

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia ex rel. Citizen Action Group, Petitioner

vs.) No. 101494

Earl Ray Tomblin, President of the West Virginia Senate, Richard Thompson, Speaker of the West Virginia House of Delegates, and Natalie Tennant, Secretary of State of West Virginia, Respondents,

--AND--

State of West Virginia ex rel. Thornton Cooper, Petitioner

Vs.) No. 10-4004

Earl Ray Tomblin, Acting Governor of the State of West Virginia, And President of the West Virginia Senate, Richard Thompson, Speaker of the West Virginia House of Delegates, and Natalie Tennant, Secretary of State of West Virginia, Respondents.

**MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF
AND PROPOSED BRIEF**

(Since the Movant does not know the positions of the Respondents on the issues presented by the Petitioners, he does not know whether he supports or opposes them. He opposes the Petitioners.)

**Charles McElwee, Esq.
606 Briarwood Road
Charleston, WV 25314
WV State Bar ID: 2447
Email: crm@ramlaw.com**

Pro Se

DEC 15 2010

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IDENTITY OF THE AMICUS CURIAE

The amicus curiae is Charles McElwee, a resident of Kanawha County and an attorney with over fifty years of practice. (Hereinafter, Amicus.)

MOVANT'S INTEREST IN THE CASE

He became curious about the two legal issues arising out of the resignation of then Governor Manchin following his election as U.S. Senator to fill the vacancy in that office occasioned by the death of Senator Byrd, namely: (1) when does the State Constitution and State Code require that an election be held to fill the vacancy; and (2) may the President of the Senate continue in that role and as a member of the Senate upon becoming acting Governor.

He did considerable research of both the State Constitution and Code in order to form opinions as to the likely answers to these two questions based thereon. He continues to have much interest in these subject matters and believes that it is the interest of all West Virginians and the State Legislature that this Court resolve the issues raised.

However, since the Petitioners appear to address only the first of the two legal issues, Amicus' proposed brief and argument that

follow will be limited to that issue, namely, when does the State Constitution and Code require than an election be held to fill the gubernatorial vacancy occasioned by the resignation of then Governor Manchin on or about November 15, 2010?

SOURCE OF MOVANT'S AUTHORITY TO FILE

Rule 30, Rules of Appellate Procedure.

REASON WHY AN AMICUS CURIAE BRIEF IS DESIRABLE

See Amicus' statement under next caption.

**REASON WHY THE MATTERS ASSERTED ARE RELEVANT
TO THE DISPOSITION OF THE CASE**

Amicus believes that the arguments he will present, if permitted by the Court, are relevant to the issue raised by the Petitioners, and, hopefully, will assist the Court in its rulings.

TABLE OF AUTHORITIES

State Constitution:

**Art. VII, § 16. 1,2,3,4,5,6,7,8,9,10,11,12,13,14,15,16,18,20,
21,22,23,24**

Art. V, § 1.4, 19

Art. VI, § 13.4, 5, 19

Art. VII, § 4. . . . 4, 5

Art. VI, § 24. . . . 10

Art. VIII, § 7 19

Art. VII, § 1. . . . 12, 14

Art. VI, § 17. . . . 16

Art. IV, § 7 17, 18, 20, 21, 22

State Code:

3-10-21, 4, 6, 21, 23, 24

6-5-1 1 (n. 2), 2

3-1-31 1 (n. 2)

WV Cases:

***McGraw v. Willis*5, 9**

***Carr v. Wilson* 8**

***Miller v. Burley* 16, 21**

***State Ex Rel. Robb v. Caperton* 18**

***Rohrbaugh v. State* 23**

SUMMARY OF ARGUMENT

Amicus subsequently argues that W.Va. Code 3-10-2, which sets the election for filling the vacancy in the office of Governor on November 6, 2012, is not only consistent with the provisions of Art.

IV, § 7 of the State Constitution, but complements Art. VII, § 16 of the State Constitution in specifying, as does Art. IV, § 7, when the “new election for governor shall take place to fill the vacancy.”

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ARGUMENT¹

An Overview of Petitioners' Advocacies

Petitioner West Virginia Citizen Action Group (CAG) and Petitioner Thornton Cooper (Cooper) (collectively, Petitioners) claim that the State Constitution, specifically, Art. VII, § 16, requires that an election be held earlier than November 6, 2012, the date provided by WV. Code 3-10-2,² for the filling of the gubernatorial vacancy created by the resignation of then Governor Joe Manchin, III, on or about November 15, 2010, and that, therefore, the Code section is unconstitutional as being violative of § 16.

¹ No counsel for a party authored this amicus curiae brief in whole or in part, and no party, or counsel for a party, made a monetary contribution specifically intended to fund the preparation or submission of this amicus curiae brief. The following proposed amicus curiae brief is solely the product of the movant's research and preparation, and is not intended to represent the views of any other person, whether associated with him or not.

² In that the gubernatorial vacancy occurred "before the first three years of [Governor Manchin's] term shall have expired," and "more than thirty days next preceding a general election, the vacancy [according to W.Va. Code 3-10-2] shall be filled at such election." The first three years of Governor Manchin's term will not expire until on about January 14, 2012. W.Va. Code 6-5-1. The next general election will be on November 6, 2012. W.Va. Code 3-1-31. There does not appear to be a disagreement that W.Va. Code 3-10-2 requires that the election to fill the gubernatorial vacancy is to be held at the next general election following the vacancy that occurred on or about November 15, 2010.

§ 16 declares, in part, that “[w]henever a vacancy shall occur in the office of governor before the first three years of the term shall have expired, a new election for governor shall take place to fill the vacancy.” The first three years of Governor Manchin’s term expires on or about January 14, 2012. W.Va. Code 6-5-1.

The CAG would have the Court to amend § 16 to insert the following underscored words to as to have it read “Whenever a vacancy shall occur in the office of governor before the first three years of the term shall have expired, a new election shall take place as soon as an election may practicably be held to fill the vacancy.” CAG’s Petition for Writ of Mandamus, p. 1.

Cooper would have the Court to revise § 16, in accordance with the following underscored wording, so as to have it read “As soon as possible after a vacancy arises in the office of governor during the first 36 months of the gubernatorial term, a new election (normally meaning a new special primary election and a new special general election) shall take place to fill

that vacancy.” Cooper’s Petition for Writ of Mandamus, p. 40. (Cooper’s Petition.)

Amicus will argue that § 16 cannot be construed, as Petitioners advocate, as requiring that the “new election” must be held “as soon as possible” or “as soon as practicable” after the gubernatorial vacancy occurs; had the framers of § 16 intended to include in that section the words proposed by the Petitioners, they would have done so.

Let’s say that the Governor becomes temporarily disabled and is incapable of performing the duties of the Governor for a period of four months. In such case, the president of the senate becomes acting governor until the disability is removed under the provisions of § 16. If it would be practicable to hold an election to fill the temporary vacancy within the four months period, Petitioners interpret § 16 as requiring an election to be held to fill the temporary vacancy, even though the disability of the elected governor is removed within that time frame.

I will first address the arguments made by the CAG in support of its position that W.Va. Code 3-10-2 violates Art. VII, § 16 of the State Constitution.

While the CAG concedes that § 16 “does not directly specify when the new election should be held,” it contends that other provisions of the State Constitution indicate that § 16 was “designed to provide a short-term executive only [the President of the Senate as acting Governor] until an election could be held.” (CAG’s Memorandum in Support of Petition for Writ of Mandamus, p. 4) (CAG’s Memorandum.)

The “other provisions of the State Constitution,” upon which the CAG rely as supporting its interpretation of § 16, are Art. V, § 1, Art. VI, § 13, and Art. VII, § 4. (CAG’s Memorandum, p. 5.)

Art. V, § 1 embodies the separation-of-powers doctrine— “[t]he legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others,” and that no “person [may] exercise the powers of

more than one of [the legislative, executive and judicial departments of State government] at the same time.”

Art. VI, § 13 precludes a person who is holding any other lucrative office...under this State [and that would include the office of Governor] ...shall be eligible to a seat in the legislature.”

Art. VII, § 4 declares that “[n]one of the executive officers mentioned in this article [the Governor being one of them] shall hold any other office [“other office” would include both an office of Senate Senator and the President of the Senate] during the term of his service.” “[T]he President of the Senate is an independent officer of the Senate, distinct and separate from his senatorial position.” *McGraw v. Willis*, 323 S.E.2d 600, 601 (W.Va. 1984).

The CAG asserts that these other provisions of the State Constitution preclude § 16 from being interpreted as “permit[ting] a member of the Legislature to act as Governor for any longer than it takes to hold a new election for Governor....” (CAG’s Memorandum, p.6.)

The CAG thus takes the curious position that the President of the Senate may, while continuing as President, also be the acting Governor without violating these Constitutional provisions if he does so no “longer than it takes to hold a new election for Governor...” In other words, these Constitutional provisions may be violated for a short time but not for a long time. There is no support for the CAG’s position anywhere in the Constitution.

The Constitutional provisions cited by the CAG have no relevancy to an interpretation of § 16. They may be relevant to whether the acting Governor may at the same time hold the offices of President of the Senate and a member of the Senate.

For the reasons asserted by the CAG, it claims that W.Va. Code 3-10-2, in providing for the filling of the gubernatorial vacancy at the November 6, 2012, general election, is unconstitutional, and on that basis asks the Court to issue a writ of mandamus “ordering a new election for Governor to be held within ninety days from the issuance of the writ.” (CAG’s Memorandum, p. 4.)

I disagree with the CAG's analysis. However, before undertaking to relate the bases of my disagreement, I will review and respond to Cooper's argument.

Cooper's Advocacy and Amicus' Response

Cooper starts off by conceding that "[b]ecause no West Virginia governors have died in office and only one governor before Joe Manchin, III, failed to serve out his gubernatorial term or terms, there is little precedent [both historic and judicial] to follow in analyzing the above constitutional section [Art. VII, § 16] and even less in analyzing its final sentence. (Cooper's Petition, p. 13.)

Cooper identifies "three (3) occasions on which senate presidents either became acting governor or commenced legal proceedings in anticipation of becoming acting governor." *Id.*

The first occasion related to the Boreman/Stevenson/Farnsworth challenges in 1869, three years before the adoption of our present State Constitution. (Cooper's Petition, p. 14.) Cooper finds nothing in these 1869 occurrences to support his position. The issues were not brought to this

Court. He does say that “[p]robably the main legal significance of Governor Farnsworth brief tenure was that it may have underscored deficiencies in the 1863 *Constitution* that were addressed in part by the addition of the ‘new election’ language in Article VII, § 16, of the 1872 *Constitution*.” *Id.* Cooper does not specifically identify what those deficiencies in the 1863 *Constitution* may have been and how they may have been corrected in the 1872 *Constitution*.

Cooper’s second “occasion” did end up in a judicial proceeding and was settled in this Court’s decision in *Carr v. Wilson*, 9 S.E. 31 (1889). The Court’s decision in *Carr* is not relevant to the issue presently before the Court, and Cooper does not contend that it is. The Court’s holding is set forth in its first two syllabi, namely, that while an election contest between two candidates for Governor is pending and unresolved, there is no vacancy in the office of Governor in that the incumbent Governor, the last elected Governor, continues as hold-over Governor to discharge the duties of the office until a successor shall be declared elected.

Cooper cites the Court's dictum in *Carr v. Wilson, id.* at 33, which states that upon a vacancy in the office of Governor, "the president of the senate can come into the office of governor, or rather act as governor temporarily *ex officio*, as president of the senate...." Cooper states that this language indicates that "the president of the state senate may act as governor only if he or she also remains president of the state senate." (Cooper's Petition, p. 16.) The issue was not before the Court, and there is no indication that it was briefed or argued. The term "ex officio" does not appear in Art. VII, § 16 of the State Constitution. Moreover, Cooper's quotation from *Carr* has no relevancy to the issue he presents to the Court.

The third "occasion" identified by Cooper is this Court's decision in *State ex rel. McGraw v. Willis*, 174 W.Va. 118, 323 S.E.2d 600 (1984). Again, there is nothing in that case that has any relevancy to the issue at hand, and again Cooper does not contend that it does. The Court made a decision on an issue that had not become "justiciable"; nevertheless, its only holdings, if they merit that description, were that the President of the Senate is an office separate from the office of State Senator, and that an

incumbent Senate President, even though no longer a member of the Senate, continues in that position until his successor is elected by the Senate, a dubious decision in light of the Art. VI, 24 of the State Constitution which declares that the Senate President must be “from its own body.”

Cooper next focuses on the construction of the last sentence of Art. VII, § 16 of the State Constitution: “Whenever a vacancy shall occur in the office of governor before the first three years of the term shall have expired, a new election shall take place to fill the vacancy.” He does so under the caption “(c) CONSTRUCTION OF THE ‘NEW ELECTION SENTENCE’ IN CONJUNCTION WITH OTHER CONSTITUTIONAL PROVISIONS,” commencing at page 18 of his Petition.

Cooper starts by focusing “on the meaning of the sentence itself.” *Id.* He says it is composed of two clauses: “one an adverb clause that begins with the subordinating conjunction “‘whenever’”; the other, “an independent clause beginning with the adjective “‘a.’” *Id.*

“Whenever” is an adverb, not a conjunction, that introduces the subordinate adverb clause, meaning “at whatever time.” The American Heritage Dictionary of The English Language. Third Edition. “A” is an indefinite article, not an adjective. *Id.* This play in attempting to assign to “whenever” and “a” their parts of speech gets us nowhere in construing the last sentence of Art. VII, § 16 of the State Constitution.

I agree with Cooper that “whenever” and the adjective “new” relate to time, but are indefinite as to a specific time within a span of time. Cooper may “understand” the last sentence of Art. VII, § 16 to “mean” the following: “As soon as possible after a vacancy arises in the office of governor during the first 36 months of the gubernatorial term, a new election shall take place to fill that vacancy.” Unfortunately for him, Mr. Cooper’s “understanding” will not stand scrutiny and is incorrect.

He says that “whenever” is equivalent to ‘as soon as’ and ‘at whatever time’ and is synonymous with, or equivalent to, the words ‘upon which’, ‘where’, ‘in case’, and ‘if’.”

As noted above, the dictionary definition of “whenever” is “at whatever time.” Thus, the last sentence of Art. VII, § 16 of the State Constitution is in effect saying that “At whatever time a vacancy shall occur in the office of governor before the first three years of the term shall have expired....”

When Cooper says that “‘whenever’ is equivalent to “ ‘as soon as,’” he is plainly wrong. “As soon as” assigns specificity to “whenever” or “at whatever time” that is not implicit in these terms. Moreover, when Cooper says that the words “upon which”, “where”, “in case”, and “if” are “synonymous with, or equivalent to” to “as soon as,” he is clearly incorrect. “As soon as” limits the span of time that is not limited by “whenever” or “new election” or any of his claimed synonyms.

After completing his argument on the meaning of the last sentence of Art. VII, § 16 of the State Constitution in isolation, Cooper states, at page 19 of his Petition, that § 16 must be read in conjunction with other provisions of Art. VII, starting with § 1 relating to the terms of office of the officers in the Executive Department of State Government. Specifically, it

provides that the terms of office of these officers “shall be four years and shall commence on the first Monday after the second Wednesday of January next after their election.”

Somehow, which is not clear, Cooper, “[a]s a voter and as an occasional candidate for public office,” submits that § 1, which relates to the term of office of Executive Department officers and the commencement date of their terms, implies two things about the “new election” provision of Art. VII, § 16 of the State Constitution: (1) “that the period for filling a gubernatorial vacancy, as measured from the date that the vacancy arises to the date that the newly elected governor is sworn in, must be *shorter* than the period remaining in the unexpired term as of the date of his or her inauguration. (2) “[T]he duration of the period for filling a gubernatorial vacancy, no matter when it arises during the 36-month period, should be less than six months.” (Cooper’s Petition, p. 20.)

Cooper offers these explanations for his two “implications” from § 1:

[I]f Governor Manchin had resigned on January 14, 2012, the period for filling the gubernatorial vacancy would have to be less than six months,

which would be in mid-July 2012, because only six months would then remain in the unexpired term.

...If a vacancy that arises in mid-January 2012 can be filled by a newly elected governor in mid-July 2012, why can't a vacancy that arises in mid-November 2010 be filled by a newly elected governor in mid-May 2011" By making a vacancy that arises during the last 12 months of a gubernatorial term exempt from the new-election language, the voters who ratified the 1872 Constitution must have intended that one-half of that twelve-month period, that is *six months*, was to serve as a cap on the length of service by an individual not elected by the people throughout the state to serve as acting governor, unless that service began during the last year of the gubernatorial term.

(Cooper's Petition, 20-21.)

Cooper's arguments in these quoted paragraphs are abstruse, so much so that they cannot fairly be attributed to the intent of the framers of Art. VII, § 16 of the State Constitution.

Cooper claims that the "new-election sentence" in Art. VII, § 16 of the State Constitution implies, apparently without regard to § 1 of that article, "that the period for filling a gubernatorial vacancy, as measured from the date that the vacancy arises to the date that the newly elected

governor is sworn in, must be *shorter* than the period remaining in the unexpired term as of the date of his or her inauguration.” Petition, p. 20.

Although Cooper does not tell us the derivation of his “implication,” he gives us what he regards as consequences of the implication, such as that had Governor Manchin resigned on January 14, 2012, “the period for filling the gubernatorial vacancy would have to be less than six months...because only six months would then remain in the unexpired term.”

We are left wondering where he came up with the “six months.” In addition, there is an inconsistency in what he says: on the one hand, that § 16 exempts “a vacancy that arises during the last 12 months of a gubernatorial term...from the new-election language,” and, on the other hand, that the Manchin hypothesis “can be filled by a newly elected governor in mid-July 2012.” Cooper does not tell us the authority upon which he relies for positing a gubernatorial election in mid-July 2012 in his hypothesis.

In any case, there is no basis whatever for reading these “implications” into Art. VII, § 16, whatever they may be.

Next, Cooper tries to make something of the fact that Art. VI, § 17, unlike § 16 of that article, includes the term “as may be prescribed by law.” (Cooper’s Petition, p. 21.) As will be discussed *infra*, there are a number of omissions in § 16 that are supplied in another constitutional provision and in W.Va. Code 3-10-2. § 16 is not “self-executing” as Cooper contends and must rely upon external sources to provide answers to the questions left unanswered in the section.

Cooper next claims that “the general default language of Article IV [of the State Constitution], relating to elections, terms of office, and the filling of vacancies, does not apply in this case [because “the filling of vacancies in the executive department is explicitly addressed in (Art. VII, §§ 16 and 17 of the State Constitution)], and, therefore, this Court’s decision in *Miller v. Burley*, 155 W.Va. 681, 187 S.E.2d 803 (1972) “is clearly not on point.” (Cooper’s Petition, p. 22.)

Cooper is wrong on both claims. Cooper does not cite the section of Art. IV, nor quote that language of that Article, to which he refers. No wonder. He should have been open enough and told the Court what he was referring to. Art. IV, § 7 does not support his position in this case.

That section declares that “[e]lections to fill vacancies [in “state and county officers, and of members of the legislature] shall be for the unexpired term. When vacancies [in these offices] occur prior to any general election, they shall be filled by appointment, in such manner as may be prescribed herein, or by general law, which appointments shall expire at such time after the next general election as the person so elected to fill such vacancy shall be qualified.”

Art. IV, § 7 was not applicable to the vacancy in the office of U.S. Senate occasioned by the death of Sen. Byrd because it applies only to “state and county officers, and of members of the legislature.” See the first two sentences of § 7. It does apply to a vacancy in the office of Governor for the reasons stated *infra* when this section is considered in greater detail. As argued later, this section supplies answers to the questions left

unanswered in Art. VII, § 16, namely, that the “new election” provided for in that section must, in this case, be held on November 6, 2012.

There exists no irreconcilable conflict between Art. IV, § 7 and Art. VII, § 16 of the State Constitution, as Cooper contends, again for the reasons explained in greater detail later.

This Court’s decision in *Miller* is, therefore, relevant to the issue at hand, and will be discussed in some detail later on.

Cooper states that this Court in its decision in *State Ex Rel. Robb v. Caperton*, 191 W.Va. 492, 446 S.E.2d 714 (1994) “failed to follow *Miller*.” (Cooper’s Petition, p. 23.) The reason the Court failed to follow *Miller* in *Robb* in applying Art. IV, § 7 was because the vacancy involved was that of a circuit judge, vacancies in which are specifically dealt with in Art. VIII, § 7 of the State Constitution. The Court found the general provisions of Art. IV, § 7 irreconcilable with the more specific provisions of Art. VIII, § 7, in which case the more specific provisions are given precedence. Rather than Art. IV, § 7 and Art. VII, § 16 being irreconcilable, the first of the two sections complements the second, as will be more fully discussed *infra*.

Incidentally, Art. VIII, § 7 allows the Governor to fill the unexpired term of a circuit judge or supreme court justice for up to three years without an election. This provision defies Cooper's prompt election argument made on page 24 of its Petition.

Lastly, Cooper argues that "the constitutional tension resulting from the fact that the same individual [as acting Governor and the President of the Senate] simultaneously holds office (even though they not be actively functioning in both offices) in two separate branches of government can only be abated by prompt election to fill the gubernatorial vacancy." (Cooper's Petition, p. 24.)

He cites Art. V, § 1 (separation-of powers) and Art. VI, § 13 (no person holding a lucrative office under the State, "shall be eligible to a seat in the Legislature." Cooper, like the CAG, sets forth the curious argument that these sections may be violated for an unspecified short period of time but not for an unspecified longer period of time. Violations are violations unrelated to any time span.

Having now responded to the claims of the CAG and Cooper, Amicus now turns to making an independent case of why the Legislature may not under the State Constitution change the election for filling the vacancy in the office of Governor from November 6, 2012.

Amicus' Advocacy

Amicus begins by quoting again the relevant part of Art. VII, § 16: "Whenever a vacancy shall occur in the office of governor before the first three years of the term shall have expired, a new election for governor shall take place to fill the vacancy."

§ 16 does not state when the "new election" shall take place. Nor does it state whether the "new election" is to be a special election or may be a part of a general election.

These two omissions are filled by the provisions of Art. IV, § 7 of the State Constitution, which in relevant part states:

Elections to fill vacancies [in state and county officers, and of members of the legislature, but not vacancies in the U.S. Senate and House of Representatives] shall be for the unexpired term.

When vacancies occur prior to any general election, they shall be filled by appointments,³ in such manner as may be prescribed herein, or by general law, which appointments shall expire at such time after the next general election as the person so elected to fill such vacancy shall be qualified.

Thus, according to the provisions of § 7, the “new election” referred to in § 16, will be, in this case, the next general election to be held on November 6, 2012.

Thus, instead of there being an irreconcilable conflict between §§ 7 and 16, and between § 16 and W.Va. Code 3-10-2, both Art. VII, § 7 of the State Constitution and W.Va. Code 3-10-2 complement Art. VII, § 16 of the State Constitution, and provide answers to the questions left unanswered in § 16.

This Court’s decision in *Miller v. Burley*, 155 W.Va. 681, 187 S.E.2d 803, 810 (1972) (Judge Calhoun dissenting) is instructive. There, the Court found Art. IV, § 7 to be “clear and unambiguous” stating:

³ “Appointment” includes both “[t]he act of appointing or designating for an office or position.” The American Heritage Dictionary of The English Language, Third Edition. The term has also been defined as “[t]he designation of a person, such as a nonelected public official, for a job or duty....” Black’s Law Dictionary, Eighth Edition. The President of the Senate has been designated by the State Constitution, Art. VII, § 16, to fill a vacancy in the office of Governor.

It should be emphasized that the vacancies to be filled for the unexpired term are vacancies that occur *at any time* prior to any general election and that the Constitution contains no provision that such vacancy must occur at any specified time before such general election. If the framers of the Constitution had intended to fix a cutoff date or a deadline of any specified time for the occurrence of a vacancy before a general election to be filled for the unexpired term at such election, as has been contended, they could and undoubtedly would have provided such a specified period of time for the occurrence of the vacancy before a general election. The omission of any such specified time shows clearly that the time of the occurrence of a vacancy before a general election is utterly immaterial and that, regardless of the time of the occurrence of the vacancy, it must be filled at such election for the unexpired term of the office in which the vacancy occurs.

Thus, *Miller* stands for the proposition that the “new election” provided for in Art. VII, § 16 of the State Constitution is, according to Art. IV, § 7 of the State Constitution, at the next general election, in this case November 6, 2010, regardless of the time the vacancy occurs within the first three years of the term.

Even if the Court should determine, for whatever reason, that Art. IV, § 7 is inapplicable to the issue at hand, then Art. VII, § 16, standing alone, should be like interpreted in that it does not specify when the “new

election” is to be held. One cannot read into that section that its framers intended that it be held sooner than November 6, 2012, in the case at hand. Had they intended such a result, they (paraphrasing *Miller*) “could and undoubtedly would have provided [a specified time within which such “new election” had to be held].”

Since Art. VII, § 16 lacks such specification, W.Va. Code 3-10-2 supplies the omission, in declaring that the “new election” will be on November 6, 2010, in this case.

Any attack upon W.Va. Code 3-10-2 as being unconstitutional under Art. VII, § 16 of the State Constitution must be resolved according to the principles stated in Syllabus Point 4, *Rohrbaugh v. State*, 216 W.Va. 298, 607 S.E.2d 404 (2004):

In considering the constitutionality of a legislative enactment, courts must exercise due constraint, in recognition of the principle of separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in

question....In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.

Since Art. VII, § 16 of the State Constitution does not specify when "the new election" must be held, and W.Va. Code 3-10-2 does, there would be no basis whatever for declaring W.Va. Code 3-10-2 unconstitutional for being in violation of § 16; to the contrary, W.Va. Code 3-10-2 complements Art. VII, § 16 of the State Constitution by answering the questions left unanswered in § 16.

CONCLUSION

For the reasons above stated, Amicus urges the Court to deny the writ sought by the Petitioners, and hold that W.Va. 3-10-2 complements, rather than violates, Art. VII, § 16 of the State Constitution.

Respectfully Submitted,


Charles McElwee

Pro Se

CERTIFICATE OF SERVICE

I, Charles R. McElwee, pro se, do certify that I have served the Motion for Leave to File An Amicus Curiae Brief and Proposed Brief to which the Certificate of Service is attached, by mailing a copy thereof to each of the following persons, at their addresses indicated, postage prepaid, this 15th day of December, 2010:

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

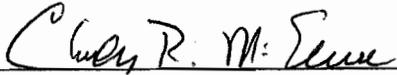
The Honorable Richard Thompson
Speaker West Virginia House of Delegates
Room 228M, Building 1
State Capitol Building
1900 Kanawha Boulevard, East
Charleston, WV 25305

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

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

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

Thornton Cooper
3015 Ridgeview Drive
South Charleston, WV 25303



Charles R. McElwee, Esq.
606 Briarwood Road
Charleston, WV 25314