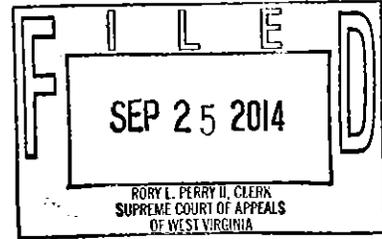


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
NO. 14-0939

STATE OF WEST VIRGINIA EX REL.  
MARIE MACDAVID, and KANAWHA  
COUNTY REPUBLICAN EXECUTIVE  
COMMITTEE,

Petitioners/Relators,



v.

NATALIE TENNANT, as Secretary of State  
And as a Member of the State Election Commission;  
DR. ROBERT RUPP, GARY COLLIAS, TAYLOR  
DOWNS, and VINCENT CARDI, as Members  
of the State Election Commission, and the STATE  
ELECTION COMMISSION,

Respondents.

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BRIEF OF THE WEST VIRGINIA STATE DEMOCRATIC  
EXECUTIVE COMMITTEE, AS INTERVENOR OR, IN THE ALTERNATIVE,  
*AMICI CURIAE*, IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

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**TABLE OF CONTENTS**

Table of Contents ..... i

Table of Authorities ..... ii

Identity of Amicus Curiae ..... 1

Statement of Interest ..... 1

Source of Authority to File ..... 1

Request to Participate in Oral Argument ..... 1

Statement of the Case ..... 1

Argument ..... 2

Conclusion ..... 6

**TABLE OF AUTHORITIES**

**Cases**

*Perry v. Barker*, 169 W. Va. 531, 538 (1982) .....2  
*State Farm Fire and Casualty Co. v. Prinz*, 231 W. Va. 96 (2013) .....4  
*State of West Virginia ex rel. Cravotta, et al. v. Hechler, et al.*, 187 W. Va. 790 (1992) .....3,5,6

**Statutes**

West Virginia Code § 3-3-5 .....6  
West Virginia Code § 3-5-19(a)(6) .....3,7  
West Virginia Code § 55-17-1 .....5  
West Virginia Code § 55-17-3 .....4  
West Virginia Rule of Appellate Procedure 16 .....5

**Constitutional Provisions**

West Virginia Constitution Article VIII, Section 3 .....4

**I. IDENTITY OF AMICUS CURIAE, STATEMENT OF INTEREST AND SOURCE OF AUTHORITY TO FILE**

The West Virginia State Democratic Executive Committee (hereinafter referred to as “WVDEC”) is a political party committee of the West Virginia State Democratic Party and is the statutorily presumed representative of the citizens and voters of the West Virginia State Democratic Party.<sup>1</sup> As such, the WVDEC has a duty to see that the democratic process and the rights of West Virginia’s citizens to meaningfully participate in that process are protected by assuring qualified candidates are on the ballot. In order to fulfil that duty, the WVDEC seeks permission to file this brief as set forth in its motion filed herewith.

**II. REQUEST TO PARTICIPATE IN ORAL ARGUMENT**

While mindful that Rule 30 of the West Virginia Rules of Appellate Procedure permits *Amicus Curiae* to participate in oral argument only in "extraordinary" circumstances, the potential outcome of this decision will have such impact on the democratic process and is of such significance to the rights of the citizens and voters of West Virginia, the WVDEC requests the right to participate in oral argument if it is authorized to participate in these proceedings as *Amicus Curiae*.

**III. STATEMENT OF THE CASE**

On July 21, 2014, the WVDEC filed a Petition for Writ of Mandamus in the Circuit Court of Kanawha County (the “Circuit Court Petition”) against Suzette Marie Raines (“Raines”) and Kanawha County’s ballot commissioners, seeking to have Raines removed from the general election ballot for misrepresenting her city of residence and failing to file required ethics and

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<sup>1</sup> No party or any other person provided any monetary contribution specifically intended to fund the preparation or submission of this brief nor did any party or counsel for any party author this brief in whole or in part.

campaign finance disclosure statements. [Ex. 1.] An Order to Show Cause was entered by the Honorable Louis H. Bloom on August 4, 2014, and returnable on August 7, 2014.<sup>2</sup> [Ex. 2.] Rather than defend the legitimacy of her candidacy and fight the Circuit Court Petition, Raines agreed to withdrawal from candidacy in exchange for dismissal of the Circuit Court Petition on the basis it was rendered moot. [Ex. 3.]

It was this agreement – not the alleged “extenuating personal circumstances” offered by Raines [Pet. Ex. 1] – which led to the request to withdraw her candidacy offered to the State Election Commission (“SEC”) on August 11, 2014. As set forth in the Petitioner’s brief, the Kanawha County Republican Executive Committee (“KCREC”) requested permission, on August 12, 2014, to fill the vacancy it “anticipated” would be created once the SEC acted on Raines’ withdraw. [Pet. at 1.] On August 13, 2014, the SEC convened. Ultimately, the SEC took no action on the KCREC’s request to appoint a substitute candidate. [Pet. Ex. 2.]

#### IV. ARGUMENT

Petitioners seek a writ of mandamus from this Court, a court of original jurisdiction for such an extraordinary remedy pursuant to the provisions of Article 8, Section 3 of the West Virginia Constitution and Rule 16 of the West Virginia Rules of Appellate Procedure, compelling the Respondents to certify a substitute candidate to the ballot in place of Raines. In order to be entitled to the requested relief, Petitioners must establish: (1) a clear right to certify a replacement candidate to the ballot; (2) a legal duty on the SEC to authorize such replacement; and (3) the absence of another adequate remedy at law. *Perry v. Barker*, 169 W. Va. 531, 538 (1982) (citations omitted). In this case, the Petitioner can show neither a clear right to replace Raines or a legal duty

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<sup>2</sup> Numerous witnesses were noticed by the WVDEC and prepared to testify at the August 7, 2014 hearing, including the Kanawha County Circuit Clerk, the Kanawha County Ballot Commissioners, representatives of the West Virginia Secretary of State’s Office, Sean Cook, and Becky Jordan.

on the SEC to authorize such replacement.

The KCREC relies on West Virginia Code § 3-5-19(a)(6). The clear language of the statute establishes both a duty on the Secretary of State to authorize, and a right of the KCREC to appoint and have certified, a replacement to the ballot *not later than 78 days prior* to the general election *if* a vacancy is created by a candidate's withdrawal from a race *no later than 84 days before* the general election *and if* the SEC finds that withdrawal was warranted by extenuating personal circumstances. West Virginia Code § 3-5-19(a)(6). These circumstances simply do not exist here.

First, Raines' withdrawal and thus, any corresponding vacancy in the race, could not have occurred any earlier than the SEC meeting on August 13, 2014, which was only 83 days before the general election and outside the important time strictures set by the statute. The Petition itself acknowledges that Raines only "requested" permission to withdraw on August 11, 2014. [Pet. at 1.]

Second, the KCREC failed to act in a timely manner. Although the KCREC indeed made its first attempt to certify the candidacy of Petitioner Marie McDavid, more than 78 days prior to the general election as the statute required, it then failed to even *attempt* to seek the immediate intervention of this Court when it was not successful. The resulting delay has and is causing irreparable harm. In fact, despite the fact that the KCREC was aware on August 13, 2014 – 83 days prior to the general election - that its attempt to certify a substitute candidate for Raines was unsuccessful and, more importantly, was well aware that the time for printing general election ballots and distributing absentee ballots was very close at hand, it nonetheless allowed nine days to pass before taking any action at all. When it did act, rather than petitioning this Court immediately for emergency relief, it instead served "notice" of its intent to file a petition, purportedly complying with a statute that is both inapplicable and unconstitutional as applied to

cases filed with this Court based on its constitutionally-given original jurisdiction. [Pet. at 5.] Even more vexingly, it then ignored repeated pleas from counsel for the Secretary of State and the SEC to file the petition immediately - in order to minimize the jeopardy imposed by every day of delay upon the ability of absentee voters to meaningfully participate in the general election – and instead needlessly allowed 30 additional days to pass before seeking a resolution of the issue a mere 43 days prior to the general election. [Ex. 4.]

In an attempt to legitimize the forty (40)-day delay in seeking relief, the KCREC relies upon West Virginia Code § 55-17-3. The statute provides for thirty days advance notice of certain suits against government entities. However, the statute has never been applied to suits brought pursuant to this Court’s original jurisdiction, nor has its constitutionality ever been challenged. This Court writes its own rules and possesses the sole power to promulgate rules for *all* the Courts of this State. W. Va. Const. art. VIII § 3; *see syl. pt. 2, State Farm Fire & Casualty Co. v. Prinz*, 231 W. Va. 96 (2013). As Petitioners themselves acknowledge, this Court has promulgated its own rule which comprehensively governs the manner in which extraordinary writs are sought from this Court and specifically prescribes how such proceedings proceed against state officers and agencies. *See W. Va. R. App. P. 16.*

In addition, the statute excepts suits for injunctive relief in cases where irreparable harm would be caused by adherence to the pre-suit notice. Surely, the potential cost to taxpayers for printing multiple sets of ballots and the potential disenfranchisement of scores of West Virginia military servicemen is sufficient irreparable harm to justify such an exception in this case. There was simply no basis for Petitioners to legitimately conclude that they should sit idly by while the general election draws ever nearer and – by their own admission – candidates are certified, ballots

are printed, and absentee ballots are mailed.<sup>3</sup> [See Pet. at 11-12.] Not only did counsel for Respondents attempt to press this very point on multiple occasions, it also offered to move forward with the action and jointly request this Court rule on the applicability of the statute in this circumstance.

Even if the statute were applicable to the circumstances presented here, Petitioners failed to comply. The purpose behind this legislation is to provide the branches of government “more timely information” regarding the impending litigation. West Virginia Code § 55-17-1. However, though operating under the guise of comporting with this provision—which is inapplicable for a number of reasons as set forth below – Petitioners continuously refused to provide a copy of the intended petition, or additional information regarding the relief sought, to counsel for the Respondents, thus frustrating the very purpose of the statute. [Ex. 4.]

Finally, it is important to point out that the Petitioners’ focus on “extenuating personal circumstances” and the application of *Cravotta* is a red herring. Raines withdrew in order to avoid a public hearing on the issues raised in the Circuit Court Petition. The statute allows for the certification of a replacement candidate when the SEC finds withdrawal is warranted due to extenuating personal circumstances, not to avoid disqualification and removal from the ballot or public or the public airing of the evidence supporting such disqualification. The only case (*Cravotta*) relied on by Petitioners is entirely inapposite to this case. The SEC itself expressed great concern over the “extraordinary coincidence” that Raines’ request to withdraw for extenuating personal circumstances occurred so close in time to the rise of litigation over the

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<sup>3</sup> In *The Republican State Executive Committee of West Virginia v. Tennant*, Kanawha Co. Cir. Ct. 10-c-1676, a ballot dispute, no notice of suit was served and the West Virginia Republican Executive Committee acknowledged in its complaint that the “The 30-day notice requirement of W.VA. Code 55-17-3(1)(1) does not apply to this action for injunctive relief because irreparable harm would occur if the institution of the action was delayed by compliance with such requirement.” Attached at Ex 5.

validity of her candidacy. [Pet. Ex. 2 at 5-6.]

A system that allowed candidates to resign at any time, for any reason, with substitutes to be added this late in the process would be every bit as unworkable and frustrating to the democratic process as anything complained of in the belated Petition. The other candidates have a right to know against whom they are running in an adequate amount of time before the election. It is certainly not fair to the candidates who have played by the rules, to now have to re-plan their campaigns. Permitting this type of late-in-the-game substituting will open up the process to more instability. It is not surprising that West Virginia's specific statutory time limits do not allow this kind of eleventh-hour maneuver, particularly when Petitioners could easily have acted with haste rather than delayed.

Most importantly, the ultimate harm will occur in Kanawha County as a result of the Petitioners choice to wait to file a petition: the disenfranchisement of voters will occur. Absentee ballots to overseas voters and members of the military would have been mailed beginning September 19, 2014 per W. Va. Code § 3-3-5. Right now, votes have likely already been cast and are on their way back to Kanawha County. To change the ballot this late in the game is to invite a disruption in the electoral process that may not be repaired.

## V. CONCLUSION

This Court is certainly aware of the scope and import of the decision it makes in the protection of the democratic process and the right of the citizens of this State to meaningful participation in every election. The election code contains procedures and deadlines for placing candidates on the ballot in order to facilitate the work of the county clerks, protect the taxpayers from additional costs, protect the right of the citizens and voters of this State to have qualified, vetted candidates for elected positions, and to prevent any of the citizens and voters of this State

(including our military serviceman serving away from home) from being disenfranchised. At this late date, it is impossible for the Democratic Party to challenge the qualifications of a new Republican candidate in time to remove them from the ballot if they do not possess the requisite qualifications. This rises to a higher public policy than simply having *any* candidate on the ballot who may later be found to be unable to serve. West Virginia Code § 3-5-19(a)(6) requires a showing of extenuating personal circumstances in order to certify a replacement candidate to the ballot in order to prevent the political parties and candidates from gaming the system. No party should be allowed to play fast and loose with the democratic process and use withdrawal as a tool to avoid political trouble for a candidate and then persist in a willful and needless delay in asserting its believed rights which resulted in grave disruption to the democratic process.

For these reasons and those asserted by the Respondents, the West Virginia State Democratic Executive Committee urges this Court to adopt the position of the Respondents and deny the Petition for Writ of Mandamus.