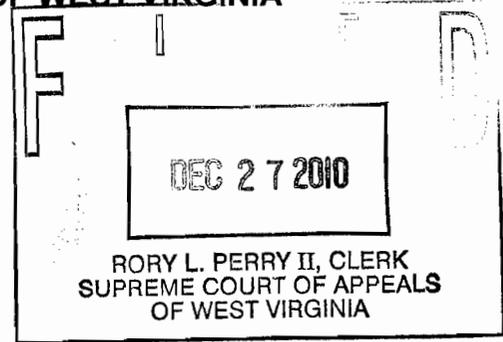


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**At Charleston**

Upon Original Jurisdiction



**STATE OF WEST VIRGINIA  
ex rel/ WEST VIRGINIA CITIZEN  
ACTION GROUP,**

**Petitioner,**

**v.**

**No. 101494**

**EARL RAY TOMBLIN,  
President of the West Virginia Senate,  
RICHARD THOMPSON,  
Speaker of the West Virginia House of  
Delegates, and,  
NATALIE E. TENNANT,  
Secretary of State of West Virginia**

**Respondents.**

**AND**

**STATE OF WEST VIRGINIA  
ex rel/ THORNTON COOPER,**

**Petitioner,**

**v.**

**No. 10-4004**

**EARL RAY TOMBLIN,  
President of the West Virginia Senate,  
RICHARD THOMPSON,  
Speaker of the West Virginia House of  
Delegates, and,  
NATALIE E. TENNANT,  
Secretary of State of West Virginia**

**Respondents.**

TABLE OF CONTENTS

SECTION NO.	PAGE
I. INTRODUCTION.....	1
II. FACTUAL BACKGROUND.....	2
III. ARGUMENT.....	2
A. A special election must be held to fill the vacancy for the Office of Governor .....	2
1. The clear and unambiguous terms of Article VII, Section 16 of the West Virginia Constitution call for a new, special election when a vacancy occurs before three years have expired in the Governor's term.....	2
2. The provisions of West Virginia Election Code Section 3-10-2 that allow a special election to be delayed until 2012, or not held at all, are unconstitutional, to the extent that they permit a result that is contrary to the clear terms of the West Virginia Constitution.....	4
IV. CONCLUSION.....	8

## TABLE OF AUTHORITY

<b>CASES</b>	<b>Page No.</b>
<b>West Virginia Supreme Court</b>	
<i>Appalachian Power Company, etc. v. The County Court of Mercer County, etc., et al.</i> , 146 W. Va. 118 (1961).....	7
<i>C. Donald Robertson, et al. v. Lewis A. Hatcher, et al.</i> , 148 W. Va. 239 (1964).....	7
<i>Chesapeake and Ohio River Co. v. Miller</i> , 19 W. Va. 408 (1882).....	6
<i>Harmison v. Ballot Commissioners</i> , 45 W. Va. 179, 181 (1898).....	4, 6, 7
<i>State ex rel. County Court of Marion County, A Corporation v. Joan E. Demus, Clerk,</i> <i>etc.</i> , 148 W. Va. 398 (1964).....	7
<i>State v. Ellison</i> , 49 W. Va. 70 (1901).....	3
<i>State ex rel. Morgan v. O'Brien</i> , 134 W. Va. 1 (1948).....	6

<b>United States Supreme Court</b>	
<i>Lake County v. Rollins</i> , 130 U.S. 662 (1889).....	3, 5, 6

<b>CONSTITUTIONAL PROVISIONS</b>	<b>Page</b>
<b>No.</b>	
<i>Article VII, Section 16 of the West Virginia Constitution</i> .....	2, 3, 4, 6, 8

<b>STATUTES</b>	<b>Page</b>
<b>No.</b>	
West Virginia Code § 3-10-2.....	2, 4, 5, 6, 8

# **AMICUS BRIEF OF GLEN B. GAINER III, WEST VIRGINIA STATE AUDITOR**

## **I. INTRODUCTION**

Glen B. Gainer, III, the Auditor of the State of West Virginia ("Auditor"), by and through his legal counsel, respectfully submits this Amicus Brief in connection with this Court's consideration of the West Virginia Citizen's Action Group ("WVCAG") Petition for Mandamus, filed on November 19, 2010. As an elected officer of the State of West Virginia, the Auditor is filing this amicus brief as a matter of right under Rule 30 of the West Virginia Rules of Appellate Procedure. (W. Va. R.A.P., Rule 30 (2010)). No party, other than the Auditor and his legal counsel, has assisted with or contributed to the preparation of this brief.

The Auditor avers that, as an elected officer of the State of West Virginia, he has sworn in his oath of office to unwaveringly uphold the mandates of the West Virginia Constitution. The Auditor avers that, pursuant to the West Virginia Constitution, a special election to fill the vacant gubernatorial position is necessary as soon as practicably possible. The Auditor further submits that any statute which contradicts the clear terms of the West Virginia Constitution, or allows the clear terms of the constitution to be circumvented, is unconstitutional and therefore void.

Because the plain and unambiguous provisions of the West Virginia Constitution are at risk of being disregarded, the Auditor respectfully submits that this Court must grant the Petition for Mandamus and order Respondents to hold a special election for the position of Governor as soon as this Court deems proper.

## II. FACTUAL BACKGROUND

In the matter presently before this Court, the facts indicate that former Governor Joe Manchin III resigned from the office of Governor of West Virginia on November 15, 2010, after being elected to serve the remainder of the unexpired term of the late Senator Robert C. Byrd. One day later, on November 16, 2010, Senate President Earl Ray Tomblin ("President Tomblin") took the oath of office for the office of Governor. Under the apparent authority of West Virginia Election Code Section 3-10-2, President Tomblin intends to stay in the office of Governor, while still being Senate President, until 2012 when the next scheduled election is to be held.

On November 19, 2010, The WVCAG filed a Petition for a Writ of Mandamus in this Court. WVCAG seeks, through its Petition for Mandamus, that this Court order Respondents, named above, to hold a special election to fill the office of Governor as soon as an election can practicably be held, pursuant to Article VII, Section 16, of the West Virginia Constitution.

## III. ARGUMENT

### **A. A special election must be held to fill the vacancy for the Office of Governor.**

**1. The clear and unambiguous terms of Article VII, Section 16 of the West Virginia Constitution call for a new, special election when a vacancy occurs before three years have expired in the Governor's term.**

According to Article VII, §16 of the Constitution of the State of West Virginia,

"In case of the death, conviction on impeachment, failure to qualify, resignation, or other disability of the governor, the president of the senate shall act as governor until the vacancy is filled, or the disability removed... *Whenever a*

*vacancy shall occur in the office of governor before the first three years of the term shall have expired, a new election for governor shall take place to fill the vacancy.” (W. Va. Const. Art. VII, §16, emphasis added)*

From a logical, reasoned reading of this provision, it seems obvious that when a governor passes away, is impeached, fails to qualify, resigns, or is otherwise disabled, the president of the senate shall act as governor until the vacancy is filled. Further, this section states that when the gubernatorial vacancy occurs before the first three years of the term of the governor have expired, a new election for governor must take place to fill the vacancy. If the vacancy occurs with less than one year of the term of the governor, then the senate president acts as governor until the next scheduled election. These provisions of the state constitution are clear, plain, and unambiguous.

The United States Supreme Court has long held that “...when the text of a constitutional provision is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument.” (*Lake County v. Rollins*, 130 U.S. 662 (1889)). This Court has ruled similarly, holding “When the text of a constitutional provision is plain and unambiguous, courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument itself.” (*State v. Ellison*, 49 W. Va. 70 (1901)).

In the matter presently before the Court, Joe Manchin III’s resignation created a vacancy in the Office of Governor with more than two (2) years remaining in the term. Article VII, Section 16 of the West Virginia Constitution clearly sets forth the procedure when such a gubernatorial vacancy occurs. Article VII, Section 16 states that “...Whenever a vacancy shall occur in the office of governor before the first three years

of the term shall have expired, a new election for governor shall take place to fill the vacancy.” (W. Va. Constitution, Article VII, Section 16).

It may be argued that the term “new election” is not defined in Article VII, Section 16. However, when the text is read as a whole, it is unmistakably clear that the framers of West Virginia’s Constitution intentionally differentiated between vacancies occurring with more than one year remaining in the governor’s term, and vacancies occurring with less than one year remaining in the governor’s term. Logically, the framers would not have mandated a special provision calling for a “new” election if all vacancies were going to be filled via an “acting governor” until the next regular election. Allowing all vacancies to be remedied in the same fashion would be illogical and absurd. More importantly, allowing all gubernatorial vacancies to be filled by an acting governor until the next regular election would render the “new election” provision ineffectual and unnecessary.

If President Tomblin is permitted to serve over one (1) year as “acting governor,” Article VII, Section 16 will effectively be circumvented. As this Court has stated before, “...constitutional provisions are mandatory, not merely directory.” (*Harmison v. Ballot Commissioners*, 45 W.Va. 179, 181 (1898)). It is the position of the Auditor that the clear intent and mandates of Article VII, Section 16, of the West Virginia Constitution must be honored; a new, special election must be held in order to fill the vacancy in the Office of Governor as soon as possible.

**2. The provisions of West Virginia Election Code Section 3-10-2 that allow a special election to be delayed until 2012, or not held at all, are unconstitutional, to the extent that they permit a result**

**that is contrary to the clear terms of the West Virginia Constitution.**

West Virginia Code § 3-10-2 states the following, in pertinent part:

**§ 3-10-2. Vacancy in office of Governor.**

In case of the death, conviction or impeachment, failure to qualify, resignation or other disability of the Governor, the president of the senate shall act as Governor until the vacancy is filled or the disability removed; and if the president of the Senate, for any of the above-named causes, shall be or become incapable of performing the duties of Governor, the same shall devolve upon the speaker of the House of Delegates; and in all other cases where there is no one to act as Governor, one shall be chosen by the joint vote of the Legislature. Whenever a vacancy shall occur in the office of Governor before the first three years of the term shall have expired, a new election for Governor shall take place to fill the vacancy. If the vacancy shall occur more than thirty days next preceding a general election, the vacancy shall be filled at such election and the acting Governor for the time being shall issue a proclamation accordingly, which shall be published prior to such election as a Class II-0 legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code, and the publication area for such publication shall be each county of the state. But if it shall occur less than thirty days next preceding such general election, and more than one year before the expiration of the term, such acting Governor shall issue a proclamation, fixing a time for a special election to fill such vacancy, which shall be published as hereinbefore provided.

There has been much speculation concerning the interpretation of this statute, and those interpretations vary considerably. Some have argued that the authority of West Virginia Code § 3-10-2 is clearly valid, and that no election need be held until 2012. Conversely, others have argued that the statutory provisions in question are unconstitutional and that a special election is required to fill the vacancy as soon as possible. The statutory section in question here obviously can lead to any number of

results, depending on the interpretation of both of the pertinent statutory and constitutional provisions.

When considering the interpretation of constitutional provisions, the United States Supreme Court has unequivocally held that,

“If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it.” (*Lake County v. Rollins*, 130 U.S. 662 (1889)).

The West Virginia Supreme Court has adopted the above-quoted rule of law in a number of cases as well. (*Chesapeake and Ohio River Co. v. Miller*, 19 W. Va. 408 (1882), *State ex rel. Morgan v. O'Brien*, 134 W. Va. 1 (1948)). When comparing Section 3-10-2 with Article VII, Section 16, it becomes clear that Section 3-10-2 of the West Virginia Election Code adds provisions to the constitutional language. In fact, much of Section 3-10-2 mirrors exactly the language from Article VII, Section 16, but then goes on to add to the constitutional language with the “If the vacancy shall occur more than thirty days next preceding a general election, the vacancy shall be filled at such election...” provisions.

By some parties’ interpretations, Section 3-10-2 of the West Virginia Code apparently allows for no special election to be held, or one to be postponed until the natural term of the governor expires—despite the fact that the vacancy occurred with greater than one (1) year remaining in the governor’s term. That result, allowed by Section 3-10-2, cannot be reconciled with the provisions of Article VII, Section 16 of the West Virginia Constitution, which mandate that a new, special election must be held when a gubernatorial vacancy occurs with more than one (1) year remaining in

the governor's term. Adherence to the legislative additions to the constitution will lead to a result (an "acting governor" for more than 2 years) which conflicts with the original terms of the West Virginia Constitution. Therefore the provisions of Section 3-10-2 which allow the conflicting result should be ruled unconstitutional and void.

The Supreme Court of West Virginia has long held that it has not only the power, but the duty, to declare invalid and void any law that is contrary to either the Constitution of the United States or the Constitution of West Virginia. In fact, this Court has held that "the judiciary must hold an act contrary to the constitution as no law for any purpose" (*Harmison v. Ballot Commissioners*, 45 W.Va. 179,180 (1898)),<sup>1</sup> and that "[t]here can be no doubt of the power of this Court to declare invalid an act of the legislature that it finds in plain contravention of a provision of the constitution of this state." (*State ex rel. County Court of Marion County, A Corporation v. Joan E. Demus, Clerk, etc.*, 148 W. Va. 398 (1964)). This Court clearly has the power and duty to deem any act of the state legislature void if that act conflicts with a state constitutional provision.

The Auditor recognizes that the Legislature enjoys almost plenary power to enact laws as it so chooses. (*C. Donald Robertson, et al. v. Lewis A. Hatcher, et al.*, 148 W. Va. 239 (1964)). However, despite the Legislature's broad powers to enact law, if a legislative action oversteps constitutional bounds by clearly conflicting with constitutional provisions, it is the duty of this Court to declare such enactment unconstitutionally void. In fact, this Court has noted:

"We are mindful of the well-settled rule of law that courts are not warranted in declaring legislative enactments

---

<sup>1</sup> In this opinion, President Judge Brannon notes that the duty of the judiciary to hold any "act contrary to the constitution as no law for any purpose" is echoed in the decisions of at least eleven other states at the time, including Indiana, Wisconsin, Michigan, New York, Illinois, New Jersey, Massachusetts, Ohio, North Carolina, Nebraska, and Kansas. (*Harmison* at 180-181.)

unconstitutional unless the unconstitutionality is clearly manifest. *Farley v. Graney* (decided December 20, 1960) 146 W. Va. 22, 119 S.E.2d 833. On the other hand, when a legislative enactment is clearly unconstitutional, the duty of the Court is plain. 'Notwithstanding that an act of the Legislature was enacted with the best of motives and in the interest of good government, if such act clearly violates a provision of the West Virginia Constitution, it is the duty of this Court to declare the act void.'" (*Appalachian Power Company, etc. v. The County Court of Mercer County, etc., et al.*, 146 W. Va. 118 (1961)), (citing *State ex rel. Trent v. Sims*, 138 W. Va. 244 (1960)).

The Auditor doesn't question the good motives and interests of the legislators who enacted the Election Code provisions at issue, nor does the Auditor question the good motives and interests of those who seek office under its apparent authority. However, regardless of good intentions or motives, adherence to the Election Code provisions in this case produce a result that is in plain contravention of the West Virginia Constitution—namely Article VII, Section 16.

#### IV. CONCLUSION

In conclusion, the Auditor avers that a reasoned, logical reading of Article VII, Section 16 of the West Virginia Constitution leads to the clear conclusion that a new, special election to fill the vacant Governor position is necessary as soon as practicably possible. The Auditor further submits that Section 3-10-2 of the West Virginia Code cannot supersede that constitutional provision, and to the extent that Section 3-10-2 allows the election to be postponed or not held until the next general election, it should be deemed unconstitutionally void. Overall, the Auditor's position is accurately reflected

in the language of the West Virginia Supreme Court's opinion in the case *May v. Topping*, wherein this Court held that:

"A Constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. 'For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be derived at is that of the people, and it is not to be supposed that they have looked for any dark or obstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed.'" (*May v. Topping*, 65 W. Va. 656 (1906)).

As this Court noted, it is the people of West Virginia who give force to our constitution, and it is the people of West Virginia who have the most at stake here. The Auditor asserts that the people of West Virginia need and deserve a Governor, our state's highest executive, who has been elected under the irreducible authority of the clear terms of the West Virginia Constitution. The Auditor further submits that any statutory provision that allows those clear constitutional terms to be circumvented or contradicted should be deemed unconstitutionally void by this Court.

The Auditor prays that this Court will grant WVCAG's and/or Thornton Cooper's Petition for Mandamus, and thereby order Respondents to quickly call for and hold the new, special election for governor that the West Virginia Constitution and the people of West Virginia unambiguously mandate and desire.

Glen B. Gainer III

West Virginia State Auditor

By: \_\_\_\_\_



Lisa A. Hopkins, Esq.

General Counsel

West Virginia Bar # 6082

West Virginia State Auditor's Office

Capitol Complex, Bldg. 1, Room W-100

Charleston, West Virginia 25305

304-558-2251

**CERTIFICATE OF SERVICE**

I, Lisa Hopkins, General Counsel, do certify that I have served this **AMICUS BRIEF OF GLEN B. GAINER III, WEST VIRGINIA STATE AUDITOR** to the following parties on this 27th day of December, 2010, via United States mail or hand delivery at the addresses set forth below:

The Honorable Earl Ray Tomblin  
President, West Virginia Senate  
Room 227M, Building 1  
State Capitol Bldg.  
1900 Kanawha Boulevard, East  
Charleston, WV 25305

The Honorable Natalie E. Tennant  
West Virginia Secretary of State  
Room 157-K, Building 1  
State Capitol Building  
1900 Kanawha Boulevard, East  
Charleston, WV 25305

The Honorable Darrell V. McGraw  
West Virginia Attorney General  
Room E-26, Building 1  
State Capitol Building  
1900 Kanawha Boulevard, East  
Charleston, WV 25305

Anthony J. Majestro, Esq.  
Powell & Majestro, PLLC  
405 Capitol Street  
Suite P-1200  
Charleston, WV 25301

Kathryn Reed Bayless, Esq.  
Bayless Law Firm, PLLC  
1607 West Main Street  
Princeton, WV 24740

Mr. Thornton Cooper, Esq.  
3015 Ridgeview Drive  
South Charleston, WV 25303

The Hon. Rory L. Perry II  
West Virginia Supreme Court Clerk  
Building 1, Room E-317  
1900 Kanawha Blvd., East  
Charleston, WV 25305-0830



Lisa A. Hopkins, Esq.

General Counsel  
West Virginia Bar # 6082  
West Virginia State Auditor's Office  
Capitol Complex, Bldg. 1, Room W-100  
Charleston, West Virginia 25305  
304-558-2251