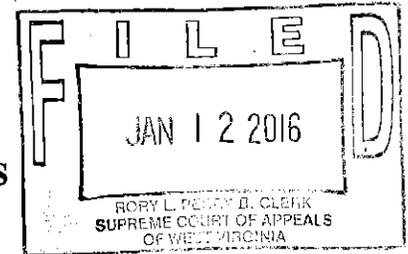


IN THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA



No. 16-0013

**STATE OF WEST VIRGINIA ex rel. BELINDA BIAFORE,**  
**in her capacity as Chair of the West Virginia State Democratic**  
**Executive Committee, and STEPHEN DAVIS, LINDA KLOOP,**  
**DAVID THOMPSON, LINDA PHILLIPS, STEPHEN EVANS,**  
**and PATRICIA BLEVINS, each individual, and in their capacity**  
**as the members of the West Virginia Democratic Executive**  
**Committee for the Ninth Senatorial District,**

**Petitioners,**

**v.**

**EARL RAY TOMBLIN, in his capacity as Governor**  
**of the State of West Virginia, and BEVERLY R. LUND,**  
**JUSTIN M. ARVON, SUE "WAOMI" CLINE, TONY**  
**PAYNTER, JOHN DOE, and JANE DOE, in their capacity as**  
**the members of the West Virginia Republican Executive**  
**Committee for the Ninth Senatorial District,**

**Respondents.**

**THE STATE OF WEST VIRGINIA'S MOTION TO INTERVENE**

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## THE STATE OF WEST VIRGINIA'S MOTION TO INTERVENE

Pursuant to West Virginia Rule of Appellate Procedure 32, the Attorney General of West Virginia, on behalf of the State of West Virginia, (the "State") moves to intervene in this matter to respond to Petitioners' claims regarding the meaning of West Virginia Code § 3-10-5, and to defend the position of the Attorney General adopted in an advisory opinion addressing the same question. *See* 2016 WL 97256 (W. Va. A.G. Jan. 5, 2016).

As this Court has explained, the Attorney General "has the right to appear as an intervenor on behalf of the State in all proceedings where the interest of the State or a State entity is at issue, to assert the Attorney General's view of the law on behalf of the State." Syl. Pt. 7, in part, *State ex rel. McGraw v. Burton*, 212 W. Va. 23, 569 S.E.2d 99 (2002). The need for presentment of the Attorney General's views is particularly heightened when the "the Attorney General takes a different view of matters before a tribunal than the State entity"—here, the Respondent Governor. *Id.*, 212 W. Va. at 41 n.27, 569 S.E.2d at 117 n.27. This Court has specifically held that in such circumstances, "the Attorney General's intervenor standing permits the presentation of the Attorney General's view." *Id.*

The State requests that this Court grant this motion and accept the attached proposed intervenor's brief as filed.

### BACKGROUND

By letter dated January 3, 2016, Daniel J. Hall, of Wyoming County, resigned his membership in the West Virginia State Senate. In advance of that letter, the President of the State Senate had requested a written opinion from the Attorney General pursuant to West Virginia Code § 5-3-1, asking which political party is responsible for submitting a list of potential replacements to the Governor to fill a vacancy created by the resignation of a State Senator who was elected to office as a member of one political party but was affiliated with

another political party at the time of his or her resignation. On January 5, 2016, the Attorney General responded in a formal opinion, concluding that Section 5 manifests only one meaning with reasonable certainty as to the question presented: the Governor must select an individual with the same party affiliation of the vacating member *at the time of vacancy*. See 2016 WL 97256 (W. Va. A.G. Jan. 5, 2016).

On January 8, 2016, before any party submitted a list of potential replacements to the Governor, the Chair of the West Virginia State Democratic Party, Belinda Biafore, and the members of the West Virginia Democratic Executive Committee for the Ninth Senatorial District filed an emergency petition for a writ of mandamus against Governor Tomblin and the members of the West Virginia Republican Executive Committee for the Ninth Senatorial District. The Petition asks this Court to direct the Governor to fill the current vacancy in the Senate with an individual from the party with which Hall was affiliated at the time of his election to the Senate in 2012. On January 11, 2016, the Governor filed a response indicating that if no clear answer was given from the Court, he would apply Section 5 to refer to the time of election, not the time of vacancy. See Governor's Br. 4-5.

## **ARGUMENT**

### **The State of West Virginia By The Attorney General Should Be Allowed To Intervene**

West Virginia Rule of Appellate Procedure 32 provides that a party has the right to intervene in an action “when (1) a statute of this State confers an unconditional right to intervene; *or* (2) the representation of the applicant’s interest by existing parties is or may be inadequate, and the applicant is or may be bound by judgment in the action.” W. Va. R. App. P. 32 (emphasis added). In this case, the intervention of the State of West Virginia (“State”) by the Attorney General satisfies either requirement.

*First*, the State has a right to intervene to ensure “the Attorney General the full opportunity to perform his constitutional and statutory duties.” *State ex rel. McGraw v. Burton*, 212 W. Va. 23, 41, 569 S.E.2d 99, 117 (2002). “To implement” these duties, *id.*, this Court has expressly held that “[t]he Attorney General additionally has the right to appear as an intervenor as Attorney General on behalf of the State in all proceedings where the interest of the State or a State entity is at issue, to assert the Attorney General’s view of the law on behalf of the State.” Syl. Pt. 7, in part, *id.*, 212 W. Va. 23, 569 S.E.2d 99. Intervention by the Attorney General on behalf of the State in this proceeding is necessary to ensure, at a minimum, that he “may express his legal view on matters of State legal policy generally.” Syl. Pt. 4, *id.*, 212 W. Va. 23, 569 S.E.2d 99. In this case, the Attorney General seeks to intervene to defend his view of State law taken in an opinion required by statute to be rendered to the Senate President. *See* West Virginia Code § 5-3-1 (“It is . . . *the duty* of the attorney general to render to the president of the Senate and/or the speaker of the House of Delegates a written opinion or advice upon any questions submitted to the attorney general by them or either of them whenever he or she is requested in writing so to do.”) (emphasis added); *see* 2016 WL 97256 (W. Va. A.G. Jan. 5, 2016).

*Second*, intervention is particularly justified in this case, where the Attorney General has already expressed and continues to express “a different view of matters before a tribunal than the State entity”—here, the Governor. *Id.*, 212 W. Va. at 41 n.27, 569 S.E.2d at 117 n.27. *Accord* W. Va. R. App. P. 32 (intervention granted where “the representation of the applicant’s interest by existing parties is or may be inadequate”). As noted, the Governor has reached the opposite conclusion on the question presented by the Petition than that reached by the Attorney General in his advisory opinion. *See* 2016 WL 97256.

## CONCLUSION

For the foregoing reasons, the State of West Virginia by the Attorney General respectfully requests that it be permitted to intervene in this action and that the attached proposed intervenor's brief be accepted as filed.<sup>1</sup>

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<sup>1</sup> In the event this Court denies intervention of the State by the Attorney General, the State respectfully requests that this Court treat the State's proposed submission as an amicus brief. Under West Virginia Rule of Appellate Procedure 30(a), "[t]he State of West Virginia . . . may file an amicus curiae brief without the consent of parties or leave of the Court." W. Va. R. App. P. 30(a). To ensure that the attached submission is accepted, the State's proposed brief satisfies the page requirement for an amicus brief. *See* W. Va. R. App. P. 38(c) (an amicus brief may not exceed 25 pages).

Dated: January 12, 2016

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I, Elbert Lin, counsel for the State of West Virginia, hereby certify that on this 12th day of January, 2016, I caused the foregoing document to be served by mailing a true copy thereof by United States Mail and by electronic service where available, to the following:

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