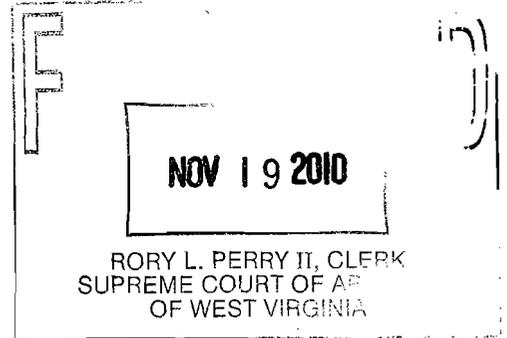


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**Upon Original Jurisdiction**

**No.** \_\_\_\_\_



**STATE OF WEST VIRGINIA  
ex rel WEST VIRGINIA CITIZEN  
ACTION GROUP,**

**Petitioner,**

**v.**

**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.**

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**MEMORANDUM IN SUPPORT OF PETITION  
FOR WRIT OF MANDAMUS**

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**MEMORANDUM IN SUPPORT OF PETITION  
FOR WRIT OF MANDAMUS**

State of West Virginia ex rel. West Virginia Citizen Action Group (“WV-CAG”) has filed a Petition for a Writ of Mandamus against Earl Ray Tomblin, President of the West Virginia Senate (“President Tomblin”), Richard Thompson, Speaker of the West Virginia House of Delegates (“Speaker Thompson”), and Natalie E. Tennant, Secretary of State of West Virginia (“Secretary Tennant”). In support of this Petition, WV-CAG now files this Memorandum of Law. For the reasons set forth below, WV-CAG seeks a writ of mandamus from this Court ordering the Respondents to call a special election to fill the office of Governor. WV-CAG brings this action on behalf of its members who are citizens and voters in this State.

**KIND OF PROCEEDING**

This is an original jurisdiction proceeding brought pursuant to West Virginia Rule of Appellate Procedure 14 and West Virginia Code § 53-1-2 by Petitioner WV-CAG against Respondents seeking a writ of mandamus from this Court requiring Respondents to call a special election to fill the office of Governor as soon as such election may practicably be held.

**STATEMENT OF FACTS**

Petitioner, WV-CAG is a non-profit, incorporated association. Since 1974, WV-CAG has advocated for better public policy, rights of individuals, a clean environment and a stronger democratic process. With members in every West

Virginia county, WV-CAG's mission is to ensure that the public interest is expressed and represented before the state's decision-making instrumentalities. In connection with this mission, WV-CAG has consistently advocated on behalf of rights of the citizens of West Virginia to participate in the democratic process.<sup>1</sup> It has also not hesitated to bring disputes before this Court to safeguard constitutional guarantees of separation of powers.<sup>2</sup>

Respondent President Tomblin is the current President of the West Virginia Senate. Speaker Thompson is the current Speaker of the West Virginia House of Delegates. Pursuant to article VII, section 16, President Tomblin is charged with acting as Governor when there is a vacancy in the office of Governor. Under this same provision, Speaker Thompson would act as Governor should President Tomblin become incapable of serving. Secretary Tennant is the West Virginia Secretary of State. As such, she is the Chief Elections officer of the State of West Virginia.

On January 19, 2009, Joe Manchin, III was inaugurated as Governor after being elected to a second four-year term on November 4, 2008. On November 8, 2010, Governor Manchin was elected to fill the unexpired term of Senator Robert C. Byrd who passed away on June 28, 2010. On November 15, 2010, Manchin resigned as Governor and was sworn in as United States Senator.

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<sup>1</sup>See, e.g., *West Virginia Citizens Action Group, Inc. v. Daley*, 174 W.Va. 299, 324 S.E.2d 713 (1984).

<sup>2</sup>See, e.g., *State ex rel. West Virginia Citizens Action Group v. West Virginia Economic Development Grant Committee*, 213 W.Va. 255, 580 S.E.2d 869 (2003).

Governor Manchin's resignation was apparently effective as of noon, November 15, 2010. *See* Exhibit A. Shortly thereafter, President Tomblin took an oath of office for the office of Governor. *Id.* On November 16, 2010, a public oath of office was administered by Chief Justice Robin Davis. *Id.*

The West Virginia Constitution requires that a new election take place to fill the vacancy in the office of the Governor caused by Governor Manchin's resignation. President Tomblin has publicly announced his belief that West Virginia law allows him to be and remain in the position of Governor until the November, 2012 election. *See* Exhibit B at p. 4. Legislative attorneys working for President Tomblin and Speaker Thompson have concluded that the special election required by the West Virginia Constitution is not required to occur until November, 2012. *See* Exhibit C.

The constitutionality of this interpretation has been challenged by citizens (*see, e.g.,* Exhibit D), and at least one noted West Virginia constitutional scholar. *See* Exhibit C. Despite these requests to correct the statute to comply with the Constitution's intent, the Legislature, led by President Tomblin and Speaker Thompson, has not acted and has indicated that there will not be a prompt legislative special session to address this issue. *See* Exhibit E.

Respondents have refused to set a new election before the 2012 primary and general elections which will result in the State having no elected governor for two years. Because the West Virginia Constitution does not permit this result,

WV-CAG seeks a writ of mandamus from this Court ordering a new election for Governor to be held within ninety days from the issuance of the writ.

### **POINTS AND AUTHORITIES AND DISCUSSION OF LAW**

#### **I. THE WEST VIRGINIA CONSTITUTION REQUIRES A PROMPT NEW ELECTION FOR GOVERNOR FOLLOWING THE RESIGNATION OF THE GOVERNOR LESS THAN THREE YEARS INTO THE TERM.**

Section 16 of article VII of the West Virginia Constitution provides as follows:

In case of the death, conviction or 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.

Under this provision, President Tomblin can “act as governor until the vacancy is filled.” *Id.* However, section 16 makes it clear that this arrangement is temporary and that “a new election for governor shall take place to fill the vacancy” when the remaining term has more than one year left. *Id.*

The Constitution does not directly specify when the new election should be held; however, a number of its provisions are consistent with interpreting the Constitution’s gubernatorial succession provision as being designed to provide a short-term executive only until an election could be held.

First, section 16 by its terms requires a new election if there is more than one year remaining in the elected term. This is clear evidence that longer vacancies require a new election.

Second, allowing a member of the Legislature to act as Governor only on a temporary basis is consistent with the numerous Constitutional provisions setting forth the doctrine of separation of powers. Article V, section 1 sets forth the doctrine:

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.

Other provisions in the Constitution reinforce this principle. For example, “[n]o person holding any other lucrative office . . . under this state. . . shall be eligible to a seat in the Legislature.” W.Va. Const., art. VI, § 13. Similarly, no executive officer “shall hold any other office during the term of his service.” *Id.* at art. VII, § 4. And, with respect to the judiciary, “[n]o justice, judge or magistrate shall hold any other office. . . under this or any other government.” *Id.* at art. VIII, § 7.

This Court has recognized these important principles. “Article V, section 1 of the Constitution of West Virginia which prohibits any one department of our state government from exercising the powers of the others, is not merely a suggestion; it is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed.” Syl. pt. 1, *Barker v. Manchin*, 167 W.Va. 155, 279 S.E.2d 622 (1981). Indeed, this Court has never “hesitated to utilize the

doctrine [of separation of powers] where . . . there was a direct and fundamental encroachment by one branch of government into the traditional powers of another branch of government.” *Appalachian Power Co. v. PSC*, 170 W.Va. 757, 759, 296 S.E.2d 887, 889 (1982).

Any interpretation of the West Virginia Constitution that permits a member of the Legislature to act as Governor for any longer than it takes to hold a new election for Governor is inconsistent with both the doctrine of separation of powers and section 16 of article VII.

**II. TO THE EXTENT THAT WEST VIRGINIA’S ELECTION CODE PERMITS A SPECIAL ELECTION FOR GOVERNOR TO BE DELAYED FOR TWO YEARS, IT IS UNCONSTITUTIONAL.**

Respondents apparently believe that West Virginia Code § 3-10-2 permits the new election for Governor required by the Constitution to be delayed until the 2012 regularly scheduled primary and general election. It provides:

In case of the . . . resignation . . . 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 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. In this case, the Governor has resigned before the first three years of the elected term have expired, but not within thirty days preceding a general election. Thus, under the terms of the statute as interpreted by Respondents, the election to fill the unexpired term will not occur until November, 2012.

This interpretation is directly contrary to article VII, section 16 of the West Virginia Constitution and leads to absurd results. For the reasons noted above, the Constitution limits the vacancy period to the situation where there is only a year remaining at the time that the vacancy occurs. Under the statute, however, a vacancy occurring 29 days before the mid-term general election would not be filled by an elected candidate for over two years. Such a result is clearly in violation of the Constitution. Legislative enactments that violate separation of powers are void. Syl. pt. 3, *Barker v. Manchin, supra*.

**III. THIS COURT SHOULD GRANT A WRIT OF MANDAMUS REQUIRING THE RESPONDENTS TO CONDUCT THE NEW ELECTION FOR GOVERNOR REQUIRED BY THE CONSTITUTION.**

The West Virginia statutes providing for an election when there is a vacancy in the office of the Governor are, for the reasons noted above,

unconstitutional. Under these circumstances, relief in the form of a writ of mandamus is appropriate.

“Mandamus is a proper remedy to require the performance of a nondiscretionary duty by various governmental agencies or bodies.” Syl. pt. 1, *State ex rel. Allstate Ins. Co. v. Union Public Service Dist.*, 151 W.Va. 207, 151 S.E.2d 102 (1966). The general standard is as follows:

A writ of mandamus will not issue unless three elements coexist-(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.

Syllabus Point 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969).

This Court has approved of the use of mandamus to order elections improperly withheld by a legislative body. *See* syl. pt. 1, *State ex rel. Horne v. Adams*, 154 W.Va. 269, 175 S.E.2d 193 (1970) (“Mandamus is the proper remedy to compel a city council to submit a question to the voters where the law provides for such submission and council refuses to do so.”); *see also State ex rel. Elliott v. Adams*, 155 W.Va. 110, 113, 181 S.E.2d 276, 278 (1971) (“when the requisite number of signatures is contained upon a valid [initiative] petition, mandamus will lie to compel the council to submit the question to the voters at an election where the council has refused to adopt such ordinance or submit such question to the voters of the municipality”); *State ex rel. Plymale v. Garner*, 147 W.Va. 293, 128 S.E.2d 185 (1962) (same). Indeed, this Court has often noted that mandamus is

especially appropriate for resolving election issues. See 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) (“this Court does not hold an election mandamus proceeding to the same degree of procedural rigor as an ordinary mandamus case”). “Said another way, ‘when a writ of mandamus has been invoked to preserve the right to vote or to run for political office ... this Court has eased the requirements for strict compliance for the writ’s preconditions, especially those relating to the availability of another remedy.’ Syllabus Point 3, in part, *State ex rel. Sowards v. County Comm'n of Lincoln Co.*, 196 W.Va. 739, 474 S.E.2d 919 (1996).” *State ex rel. Sandy v. Johnson* 212 W.Va. 343, 348, 571 S.E.2d 333, 338 (2002).

The facts of this case clearly meet the test for mandamus. Under the West Virginia Constitution, WV-CAG’s members have clear legal right to elect a successor Governor when more than one year remains in the term. For these same reasons, Respondents have a legal duty to call a special election to elect a Governor. Finally, there is no other adequate remedy. Absent an order from this Court, no special election will be held before 2012.

When courts are forced to order a special election when the timing is not provided by statute, the court should order that the election occur “as soon as practicable.” *Buck v. Corrigan*, 233 Mich. 414, 424, 206 N.W. 798, 801 (1926) (granting mandamus and ordering special election as soon as practicable); see also *Wright v. City of Albany*, 306 F.Supp.2d 1228, 1239-1240 (M.D.Ga. 2003)

(denying request to hold special election in conjunction with regularly scheduled primary after determining that the election should be held “as soon as possible and practicable”); *Dillard v. City of Greensboro*, 865 F.Supp. 773, 779 (M.D.Ala. 1994) (same), *vacated on other grounds*, 74 F.3d 230 (11th Cir. 1996); *State ex rel. Lanier v. Hall*, 74 N.D. 426, 432, 23 N.W.2d 44, 48 (N.D. 1946) (“When an elective office becomes vacant it is the policy of the law to give the people a chance to fill it by the elective process as soon as practicable,” citing 42 Am.Jur., Public Officers, sec. 130).

#### **PRAYER OF RELIEF**

Petitioner, WV-CAG, seeks a writ of mandamus from this Court requiring Respondents to call a special election to fill the office of Governor as soon as such election may practicably be held. In connection with this request, this Court should promptly issue a rule to show cause and set the case for an expedited hearing.

**STATE OF WEST VIRGINIA**  
*ex rel* **WEST VIRGINIA CITIZEN**  
**ACTION GROUP,**

**By counsel,**

A handwritten signature in black ink, appearing to read 'KRB', is written over a horizontal line.

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