

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Upon Original Jurisdiction

STATE OF WEST VIRGINIA
ex rel. CITIZENS ACTION GROUP,
Petitioner,

v.

No. 101494

EARL RAY TOMBLIN,
President of the West Virginia Senate,
RICHARD THOMPSON,
Speaker of the West Virginia House of Delegates,
and NATALIE E. TENNANT,
Secretary of State of West Virginia,
Respondents.

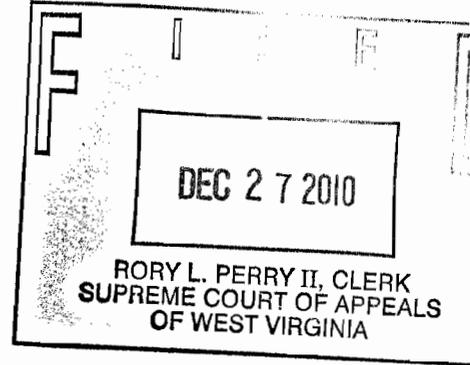
--AND--

STATE OF WEST VIRGINIA
ex rel. THORNTON COOPER,
Petitioner,

v.

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 E. TENNANT,
Secretary of State of West Virginia,
Respondents.



**CONSOLIDATED RESPONSE OF EARL RAY TOMBLIN
TO PETITIONS FOR WRIT OF MANDAMUS**

Thomas V. Flaherty (WV Bar No. 1213)
Tammy R. Harvey (WV Bar No. 6904)
Caleb P. Knight (WV Bar No. 11334)
Flaherty Sensabaugh Bonasso PLLC
P. O. Box 3843
Charleston, WV 25338-3843
(304) 347-4232

Counsel for Earl Ray Tomblin

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STATEMENT OF THE CASE

At 12:01 p.m. on November 15, 2010, Joe Manchin, III resigned as Governor of the State of West Virginia to assume the seat in the United States Senate vacated by the death of Robert C. Byrd.¹ As President of the West Virginia Senate, Respondent Earl Ray Tomblin (“Respondent Tomblin”) began to act as Governor of the State of West Virginia upon Manchin’s resignation. W. Va. Const. art. VII, § 16.

On November 19, 2010, without providing the proper statutory notice,² the West Virginia Citizens Action Group (the “WV-CAG”) filed a Petition for Writ of Mandamus against Respondent Tomblin, the Speaker of the West Virginia House of Delegates, Richard Thompson, and the Secretary of State of West Virginia, Natalie E. Tennant (collectively the “Respondents”). *See* (WV-CAG Pet. 2.) In its Petition, the WV-CAG seeks a ruling from this Court compelling the Respondents to call a special election “to fill the office of Governor as soon as such election may practicably be held...” *Id.* at 10. Respondent Thompson then filed a Motion to Expedite under Rule 14(c) of the West Virginia Rules of Appellate Procedure. *See* (Thompson Mot. To Expedite.)

¹ On November 2, 2010, then-Governor Manchin won the election held pursuant to West Virginia Code section 3-10-4a to fill the vacant Senate seat. Several hours after the effective date of his resignation as Governor, Mr. Manchin was sworn in as a United States Senator by Vice-President Joseph R. Biden.

² West Virginia Code section 55-17-3(a)(1) (2010) requires that “[n]otwithstanding any provision of law to the contrary, at least thirty days prior to the institution of an action against a government agency, the complaining party or parties must provide the chief officer of the government agency and the attorney general written notice, by certified mail, return receipt requested, of the alleged claim and the relief desired.” W. Va. Code § 55-17-3(a)(1). West Virginia Code section 55-17-2(2) defines the term “government agency” as “a constitutional officer or other public official named as a defendant or respondent in his or her official capacity.” Further, this Court has previously held that “[c]ompliance with the pre-suit notification provisions set forth in West Virginia Code section 55-17-3(a) is a jurisdictional pre-requisite for filing an action against a State agency subject to the provisions of West Virginia Code section 55-17-1.” *See Motto v. CSX Transp., Inc.*, 220 W. Va. 412, 647 S.E.2d 848 (2007). The WV-CAG filed its Petition for Writ of Mandamus on November 19, 2010, without providing the preliminary notice required by West Virginia law. As such, WV-CAG’s Petition is procedurally improper and this Court should deny its Petition for Writ of Mandamus and decline to issue a Rule to Show Cause relative thereto.

On December 2, 2010, Thornton Cooper filed a separate Petition for Writ of Mandamus.³ In his Petition, Mr. Cooper, like the WV-CAG, seeks an Order from this Court compelling the Respondents to schedule a special primary election and a special general election to be held during the first half of 2011 to fill the vacancy left by Manchin. *See* (Cooper Pet. 40.)

On December 3, 2010, this Court consolidated the WV-CAG Petition and the Cooper Petition “for purposes of briefing, consideration and decision” and denied Respondent Thompson’s Motion to Expedite. *See* (December 3, 2010 Order.)

On December 13, 2010, an Amicus Curiae Brief was filed by the Christian Patriotic Front. Thereafter, on December 15, 2010, a Motion to Intervene and Brief in Support were filed by Kenneth Perdue as President of the West Virginia AFL-CIO (the “AFL-CIO”) requesting to Intervene in the “Petitions and relief requested by [WV-CAG] and [Cooper].”⁴ *See* (AFL-CIO Mot. To Intervene 1.) Amicus Curiae briefs were also filed by the West Virginia Education Association and Charles McElwee, respectively.

Respondent Tomblin comes now, pursuant to Rule 16(g) of the *Revised West Virginia Rules of Appellate Procedure*, and respectfully responds to the Consolidated Petitions for mandamus relief.

³ Mr. Cooper, unlike the WV-CAG, did provide with the Respondents with written notice prior to filing his Petition. Specifically, on August 9, 2010, Mr. Cooper mailed a notice to the Respondents styled “Notice by Thornton Cooper of his Intention to Institute Legal Proceedings Relating to Requiring Prompt Special Elections to Fill Possible Gubernatorial Vacancy.” *See* (Cooper Notice 4.)

⁴ Respondent Tomblin submits that the AFL-CIO’s Motion to Intervene does not satisfy the requirements of Rule 32 of the *Revised West Virginia Rules of Appellate Procedure*. Neither the Motion nor the Brief in Support cite a statute that confers an unconditional right upon the AFL-CIO to intervene and neither alleges that the representation by the WV-CAG or Mr. Cooper is or may be inadequate. *See Rule 32 of the Rev. W. Va. Rules of App. Proc.* Thus, the AFL-CIO may not intervene in this matter as of right and its Motion to Intervene should be denied. In the event that the Court allows the AFL-CIO to intervene in this matter based on its discretion, Respondent Tomblin addresses the separation of powers issue raised by the AFL-CIO on the merits in section IV of the Argument out of an abundance of caution.

SUMMARY OF ARGUMENT

The Consolidated Petitions must be denied because: (1) they do not satisfy the strict requirements necessary to invoke the “extraordinary remedy” of mandamus; (2) West Virginia’s current election code is both constitutional and consistent with other vacancy filling provisions under West Virginia law; (3) the relief requested therein would require that the judiciary violate the separation of powers doctrine found in article V, section 1; and (4) the President of the Senate acting as Governor for any period of time does not violate the separation of powers principles found in article V, section 1, article VI, section 13 and article VII, section 4 of the Constitution. Further, the current election code, which allows for Tomblin to act as Governor until the next general election in 2012, is not only constitutional, but absolutely critical to ensuring the uninterrupted continuation of government. For these reasons, as set forth more fully herein, the Consolidated Petitions must be denied.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent Tomblin respectfully requests a “Rule 20 argument” on the grounds that this matter meets the criteria set forth in Rule 18(a) of the *Revised West Virginia Rules of Appellate Procedure* and involves issues of first impression, issues of fundamental public importance, and issues involving constitutional questions regarding the validity of a statute. *See Rules 18(a) and 20 of the Rev. W. Va. Rules of App. Proc.*

ARGUMENT

I. THE COURT SHOULD DECLINE TO ISSUE A RULE TO SHOW CAUSE BECAUSE THE PETITIONERS HAVE FAILED TO DEMONSTRATE THAT A WRIT OF MANDAMUS IS PROPER IN THIS CASE.

This Court has long acknowledged that petitions invoking original jurisdiction by way of mandamus relief should be permitted “only in limited and truly exceptional circumstances.” *See*

e.g., *State ex rel. School Bldg. Auth. v. Marockie*, 198 W. Va. 424, 432, 481 S.E.2d 730, 738 (1996); *State ex rel. Charleston Bldg. Comm. v. Dial*, 198 W. Va. 185, 191, 479 S.E.2d 695, 701 (1996). The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations where a petitioner can show a clear and indisputable right to relief sought. *See e.g.*, *State ex rel. Billings v. City of Point Pleasant*, 194 W. Va. 301, 303, 460 S.E.2d 436, 438 (1995) (stating “since mandamus is an ‘extraordinary’ remedy, it should be invoked sparingly”) (footnote omitted); *State ex rel. United States Fidelity & Guar. Co. v. Canady*, 194 W. Va. 431, 436, 460 S.E.2d 677, 682 (1995) (providing that “mandamus is an extraordinary remedy reserved for really extraordinary causes”). Here, the WV-CAG and Mr. Cooper (together the “Petitioners”) cannot show a “clear and indisputable right to the relief sought.” As such, the Consolidated Petitions must be denied.

While this Court has sometimes relaxed the otherwise strict requirements for the issuance of a writ of mandamus in “election” cases, the circumstances giving rise to the exception in those cases do not exist in this matter. Specifically, this Court has only recognized the exception in election cases which involve the eligibility of candidates. *See e.g.*, Syl. Pt. 5, *State ex rel. Maloney v. McCartney*, 159 W. Va. 513, 223 S.E.2d 607 (1976); Syl. Pt. 2, *State ex rel. Bromelow v. Daniel*, 163 W. Va. 532, 258 S.E.2d 119 (1979).

In *State ex rel. Bromelow, supra*, the Petitioner sought a writ of mandamus and contended that the eligibility requirement imposed on candidates for the office of mayor was void. This Court agreed and awarded the writ after noting that, while the action was “technically brought in mandamus,” the Court would not hold it to the “technical rules which ordinarily govern mandamus in West Virginia....” 163 W.Va. at 536 (citing *State ex rel. Maloney*, 159 W. Va. at 526). In so holding, the Court explained 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” *Id.*

However, because the “election case” now before the Court does not involve the “eligibility of questionable candidates,” the rationale for relaxing the strict requirements for a writ of mandamus does not exist. Accordingly, in order for this action to proceed, the Petitioners must first satisfy the strict requirements for a writ of mandamus, which are the following:

(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, *State ex rel. Billy Ray C. v. Skaff*, 190 W. Va. 504, 438 S.E.2d 847 (1993); Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969); Syl. Pt. 2, *Staten v. Dean*, 195 W. Va. 57, 464 S.E.2d 576 (1995). The Petitioners have not satisfied and cannot satisfy these requirements and the Court must, therefore, decline to issue a rule to show cause and deny the respective Petitions.

A. The Petitioners Do Not Have a Clear Legal Right to the Relief Sought.

Neither the WV-CAG nor Mr. Cooper has a “clear legal right to the relief sought” in their respective Petitions, namely the right to elect a successor Governor via a “special election” prior to 2012. (WV-CAG. Pet. 9; Cooper Pet. 11.) And, without a clear legal right, there can be no writ of mandamus. *See e.g., State ex rel. Billy Ray C.*, 190 W. Va. at 504.

It is important to note that the Petitioners are not alleging that they are being denied the right to elect Manchin’s successor. Instead, they are alleging that they are being denied the right to elect Manchin’s successor *via a special election prior to 2012*. Their allegation assumes, however, without any legal foundation, that such a right exists. A writ of mandamus cannot be

issued on the basis of an assumption, however. It can only be issued on a “clear legal right.” See e.g., *State ex rel. Billings v. City of Point Pleasant*, 194 W. Va. at 303, 460 S.E.2d at 438 n.1 (quoting *Kerr v. United States District Court*, 426 U.S. 394, 402, 96 S. Ct. 2119, 2124 (1976)) (relator “must demonstrate that the right to issuance of the writ is ‘clear and undisputable’”); *Williams v. Robinson*, 180 W. Va. 290, 294 376 S.E.2d 304, 308 (1988) (“The function of mandamus is not to establish rights, but to enforce rights that have been established.”);⁵ *State ex rel. Matheny v. County Ct.*, 47 W. Va. 672, 680, 35 S.E. 959, 962 (1900) (“[I]t is a fundamental principle of the law of mandamus that the writ will never be granted in cases where, if issued, it would prove unavailing.”); Syl. Pt. 1, *Hall v. Staunton*, 55 W. Va. 684, 47 S.E. 265 (1904) (“The extraordinary writ of mandamus will never be issued in any case where it is unnecessary, or where, if used, it would prove unavailing, fruitless and nugatory. The court will not compel the doing of a vain thing.”); *Ballentine v. Attorney General of the Virgin Islands*, 2008 WL 4601044. *5 (D. Virgin Islands 2008) (“A writ of mandamus may not be issued to a legislature to enforce actions that are typically governed by the discretion of that legislature.”). Because a clear, legal right to a special election prior to 2012 does not exist under the Constitution and laws of West Virginia, the Petitioners’ respective Petitions must be denied.

Notwithstanding the Petitioners’ allegations, neither the Constitution nor current state law requires that a special election be held any earlier than 2012. On the contrary, pursuant to West Virginia Code section 3-10-2, the “new election” required by article VII, section 16 of the Constitution shall take place during the 2012 general election cycle. At that time, West Virginia citizens will elect a governor to fill the vacancy created by Senator Manchin’s resignation. Therefore, the Petitions must be viewed not as seeking to remedy the deprivation of their right to

⁵ Indeed, Mr. Cooper himself admits that this matter is “one of first impression.” (Cooper Pet. 10.)

vote, but as seeking to accelerate their opportunity to vote to sometime in 2011 as opposed to 2012. (WV-CAG Pet. 6; Cooper Pet. 37.)⁶ Stated simply, even though the timing of the “new election” does not suit the Petitioners’ respective preferences, West Virginia law does not prevent the Petitioners from electing Senator Manchin’s successor in a constitutionally permissible timeframe.

As this Court has acknowledged, mandamus relief should be denied when the Court is “confronted with no fundamental imperfection in the functioning of democracy.” *State ex rel. Robb v. Caperton*, 191 W. Va. 492, 446 S.E.2d 714 (1994) (finding permissible a **thirty-two month delay** before a judicial vacancy was filled) (emphasis added) (citing *Valenti v. Rockefeller*, 292 F. Supp. 851, 867 (S.D.N.Y. 1968)). In this matter, “[n]o political party or portion of the state’s citizens can claim it is permanently disadvantaged ... or that it lacks effective means of securing legislative reform if the statute is regarded as unsatisfactory.” *Id.* at 497. As explained below, because the two-year interval between Senator Manchin’s resignation and the 2012 “new” election does not rise to the level of a fundamental imperfection in the functioning of democracy, Petitioners’ requests for mandamus relief must be denied.

1. West Virginia’s Constitution Does Not Require a Special Election Prior to 2012.

This Court has held that, “[i]n every case involving the application or interpretation of a constitutional provision, the analysis must begin with the language of the constitutional provision itself.” *Committee to Reform v. Thompson*, 223 W. Va. 346, 352, 674 S.E.2d 207, 215 (2008). An analysis of the language of the constitutional provision at issue in this case, article VII, section 16, clearly shows that a special election to fill the office of Governor prior to 2012 is not required. All that is required is a “new election.” As such, the requested relief must be denied.

⁶ See also (AFL-CIO Br. in Supp. of Mot. to Intervene 12) (alleging that “[t]he failure to hold a special gubernatorial election until November 2012 appears to be a direct conflict” with the Constitution.)

Beginning with the First Constitution of West Virginia in 1863, and continuing under the current Constitution, which was ratified in 1872, the state's founding document has always provided that the President of the Senate would fill a vacancy in the governorship in the event of several named contingencies. The First Constitution of West Virginia provided as follows:

In case of the removal of the Governor from office, or of his death, failure to qualify within the time prescribed by law, resignation, removal from the Seat of Government, or inability to discharge the duties of the office, **the said office with its compensation, duties and authority, shall devolve upon the President of the Senate**; and in case of his inability or failure from any cause to act, on the Speaker of the House of Delegates. The Legislature shall provide by law for the discharge of the Executive functions in other necessary cases.

W. Va. Const. art. V, § 6 (1863) (emphasis added). The language of that Section was revised and ratified as part of the Second Constitution of West Virginia in 1872, which is still in effect today, and reads in full as follows:

In case of the death, conviction on impeachment, failure to qualify, resignation, or other disability of the governor, **the president of the Senate shall act as governor until the vacancy is filled, or the disability removed**; and if the president of the Senate, for any of the above named causes, shall become incapable of performing the duties of governor, the same shall devolve upon the speaker of the House of Delegates; and in all other cases where there is no one to act as governor, one shall be chosen by joint vote of the Legislature. **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.**

W. Va. Const. art. VII, § 16 (1872) (emphasis added).⁷

Contrary to the Petitioners' position, nowhere in this constitutional provision is there any reference to *when* the new election for Governor shall take place. (WV-CAG Pet. 4; Cooper Pet. 20.) Instead, article VII, section 16 simply calls for a new election. Thus, in the absence of

⁷ Of note, the First Constitution of West Virginia in 1863 provided that the office of governor "shall devolve upon the President of the Senate." W. Va. Const. art. V, § 6 (1863). In the current Constitution, the office of governor does not devolve upon the President of the Senate, but rather he or she is called upon to "act as governor until the vacancy is filled." W. Va. Const. art. VII, § 16.

controlling constitutional language, the Legislature, the branch of government charged with regulating the election process pursuant to article IV, section 8 of the Constitution,⁸ appropriately enacted West Virginia Code section 3-10-2 to set forth the time frame that must be followed in the event the office of Governor is vacated. Pursuant to West Virginia Code section 3-10-2, the new election is to take place on the date of the next general election, which will be in 2012. Importantly, the Legislature's scheduling of the "new" election under West Virginia Code section 3-10-2 is not unreasonable and is consistent with the general deferred election rule articulated by the Framers of the Constitution in article IV, section 7 (the "Constitution's General Deferred Election Rule"),⁹ which provides as follows:

The general elections of state and county officers, and of members of the Legislature, shall be held on the Tuesday next after the first Monday in November, until otherwise provided by law. The terms of such officers, not elected, or appointed to fill a vacancy, shall, unless herein otherwise provided, begin on the first day of January; and of the members of the Legislature, on the first day of December next succeeding their election. Elections to fill vacancies, shall be for the unexpired term. **When vacancies occur prior to any general**

⁸ Article IV, section 8 provides that, "[t]he Legislature, in cases not provided for in this constitution, shall prescribe, by general laws, the terms of office, powers, duties and compensation of all public officers and agents, and the manner in which they shall be elected, appointed and removed."

⁹ "Questions of constitutional construction are in the main governed by the same general rules applied in statutory construction." *Winkler v. State of West Virginia Sch. Bldg. Auth.*, 189 W. Va. 748, 434 S.E.2d 420 (1993). "Statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *pari materia* to assure recognition and implementation of the legislative intent. Accordingly, a court should not limit its consideration to any single part, provision, section, sentence, phrase or word, but rather review the act or statute in its entirety to ascertain legislative intent properly." *Richards v. Harman*, 217 W. Va. 206, 210, 617 S.E.2d 556, 560 (2005). Thus, since article IV, section 7 and article VII, section 16 both deal with elections to fill vacancies in state offices, they should be read in *pari materia*.

Article IV, section 7 applies to elections to fill vacancies in all State offices, which necessarily includes a vacancy in the office of governor. Because article VII, section 16 requires a "new election" whenever a vacancy shall occur in the office of governor before the first three years of the term shall have expired, but fails to specify when the "new election" shall take place, Respondent Tomblin maintains that article IV, section 7 and article VII, section 16 must be read together as they are not irreconcilable. See Syl. Pt. 3, *Robb v. Caperton*, 191 W. Va. 492, 446 S.E.2d 714 ("A specific constitutional provision will be given precedence over a general constitutional provision relating to the same subject matter where the two cannot be reconciled.") Because article IV, section 7 and article VII, section 16 do not conflict with one another as summarily alleged by the Petitioners and can be reconciled, the Court should allow the Constitution's General Deferred Election Rule contained in article IV, section 7 to fill the timing gap in the "new election" sentence of article VII, section 16.

election, they shall be filled by appointments, 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.

W. Va. Const. art. IV, § 7 (emphasis added).

Despite the plain language of article VII, section 16 of the Constitution and West Virginia Code section 3-10-2, Mr. Cooper argues that the dates of the many elections held between October 1870 and November 1872 show that, “[w]hen they ratified the Constitution, the voters of West Virginia must have understood the new-election sentence to mean: ‘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.’”¹⁰ (Cooper Pet. 32.) This simply is not correct.

As of August 22, 1872, the date on which the Constitution (including the language quoted above) was ratified, there had already been three elections in 1872 alone and two others in the fall of 1870 and 1871. Thus, contrary to Mr. Cooper’s claim, the voters of West Virginia must have understood that state government is better left to elected officials than to candidates. The text of the 1872 Constitution itself supports this position, to-wit, the Framers forever abandoned the regimen of yearly elections by cutting the regular elections in half and adopting biennial elections in place of yearly elections, doubling the terms of delegates from one year to two, and by increasing the terms of state senators. These revisions, which dramatically reduced the

¹⁰ In fact, Mr. Cooper’s allegation that the Framers intended that the Senate President act as governor for a shorter period than the person elected at the “new” election is contradicted by the structure of article VII, section 16 itself. Specifically, if an “as soon as possible” or a “prompt” requirement were read into article VII, section 16’s “new” election sentence, disparate policies emerge. On the one hand, the Constitution would require a prompt new election to address permanent vacancies, thus reducing the tenure of the President of the Senate acting as governor. On the other hand, the Constitution would permit the President of the Senate to act as governor for a period approaching four years if the elected governor were to become permanently disabled during the first weeks of his or her term. Therefore, based on these contradictory results, the Court should reject Mr. Cooper’s unfounded interpretation of the “new” election sentence and refuse to supply the “as soon as possible” or “prompt” language that the Framers themselves left out of article VII, section 16.

frequency of statewide elections, were ratified on the heels of the preceding ten years (1863-1872) of yearly elections. Thus, the effect of the 1872 changes was clearly to allow government to operate as a government and not as an ongoing electoral campaign, thereby furthering the underlying policy of article VII, section 16 to ensure continuity in government.

Mr. Cooper also argues that the “new-election sentence” of article VII, section 16 should be interpreted to mean “*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.” (Cooper Pet. 18) (emphasis added). He claims that the word “whenever,” in this instance, is equivalent to “as soon as.” However, as set forth in the amicus brief filed by Charles McElwee, words “whenever” and “new” relate to time, but are “indefinite as to a specific time” (McElwee Amicus Br. 17.) “Whenever,” as a subordinating conjunction, can have various meanings, not the least of which is the dictionary definition “at whatever time.” Applying these rules of construction, the new-election sentence is more accurately read as such: “At whatever time [or “if”] 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.” This language comports with the case cited by Mr. Cooper in support of his argument, *People v. Merhige*, 212 Mich. 601, 180 N.W. 418, 422 (1920), in which the Court classified “whenever” as “a word of condition or contingency” and noted that “[i]n construing statutes the word is frequently an equivalent to ‘if’”. Even when following the authority cited by Mr. Cooper, the Constitution of West Virginia cannot properly be read to require a “prompt” new election prior to 2012.

Therefore, instead of requiring a special election in 2011 as asserted by the Petitioners, the Constitution requires Respondent Tomblin, as President of the West Virginia Senate, to “act

as Governor until the vacancy is filled.” And, in accordance with West Virginia Code section 3-10-2, the vacancy will be filled at the next general election in 2012.

2. Current State Law Dictates that a “New” Election Occur for the Governorship in 2012 as Opposed to a Special Election in 2011.

According to article VII, section 16 of the State Constitution, “[w]henver 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.” W. Va. Const. art. VII, § 16 (emphasis added). Article VII, section 16 of the Constitution does not provide a timeline for the “new” election. However, the Legislature enacted West Virginia Code section 3-10-2 to do just that, and the history of the statutory provision shows that the Legislature was closely tracking the Constitution when formulating the statute. In that regard, the same year that the Constitution was ratified, the Legislature enacted Chapter 118, section 41, which read as follows:

*In case of the death, conviction on impeachment, failure to qualify, resignation, removal from the seat of government, or other disability of the governor, the **president of the senate shall act as governor until the vacancy is filled or the disability is removed**; and if the president of the senate, for any of the above-named causes shall become incapable of performing the duties of governor, the same shall devolve upon the speaker of the house of delegates; and in all other cases where there is no one to act as governor, one shall be chosen by joint vote of the legislature. **If the vacancy occur before the first three years of the term shall have expired, a new election for governor shall take place to fill the vacancy.** *The president of the senate, or such other officer as shall succeed to the office of governor, shall issue a proclamation fixing the time for holding an election to fill the vacancy, which shall be published in one newspaper in each county where a paper is printed, at least thirty days prior to such election, directed to the commissioner of election in the several counties, who shall proceed in the manner prescribed for conducting elections.**

Acts of the Legislature, Regular Session 1872-3, Ch. 118, § 41 (emphasis added). Only a few months later, the language italicized above was cut from Ch. 118, section 41. Acts of the Legislature, 1872-3, Ch. 118, § 177. The effect of this subsequent revision **was to remove the**

acting governor's power to issue a proclamation "fixing the time for holding an election."¹¹ Thereafter, in 1875 the state Legislature enacted the following to "fix the time for the holding of an election" when there is a vacancy in the Governor's office:

Whenever a vacancy shall occur in the office of governor before the first three years of the term shall have expired, it shall be the duty of the next person acting as governor, to issue a writ of election **to fill such vacancy at the next general election.**

Acts of the Legislature, Regular Session 1875, Ch. 66, § 41 (emphasis added). In 1881, the section was again amended and replaced by the following:

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. **If the vacancy occur more than forty days next preceding a general election the vacancy shall be filled at such election**, and the acting governor for the time being shall issue his proclamation accordingly, which shall be published in one newspaper in each county, where such paper is published, at least once in each week for four successive weeks prior to said election. But if it occur less than forty days next preceding such general election such acting governor shall issue his proclamation fixing a time for the election to fill such vacancy, which shall be published as hereinbefore provided; and it shall be the duty of the commissioners of elections in each county to hold the said election accordingly.

Acts of the Legislature, Regular Session 1881, Ch. 10, § 2 (emphasis added). This language was incorporated, unchanged, into the West Virginia Code in 1923, at West Virginia Code section 4-2-7. West Virginia Code section 4-2-7 was later amended by Senate Bill No. 2 in 1963 to reduce the forty-day threshold for proclaiming a special election to thirty days and was incorporated into the West Virginia Code at West Virginia Code section 3-10-2 and titled "Vacancy in office of governor." West Virginia Code section 3-10-2 has been relatively unchanged since 1963 and reads, in pertinent part, as follows:

In case of the death, conviction on impeachment, failure to qualify, **resignation** or other disability of the governor, **the president of the Senate shall act as**

¹¹ Notably, the amendment removed any authority that the President of the Senate (while acting as Governor) or the other Respondents might have had in this matter to call the special election sought in the Petitions.

governor until the vacancy is filled or the disability removed; and if the president of the Senate, for any of the above-named causes, shall be or become incapable of performing the duties of governor, the same shall devolve upon the speaker of the House of Delegates; and in all other cases where there is no one to act as governor, one shall be chosen by the joint vote of the Legislature. **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.** If the vacancy shall occur **more than thirty days next preceding a general election, the vacancy shall be filled at such election** and the acting governor for the time being shall issue a proclamation accordingly, which shall be published prior to such election as a Class II-O legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code, and the publication area for such publication shall be each county of the state. But **if it shall occur less than thirty days next preceding such general election, and more than one year before the expiration of the term, such acting governor shall issue a proclamation, fixing a time for a special election to fill such vacancy,** which shall be published as hereinbefore provided.

W. Va. Code § 3-10-2 (2010) (emphasis added).

The first portion of the aforesaid statute, even in its original form, closely tracks article VII, section 16 of the Constitution, and the latter portion establishes the procedure by which elections are to be held to fill a vacancy in the governorship. Specifically, for vacancies occurring before the first three years of a term have expired, and more than thirty days before the next general election, the new election to fill the vacancy occurs on the date of the next general election. The *only provision* under West Virginia Code section 3-10-2 for a special election (like that requested by the Petitioners) is where a vacancy in the governorship occurs *less* than thirty days before the general election, in which case time constraints would render an election on that date impossible. Thus, despite the fact that the original implementing statute has been amended and replaced by West Virginia Code section 3-10-2, the effect of the statute over the past one-hundred and thirty-five years has remained essentially the same – a “new” election to fill a vacancy in the governorship is deferred until the date of the next general election. Moreover, the effect of the implementing statute as amended in 1875 (like the effect of West Virginia Code

section 3-10-2 today) was consistent with the Constitution's General Deferred Election Rule ratified only three years earlier in 1872.

Importantly, an election held in 2012 pursuant to West Virginia Code section 3-10-2 will be "new" in every sense of the word. It will be "new" in that it will be a second election for a single term of office. It will be "new" in that, in accordance with West Virginia Code section 3-10-2, it will be proclaimed by Respondent Tomblin and published in a legal advertisement in order to appear on the ballot. Thus, pursuant to the dictates of the Constitution of West Virginia and West Virginia Code section 3-10-2, the election to fill the vacancy in the governorship will occur by operation of statute on the date of the next general election in 2012.

Notwithstanding the clear directive of West Virginia Code section 3-10-2 that the "new" election be held in November 2012, Mr. Cooper contends that article VII, section 16 of the Constitution did not contemplate the legislative action resulting in West Virginia Code section 3-10-2, as he deems the provision to be "self-executing." (Cooper Pet. 21-22.) Accordingly, Mr. Cooper argues that the Framers "did not plan to authorize the Legislature to carry out" the provisions of article VII, section 16. *Id.* at 22. In support thereof, he points to other constitutional provisions that contain the phrase "as may be prescribed by law," and notes that article VII, section 16 does not contain that language. Mr. Cooper, however, ignores that this Court has addressed similar arguments in the past and has specifically held that "[c]onstitutional provisions are not self-executing if they merely indicate a line of policy or principles, without supplying the means by which such policy or principles are to be carried into effect, or . . . if it appears from the language used and the circumstances of its adoption that subsequent legislation was contemplated to carry it into effect." *State ex rel. Firestone Tire & Rubber Co. v Ritchie*, 153 W. Va. 132, 139, 168 S.E.2d 287, 291 (1969) (internal quotation marks omitted). Based on

article VII, section 16 and the foregoing history and evolution of West Virginia Code section 3-10-2, Mr. Cooper's argument that article VII, section 16 is self-executing is unfounded. Therefore, because the Constitution does not require a special election prior to 2012 and because current state law dictates that a "new" election occur for the governorship in 2012, this Court should find that the Petitioners do not have a clear legal right to the relief sought.

B. The Respondents Do Not Have the Legal Duty or Authority to Call for a Special Election to Fill the Office of Governor Prior to 2012.

Mandamus is a proper remedy to require the performance of a nondiscretionary duty by a government agency or body. *See e.g., State ex rel. Allstate Ins. Co. v. Union Public Service Dist.*, 151 W. Va. 207, 151 S.E.2d 102 (1966). It is axiomatic that there can be no duty where there is no authority. Here, the Respondents do not have the authority, and therefore cannot have the duty, to call a special election in the timeline requested by the Petitioners. The Legislature has already determined an appropriate timeline for the "new" election required by article VII, section 16 and has codified that timeline in West Virginia Code section 3-10-2. To require a special election in 2011 to fill the vacated office of Governor would require that the Legislature amend West Virginia Code section 3-10-2. Therefore, the authority to require a special election in 2011 rests solely with the West Virginia Legislature, and the issuance of a writ of mandamus against the Respondents would be fruitless and improper.

The Constitution of West Virginia provides that "[t]he Legislature, in cases not provided for in this constitution, **shall prescribe, by general laws**, the terms of office, powers, duties and compensation of all public officers and agents, **and the manner in which they shall be elected, appointed and removed.**" W. Va. Const. Art. IV, § 8 (emphasis added).¹² Absent such a

¹² By way of example, a case "provided for" in the Constitution occurs with regard to the filling of a vacancy in the office of a justice of the Supreme Court of Appeals or a judge of a circuit court. W. Va. Const. art. VIII, § 7. When such a vacancy occurs, "the governor shall issue a directive of election to fill such vacancy in the manner

provision, the plenary power over elections is vested in and reserved to the Legislature. Syl. Pt. 2, *State ex rel. Fox v. Brewster*, 140 W. Va. 235, 84 S.E.2d 231 (1954). Specifically, the Legislature has the power and the plenary authority, within constitutional limitations, to regulate elections and enact requirements for the elections process, **including special elections**. *Halstead v. Rader*, 27 W. Va. 806, 1886 W. Va. LEXIS 64 (1886); *State ex rel. Brewer v. Wilson*, 151 W. Va. 113, 150 S.E.2d 592 (1966).¹³ Thus, except for the those situations provided for in the Constitution or in which the Legislature has delegated its authority by statute, the plenary power to call or proclaim special elections is vested in and reserved solely to the West Virginia Legislature.

In limited cases, this Court has determined that it has the authority to order the governor to perform a function traditionally reserved for the Legislature. However, in those cases, the

prescribed by law for electing a justice or judge of the court in which the vacancy exists, and the justice or judge shall be elected for the unexpired term.” *Id* (emphasis added).

¹³ Again by way of example, West Virginia Code sections 3-10-3 and 3-10-4 each grant the governor the authority to proclaim a special election. Those sections provide, in pertinent part:

If the unexpired term of any office is for a longer period than above specified, the appointment is until a successor to the office has timely filed a certificate of candidacy, has been nominated at the primary election next following such timely filing and has thereafter been elected and qualified to fill the unexpired term. **Proclamation of any election to fill an unexpired term is made by the governor of the state** and, in the case of an office to be filled by the voters of the entire state, must be published prior to the election as a Class II-O legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code and the publication area for the publication is each county of the state.

W. Va. Code § 3-10-3 (2010).

If there be a vacancy in the representation from this state in the House of Representatives in the Congress of the United States, **the governor shall, within ten days after the fact comes to his knowledge, give notice thereof by proclamation**, to be published prior to such election as a Class II-O legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code, and the publication area for such publication shall be each county in the congressional district. In such proclamation he shall appoint some day, not less than thirty nor more than seventy-five days from the date thereof, for holding the election to fill such vacancy.

W. Va. Code § 3-10-4 (2010). By contrast, the governor only has those duties “as may be prescribed by law.” W. Va. Const. art. VII, § 1.

Court relied upon *specific provisions* giving the governor the power to perform the function at issue.¹⁴ See *State ex rel. Robb v. Caperton*, 191 W. Va. at 494, 446 S.E.2d at 716-17 (concluding that a provision in the Constitution allowing the governor to fill a judicial vacancy that is “detailed and considerably more specific” must take precedence over a more general provision in the Constitution relating to filling vacancies for state and county officers); *Rice v. Underwood*, 205 W. Va. 274, 284, 517 S.E.2d 751, 761 (1998) (governor’s removal of public officer from his position not unconstitutional when governor did so pursuant to an explicit statutory provision).¹⁵ Here, there is no specific provision giving the Respondents the power to do what the Petitioners seek to compel.

Accordingly, because the Constitution does not provide for a prompt special election to fill the vacancy in the Governor’s office and because the Legislature has not delegated its authority in that regard, only the Legislature has the power to require a special election in 2011 to fill the vacancy in the office of Governor. Therefore, since the Respondents cannot be compelled to do something which they have no authority to do (*i.e.*, call a special election prior

¹⁴ In his Petition, Mr. Cooper cites several cases in support of his claim that mandamus relief is appropriate in this matter, *Burnell v. City of Morgantown*, 210 W. Va. 506, 558 S.E.2d 306 (2001); *State ex rel. Elliot v. Adams*, 155 W. Va. 110, 181 S.E.2d 276 (1971); *State ex rel. Woofler v. Town of Clay*, 149 W. Va. 588, 142 S.E.2d 771 (1965); *Killian v. Wilkins*, 203 S.C. 74, 26 S.E.2d 246 (1943). (Cooper Pet. 12.) However, in each of these cases, there was a statute which specifically authorized the election that was ultimately compelled by a writ of mandamus. There is no statute in the instant case requiring the Respondents to call for a special election prior to 2012. As such, not only are the cases cited by Mr. Cooper not applicable to show that mandamus is appropriate in this matter, they actually underscore why mandamus is *not appropriate*. That is, a writ of mandamus cannot be issued against a government agency or official to call a special election *unless* the Constitution of West Virginia or the applicable state code provides such government agency or official *with the authority* to call a special election. Therefore, because the plenary power to call or proclaim special elections is vested in and reserved to the West Virginia Legislature, the Respondents have no authority to proclaim the election as sought by the Petitioners.

¹⁵ There are other numerous specific constitutional provisions that operate despite general constitutional rules. Compare W.Va. Const. art. VIII, § 7 (providing for judicial pay raises) and W.Va. Const. art. VI, § 33 (providing for legislative pay raises) *with* W.Va. Const. art. VI, § 38 (general rule regarding pay raises); Compare W.Va. Const. art. IX, §§ 9, 11 (vesting county commissions with executive, judicial and legislative duties) *with* W.Va. Const. art. V, § 1 (providing for the separation of the “legislative, executive and judicial departments”).

to 2012) the Court should decline to issue rule to show cause and the requested mandamus relief should be denied.

II. THE COURT SHOULD DECLINE TO ISSUE A RULE TO SHOW CAUSE BECAUSE THE PETITIONERS HAVE FAILED TO OVERCOME THE PRESUMPTION THAT WEST VIRGINIA'S ELECTION CODE IS CONSTITUTIONAL.

“Statutes are presumed to be constitutional unless proven otherwise ‘beyond a reasonable doubt.’” *Jones v. Bd. of Stewards of Charles Town Races*, 693 S.E.2d 93, 95, 2010 W. Va. LEXIS 64, 66 (2010); *see also, Carvey v. State Bd. of Educ.*, 206 W. Va. 720, 727, 527 S.E.2d 831, 838 (1999) (noting that the Court has long exercised judicial restraint to avoid invalidating statutes on constitutional grounds). Accordingly, West Virginia Code section 3-10-2 is presumed constitutional unless the Petitioners prove otherwise beyond a reasonable doubt, which they have not and cannot do. Further, not only is West Virginia Code section 3-10-2 constitutional, it is also consistent with other provisions in the Constitution and in the West Virginia Code for filling vacancies in office.

A. The Petitioners Cannot Prove that West Virginia Code Section 3-10-2 is Unconstitutional Beyond a Reasonable Doubt.

This Court has repeatedly held that it will avoid invalidating a statute on constitutional grounds where reasonably possible. *See e.g., State ex rel. Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 143 S.E.2d 351 (1965); *State ex rel. Heck's Inc. v. Gates*, 149 W. Va. 421, 141 S.E.2d 369 (1965). “Every reasonable construction must be resorted to by a reviewing court in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question.” Syl. Pt. 1, *State ex rel. Appalachian Power Co.*, 149 W. Va. 740, 143 S.E.2d 351; *see also, Syl. Pt. 2, State ex rel. Riley v. Rudloff*, 212 W. Va. 767, 575 S.E.2d 377 (2002) (quoting *State ex rel. Appalachian Power*). Indeed, “the

well-settled general rule is that in cases of doubt the intent of the Legislature **not to exceed its constitutional powers is to be presumed and the courts are required to favor the construction which would consider a statute to be a general law.**” Syl. Pt. 8, *State ex rel. Heck's Inc.*, 149 W. Va. at 421, 141 S.E.2d at 369 (emphasis added). More recently, this Court summarized its duty in addressing the constitutionality of statutes by stating:

Only when it can be said beyond a reasonable doubt that a law violates the Constitution of this State will we invalidate a legislative enactment on constitutional grounds. Thus, when the constitutionality of a statute is questioned **every reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment.** In this regard, courts will never impute to the legislature intent to contravene the constitution of either the state or the United States, by construing a statute so as to make it unconstitutional, if such construction can be avoided, consistently with law, in giving effect to the statute, and this can always be done, if the purpose of the act is **not beyond legislative power in whole or in part, and there is no language in it expressive of specific intent to violate the organic law.**

Carvey v. State Bd. of Educ., 206 W. Va. at 727, 527 S.E.2d at 838 (internal quotations and citations omitted) (emphasis added). Thus, this Court has always gone to great lengths and exhausted every reasonable construction before invalidating a legislative enactment on constitutional grounds.

Nevertheless, the Petitioners want this Court to invalidate a portion of West Virginia’s election code, West Virginia Code section 3-10-2, on the grounds that it is unconstitutional to the extent it does not require a new election prior to 2012. However, to find West Virginia Code section 3-10-2 unconstitutional, this Court would first have to find that the Constitution requires that a new election be held prior to 2012. As set forth herein, the Constitution only requires that a “new” election be held. W. Va. Const. art. VII, § 16. It is silent as to *when* the new election should be held. If the Framers had intended that a new election be held promptly after the vacancy occurs, they would have said so in the Constitution. In the absence of an express

temporal requirement in article VII, section 16's "new" election sentence, the Court should not write it into the Constitution. *Cf. State ex rel. Wayne v. Sims*, 141 W.Va. 302, 314, 90 S.E.2d 288 (1955) (in construing Article VII section 9 of the state's Constitution, determining that the phrase "next meeting of the Senate" included extraordinary legislative sessions and observing that "[i]f [the Framers] had intended that the next meeting of the Senate would mean the next Regular Session of the Senate, they would have said so"). Accordingly, the Legislature set the timing to hold a new election when it enacted West Virginia Code section 3-10-2. That election, in this instance, will occur in November 2012, a reasonable timeframe in light of the Constitution's General Deferred Election Rule.

The intent of the Legislature not to exceed its constitutional powers or to *contravene the Constitution* when it enacted West Virginia Code section 3-10-2 must also be presumed. *See e.g. Syl. Pt. 29, Coal & Coke Ry. Co. v. Conley*, 67 W. Va. 129, 67 S.E. 613 (1910) ("The courts will never impute to the legislature intent to contravene the constitution if it can be avoided ..."). It must also be presumed that the timing set forth in West Virginia Code section 3-10-2 satisfies article VII, section 16's "new" election requirement. Therefore, because the Legislature has the power and plenary authority over elections, *Halstead v. Rader*, 27 W. Va. at 808, and because the time frame set forth in West Virginia Code section 3-10-2 does not operate to violate the Constitution, the constitutionality of West Virginia Code section 3-10-2 should be upheld. As such, the Petitioners' request for mandamus relief must be denied.

B. West Virginia Code Section 3-10-2 Comports with the Spirit of Article VII, Section 16, and is Consistent with Other Provisions in the Constitution for the Filling of Vacancies.

West Virginia Code section 3-10-2 is consistent with several other constitutional and statutory provisions, to-wit, they operate to fill vacancies on the date of the next regularly

scheduled general election. Foremost among these is the Constitution's General Deferred Election Rule, article IV, section 7, which applies to vacancies in all State offices and provides as follows:

The general elections of state and county officers, and of members of the Legislature, shall be held on the Tuesday next after the first Monday in November, until otherwise provided by law. The terms of such officers, not elected, or appointed to fill a vacancy, shall, unless herein otherwise provided, begin on the first day of January; and of the members of the Legislature, on the first day of December next succeeding their election. Elections to fill vacancies, shall be for the unexpired term. When vacancies occur prior to any general election, they shall be filled by appointments, 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.

W. Va. Const. art. IV, § 7 (emphasis added).

Pursuant to the Constitution's General Deferred Election Rule, this Court has recognized that all vacancies in state offices are filled by appointment until the next general election.¹⁶ *See Miller v. Burley*, 155 W. Va. 681, 692, 187 S.E.2d 803, 810 (1972) (“[A]ny vacancy in a state or county office which occurs at any time before a general election shall be filled by appointment which shall expire at such time after the next general election as the person elected to fill such vacancy shall be qualified and the vacancy for the unexpired term shall be filled at such general election.”)

In addition to article IV, section 7, the general policy of deferring elections until the next general election is echoed throughout the West Virginia Code. Of note, West Virginia Code section 3-10-3 provides that elections to fill certain unexpired terms take place after a candidate has been nominated at the primary election and “has thereafter been elected and qualified to fill

¹⁶ The Constitution's General Deferred Election Rule, article IV, section 7, requires the appointment of persons to fill vacancies in the offices of secretary of state, attorney general, auditor, treasurer, and commissioner of agriculture. Thereafter, the person appointed serves until the next general election.

the unexpired term.”¹⁷ W. Va. Code § 3-10-3. Such an election would necessarily take place on the date of the general election, in accordance with article IV, section 7. Also consistent is West Virginia Code section 3-10-5, which provides for the election of state senators, in pertinent part, as follows:

If the unexpired term in the office of the state senator be for less than two years and two months, the appointment shall be for the unexpired term. If the unexpired term be for a period longer than two years and two months, **the appointment shall be until the next general election** and until the election and qualification of a successor to the person appointed, at which general election the vacancy shall be filled by election for the unexpired term.

W. Va. Code § 3-10-5 (2010) (emphasis added).

Notably, the only vacancy statutes that do not provide for an appointee to serve until the next general election are those where the office is not filled by an appointment at all or where the office only has a two-year term, thereby eliminating the need for a new election. *See* W. Va. Code § 3-10-4 (operating to fill a vacancy in the United States House of Representatives by election “not less than thirty nor more than seventy-five days” from the date of proclamation); W. Va. Code § 3-10-3 (operating to fill by appointment an unexpired term of less than two years for some offices and less than two years and six months for others). In all other cases involving State offices, where the vacancy occurs on the back end of the term between the mid-term election and the four-year general election, the filling of a vacancy is accomplished on the date of the next general election.

Thus, the WV-CAG’s allegation that the “interpretation [that the election to fill the unexpired term will not occur until 2012] is directly contrary to article VII, section 16 of the

¹⁷ In an opinion dated January 31, 1990, the Attorney General of West Virginia has acknowledged the similarity between West Virginia Code §§ 3-10-2 and 3-10-3, by stating that “[t]he manner for filling a gubernatorial vacancy is found in W. Va. Code § 3-10-2, which is essentially the same as [W. Va. Code § 3-10-3].” 1990 W. Va. AG LEXIS 1.

West Virginia Constitution and leads to absurd results” is groundless and unwarranted.¹⁸ See (WV-CAG Pet. 7.) The fact that West Virginia Code section 3-10-2 does not operate to allow for an election prior to 2012 is not an aberration; it is, indeed, reflective of the same constitutional principle embodied in article IV, section 7 and reflected throughout West Virginia law.

The Petitioners contend that article IV, section 7 (the Constitution’s General Deferred Election Rule) does not apply to article VII, section 16 because the latter is an exception to the former. To the contrary, article VII, section 16 can be read as an example of article IV, section 7’s policy of ensuring the continuity of government. Under that article, the Framers must have necessarily understood that the Governor, as the “appointer-in-chief” pursuant to article VII, section 17,¹⁹ would not be capable of appointing a successor in the case of a vacancy in the

¹⁸ In support of their argument that article VII, section 16 requires a “prompt” new election, the Petitioners argue the “absurd result” that a new governor, elected pursuant to the “new” election language of article VII, section 16, may serve for a term of only eight weeks, or fifty-six days. See (Cooper Pet. 37; WV-CAG Pet. 7.) Petitioner Cooper is correct in stating that “different outcomes result from different times that a vacancy might arise.” (Cooper Pet. 37.) But this is not absurd or constitutionally infirm; in fact, following the Constitution alone (and ignoring W. Va. 3-10-2) would lead to a similar result. For example, under article VII, section 16, if a vacancy in the office of governor occurred on January 1, 2012, it would still occur before “the first three years of the term shall have expired.” Under article VII, section 16, a new election would be held to fill the vacancy. Following Mr. Cooper’s argument 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,” the election could occur as late as early to mid July, 2012. See (Cooper Pet. 20.) This would necessarily mean that the new governor could serve for less than four months before a new governor is elected in the general election of November 2012, and only six months before another governor is inaugurated. In this instance, however, the state would have accrued the significant additional cost of having a special election only four months before the general election.

In the end, this Court need not trouble itself with whether certain circumstances or facts would render an “absurd” outcome under the Constitution, but rather, whether it should read an entirely absent quality (*i.e.*, “promptness”) into article VII, section 16.

¹⁹ Article VII, section 17 provides that, “[i]f the office of secretary of state, auditor, treasurer, commissioner of agriculture or attorney general shall become vacant by death, resignation, or otherwise, it shall be the duty of the governor to fill the same by appointment, and the appointee shall hold his office until his successor shall be elected and qualified in such manner as may be prescribed by law. The subordinate officers of the executive department and the officers of all public institutions of the state shall keep an account of all moneys received or disbursed by them, respectively, from all sources, and for every service performed, and make a semiannual report thereof to the governor under oath or affirmation; and any officer who shall willfully make a false report shall be deemed guilty of perjury.”

governorship. With that reality in mind, the Framers took it upon themselves to specify a line of succession to fill such a vacancy. As such, article VII, section 16 operates as a constitutional “appointment” when it automatically vests the President of the Senate with the power to “act as governor until the vacancy is filled.” W. Va. Const. art. VII, § 16. Because article VII, section 16 is a constitutional “appointment,” article IV, section 7 mandates that the new election required therein be held at the 2012 general election. Therefore, West Virginia Code section 3-10-2 appropriately complies with article IV, section 7 and the Constitution’s General Deferred Election Rule by setting the date of the “new” election on the date of the next regularly scheduled general election. For all of these reasons, West Virginia Code section 3-10-2 is constitutional and consistent with other provisions of West Virginia law that work to ensure the continuity of government when a vacancy occurs.

C. If West Virginia Code Section 3-10-2 is Found to be Constitutionally Deficient, Then it is the Legislature, Not This Court, That Should Take Corrective Measures.

Even if West Virginia Code section 3-10-2 is found to be constitutionally deficient, this Court must still deny the Petitioners’ request for mandamus relief and defer to the Legislature for a solution.²⁰ Such an action would be consistent with this Court’s policy of adopting the least intrusive remedy when a statute is found to be unconstitutional. *See e.g., Partain v. Oakley*, 159 W. Va. 805, 227 S.E.2d 314 (1976) (providing the legislature a reasonable period to correct the deficiency); *State ex rel. Longanacre v. Crabtree*, 177 W. Va. 132, 136, 350 S.E.2d 760, 765

²⁰ The Petitioners request that this Court strike down the timeframes established in West Virginia Code section 3-10-2 for conducting the “new” election on the date of the next general election. Notwithstanding the inextricable relationship between the timing of the “new” election and the procedure for selecting candidates set forth in West Virginia Code section 3-10-2, the AFL-CIO takes great care to advocate that this Court preserve the process of selecting candidates via state party conventions while apparently sacrificing the opportunity to hold a primary election for such purpose. Respondent Tomblin submits that the Court should not favor state party conventions over primary elections and, therefore, maintains that the process for selecting candidates for the “new” election set forth in West Virginia Code section 3-10-2 should rise or fall with the constitutionality of holding the “new” election on the date of the next general election.

(1986) (allowing the legislature sufficient time to take corrective measures to revise a statute); *Don S. Co., Inc. v. Roach*, 168 W. Va. 605, 613, 285 S.E.2d 491, 496 (1981) (noting “[u]nder the doctrine of least obtrusive remedy, this Court will avoid striking down legislation whenever there is an adequate remedy to prevent such legislation from being unconstitutionally applied”); *Bd. of Education of the County of Kanawha v. West Virginia Bd. of Education*, 219 W. Va. 801, 808, 639 S.E.2d 893, 900 (2006) (finding a statute constitutionally deficient but deferring “entry of a final order to accommodate a legislative solution”).

Nevertheless, the Petitioners ask this Court to order the Respondents to call “a special election to fill the office of Governor as soon as such election may practicably be held,” notwithstanding the specific provisions of West Virginia Code section 3-10-2. (WV-CAG Pet. 10; Cooper Pet. 40.) Even assuming *arguendo* that the Respondents are vested with such authority, the Petitioners are asking this Court to either strike down or ignore West Virginia law, a course of action this Court has been reluctant to do in the past and should be equally reluctant to do here.²¹

The proper course of action would be for this Court, as an act of comity, to let the Legislature address the issue of special elections in future Legislative sessions. For example, in *West Virginia Education Association v. Legislature of West Virginia.*, 179 W. Va. 381, 383, 369 S.E.2d 454, 456 (1988), the West Virginia Education Association (“WVEA”) instituted a mandamus proceeding to challenge the constitutionality of cuts in the State expenditures for education made in the State’s budget. The WVEA sought writ of mandamus requiring the

²¹ In fact, this Court has utilized this principle even when legislative action took much longer than one 60-day legislative session. See *Crain v. Bordenkircher*, 180 W. Va. 246, 248, 376 S.E.2d 140, 142 (1988), modified by *Crain v. Bordenkircher*, 187 W. Va. 596, 420 S.E.2d 732 (1992), modified by *Crain v. Bordenkircher*, 191 W. Va. 583, 447 S.E.2d 275 (1994) (per curiam) (explaining that the Court waited for over six years for the Governor or Legislature to remedy the deplorable, unconstitutional conditions at the West Virginia Penitentiary before it stepped in).

respondent governor to call a special legislative session and requiring the respondent Legislature to supplement the budgetary appropriation for education. This Court agreed with the Petitioners that the budget was unconstitutional under article VI, section 51. However, this Court refused to issue the requested writs as an act of comity. In so doing, this Court explained as follows:

While we have determined that the budget is unconstitutional, as an act of comity, we decline today to issue extraordinary writs prayed for by WVEA. Comity is “mutual consideration between . . . equals.” Webster's Third New International Dictionary 455 (1970). Comity, as a principle of law, is a courtesy extended in deference from equals who are mindful of their duty to equals who are mindful of their duty. See W. Anderson, *A Dictionary of Law* 197 (1890). Because the concept of comity is based in mutual deference accorded to equals, it is applicable among co-equal departments (branches) of a single sovereign government. We do not today order the Governor to do any act. We do not today order the Legislature to do any act. The law presumes the Governor to know his duty when faced with an unconstitutional budget. The law presumes the Legislature to know its duty, too.

West Va. Educ. Ass'n v. Legislature of W. Va., 179 W. Va. at 383, 369 S.E.2d at 456 (footnotes omitted).

In the instant case, if this Court finds that West Virginia Code section 3-10-2 is unconstitutional in some respect, it should, in keeping with its practice of deferring to the Legislature as a co-equal branch of government and its policy of adopting the least intrusive remedy, decline to issue the extraordinary writs sought by the Petitioners.²²

²² The commencement of the next regular session will be the first opportunity for the House of Delegates and the West Virginia Senate to address the alleged constitutional and statutory infirmities in West Virginia Code section 3-10-2. The West Virginia Legislature adjourned *sine die* on July 21, 2010, at the conclusion of the Second Extraordinary Session, and one-hundred and four (104) days before the election of former-Governor Manchin to the United States Senate. The Legislature is set to convene next month “on the second Wednesday of January” in accordance with its constitutional mandate. W. Va. Const. art. VI, § 18. Accordingly, the 80th West Virginia Legislature will convene on January 12, 2011, less than sixty (60) days after the effective resignation of Governor Manchin, and fifty-four (54) days after the Petition for Writ of Mandamus was filed.

III. THE COURT SHOULD DECLINE TO ISSUE A RULE TO SHOW CAUSE BECAUSE THE COURT CANNOT PROVIDE THE RELIEF SOUGHT BY THE PETITIONERS WITHOUT OVERSTEPPING ITS OWN CONSTITUTIONAL BOUNDARIES.

As set forth herein, the Respondents are without the requisite authority do what the Petitioners request: proclaim a special election to fill the office of Governor before November 2012. *See supra* at p. 16. Only the Legislature is vested with the authority to amend West Virginia Code section 3-10-2 to allow for such a special election. W. Va. Const. art. IV § 8. Consequently, if this Court were to grant the Petitioners' respective writs of mandamus and order the Respondents to proclaim a special election in 2011, it would be interfering with powers belonging **exclusively** to the West Virginia Legislature in violation of the doctrine of separation of powers, article V, section 1, which reads as follows:

The legislative, executive and judicial departments shall be separate and distinct, so that **neither shall exercise the powers properly belonging to either of the others**; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the Legislature.

W. Va. Const., art. V, § 1 (emphasis added).²³

Under the doctrine of separation of powers, “courts have no authority -- **by mandamus, prohibition, contempt or otherwise** -- to interfere with the proceedings of either house of the Legislature.” Syl. Pt. 3, *State ex rel. Holmes v. Clawges*, 2010 W. Va. LEXIS 116 (2010) (emphasis added); *see also, Clough v. Curtis*, 134 U.S. 361, 371 (1890) (observing that a writ of mandamus may not be issued to a legislature to enforce actions typically governed by the legislature, as “[o]ne branch of the government ... cannot encroach on the domain of another without danger”); *State ex rel. County Court of Marion Co. v. Demus*, 148 W. Va. 398, 135

²³ This Court has consistently maintained that “[t]he legislative, executive and judicial departments of the government must be kept separate and distinct, and each in its legitimate sphere must be protected.” Syl. Pt. 1, *State ex rel. Miller v. Buchanan*, 24 W. Va. 362, 1884 W. Va. LEXIS 66 (1884); *Danielley v. City of Princeton*, 113 W. Va. 252, 255, 167 S.E. 620, 622 (1933) (“whenever a subject is committed to the discretion of the legislative or executive department, the lawful exercise of that discretion cannot be controlled by the judiciary”).

S.E.2d 352 (1964) (courts of this state are forbidden to “exercise legislative authority of any kind”). The authority to regulate elections and enact requirements for the election process in West Virginia rests solely in the domain of the Legislature. As such, any attempt by this Court to interfere with the election process is strictly prohibited.

Nevertheless, by seeking mandamus relief to compel the Respondents to take action (*i.e.*, call a special election), that is exactly what Petitioners would have this Court do – interfere with a matter exclusively within the domain of the West Virginia Legislature. Such interference is strictly forbidden by the Constitution, however, and the respective Petitions should therefore be denied.

IV. THE COURT SHOULD DECLINE TO ISSUE A RULE TO SHOW CAUSE BECAUSE THE DOCTRINE OF SEPARATION OF POWERS DOES NOT BAR RESPONDENT TOMBLIN FROM ACTING AS GOVERNOR UNTIL THE NEXT GENERAL ELECTION.

This Court has repeatedly held that the doctrine of separation of powers, article V, section 1, “is not merely a suggestion; it is part of the fundamental law of our State and, as such, it must be strictly construed and clearly followed.” *State ex rel. Barker v. Manchin*, 167 W. Va. 155, 279 S.E.2d 622 (1981); *See also, State ex rel. State Building Comm. v. Bailey*, 151 W. Va. 79, 150 S.E.2d 449 (1966). Notwithstanding this precept, however, this Court has recognized that there are circumstances under which “interference” between the branches is constitutionally approved.²⁴ *See e.g., State ex rel. Barker*, 167 W. Va. at 167, 279 S.E.2d at 630 (where one branch of state government seeks to exercise or to impinge upon the powers conferred upon another branch, the Court is “compelled...to restrain such action, **absent a specific**

²⁴ In *State ex rel. Barker*, this Court provided some examples of constitutionally-approved intrusions into the legislative sphere which make clear that, despite the otherwise sweeping language of the doctrine of separation of powers, there exist specific constitutional provisions permitting executive interference with the legislative sphere. For example, the Governor, as chief executive of the State, is required to prepare and submit to the Legislature a budget under article VI, section 51, and is empowered to convene the Legislature under article VI, section 19, to call extraordinary sessions under article VII, section 7, and to veto bills under article VII, sections 14 and 15.

constitutional provision permitting such interference.”) (emphasis added); *State ex rel. Thompson v. Morton*, 140 W. Va. 207, 84 S.E.2d 791, 1954 W. Va. LEXIS 63 (1954) (“While the Constitution contemplates the independent operation of the three departments of government as to all matters within their respective fields, there can be no doubt that the people, through their Constitution, may authorize one of the departments to exercise powers otherwise rightfully belonging to another department.”); *State ex rel. Joint Comm. on Gov’t. and Fin. v. Bonar*, 159 W. Va. 416, 419 (1976) (“Inherent in the constitutional concept of separation of powers is the acknowledgement that the powers granted and exercised by each department separately must in some way be conjoined to produce a governmental entity.”); *State ex rel. Sahley v. Thompson*, 151 W. Va. 336, 341, 151 S.E.2d 870, 873 (1966) (“This Court has long recognized that it is not possible that division of power among the three branches of government be so precise and exact that there is no overlapping whatever.”).²⁵

In the instant case, there is a “specific Constitutional provision,” namely article VII, section 16, which allows for the “interference” between the executive branch and the legislative branch caused by Respondent Tomblin acting as Governor until the next general election in 2012. Article VII, section 16 of the Constitution actually contemplates the continued role of the Senate President *after* he begins to act as Governor.²⁶

²⁵ See also, *Ackerman Dairy v. Kandle*, 54 N.J. 71, 253 A.2d 466 (1969).

²⁶ The AFL-CIO suggests that the President of the Senate acting as governor would violate the “incompatibility of offices” provisions of article VII, section 4, and article VI, section 13 because “as a sitting member of the West Virginia Senate, while acting as governor, [Tomblin] will be receiving the governor’s salary, making appointments of State officials, including vacancies in the legislature and judiciary . . . , of which require senate approval, vetoing or signing into law acts passed by the legislature, all which appear to be a conflict with the provisions of the separation of power and incapability provisions of the Constitution.” (AFL-CIO Pet. To Intervene 7.) However, the AFL-CIO, like the Petitioners, do not argue that the President of the Senate acting as Governor is unconstitutional per se. Instead, the AFL-CIO argues that the President of the Senate acting as Governor only becomes unconstitutional if it persists for an extended period. This argument simply does not make sense. There can be no limitation on article VII, section 16’s exception to the general separation of powers clause of the Constitution. See (McElwee’s Amicus Br. 25.) Further, the crux of the AFL-CIO’s argument is seemingly that article VII, section 16 is itself unconstitutional because it contravenes the so-called “incompatibility of offices” provisions. However, the

This Court has instructed that words used in constitutional provisions be read in accordance with their ordinary meaning. *Syl. Pt. 6, State ex rel. Trent v. Sims*, 138 W. Va. 244, 77 S.E.2d 122 (1953) (“Words used in a state constitution, as distinguished from any other written law, should be taken in their general and ordinary sense.”). Specifically, the text of article VII, section 16 provides three separate indicia that the Framers intended to create a specific and narrow exception to the general separation of powers principles contained in article V, section 1,²⁷ article VI, section 13²⁸ and article VII, section 4²⁹ of the Constitution.

First, after designating that the President of the Senate shall act as governor during a vacancy or disability in the office of governor, the Framers continued to refer to the President of the Senate as the President of the Senate and not as the “acting governor” or like title when providing for the additional contingency that the President of the Senate may not be able to act as governor until the vacancy is filled or disability removed. This necessarily supports the position that the Framers did not intend for the President of the Senate to resign his or her separate office³⁰ after beginning to act as governor – a clear recognition that article VII, section 16 must

AFL-CIO’s argument is rejected by *State ex rel. Robb v. Caperton, supra*, which provides that “[t]he general rule of statutory construction requires that a *specific* statute be given precedence over a *general* statute relating to the same subject matter where the two cannot be reconciled.” 191 W. Va. 492, 494, 446 S.E.2d 714, 716 (1994) (emphasis added). Thus, the “specific” provisions of article VII, section 16 must be read to “trump” the other general provisions cited by the AFL-CIO, article VII, section 4 and article VI, section 13, not contravene them.

²⁷ The text of article V, section 1 can be found *supra* at 27.

²⁸ Article VI, section 13 provides that, “[n]o person holding any other lucrative office or employment under this state, the United States, or any foreign government; no member of Congress; and no person who is sheriff, constable, or clerk of any court of record, shall be eligible to a seat in the Legislature.”

²⁹ Article VII, section 4 provides that, “[n]one of the executive officers mentioned in this article shall hold any other office during the term of his service. A person who has been elected or who has served as governor during all or any part of two consecutive terms shall be ineligible for the office of governor during any part of the term immediately following the second of the two consecutive terms. The person holding the office of governor when this section is ratified shall not be prevented from holding the office of governor during the term immediately following the term he is then serving.”

³⁰ *State ex rel. McGraw v. Willis*, 174 W. Va. 118, 323 S.E.2d 600 (1984) (noting that the office of President of the Senate is separate and distinct from the office of senator).

operate as an exception to the general doctrine of separation of powers during the rare but critical period for our government following a vacancy in the governorship.

Second, when providing that the President of the Senate shall continue in that capacity while acting as governor until the vacancy is filled or the disability removed, the Framers used the future tense of the verb “to be” when referring to the possibility that the President of the Senate may himself or herself become incapable in the future of continuing to act as governor. Specifically, article VII, section 16 provides, in pertinent part, “and if the president of the Senate, for any of the above named causes, **shall become incapable** of performing the duties of governor, the same shall devolve upon the speaker of the House of Delegates . . .” W. Va. Const. art. VII, § 16. This phrasing also supports the position that the President of the Senate retains his or her office as President of the Senate for the entire time that he or she “acts as governor.”

Lastly, had the Framers intended that the President of the Senate relinquish his or her office when he or she begins to “act as governor,” they simply would have used the present tense verb “is” instead of the future tense verb “shall become.” If the Framers had done so, then the argument that the President of the Senate cannot continue in that capacity once he or she begins to “act as governor” without violating the separation of powers principles might be meritorious. However, this Court must interpret the words actually used in article VII, section 16 in accordance with their ordinary meaning. And, in so doing, it is clear that the Framers intended to create a narrow and specific exception to the general separation of powers principles found in article V, section 1, article VI, section 13 and article VII, section 4 when they drafted article VII, section 16. Therefore, in accordance with *State ex rel. Barker v. Manchin*, *supra*, article VII, section 16 is a specific exception to the more general constitutional separation of powers provisions and must be given precedence in accordance with the Framers’ intent. Accordingly,

the doctrine of separation of powers does not bar Respondent Tomblin from acting as Governor until 2012 and the mandamus relief requested by the Petitioners should be denied.

CONCLUSION

The Petitioners have not satisfied the three strict requirements of West Virginia's mandamus law. They have not established either a "clear legal right" to the relief sought or that the Respondents have "a legal duty" to call a special election in 2011. Additionally, the Petitioners have not demonstrated beyond a reasonable doubt that West Virginia Code section 3-10-2 is unconstitutional. West Virginia Code section 3-10-2 comports with the spirit of article VII, section 16, and it is consistent with the other provisions in the Constitution for filling vacancies. Thus, the Court should not declare as unconstitutional the Legislature's valid exercise of its power and plenary authority over elections. Lastly, the doctrine of separation of powers prevents one co-equal branch of government from exercising the powers rightly belonging to the other branches. As this Court held in *State ex rel. County Court of Marion Co. v. Demus, supra*, courts may not exercise legislative authority of any kind. However, it is also well-established West Virginia law that the doctrine of separation of powers is nevertheless subject to specific constitutional exceptions. Article VII, section 16, which allows the President of the Senate to act as Governor, is such an exception and should be respected in this case because it furthers the critical policy of ensuring continuity in government during vacancies in the State's highest executive office. Thus, while the Petitioners would prefer an election for the unexpired gubernatorial term prior to the 2012 general election, they have not demonstrated that an approximate two-year delay in holding the "new" election is unconstitutional.

WHEREFORE, on the basis of the foregoing authorities and arguments made thereupon, this Court is not confronted with a fundamental imperfection in the functioning of democracy

and should decline to issue a rule to show cause in this case, with prejudice, deny the Petitions for Writ of Mandamus and award such other and further relief as this Court may deem proper.

EARL RAY TOMBLIN, Respondent

By Counsel

A handwritten signature in black ink, appearing to read 'T.V. Flaherty', is written over a horizontal line.

Thomas V. Flaherty (WV Bar No. 1213)
Tammy R. Harvey (WV Bar No. 6904)
Caleb P. Knight (WV Bar No. 11334)
Flaherty Sensabaugh Bonasso PLLC
P. O. Box 3843
Charleston, WV 25338-3843
(304) 347-4232

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Upon Original Jurisdiction

STATE OF WEST VIRGINIA
ex rel. CITIZENS ACTION GROUP,
Petitioner,

v.

No. 101494

EARL RAY TOMBLIN,
President of the West Virginia Senate,
RICHARD THOMPSON,
Speaker of the West Virginia House of Delegates,
and NATALIE E. TENNANT,
Secretary of State of West Virginia,
Respondents.

--AND--

STATE OF WEST VIRGINIA
ex rel. THORNTON COOPER,
Petitioner,

v.

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 E. TENNANT,
Secretary of State of West Virginia,
Respondents.

CERTIFICATE OF SERVICE

I, Thomas V. Flaherty, counsel for Earl Ray Tomblin, do hereby certify that I have served the foregoing *Response of Earl Ray Tomblin to Petition for Writ of Mandamus* upon counsel of record this 27th day of December, 2010, addressed as follows:

Kathryn Reed Bayless, Esq.
Bayless Law Firm, PLLC
1607 West Main Street
Princeton, WV 24740
Counsel for Petitioner
Via Facsimile and U. S. Mail

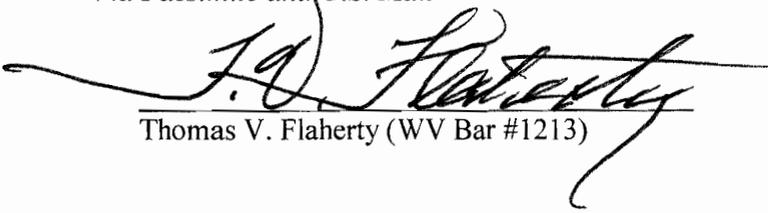
Anthony J. Majestro, Esq.
Powell & Majestro P.L.L.C.
405 Capitol Street, Ste. 1200
Charleston, WV 25301
Counsel for Richard Thompson
Via Hand Delivery and U.S. Mail

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
Via Facsimile and U.S. Mail

Thornton Cooper, Esq.
3015 Ridgeview Drive
South Charleston, WV 25303
Petitioner, Pro Se
Via Facsimile and U.S. Mail

Darrell V. McGraw, Jr., Esq.
West Virginia Attorney General
Room E-26, Building 1
State Capitol Building
1900 Kanawha Boulevard, East
Charleston, WV 25305
Via Facsimile and U. S. Mail

Lisa A. Hopkins, Esq.
General Counsel
West Virginia State Auditor's Office
Capitol Complex, Bldg. 1, Room W-100
Charleston, WV 25305
Via Facsimile and U.S. Mail


Thomas V. Flaherty (WV Bar #1213)