states the following<sup>1</sup>:

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<sup>1</sup> Rule 19 of the West Virginia Rules of Appellate Procedure states that any *amicus curiae* "shall file its brief within the time allowed to the party whose position as to affirmance or reversal the brief will support

1. ACT is a labor organization that represents thousands of construction workers who are citizens of West Virginia.

2. On July 19, 1999, this Court denied a *Writ of Prohibition/Mandamus* brought by ACT in an attempt to prevent former Commissioner of Employment Programs, William F. Vieweg, from dismissing a series of lawsuits which were then pending against various coal companies to recover workers' compensation premium taxes, interest and penalties totaling approximately \$200 million. (State ex rel. the Affiliated Construction Trades Foundation v. William F. Vieweg et al., 205 W. Va. 687, 520, S.E.2d 854, (1999)).

3. In the 1999 proceeding before this Court in said matter, the Attorney General of the State of West Virginia filed a *Response*, which opposed the decision of the former Commissioner to dismiss the lawsuits against the various coal companies and urged this Court to prohibit the former Commissioner of Employment Programs from dismissing the civil actions in question. (*Response of Attorney General*, June 7, 1999, Case No. 991510).

4. In addition, in the 1999 proceeding, the Attorney General raised the constitutional issues that are the subject of the instant case. At that point in time, this Court declined to review this issue in that it was "not necessary to the disposition of this case." (ACT v. Vieweg supra, ftnt 1)

5. In the same 1999 proceeding, the former Commissioner was represented by private counsel hired by the BEP in a manner that bypassed the Attorney General of the State of West Virginia. Unlike the Office of the Attorney General, said private

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unless the Court for cause shown shall grant leave for later filing." In that this Brief supports the Petition for Writs previously filed in this matter and as a practical matter ACT requests that this Court grant it leave for filing at this time.

counsel defended the decision of the former-Commissioner to dismiss the lawsuits against the various coal companies and urged this Court to deny ACT's *Writ of Prohibition/Mandamus*.

6. Following the decision by this Court to deny ACT's *Writ of Prohibition/Mandamus*, ACT moved for and was granted status as an Intervenor in a case currently pending in the Circuit Court of the County of McDowell entitled, West Virginia Bureau of Employment Programs, Workers' Compensation Division v. Bluestone Coal Corporation et al., (Civil Action No. 96-C-323-S). Said case was one of the lawsuits to be dismissed by Commissioner Vieweg.

7. As such, ACT moved the Circuit Court of the County Of McDowell, Chief Judge Booker T. Stephens, to grant its *Motion for Declaratory Judgment* and declare that the actions of a former Commissioner of the Bureau of Employment Programs breached his fiduciary duty when he dismissed a number of lawsuits, including the Bluestone case, which were then pending against various coal companies to recover workers compensation premium taxes, interest and penalties totaling approximately \$200 million.

8. On October 23, 2001, Chief Judge Stephens granted ACT's *Motion for Declaratory Judgment*, finding that the former Commissioner breached his fiduciary duty as a result of dismissing the lawsuits against the coal companies and had dismissed the Bluestone case, which was considered a "test case" for the other cases then pending, "arbitrarily and capriciously" and "without substantial cause, irresponsibly, and without any basis, in violation of his statutory and common law duties of fiduciary duty."

9. During the time period between ACT's 1999 *Writ of Prohibition/Mandamus*

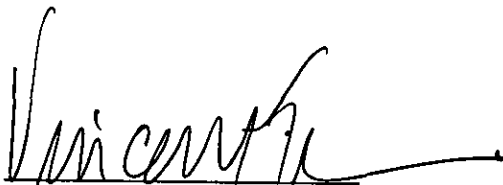
and Judge Stephens' recent Order, the Workers' Compensation Fund has been deprived of the opportunity to collection hundreds of millions of dollars and ACT has expended considerable efforts in prosecuting its Intervention in the Bluestone case.

10. In that the matter before this Court involves constitutional issues that have impacted and are impacting on ACT , and have the potential to impact others in the future, ACT has a direct interest in these issues. An amicus brief by ACT would be instructive to this Court in that it would provide a prospective of an entity that has been involved in a matter, concerning public funds and the fiduciary duties of high government officials, in which private counsel, hired in a manner that bypassed the Office of the Attorney General, provided the representation and legal advice that was in direct contradiction to that of the Attorney General.

WHEREFORE, the Affiliated Construction Trades Foundation requests entry of an order granting leave of this Court to file the *Brief as Amicus Curiae* attached hereto as exhibit 1.

The Affiliated Construction Trades Foundation, a  
division of the West Virginia State Building and  
Construction Trades Council, AFL-CIO

By Counsel.



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