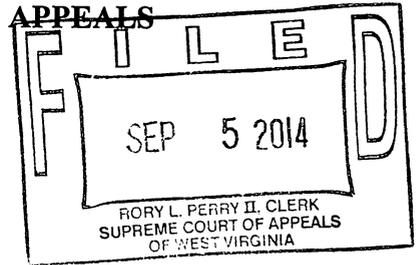


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

NO. 14-0877



STATE OF WEST VIRGINIA EX REL.
NATALIE E. TENNANT, WEST VIRGINIA
SECRETARY OF STATE,

Petitioner,

v.

BALLOT COMMISSIONERS OF
MINGO COUNTY, WEST VIRGINIA;
JIM HATFIELD, as Clerk of the Mingo County
Commission and member of the Ballot Commissioners
of Mingo County, West Virginia; ANGIE BROWNING,
as member of the Ballot Commissioners of Mingo
County, West Virginia; and RAMONA BROWNING,
as member of the Ballot Commissioners of Mingo
County, West Virginia,

Respondents.

PETITION FOR WRIT OF MANDAMUS

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Respondents.

PETITION FOR WRIT OF MANDAMUS

Natalie E. Tennant, West Virginia Secretary of State, files the instant action and prays that this Court issue a writ of mandamus compelling Respondents, Ballot Commissioners of Mingo County, West Virginia and its members, Jim Hatfield, Angie Browning and Ramona Browning, to comply with the Order of the Secretary of State issued August 28, 2014, and specifically to remove from the 2014 General Election ballot any and all reference to an election to fill an unexpired term of judge of the Eighth Family Court Circuit.

QUESTION PRESENTED

Whether the Ballot Commissioners of Mingo County, West Virginia, acted improperly by placing on its proposed ballot an election to fill an unexpired term of judge of the Eighth Family Court Circuit, and by refusing to remove that election from its proposed ballot following the issuance of an Order by the Secretary of State pursuant to W. Va. Code § 3-1A-6(a).

STATEMENT OF THE CASE

On May 21, 2014, Governor Earl Ray Tomblin appointed Judge Miki J. Thompson, formerly the Family Court Judge for the Eighth Family Court Circuit, to fill the vacancy on the Thirtieth Judicial Circuit created by the resignation of Judge Michael Thornsby. Judge Thompson's term as the Family Court Judge for the Eighth Circuit was set to expire in January 2017; consequently, no election was scheduled for that office until the November 2016 General Election. Thereafter, Governor Tomblin declared a vacancy for the Eighth Family Court Circuit on or about July 25, 2014, and the West Virginia Judicial Vacancy Advisory Committee began accepting applications for the position. [Pet. App. 1.] Applications were accepted until August 19, 2014, interviews are scheduled to occur on September 12, 2014, and Governor Tomblin will make an appointment following receipt of the recommendations from the Judicial Vacancy Advisory Commission. [*Id.*]

While this process was ongoing, the Mingo County Democratic Executive Committee met and nominated a candidate, Jonathan "Duke" Jewell, under the auspices of filling a "vacancy" on the ballot created by Judge Thompson's resignation to fill the Circuit Judge position. Respondent Hatfield, as Clerk of the Mingo County Commission, received notice of this appointment by letter dated August 7, 2014. [Pet. App. 3.] That notice was subsequently faxed to the Secretary of State on August 11, 2014. [Pet. App. 2.]

Throughout this time, the Office of the Secretary of State was in contact with Respondents, and in particular Respondent Hatfield, concerning this issue. The Secretary's Office conveyed to Respondent Hatfield that the Eighth Family Court Circuit vacancy was not properly placed on the ballot, but was rather subject to gubernatorial selection. However, on August 27, 2014, the Secretary of State learned that Respondents submitted their proposed ballot to the ballot printers, and it included an election for the Eighth Family Court Circuit. [Pet. App. 4, 5.] Only one candidate was included: Jonathan "Duke" Jewell.

Upon receipt of this information, the Secretary of State decided to issue an order to Respondents, pursuant to its authority under W. Va. Code § 3-1A-6(a), and seek their compliance with the West Virginia Code. As required by Code, the Secretary conferred with the State Election Commission in an emergency meeting held on August 28, 2014 [see Pet. App. 6], and thereafter issued an Order to Respondents. That Order said, in part,

The Office of Secretary of State has become aware that you have submitted to the printer a ballot design which contains an election which is not permitted by law. Therefore, pursuant to the authority provided in West Virginia Code § 3-1A-6(a), and after consultation with the State Election Commission, the Secretary of State hereby **ORDERS** the Mingo County ballot commissioners to remove from the 2014 general election ballot any and all reference to an election to fill an unexpired term of judge of the Eighth Family Court Circuit.

[Pet. App. 7-8.] The Order set a compliance deadline of September 2, 2014.

Following receipt of this Order, Respondent Hatfield, on behalf of Respondents, sent a letter to the Secretary of State. Therein, Respondent Hatfield requested additional time to "read, consider, and decide if legal action is necessary to allow the good people of Mingo County to decide who will be their Family Court Judge and not by some appointment as you recommended." [Pet. App. 9-11.] The Secretary of State granted the request, setting a new compliance deadline for Thursday, September 4, 2014. [Pet. App. 12.]

In order to give Respondents every opportunity to comply, the instant petition was not filed until the expiration of that deadline. As of this date, the West Virginia Secretary of State has received no indication that Respondents intend to comply and remove the Eighth Family Court Circuit judge election from their ballots. [See Pet. App. 13-15.]

SUMMARY OF ARGUMENT

Respondents should be prohibited from calling an election for the Eighth Family Court Circuit judgeship. *First*, the governing Code provisions, found in W. Va. Code § 3-10-1 *et seq.*, control the handling of this election, and provide that the current vacancy be filled by gubernatorial appointment. *Second*, the law relied on by Respondents for their position does not justify calling for an election. *Finally*, in any event, no election was ever properly called for, and thus Respondents have no right to place this election on the ballot or to disregard the order issued by the Secretary of State.

For all these reasons, the writ should be granted.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Secretary of State requests oral argument pursuant to West Virginia Rule of Appellate Procedure 20 because this petition raises a matter of first impression and issues of fundamental public importance to the administration of elections in West Virginia.

ARGUMENT

I. JURISDICTION AND STANDING

This Court has previously recognized that, given the unique nature of the election process and the need for swift resolution of issues arising therefrom, an action should lie with this Court to address those issues expeditiously. “A consistent line of decisions of this Court during the last fifteen years clearly recognizes that the intelligent and meaningful exercise of the franchise

requires some method of averting a void or voidable election. Consequently this Court has recognized that some form of proceeding must be available by which interested parties may challenge in advance of a primary or general election the eligibility of questionable candidates in order to assure that elections will not become a mockery.” See *State ex rel. Maloney v. McCartney*, 159 W. Va. 513, 526-27, 223 S.E.2d 607, 615-16 (1976). Given this necessity, this Court has likewise relaxed the procedural formalities traditionally associated with extraordinary writs to further this end. See, e.g., syl. pt. 4, *State ex rel. Sandy v. Johnson*, 212 W. Va. 343, 571 S.E.2d 333 (2002) (“[W]hen a writ of mandamus has been invoked to preserve the right to vote or to run for political office ... this Court has eased the requirements for strict compliance for the writ's preconditions, especially those relating to the availability of another remedy.”) (citing syl. pt. 3, in part, *State ex rel. Sowards v. County Comm'n of Lincoln Co.*, 196 W.Va. 739, 474 S.E.2d 919 (1996)); syl. pt. 2, *State ex rel. Bromelow v. Daniel*, 163 W. Va. 532, 258 S.E.2d 119 (1979) (“Because there is an important public policy interest in determining the qualifications of candidates in advance of an election, this Court does not hold an election mandamus proceeding to the same degree of procedural rigor as an ordinary mandamus case.”).

The West Virginia Secretary of State files this Petition in her capacity as Chief Election Officer for the State of West Virginia, and this Court has previously affirmed the standing of the Secretary of State to bring such an action. See syl. pt. 3, *State ex rel. Manchin v. Lively*, 170 W. Va. 672, 295 S.E.2d 912 (1982) (“The Secretary of State of West Virginia does have standing to bring an action to obtain a constructive enforcement of the State's election laws by virtue of his role as chief election official and the powers given to him in W. Va. Code, 3-1A-6.”).

II. WEST VIRGINIA CODE DICTATES THAT THE PRESENT EIGHTH FAMILY COURT CIRCUIT VACANCY BE FILLED BY GUBERNATORIAL APPOINTMENT.

Article 10 of Chapter 3 governs the filling of vacancies in office. “When a vacancy occurs in an elected office of the state or county, it shall be filled according to the processes set forth in this article.” W. Va. Code § 3-10-1(a). Because the vacancy was declared by the Governor on or about July 25, 2014, it occurred after the “primary cutoff date,” which is eighty-four days before the primary election, which this year fell on February 18, 2014.¹ Therefore, subsection (b)(1) controls:

If the vacancy occurs after the primary cutoff date, then that appointee shall hold the office until the end of the term of office: *Provided*, That if the vacancy for any county office or United States Senate occurs during the window after the primary cutoff date, but before the general cutoff date, the process contained in sections four, six, seven and eight of this article, depending on the specific office vacated, shall be followed.

W. Va. Code § 3-10-1(b)(1) (emphasis added). In other words, unless the office in question is covered by the provisions in sections four, six, seven or eight, then an appointee serves “until the end of the term of office.” Those sections address vacancies in a number of different offices, but none of those offices are judges. Section Four concerns vacancies in representation in United States Congress, section Six addresses vacancies in the office of circuit court clerk, section Seven concerns vacancies in the offices of county commissioner and clerk of county commission, and section Eight covers vacancies in office of prosecuting attorney, sheriff, assessor and surveyor.

¹ Respondents could conceivably argue that the vacancy was created earlier, on May 21, 2014 when Judge Thompson was appointed to fill the Circuit Court vacancy. Even if that were true, that date was still several weeks after the primary cutoff date.

Significantly, none of those sections concern judges. Rather, judges are addressed under Section 3 of Article 10. In the case of a “judge of a family court,” vacancies are to be “filled by the Governor of the State by appointment and subsequent election to fill the remainder of the term, **if required by section one of this article.**” W. Va. Code § 3-10-3 (emphasis added). Unfortunately for Respondents, nothing in section one requires, or even contemplates, an election under the facts of the present case.

The legislative history of this provision likewise compels the conclusion that an election is not called for under current law. In 2013, the Legislature made a number of changes to Article 10 of Chapter 3. Section 3, discussed above, was amended and simplified. The Legislature also made a number of changes to the election provisions contained in Sections 6, 7 and 8, all of which address offices that are exempt from the gubernatorial appointment provision applicable here. Despite creating new special procedures for each of these three categories of offices, the Legislature declined to make those same changes to Section 3, the Code section that addresses the selection of family court judges in the event of vacancies. Nor did the Legislature at that time choose to alter Section 1 of Article 10 to bring circuit and family court judges within the ambit of the procedures detailed in later provisions of the Code.

In short, the authority to fill the vacancy on the Eighth Family Court Circuit rests with the Governor, as West Virginia law does not allow for a replacement to be elected in the 2014 General Election.

III. RESPONDENTS’ ARGUMENTS THAT AN ELECTION IS PROPER ARE BASED ON AN IMPROPER READING OF THE GOVERNING LAW.

Respondents’ position that the Family Court judgeship should be on the ballot is grounded in a misunderstanding, or misapplication, of the governing law. In his letter to the

Secretary of State, Mr. Hatfield references his reliance on W. Va. Code § 3-5-19(b). That code section provides:

Except as otherwise provided in article ten of this chapter, if any vacancy occurs in a partisan office or position other than political party executive committee, which creates an unexpired term for a position which would not otherwise appear on the ballot in the general election, and the vacancy occurs after the close of candidate filing for the primary election but not later than eighty-four days before the general election, a nominee of each political party may be appointed by the executive committee and certified to the proper filing officer no later than seventy-eight days before the general election. Appointments shall be filed in the same manner as provided in subsection (a) of this section, except that the filing fee shall be paid before the appointment is complete.

(Emphasis added.) However, Respondents' reliance on this provision is misplaced. As an initial matter, this Code section references Article 10 – the same provision deemed applicable by the Secretary of State in this matter. Thus, if Article 10 applies, which it does, then section 7 is wholly inapplicable.

Respondents may also argue that, because the Eighth Family Circuit Court is contained wholly within the boundaries of Mingo County, that it is properly classified as a “county office” and thus is properly elected this November. The basis for that claim lies in section (b)(1), which contains the following proviso: “*Provided*, That if the vacancy for any county office or United States Senate occurs during the window after the primary cutoff date, but before the general cutoff date, the process contained in sections four, six, seven and eight of this article, depending on the specific office vacated, shall be followed.” W. Va. Code § 3-10-1(b)(1).

The term “county office” is never defined in Code. However, three key reasons help to explain why this interpretation of the term “county office” is unacceptable. First, the term makes no sense in the context of Article 10. Section 3 of Article 10 contains a specific procedure for the appointment of individuals to fill vacancies on Family Courts throughout the State. To

ignore this specific provision makes meaningless the provision of Section 3. Second, the same provision also states that the procedures to be followed “depend[] on the specific office vacated.” Since the office of family court judge is never mentioned in those sections (but is mentioned in Section 3) it would be impossible to determine which section’s provisions should apply. Finally, the “county offices” that are identified in sections seven and eight are all offices that are county-specific, such as sheriff, tax assessor, county commissioner, and prosecuting attorney. Each of West Virginia’s fifty-five counties has one of the officers. However, not every county has its own family court circuit. Any other interpretation of this Section that would allow Mingo County to elect its family court judge under circumstances that would deny that right to other family court circuits would be patently unfair.

Respondents cannot escape application of Article 10, and therefore have no legal basis for placing the Eighth Family Court Circuit judgeship on the 2014 General Election Ballot.

IV. RESPONDENTS DO NOT HAVE THE LEGAL AUTHORITY TO PLACE THE ELECTION FOR EIGHTH FAMILY COURT CIRCUIT JUDGE ON THE BALLOT FOR THE 2014 GENERAL ELECTION.

Even if the Code provisions were to provide for an election for this vacancy, the Ballot Commissioners of Mingo County are not in a position to make that decision unilaterally. Rather, the Code provides the manner in which elections are called: “For all other offices, the Governor, or other person granted authority by this article, shall issue a proclamation stating that the office will appear on the next regular primary election and subsequent general election, in order to fill the vacancy.” W. Va. Code § 3-10-1(c)(3). No such proclamation has been issued for this office. Rather, the only “proclamation” that was received was from the Mingo County Democratic Executive Committee [*see* Pet. App. 3], who has no authority to declare an election. Absent a valid proclamation, the Ballot Commissioners have no authority to place an election on

the calendar. “The board of ballot commissioners may not place any issue on the ballot for election which is not specifically authorized under the West Virginia Constitution or statutes or which has not been properly ordered by the appropriate governmental body charged with calling the election.” W. Va. Code § 3-6-2(f). Here, as the Governor has not called for an election, Respondents may not place the election on the ballot.

The rationale for this limitation on the authority of the Respondents makes sense for a number of reasons. First, limiting the authority of ballot commissioners ensures that all elections are handled according to the West Virginia Code. Second, it ensures that all parties and candidates are given a fair opportunity to participate and seek the nomination of their party to the election ballot. It is noteworthy here that no notice was ever published, and there is only one candidate on the ballot. Only one political party participated in the nomination process. Finally, it avoids confusion and concern, which have certainly resulted in this case. [*See, e.g.*, Pet. App. 18-20.] Here, the Judicial Vacancy Advisory Committee has solicited applications to fill this position, and Respondents have simultaneously placed this issue on the General Election ballot. A scenario is conceivable where an elected judge and an appointed judge are both declared. This would place not only the two individual “judges” in an untenable position, as one or both may have given up other employment to accept the position, but might also result in the undermining of much of the authority that would otherwise be given to the judge.

Further, Respondents have no authority to disregard an Order, properly issued by the Secretary of State, concerning how to handle this issue. The Secretary of State followed the proper procedures contained in W. Va. Code § 3-1A-6(a) to issue the Order, once it learned that Respondents had taken steps to circumvent the law. If Respondents disagreed with the Governor’s failure, or refusal, to call an election for this particular vacancy, or if Respondents

believed the Secretary's interpretation of the law was in error, the proper step would have been to seek clarification from the courts of this State. Having not done so, however, Respondents cannot simply charge ahead with an election that is not authorized by law.

CONCLUSION

For the foregoing reasons, the Secretary of State respectfully asks this Court to issue a writ requiring the Ballot Commissioners of Mingo County to remove any reference to an election for the Eighth Family Court Circuit from its ballots.

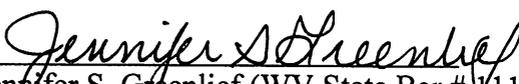
Respectfully submitted,

STATE OF WEST VIRGINIA ex rel.
NATALIE E. TENNANT,
West Virginia Secretary of State

Petitioner

By counsel

PATRICK MORRISEY
ATTORNEY GENERAL


Jennifer S. Greenlief (WV State Bar # V1125)
Assistant Attorney General

State Capitol
Building 1, Room 26-E
Charleston, West Virginia 25305
Telephone: (304) 558-2021
E-mail: Jennifer.S.Greenlief@wvago.gov

Counsel for Petitioner

VERIFICATION

I, Jennifer S. Greenlief, counsel for the petitioner, State of West Virginia ex. rel. Natalie E. Tennant, West Virginia Secretary of State, verify that the statements contained in this Petition for Writ of Mandamus and Appendix are true to the best of my knowledge.


Jennifer S. Greenlief (WV State Bar # 11126)

CERTIFICATE OF SERVICE

I, Jennifer S. Greenlief, Assistant Attorney General and counsel for Petitioner, verify that I have served a copy of the Petition for Writ of Mandamus on Respondents, counsel for Respondent Hatfield, and the Mingo County Prosecuting Attorney by the methods identified below on September 5, 2014, addressed as follows:

To: Jim Hatfield
Clerk, Mingo County Commission
Member, Ballot Commission of Mingo County, West Virginia
Post Office Box 1197
Williamson, West Virginia 25661
Via: Certified Mail, Return Receipt Requested

Ben White
Counsel for Respondent Hatfield
Via: Electronic Mail

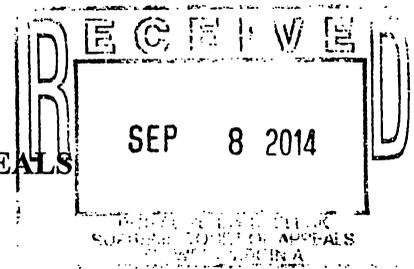
Ramona Browning
Member, Ballot Commission of Mingo County, West Virginia
Post Office Box 474
Williamson, West Virginia 25661
Via: Certified Mail, Return Receipt Requested

Angelia Browning
Member, Ballot Commission of Mingo County, West Virginia
Route 1, Box 674
Delbarton, West Virginia 25670
Via: Certified Mail, Return Receipt Requested

Teresa Maynard
Prosecuting Attorney for Mingo County
75 East 2nd Avenue, Room 201
Williamson, West Virginia 25661
Via: Certified Mail, Return Receipt Requested
Via: Facsimile at (304) 235-0567


Jennifer S. Greenlief (WV State Bar # 11125)

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS



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SECRETARY OF STATE,**

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Commission and member of the Ballot Commissioners
of Mingo County, West Virginia; ANGIE BROWNING,
as member of the Ballot Commissioners of Mingo
County, West Virginia; and RAMONA BROWNING,
as member of the Ballot Commissioners of Mingo
County, West Virginia,**

Respondents.

VERIFICATION

I, Natalie E. Tennant, West Virginia Secretary of State and Petitioner in the above-referenced Petition, verify that the statements contained in the Petition for Writ of Mandamus and Appendix, filed with this Court on September 5, 2014, are true to the best of my knowledge.

A handwritten signature in cursive script that reads "Natalie E. Tennant".

Natalie E. Tennant
West Virginia Secretary of State

CERTIFICATE OF SERVICE

I, Jennifer S. Greenlief, Assistant Attorney General and counsel for Petitioner, verify that I have served a copy of the foregoing Verification on Respondents, counsel for Respondent Hatfield, and the Mingo County Prosecuting Attorney by the methods identified below on September 8, 2014, addressed as follows:

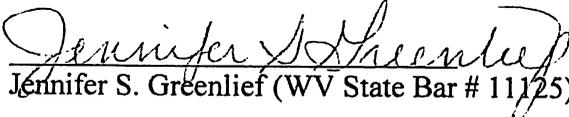
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Ben White
Counsel for Respondent Hatfield
Via: Electronic Mail

Ramona Browning
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Post Office Box 474
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Via: Certified Mail, Return Receipt Requested

Angelia Browning
Member, Ballot Commission of Mingo County, West Virginia
Route 1, Box 674
Delbarton, West Virginia 25670
Via: Certified Mail, Return Receipt Requested

Teresa Maynard
Prosecuting Attorney for Mingo County
75 East 2nd Avenue, Room 201
Williamson, West Virginia 25661
Via: Certified Mail, Return Receipt Requested
Via: Facsimile at (304) 235-0567


Jennifer S. Greenlief (WV State Bar # 11125)