

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

NO. 14-0939

**STATE OF WEST VIRGINIA EX REL.
MARIE MCDAVID, 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 VINCE CARDI, as Members
of the State Election Commission, and the STATE
ELECTION COMMISSION,**

Respondents.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

**PATRICK MORRISEY
ATTORNEY GENERAL**

**Katherine A. Schultz (WV State Bar # 3302)
*Senior Deputy Attorney General***

**Laura J. Young (WV State Bar # 4173)
*Deputy Attorney General***

**Jennifer S. Greenlief (WV State Bar # 11125)
*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

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QUESTION PRESENTED

Did Respondents appropriately exercise the discretion given to them in West Virginia Code § 3-5-19(a)(6) when they determined that the vacancy created by the withdrawal of a candidate was not under circumstances that would permit that ballot vacancy to be filled?

STATEMENT OF THE CASE

In January 2014, Delegate Suzette Raines announced her intention to run for re-election as a Republican candidate for the West Virginia House of Delegates representing the 35th District in Kanawha County, West Virginia. That district is a multi-member district composed of four delegates. During the May 2014 primary election, four Republican candidates were nominated, with Del. Raines placing second among the six candidates competing for the Republican nominations in that district. [Pet. Ex. 2 20:20-21.] Del. Raines, who was initially elected to the West Virginia House of Delegates in 2012, served in the January 2014 Legislative session, and continues to serve. [App. Vol. I, 1-4.] During that time period, Del. Raines suffered a number of personal issues including the illness and death of her mother in January and March, 2014, respectively, as well as the end of a long-term relationship. [See generally Pet. Ex. 2.]

In July 2014, the West Virginia State Democratic Executive Committee filed a lawsuit against Del. Raines, asserting that she was not qualified or eligible to run in the 2014 General Election for the 35th House of Delegates. [App. Vol. I at 6.] Del. Raines initially contested the charges and asserted her eligibility to hold this office. In a news story discussing the lawsuit, Del. Raines stated that, although “she ‘could not handle’ the political aspects of her office earlier in the year,” “[t]hat’s not the case now, she says. ‘All the Democrats have really done is energize me to campaign. I’m ready to go,’ Raines said.” [App. Vol. I at 7.]

The unilateral decision of Del. Raines to quit her campaign and not seek re-election was made on or about August 7, 2014. [App. Vol. I at 10-15.] Thereafter, on August 11, 2014, Del. Raines filed a “Notice of Withdrawal of Candidacy” with the West Virginia Secretary of State. [Pet. Ex. 1 at 3.] This notarized document stated that she was “no longer a candidate for the office listed below.” [Id.] The next day, August 12, 2014, Del. Raines entered into an agreed dismissal of the lawsuit filed against her by the West Virginia State Democratic Executive Committee. [App. Vol. I at 48-49.] That Order recognized that Del. Raines had filed her Notice of Withdrawal of Candidacy, “thereby terminating her candidacy for the West Virginia House of Delegates.” [Id.] As a condition of the dismissal of the lawsuit, “the parties represented to the Court that as a result of Suzette M. Raines withdrawing her candidacy, the ballot commissioners are not to place her name on the ballot as a candidate for the West Virginia House of Delegates for the general election in 2014.” [Id.]

Also on August 12, 2014, Petitioner Kanawha County Republican Executive Committee (“KCREC”) filed a request with the State Election Commission (“SEC”), asking for permission to “appoint a replacement whose name will appear on the November 2014 ballot.” [Pet. Ex. 1 at 1.] Accompanying their request was a copy of Del. Raines’ Notice of Withdrawal of Candidacy form and a single-page, un-notarized email summarizing the reasons for her withdrawal, which referenced the death of her mother and the end of a long-term relationship, but not the then-pending litigation filed against her, as the reasons for her withdrawal. [Id. at 3-4.]

The SEC convened an emergency meeting the following day to discuss the request filed by Petitioner KCREC.¹ [*See generally* Pet. Ex. 2.] Del. Raines did not appear at that meeting. After review of the factual circumstances presented and an initial discussion by the committee members, the SEC heard statements from a number of members of the public (*see* Pet. Ex. 2 at 12:23-41:24), which were considered during their own subsequent deliberations. The SEC discussed a number of aspects of the request. In particular, the SEC members expressed concern about the timing of Del. Raines' request, both with respect to the stated reasons for the withdrawal and the close proximity of the filing of the lawsuit against her to the decision to terminate her candidacy. The SEC also discussed the fact that Del. Raines continued to serve in the House of Delegates and that she had no plans to resign from her current position. Finally, the SEC noted the importance of remaining consistent in its decisions regarding the application of W. Va. Code § 3-5-19(a)(6), referencing its decision only two weeks earlier on the application of Big Jim Hatfield, a Democratic candidate for the Mingo County Commission, which bore a striking resemblance to the request made by Petitioner KCREC. [*See generally* App. Vol. I at 16-21 and Vol. II]

Based on the collective evidence presented, the SEC was unable to find that Del. Raines had withdrawn based on "extenuating personal circumstances which will prevent the candidate from serving in the office if elected." W. Va. Code § 3-5-19(a)(6).

SUMMARY OF ARGUMENT

The SEC properly decided the only issue before it: whether Petitioner KCREC was permitted by law to fill the vacancy created upon Del. Raines' termination of her candidacy. The

¹ Respondents have enclosed a DVD copy of the August 13, 2014 SEC meeting (also available online) for the Court's convenience and consideration.

SEC neither authorized nor approved Del. Raines' termination of her candidacy. That decision was made on or about August 7, 2014 by Del. Raines, a fact that was subsequently formalized on August 11, 2014 by her submission to the Secretary of State of a notarized form stating that she was no longer a candidate for office. Additionally, an order entered by the Circuit Court of Kanawha County on August 12, 2014 memorialized the fact that her candidacy had been terminated, and that the ballot commissioners were not to place her name on the ballot.

In order to authorize Petitioner KCREC to name a replacement, the SEC had to find that Del. Raines' termination of her candidacy was due to "extenuating personal circumstances which will prevent the candidate from serving if elected." W. Va. Code § 3-5-19(a)(6). After a thorough discussion, the SEC concluded that there were no extenuating personal circumstances that would prevent Del. Raines from serving if elected. This decision was neither arbitrary, capricious nor an abuse of discretion. Moreover, in reaching that conclusion, the SEC acted within the authority given to it in applicable provisions of the West Virginia Code, and exercised that authority in a manner consistent with the prior decisions of this Honorable Court.

STATEMENT REGARDING ORAL ARGUMENT

This Honorable Court has already determined that the importance of this issue requires expeditious resolution, but also oral presentation. Respondents submit that this matter is not appropriate for a memorandum decision, but ask that, to speed resolution, the Court issue an order to be followed by an opinion.

ARGUMENT

The writ of mandamus lies to require the discharge by a public officer of a non-discretionary duty. A writ of mandamus will not issue unless three elements co-exist (1) a clear

legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy. Syl. Pt. 1 and 2, *State ex rel. Burdette v. Zakaib*, 224 W. Va. 325, 685 S.E.2d 903 (2009).

I. The State Election Commission Properly Found that No “Extenuating Personal Circumstances Which Will Prevent the Candidate from Serving in the Office if Elected” Were Present in the Instant Case.

When a vacancy occurs on the general election ballot, the SEC must determine whether circumstances warrant allowing the appropriate party executive committee to select a replacement to fill the vacancy. The West Virginia Code requires that, when confronted with a request to fill such a vacancy, the SEC must evaluate whether the candidate’s withdrawal is “due to extenuating personal circumstances which will prevent the candidate from serving in the office if elected.” W. Va. Code § 3-5-19(a)(6) (2007).

The phrase “extenuating personal circumstances” is nowhere defined in Code, but it certainly means something more than simply “personal circumstances,” which could encompass any of a variety of excuses. The Legislature chose to modify the phrase “personal circumstances” by adding the term “extenuating,” and in order to give it meaning it must be read to limit the range of “personal circumstances” that could trigger replacement of that candidate on the ballot. Further, the Code makes clear that, whatever those circumstances are, they must be of a nature that, if elected, the candidate would be unable to serve in the office. This is shown by the secondary phrase “which will prevent the candidate from serving in office if elected.” Thus, even if circumstances were “extenuating,” they might still not trigger the replacement provision.

Only if those circumstances would prevent a candidate from serving is the SEC to authorize a replacement.

The meaning of this phrase can be further ascertained by looking at the other provisions of W. Va. Code § 3-5-19, which governs vacancies generally. Section 19 provides a mechanism for filling vacancies under certain discrete circumstances, including disqualification of a candidate, candidate incapacity, and death of the candidate. W. Va. Code § 3-5-19(a)(4), (a)(5), (a)(7). “It is a fundamental rule of construction that, in accordance with the maxim *Noscitur a sociis*, the meaning of a word or phrase may be ascertained by reference to the meaning of other words or phrases with which it is associated. Language, although apparently general, may be limited in its operation or effect where it may be gathered from the intent and purpose of the statute that it was designed to apply only to certain persons or things, or was to operate only under certain conditions.” Syl. pt. 4, *Wolfe v. Forbes*, 159 W.Va. 34, 217 S.E.2d 899 (1975). Taken together, the situations under which replacement candidates may be placed on the ballot after the primary election demonstrate that the Legislature intended to limit such replacements to situations in which serving in the elected office was not simply undesirable or inconvenient, but rather impracticable or impossible.

This reading of the statutory language also comports with the section’s legislative history. Prior to 1991, there were no statutory limitations on the replacement of candidates who withdrew from the election. W. Va. Code § 3-5-19 (1990). [App. Vol. I at 22.] However, in 1991 the Legislature amended § 3-5-19 to require the SEC’s review and approval of substitute nominees. The legislative goal, with regard to the 1991 amendment, appears clear: to strike a balance between allowing post-nomination vacancies to be filled, while at the same time guarding against

an anticipated manipulation of the electoral process. Such a manipulation might come in the form of allowing a candidate to win the nomination, withdraw, and then be supplanted by an individual selected by a political executive committee, rather than the primary electorate. This so-called “Trojan horse” scenario (referenced several times by the SEC during its deliberations) has grave implications because the election process would be left vulnerable to abuse without limitations on the right to replace withdrawn candidates.

Combining the plain language of the statute with the context in which it is found and the legislative history of these restrictions, the purpose of W. Va. Code § 3-5-19 generally, and subsection (a)(6) specifically, is to allow a party to fill a vacancy when the candidate nominated for that position will be unable to fill that office if elected. An individual who has withdrawn his or her candidacy may not be replaced if the reasons for that decision did not amount to circumstances that would prevent the candidate from serving if elected.

The transcript and video of the SEC’s August 13, 2014 meeting confirm that the SEC did not find that Del. Raines had withdrawn for reasons that would prevent her from serving if elected. To the contrary, each of the five SEC members expressed skepticism as to whether the reasons given by Del. Raines satisfied the standard set forth by the Legislature in Code.

First, the SEC questioned the fact that, despite the circumstances identified by her in her withdrawal statement, Del. Raines continues to serve in the House of Delegates, a fact of which Petitioners ask this Court to take judicial notice. [See Pet. 2., and App. Vol. I at 1-4.] Secretary Tennant, speaking first in the meeting, noted that “she said she cannot serve after the possibility of winning on November 4th. But she is also, from my understanding, continuing to serve as a delegate now.” [Pet. Ex. 2 at 5:20-22.] Taylor Downs expressed the same concern: “. . .but one

of the things that bothers me is she is still serving. And, um, I think that if it's an extenuating personal circumstance that, um, she can't remain on the ballot, she's still a delegate." [Pet. Ex. 2 at 7:19-23.] Finally, following all public comments, Vince Cardi noted that the ability to serve was critical to the Board's ultimate determination: "By reading the statute before us, it not only says, 'Due to extenuating personal circumstances,' it also says, 'Circumstances which will prevent a candidate from serving in the office.' Um, and I guess we're talking about prevent the candidate from serving in the office after January when, by [her own account], she can – she is able to serve in the office right now." [Pet. Ex. 2 at 43:20-26.]

The SEC also discussed in great detail the timing of Del. Raines' decision to withdraw. The reasons given by Del. Raines for her withdrawal, specifically the death of her mother and the end of a long-term relationship, did not strike the SEC as "extenuating personal circumstances." Chairman Rupp stated that, "while I sympathize with the delegate, I do not think that the grief and personal break-up would constitute enough of extenuating circumstances to have a select few pick the delegate." [Pet. Ex. 2 at 11:26-12:3.] However, the Commission seemed primarily concerned about the timing of the request in relation to the timing of the events and the start of the electoral office. The information presented to the Commission by Petitioner KCREC was that Del. Raines' mother passed away in March 2014, following a period of illness, and that her long-term relationship ended at some unknown time. Del. Raines did not terminate her candidacy until August 11, 2014, nearly five months after the passing of her mother. That several months had passed between these admittedly tragic events and her decision to withdraw was troubling to the Commission. While the SEC certainly acknowledged her grief, the lapse between these events, particularly while continuing to run in the primary, and serve as a member

of the House of Delegates did not support a conclusion that these were extenuating personal circumstances that would prevent her from serving in the office if elected. As Gary Collias, summarizing Del. Raines' withdrawal explanation, stated, her request amounted to "I broke up with my boyfriend, a long-term boyfriend, and my mother died in March, and because of that I can't serve a term in the legislature that doesn't begin until next January and goes for two years."

[Pet. Ex. 2 at 9:6-9.]

The timing of the request also troubled the SEC because they were aware of the lawsuit that had been filed against Del. Raines challenging her eligibility for office. At the outset of the meeting, Gary Collias noted that Del. Raines had been the subject of a legal challenge brought against her by the Democratic Party. "I mean it seems like this is maybe some sort of extraordinary coincidence that—that this controversy has arisen and apparently there is litigation in court over her eligibility to run and then suddenly, almost immediately we get this request from her to have her name removed for totally different reasons." [Pet. Ex. 2 at 6:22-7:1.]

In concluding that Petitioner KCREC had not presented sufficient information to warrant allowing a replacement candidate to be identified, the SEC remained consistent with its prior decisions in comparable cases. In July 2014, Big Jim Hatfield withdrew his candidacy for the position of Mingo County Commissioner [App. Vol. I at 16], and asked the SEC to approve the filling of the vacancy by the Mingo County Democratic Executive Committee based on his claim that extenuating personal circumstances prevented him from serving as County Commissioner if elected.² In support of this assertion, Mr. Hatfield submitted his own affidavit, an explanation of

² Although Mr. Hatfield initially styled his request to the SEC as one requesting permission to withdraw, he ultimately submitted a unilateral withdrawal of his candidacy. [App. Vol. I at 17.] Thus, as in the instant case, the

his circumstances, and a letter from his treating physician. [App. Vol. I at 18.] In his submission to the SEC, Mr. Hatfield also indicated that he would continue to serve as the Clerk of Mingo County, West Virginia. [App. Vol. I at 21-22]

The SEC's discussion of Mr. Hatfield's request to fill his ballot vacancy echoes many of the same concerns raised during the discussion of Petitioner KCREC's request.³ They expressed concern about the timing of Mr. Hatfield's request to withdraw in relation to the onset of the claimed extenuating circumstances, noting that the health problems cited by Mr. Hatfield had been ongoing for some time, including during the primary filing period and the primary election. [App. Vol. II at 12:17-22.] Members questioned whether the reasons given, that he needed to move closer to Williamson, would actually prevent him from serving as a county commissioner. [*Id.* at 19:15-19.] Of significant concern to the SEC, however, was that Mr. Hatfield was continuing to serve in public office, as Mr. Hatfield indicated that he intended to fulfill his term as Clerk of the County Commission, which runs through 2016. [*Id.* at 16:16-21; 22:4-6, 12-24; 27:19-28:1.] Consequently, they concluded that, despite the very legitimate health problems raised by Mr. Hatfield, they did not satisfy the statutory standard of "extenuating personal circumstances which will prevent the candidate from serving in the office if elected."

In much the same way, and for many of the same reasons, the SEC failed to find that Del. Raines had withdrawn for "extenuating personal circumstances which will prevent the candidate from serving in the office if elected." The SEC properly considered the fact that Del. Raines continued to serve, and had served for some time under those circumstances, in concluding that

only issue before the SEC in its July 30, 2014 meeting was whether circumstances warranted allowing the vacancy to be filled.

³ Respondents have enclosed a DVD copy of the July 30, 2014 SEC meeting (also available online) for the Court's convenience and consideration.

those circumstances did not prevent her from serving in the House of Delegates, if elected, in January 2015. Further, the SEC acted consistently, not only with its statutory duties, but also with its decisions in prior cases with similar facts.

II. *Cravotta* Is Inapplicable.

Petitioners place considerable (in fact, one might say sole) reliance on *State ex rel. Cravotta v. Hechler*, 187 W. Va. 790, 421 S.E.2d 698 (1992), contending that the case presents a “nearly identical” fact pattern to the instant case. Respondents respectfully disagree.

The factual scenario present in *Cravotta* is different from the current case in a number of ways. In *Cravotta*, the original candidate for the Second Congressional District, Ron Foster, submitted two separate requests: first, that he be permitted to withdraw as a candidate, and second, that the Republican Executive Committee be permitted to appoint a replacement candidate. *Id.* at 791-92, 699-700. Likewise, the Court’s recitation of facts confirm that two separate decisions were made: “The bipartisan Commission determined that Mr. Foster should be permitted to withdraw, but refused to authorize the Executive Committee to appoint a successor because Mr. Foster had not shown ‘extenuating personal circumstances’ as required by W. Va. Code § 3-5-19(a)(5).” *Id.* at 792, 700. The Court took issue with the SEC’s decision to allow withdrawal of the candidate while not simultaneously allowing a replacement, noting that “[t]he undeniable fact is that the Commission has authorized and accepted Mr. Foster’s withdrawal.” *Id.* From there, the Court concluded that, in “authoriz[ing]” Mr. Foster’s withdrawal, the Commission had applied the same statutory standard—whether “extenuating personal circumstances” existed—to that decision as they had to the decision to disallow a replacement candidate to be appointed. *Id.* (“If the Commission had rejected his withdrawal on the theory

that he had not shown ‘extenuating personal circumstances,’ then the issue would be whether the reasons advanced by Mr. Foster for his withdrawal met this standard.”).

In short, the fundamental holding of *Cravotta* is that the SEC cannot make two conflicting decisions, finding that the statutory standard is met for one half of the equation (permitting withdrawal) but then failing to apply that same conclusion to the second half of the equation (allowing a replacement). According to the *Cravotta* Court, the standard for authorizing withdrawal *and* for allowing a replacement candidate was the same standard: whether extenuating personal circumstances exist which would prevent the candidate from serving if elected. This is memorialized in the opinion’s third syllabus point: “Where the State Election Commission has authorized a candidate to withdraw under W. Va. Code, 3-5-19(a)(5) (1991), the Commission must authorize the executive committee of the political party for the political subdivision in which the vacancy occurs to fill the vacancy on timely request by the candidate or the chairperson of such executive committee.” So the opinion did not hold that the SEC applied the wrong standard, as posited by the Petitioners, but rather that they applied the standard inconsistently to the two decisions that were before it.

This reading of *Cravotta* is supported by the Legislature’s subsequent amendments to this section. In 2003, the Legislature revised § 3-5-19(a)(6). One significant change that was made was to the second-to-last sentence. Whereas before the Code had suggested that appointment of a replacement upon satisfying the statutory standard was permissive, the 2003 amendment replaced the permissive “may” with the mandatory “shall”: “If the commission finds the circumstances warrant the withdrawal of the candidate, the commission **shall** authorize appointment by the executive committee to fill the vacancy.” *Id.* (emphasis added).

Here, the SEC only had one issue before it: whether to allow Petitioner KCREC to appoint a replacement to fill the vacancy created by the withdrawal of Del. Raines. Del. Raines never sought the permission of the SEC to withdraw her candidacy. That decision had been made before the SEC even met, by her submission to the Secretary of State's Office, entitled a "Notice of Withdrawal of Candidacy" stating "I hereby give notice that **I am no longer a candidate for the office listed below,**" [Pet. Ex. 1 at 3 (emphasis added)], and memorialized in a dismissal order entered by the Circuit Court of Kanawha County, West Virginia. [App. Vol. I at 48-49] The SEC only learned of that decision through an attachment to the request by Fred Joseph, Chairman of the KCREC, and that request accepted Delegate Raines' withdrawal as a *fait accompli* and requested the substitution of a new candidate. [Pet. Ex. 1] Tellingly, the request from Mr. Joseph indicates that the KCREC's request to the SEC had nothing to do with approving the withdrawal of Del. Raines, but rather was a request to "consider the circumstances of **this withdrawal** and authorize the Executive Committee to appoint a replacement whose name would appear on the ballot for the General Election in November 2014."⁴ [*Id.* (emphasis added).]

The SEC meeting itself also made abundantly clear that the SEC did not consider the issue of whether to allow Del. Raines to withdraw properly before them. The transcript is replete with indicia that the SEC understood Del. Raines to have already withdrawn, and to **not** be

⁴ The only reference made at any point by Del. Raines that could possibly be construed as a request to withdraw, rather than simply a statement to withdraw, comes in the form of the last sentence of an email provided to the Secretary of State with the Notice of Withdrawal, stating that "[t]he most responsible course of action is to seek permission to withdraw from the 2014 election." [Pet. Ex. 1 at 4.] However, given the contradictory statements made by Del. Raines concerning this so-called "request," as well as the clear understanding of the SEC as to what the issue was that had been presented to them, this single statement does not amount to a formal request submitted to the SEC. Moreover, by that time, the legal status of Del. Raines' termination of her candidacy had already been decided by the Circuit Court of Kanawha County.

seeking the SEC's permission to do so. Chairman Rupp begins the meeting by noting that the order of business "is the request of the Republican Executive Committee to replace a candidate **who has withdrawn.**" [Pet. Ex. 2, 4:6-7 (emphasis added).] Tim Leach, Assistant Counsel to the Secretary of State's Office, confirmed this understanding, stating that Del. Raines "has withdrawn as a candidate." [Pet. Ex. 2, 4:13.] Secretary Tennant gave her understanding that "she has withdrawn." [Pet. Ex. 2, 5:24-25.] There is even a discussion held by the SEC members as to whether Del. Raines has already withdrawn, or whether that is the issue before the SEC. *See* Pet. Ex. 2 at 9:16-22 (Chairman Rupp clarifying to Vince Cardi that "[s]he has already withdrawn"); Pet. Ex. 2 at 10:8-18 (discussing that Del. Raines could not "un-withdraw" from the election now that she had withdrawn). Far from taking any action to "authorize[] and accept[]" the withdrawal of Del. Raines, the SEC never took any action with respect to this request, as the SEC deemed that there was no request to withdraw before it. That is, the candidate had withdrawn, and there was now a vacancy. The only issue to be considered by the SEC was whether a substitute name could be printed on the ballot. This is evident from the fact that there was no vote made by the SEC concerning this matter, and that the discussions concerning the replacement began from the premise that Del. Raines had already withdrawn. Indeed, it could not have altered that decision, as the Kanawha County Circuit Court had already entered a dismissal order that took that issue out of the SEC's hands.

Other factual distinctions make the current case distinguishable from the one considered by the Court in *Cravotta*. First, Mr. Foster, the withdrawn candidate in *Cravotta*, was not

currently serving in public office.⁵ Del. Raines, just like Mr. Hatfield of Mingo County, was currently serving at the time she withdrew and continues to serve to this day. In the SEC's mind, this distinguishing fact was significant, because it undercut the replacement rationale that the candidates' circumstances would "prevent the candidate from serving in the office if elected." In Del. Raines' case, the conflict is even more stark, as she was not seeking a different office than the one she currently held.

Finally, the races themselves are different. In *Cravotta*, the Court was faced with an election where, if the Republicans were not permitted to fill the ballot vacancy, only one candidate would have appeared on the ballot, and the absence of a challenger would have all but ensured the election of that candidate. The 35th Delegate District is dramatically different. It is a multi-seat district, with four Delegates elected from a slate of multiple candidates from each party. Thus, the absence of one candidate from the ballot for the Republicans does not automatically assure victory for an opponent. Rather, the voters of the 35th Delegate District will be given a slate of seven candidates, from which they can select four. The voters still have a choice, and multiple choices for their delegates. This choice is further enhanced by the possibility of a candidate waging a successful write-in campaign. Petitioner McDavid has already filed paperwork for write-in candidacy [App. Vol. I at 50-51], which will ensure that her name, although not on the ballot, is placed at two separate locations in each polling place. *See* W. Va. Code § 3-1-20(c). Petitioner McDavid will also have the option to pass out stickers and rubber stamp impressions for her supporters to mark their write-in ballots. W. Va. Code § 3-4A-27(c)(1), receive contributions and make lawful election expenditures including TV, radio,

⁵ This statement is made upon information and belief, following a thorough and diligent search of public records relating to federal, State and local offices in 1992.

newspaper and other media advertising, conduct fundraising events, and engage in any number of other campaigning tactics to ensure that voters can choose her to serve as one of their delegates. *See* W. Va. Code §§ 3-8-1a(4)(D), 3-8-9. The decision of the SEC places absolutely no limits on Petitioner McDavid's ability to campaign for this office vigorously. The only thing that the SEC's decision does is prevent Ms. McDavid's name from being printed on the ballot. It does not prevent her candidacy for the office.

Nothing in the Election Code of West Virginia requires there to be parity in the number of candidates appearing from each party on the ballot. In fact, it is not uncommon for some races, in some districts, in some counties to have only Democrats vying for an office, or only Republicans. Nor does *Cravotta* purport to stand for that proposition. The Court's primary concern is that the law "not be construed so as to deprive voters of the opportunity to make a choice." *Cravotta*, 187 W. Va. at 793, 421 S.E.2d at 701 (citing *Catania v. Haberle*, 588 A.2d 374, 376 (1990)). Here, that "opportunity to make a choice" is preserved for the voters in West Virginia's 35th Delegate District, while the integrity of the election process is likewise maintained by properly applying the standard established by the Legislature in W. Va. Code § 3-5-19(a)(6). In short, the SEC's decision is not inconsistent with *Cravotta*.

III. To the extent that the holding in *Cravotta* purports to apply, it should be reconsidered.

As discussed above, *Cravotta* is clearly distinguishable from the facts in the instant case, and is thus inapplicable. Nonetheless, to the extent that the Court does find *Cravotta* applicable to the current case, the Court should reconsider and reevaluate those portions of the opinion, as they run counter to the plain statutory language of W. Va. Code § 3-5-19.

Section 19 addresses vacancies in nominations. Subsection (a) sets for the triggering premise for section 19: the existence of a vacancy on the ballot. “If **any vacancy occurs** in the party nomination of candidates for office nominated at the primary election or by appointment . . . **the vacancies may be filled, subject to the following requirements and limitations.**” W. Va. Code § 3-5-19(a) (emphasis added). Subsection (a)(6), under which the Petitioners’ challenge arises, is triggered only when there is a vacancy on the ballot. And, therefore, the only time that the SEC becomes involved is when a vacancy has already occurred. The language of subsection (a)(6) supports this conclusion: it begins by discussing the situation in which “a vacancy in nomination is caused by the withdrawal of the candidate. . . .” Nothing in the Code permits or suggests that the SEC plays any role in the creation or authorization of the vacancy. In fact, the SEC only becomes involved after “the candidate or the chairperson of the executive for the political division applies in writing to the State Election Commission” Yet that action can only be taken after the vacancy has occurred—a decision in which the SEC takes no part. Certainly, the SEC is directed to “review the reasons for the request” and consider whether “the circumstances warrant the withdrawal of the candidate,” but that review gives them no authority to challenge or reject the candidate’s decision. This makes sense, as the vacancy has already been created, and the Code makes no reference to a “conditional” or “provisional” withdrawal. This conclusion is also bolstered by the fact that the Code contemplates “the candidate or the chairperson of the executive committee for the political division” applying to the SEC. [*Id.*] (emphasis added). It is inconceivable how, without a mandatory statutory duty for the candidate to apply to the SEC, the SEC can take any action concerning the candidate’s withdrawal of her candidacy.

The plain language of the statute stands at odds with the Court's holding in *Cravotta*. There, the Court, interpreting this same Code section, stated that "[w]ithdrawal by a candidate after the primary election under W. Va. Code, 3-5-19(a)(5), requires that the request to withdraw be sent to the State Election Commission within the prescribed time period." Syl. pt. 2, *in part*, *Cravotta* 187 W. Va. 790, 421 S.E.2d (1992). The Court based this statement on the Code section alone, but, as described above, the Code does not support such a conclusion. Therefore, there is no statutory obligation for a candidate wishing to withdraw to seek, or for the SEC to give, authorization or approval for a candidate's withdrawal.

In fact, this Court has acknowledged and adopted Respondent's reading of W. Va. Code § 3-5-19(a)(6) in a more recent decision, *Tillis v. Wright*, 217 W. Va. 722, 619 S.E.2d 235 (2005). There, the Court was asked to apply a different subsection of this same statute. In discussing the statute generally, the Court described it as "identif[y]ing specific requirements **and limitations in filling vacancies** under certain circumstances." *Id.* at 729, 242 (emphasis added). As to the meaning of the phrase "vacancy," however, the Court looked to the "plain, ordinary meaning" of the term. *Id.* at 730, 243. Relying on *State v. Scott*, 36 W. Va. 704, 15 S.E. 405 (1982), the Court defined the term "vacancy" as meaning "a place which is empty," "empty," "void," or "unoccupied." *Id.* "Thus, it is apparent that a vacancy in nomination signifies that at the time of the vacancy, the candidacy for that particular office is empty and unoccupied." *Id.* at 730-31, 243-44.⁶

⁶ This reading of the statute was also recently endorsed in an Attorney General Opinion. Although not binding on this Court, the Attorney General Opinion issued on April 23, 2014 confirms a reading of section 3-5-19 that does not place restrictions on a candidate's right to withdraw following the primary. The Attorney General noted that the only statutory restriction found on the timing for withdrawal as a candidate occurred in W. Va. Code § 3-5-11, which specifically addresses deadlines only on the withdrawal of candidates prior to a primary. "If the candidate wins the nomination and reaffirms his desire to withdraw, the West Virginia Code sets forth specific procedures for

The *Tillis* Court also correctly recognized that the purpose of § 3-5-19 was to place “specific requirements and limitations” on the filling of ballot vacancies. This is a reasonable exercise of the power of the state Legislature. Syl. pt. 2, *State ex rel. Brewer v. Wilson*, 151 W. Va. 113, 150 S.E.2d 592 (1966) (“The power of the legislature to regulate the nomination and election of candidates for public office . . . is plenary within constitutional limits.”). *Brewer*, *supra*, overruled on other grounds.) Petitioners attempt to read *Cravotta* as standing for the proposition that the SEC must allow replacement anytime a candidate withdraws, and bases this theory entirely on the “liberal construction” to be afforded to election statutes. However, liberal interpretation of statutory language cannot be so broadly applied as to eviscerate the meaning of the statute entirely.

“[T]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.” Syl. pt. 1, *Smith v. State Workmen’s Comp. Comm’r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). The intent of § 3-5-19 is made clear through its legislative history. Prior to the 1991 amendments, there were virtually no legislative restrictions on the selection of replacement candidates when withdrawals occurred. “If any vacancy shall occur in the party nomination of candidates for office, caused by the withdrawal, failure to make a nomination for the office at the primary election, or otherwise, it may be filled and the name of the candidate certified by the executive committee of the political party for the political division in which the vacancy occurs.” W. Va. Code § 3-5-19 (1990). [App. Vol. I at 23] Aside from providing

filling **that vacancy**.” [App. Vol. I at 54.] The Attorney General continues: “[W]e believe that a candidate who wins an election after untimely seeking to withdraw should not be automatically replaced, but rather should be required to take the (**nominal**) post-election step of reasserting his intent to withdraw. If and when the candidate does so, the **vacancy in nomination** could then be filled pursuant to the procedures in West Virginia Code § 3-5-19.” [App. Vol. I at 55.]

timelines by which point such nominations must occur, the 1990 version of § 3-5-19 places absolutely no limitations on the filling of vacancies created for any reason. The 1991 amendments to this section radically altered the statutory landscape.⁷ Not only were replacements only permitted in certain enumerated circumstances, but the Legislature chose to assign a gatekeeper, the SEC, in circumstances where the situation required an assessment of the factual circumstances. *Cf.* W. Va. Code § 3-5-19(a)(4) (allowing a written request to be made to the SEC to determine a candidate's ineligibility for office).

The "liberal construction" of the standard found in W. Va. Code § 3-5-19(a)(6) proffered by the Petitioners would reduce the role played by the SEC to nothing more than a rubber stamp on any and all requests to replace a candidate. Such a result certainly does not comport with the legislative intent manifest in the enactment of that section.

IV. Petitioners' Request is Untimely, and the Remedy They Seek is Improper.

As relief, Petitioners seek a writ "compelling [the SEC] to permit the KCREC to fill the vacancy of the nomination of Del. Suzette Raines with Petitioner McDavid," and requiring the Secretary of State certifying Petitioner McDavid as a candidate. [Pet. 12.] Petitioners seek further an instruction to the County Clerk of Kanawha County "to mail valid ballots to all absentee voters with instructions that the invalid ballot that is incomplete shall be void." [*Id.*]

The action challenged by Petitioners occurred during a meeting of the SEC held on August 13, 2014, yet the current action was not filed until September 22, 2014, fully forty days

⁷ In the Court's *Cravotta* decision, the Court characterizes the 1991 Amendments to section 3-5-19 as continuing a "legislative policy to permit vacancies for public office to be filled after the primary election in order that voters can fully exercise their right to choose elected officials from a complete slate of candidates." 187 W. Va. at 793, 421 S.E.2d at 701. Respondents respectfully submit that the 1991 Amendments do not suggest a continuation of the prior Code's liberal replacement policy, but rather suggest a change in course, and a retreat from allowing political parties to replace withdrawing candidates at will.

after the decision was made. Petitioners provided Respondents with a letter dated August 22, 2014, in which they stated, “It is unclear that W. Va. Code § 55-17-3(a)(1) has any impact on the noticed claim as the claim is akin to injunctive relief and irreparable injury to the taxpayers of the State of West Virginia and the citizens of the 35th House District would result from application of that statute.”⁸ [Pet. Ex. 8] Relying on the admittedly questionable application of this Code provision, Petitioners delayed the filing of the current lawsuit by thirty additional days,⁹ despite repeated communication with Respondents encouraging Petitioners to file their brief expeditiously, given the necessity of addressing these matters in a timely matter. *See* [App. Vol. I at 44.] (“Quite simply, the election calendar is moving rapidly. As I am sure you can appreciate, our clients are extremely interested in resolving this issue as soon as possible. Moreover, there is nothing the Secretary of State or the State Election Commission can do to place your clients’ issues before the Court.”); [App. Vol. I at 46-47] (“Inasmuch as the passage of every day delays resolution of your clients’ issues and jeopardizes the ability to get returned ballots from all voters, we encourage you to file a pleading as quickly as possible. Absent a filing, there is nothing our clients can do to move this along.”).

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

⁸ In that same letter, even after noting the irreparable injury that would occur by delay in filing the instant lawsuit, Petitioners asked Respondents to “waive the potential impact of W. Va. Code § 55-17-1, *et seq.*” [App. Vol. I at 42-43.] After a review of this Court’s current jurisprudence in *Motto v. CSX Transp., Inc.*, 220 W. Va. 412, 647 S.E.2d 848 (2007), Respondents concluded that, if applicable, the 30-day notice provision could not be waived by the parties because this Court has held it to be a jurisdictional bar. [*Id.*]

⁹ It is noteworthy that the verifications filed to accompany the Petition, in which both Petitioners state that they “have read the ‘Petition for Writ of Mandamus and Supporting Memorandum of Law,’” are dated August 21, 2014, a full month before the Petition was filed with the Court.

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.” *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.”). “[T]his action in mandamus, being a special creation of the evolving common law, is ripe for prosecution immediately upon a candidate’s filing of his certificate of candidacy.” *Maloney*, 173 W. Va. 526, 318 S.E.2d 470 at syl. pt. 5.

Petitioners’ delay could have serious consequences for the 2014 General Election. Federal law requires that States transmit absentee ballots to uniformed service voters and other overseas voters no later than forty-five (45) days prior to an election. *See* the Uniformed and

Overseas Citizens Absentee Voting Act (“UOCAVA”), 42 U.S.C. § 1973ff-1(a)(8)(A), *as amended by the 2009 Military and Overseas Voters Empowerment Act (“MOVE”)*. When that day falls on a Saturday, as occurred this year, the ballots must be transmitted on the preceding Friday. [App. Vol. I at 25-41.] This year, the deadline for the provision of absentee ballots to members of the Armed Services and others working abroad was Friday, September 19, 2014. The ballots which have been, and are being, transmitted as of this date are in compliance with the federal law time limit. However, if the Court were to grant the relief requested by Petitioners, any replacement ballot transmitted would not be in compliance with the deadline and would violate federal law. Waivers are available in instances where “[t]he State has suffered a delay in generating ballots due to a legal contest,” 42 U.S.C. 1973ff-1(g)(2)(B),¹⁰ but it is unclear that this would apply to the present case, as there was no delay in printing ballots and there was no legal challenge pending at the time the deadline expired.¹¹

In a practical sense, the relief requested by Petitioners would result in the effective disenfranchisement of military and overseas voters. Any change ordered by this Court to the original ballots would result in recipients of absentee ballots being given fewer than thirty-three days, subject to vendor turnaround, to accomplish the two-way transmission of ballots, once new

¹⁰ To obtain a waiver, the State must provide considerable information, including: the reasons for the undue hardship to the State; the identity of the federal offices and jurisdictions involved; a report of how long a waiver is required; the State’s comprehensive plan to ensure military voters are entitled to request, received, vote, return and have counted their ballots; and a verification by the State that it “specifically recognize[s] that the purpose of the Act’s forty-five day prior requirement is to allow UOCAVA voters enough time to vote and have their votes counted in an election for federal office.” [App. Vol. I at 25-41.]

¹¹ In anticipation of a potential legal challenge, the Secretary of State consulted with the legal staff of the Federal Voting Assistance Program (“FVAP”), the body charged with administering UOCAVA, about when a waiver request should be submitted by the State. FVAP is studying the matter because this is a novel situation and one of first impression for FVAP. The applicable U.S. Code provisions are clearly written with the expectation that a waiver request will be filed before, and not after, the deadline has passed. Further, FVAP is unaware of any jurisdiction that has failed to comply, or that has requested a waiver, based upon a legal challenge filed after the forty-five day prior to the election. At present, the Secretary of State does not know if, when, or for how long a waiver may be granted.

ballots were printed. And, since they request that all original ballots be voided, all military personnel or others who attempted to vote with the new ballot (after having voted the first ballot) but were unable to return it on time, or were confused about the need to complete a second ballot, would have lost their right to vote in two federal elections and numerous other state and county elections contained on the same ballot.

CONCLUSION

For the foregoing reasons, Respondents pray that Petitioners' Petition be denied. In the alternative, should the Court wish to grant the Petition, Respondents pray that the relief requested be modified as discussed above.

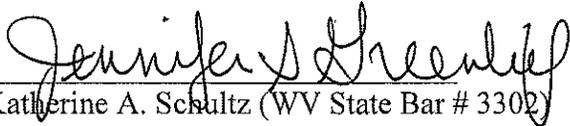
Respectfully submitted,

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

Respondents

By counsel

PATRICK MORRISEY
ATTORNEY GENERAL



Katherine A. Schultz (WV State Bar # 3302)

Senior Deputy Attorney General

Laura J. Young (WV State Bar # 4173)

Deputy Attorney General

Jennifer S. Greenlief (WV State Bar # 11125)

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 Respondents

CERTIFICATE OF SERVICE

I, JENNIFER S. GREENLIEF, Assistant Attorney General and counsel for the Respondents, do hereby verify that I have served a true copy of the *RESPONSE IN OPPOSITION TO WRIT OF MANDAMUS* upon counsel for the Petitioners, by depositing said copy in the United States mail, with first-class postage prepaid, on this 25th day of September, 2014, addressed as follows:

Mark A. Carter
Dinsmore & Shohl LLP
P. O. Box 11887
Charleston, WV 25339-1887

J. Mark Adkins
Bowles Rice LLP
P. O. Box 1386
Charleston, WV 25325-1386



JENNIFER S. GREENLIEF