
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

STATE OF WEST VIRGINIA ex rel.
BELINDA BIAFORE, in her capacity as
Chair of the West Virginia State Democratic
Executive Committee, and STEPHEN DAVIS,
LINDA KLOPP, DAVID THOMPSON, LINDA
PHILLIPS, STEPHEN EVANS, and PATRICIA BLEVINS,
each individually, and in their capacity as the
members of the West Virginia Democratic
Executive Committee for the Ninth Senatorial District,

Petitioners,

v.

EARL RAY TOMBLIN, in his capacity as
Governor of the State of West Virginia, and
BEVERLY R. LUND, JUSTIN M. ARVON,
SUE "WAOMI" CLINE, TONY PAYNTER, JOHN DOE,
and JANE DOE, in their in their capacity as the
members of the West Virginia Republican
Executive Committee for the Ninth Senatorial District,

Respondents.

BRIEF OF THE HONORABLE WILLIAM P. COLE, III, PRESIDENT OF THE WEST VIRGINIA SENATE, AS *AMICUS CURIAE* IN SUPPORT OF BRIEF OF RESPONDENTS, BEVERLY R. LUND, JUSTIN M. ARVON, SUE "WAOMI" CLINE, TONY PAYNTER, JOHN DOE, AND JANE DOE, IN THEIR CAPACITY AS THE MEMBERS OF THE WEST VIRGINIA REPUBLICAN EXECUTIVE COMMITTEE FOR THE NINTH SENATORIAL DISTRICT

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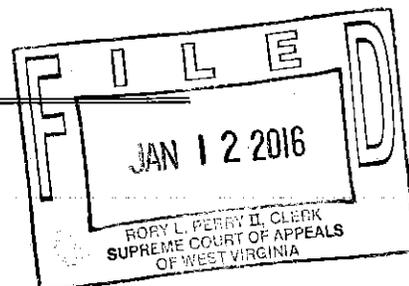


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INTRODUCTION

The Honorable William P. Cole, III, President of the West Virginia Senate ["President Cole"], files this brief as *amicus curiae* in support of the brief to be filed by the Respondents, Beverly R. Lund, Justin M. Arvon, Sue "Waomi" Cline, Tony Paynter, John Doe, and Jane Doe, in their Capacity as the Members of the West Virginia Republican Executive Committee for the Ninth Senatorial District ["Republican Respondents"].¹ He does so because the West Virginia Senate has a strong interest in ensuring that vacancies in the body are filled in accordance with an unambiguous statutory directive and in a manner which is not disruptive to the orderly administration of the chamber. Requiring that vacancies be filled pursuant to a clear legislative directive is also consistent with the Senate's constitutional authority to be the judge of the qualifications of its members. Here, the Emergency Petition for a Writ of Mandamus ["Petition"] advances a position which is at odds with the clear language of the applicable statute. Thus, President Cole specifically requests that this Court deny the application for mandamus relief.

STATEMENT OF THE CASE

President Cole generally incorporates by reference the Statement of the Case set forth by Petitioners. There are, however, certain inaccuracies which should be corrected. Contrary to Petitioners' assertion, the switch in party affiliation of Senator Daniel Jackson Hall ["Senator Hall"] on November 5, 2014² did not give control of the Senate to the Republicans by a one vote margin. *See* Petition pp. 2, 5. Instead, the majority was by a two (2) vote margin, 18-16. Additionally, the contention that Senate Democrats would be entitled to equal representation on all Senate committees with some Democrats serving as committee chairs is incorrect. There is nothing within the Senate rules which would entitle Democrats to equal representation on

¹ Pursuant to West Virginia Rule of Appellate Procedure 30(b), President Cole has provided notice to all parties of his intention to file an *amicus curiae* brief. Because the Emergency Petition for a Writ of Mandamus was filed on January 8, 2016 and this Court directed that any *amicus curiae* filing be accomplished by noon on January 12, 2016, President Cole could not provide such notice at least 5 days prior to the filing as normally required by Rule 30(b).

² The Petition inaccurately asserts that Senator Hall switched parties on November 5, 2015.

committees or to serve as committee chairs. Most committees have odd numerical compositions such that equal representation can never occur. See W.Va. Senate Rule 27. Moreover, the selection of committee chairs is exclusively within the authority of President Cole who is beginning the second year of a two (2)-year term. See W.Va. Const., Art. VI §18; W.Va. Senate Rule 28.

STATEMENT OF INTEREST

President Cole is the duly elected President of the West Virginia Senate, having been elected by his peers for a two (2) year term on January 14, 2015, pursuant to the provisions of W.Va. Const. Art. VI §§18 and 24 and W.Va. Code §4-1-8. President Cole is an independent officer of the Senate, distinct and separate from his senatorial position. *State ex. rel. McGraw v. Willis*, 174 W.Va. 118, 323 S.E.2d 600 (1984). The chamber over which President Cole presides possesses the constitutional authority to be the judge of the qualifications of its members and would be directly impacted by the resolution of the Petition.

President Cole files this brief, pursuant to Rule 30 of the West Virginia Rules of Appellate Procedure, in support of the position of the Republican Respondents in this original jurisdiction proceeding. The Senate has a strong interest in ensuring that vacancies in its body are filled in accordance with a clear and unambiguous statutory directive. The Senate must be able to rely upon this clear provision for the filling of vacancies so that its proceedings are conducted in an orderly manner and, again, in a way consistent with the Legislature's clear expression of how vacancies are to be filled. Here, the position of the Petitioners is not only inconsistent with the unambiguous provisions of W.Va. Code §3-10-5, but it threatens to undermine the constitutional authority of the Senate to determine how vacancies of its members are to be filled as expressed through the enactment of the statute. Accordingly, President Cole appears as *amicus curiae* because the import of the Petition is far reaching if a writ of mandamus is awarded.

ARGUMENT

There are several compelling reasons why the Petition should be denied. Faced with a legislator who changed party affiliation over a year ago, Petitioners seek a judicial remedy to effect a political solution rather than addressing the issue through the electoral process. This effort, however, runs afoul of the clearly defined procedure that the Legislature prescribed for filling vacancies in either body.

The statutory manner for filling a Senate vacancy is clear and unambiguous. The appointment by the Governor must be from the political party “with which the person holding the office immediately preceding the vacancy was affiliated.” W.Va. Code §3-10-5(a). There is a clear temporal definition as to when party affiliation is to be determined and it focuses upon affiliation immediately before the vacancy. Thus, the Governor will be required to appoint a Republican as that was the party affiliation of Senator Hall “immediately preceding” his resignation.

It is also significant that the Petition seeks relief which will undermine important separation of powers principles. Constitutionally, the Senate is empowered to determine the qualifications of its members. That power has been exercised through a clear statutory provision. To adopt Petitioners’ argument would result in this Court invading an area in which the Senate and the House of Delegates have clearly spoken.

I. THE STATUTORY PROVISION FOR FILLING THE SENATE VACANCY IS CLEAR AND UNAMBIGUOUS AND SHOULD BE APPLIED BY THIS COURT

A. WEST VIRGINIA CODE §3-10-5(a) IS CLEAR AND UNAMBIGUOUS

“The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.” Syl. Pt. 3, *Collett v. Eastern Royalty, LLC*, 232 W.Va. 126, 751 S.E.2d 12 (2013). “When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.” Syl. Pt. 5, *Liberty Mutual Ins. Co., v. Morrisey*, _____ W.Va.

_____, 760 S.E.2d 863 (2014). Likewise, “[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.” Syl. Pt. 4., *Id.* With these canons of statutory construction in mind, this Court has cautioned that “[a] statute, or an administrative rule, may not, under the guise of ‘interpretation’ be modified, revised, amended or re-written.” Syl. Pt. 1 *Consumer Advocate Div. of Pub. Serv. Comm’n v. Pub. Serv. Comm’n*, 182 W.Va. 152, 386 S.E.2d 650 (1989).

The relevant statute, W.Va. Code §3-10-5, is not ambiguous and its plain terms should be simply applied. The statute provides in relevant part:

(a) Any vacancy in the office of State Senator or member of the House of Delegates shall be filled by appointment by the Governor, from a list of three legally qualified persons submitted by the party executive committee of the party with which the person holding the office immediately preceding the vacancy was affiliated. The list of qualified persons to fill the vacancy shall be submitted to the Governor within fifteen days after the vacancy occurs and the Governor shall duly make his or her appointment to fill the vacancy from the list of legally qualified persons within five days after the list is received. If the list is not submitted to the Governor within the fifteen-day period, the Governor shall appoint within five days thereafter a legally qualified person of the same political party as the person vacating the office.

...

(c) In the case of a State Senator, the list shall be submitted by the party executive committee of the state senatorial district in which the vacating senator resided at the time of his or her election or appointment. The appointment to fill a vacancy in the State Senate is for the unexpired term, unless section one of this article requires a subsequent election to fill the remainder of the term, which shall follow the procedure set forth in section one of this article.

Under W.Va. Code §3-10-5(a), in the event of a legislative vacancy, the Governor appoints a replacement from “a list of three legally qualified persons submitted by the party executive committee of the party with which the person holding the office immediately preceding the vacancy was affiliated.” This section means exactly what it says: if the member resigning was a Democrat at the time of resignation, the Democratic Party Executive Committee

selects three names for the Governor's consideration. Likewise, if the member was a Republican when the vacancy was created, the Republican Party Executive Committee selects three names for the Governor's consideration. Reading the provision in any other manner would be modifying the express terms under the guise of interpretation.

Despite this clear language, Petitioners urge this Court to find ambiguity where none exists. They argue that W.Va. Code §3-10-5(a) "does not specifically require the Governor to determine party affiliation at any specific point and time." See Petition p. 15. This is inaccurate. Unlike other sections of Article 10, Section 5(a) contains discrete language which defines the temporal period for the determination of party affiliation. As noted, the statute provides that a replacement is to be appointed from "a list of three legally qualified persons submitted by the party executive committee of the party with which the person holding the office **immediately preceding the vacancy** was affiliated" (emphasis supplied). The operative language, not found elsewhere in Article 10, is "immediately preceding the vacancy." Thus, the Legislature clearly defined that it is the period immediately before the vacancy that is determinative. Otherwise, the "immediately preceding the vacancy" language would be superfluous.³

B. THE INTERPRETATION OF W.VA. CODE §3-10-5(a) PROPOSED BY PETITIONERS WOULD RENDER THE STATUTE'S TEMPORAL STANDARD SUPERFLUOUS

While canons of statutory construction are generally applied only in the case of ambiguity, some frequently used aids to interpretation illustrate why W.Va. Code §3-10-5(a) is clear and the Petitioners' arguments are flawed. The first helpful canon provides that "[a] cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute." Syl. Pt. 3, *Meadows v. Wal-Mart Stores, Inc.*,

³ Petitioners state that the West Virginia Attorney General "concedes" this subsection is "arguably ambiguous." Petitioners' statement is taken out of context as the Attorney General unequivocally concluded that "we do not find the statute to be ambiguous...." The "arguably ambiguous" phrase was used by the Attorney General to describe a single sentence standing alone. President Cole and Attorney General reached the same ultimate conclusion that the statute is clear.

207 W.Va. 203, 530 S.E.2d 676 (1999); See also *State ex rel. Johnson v. Robinson*, 162 W.Va. 579, 582, 251 S.E.2d 505, 508 (1979) (“It is a well known rule of statutory construction that the Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning.”). Another commonly used tenet states, “[i]n the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.” Syl. Pt. 1, *Miners in Gen. Grp. v. Hix*, 123 W. Va. 637, 17 S.E.2d 810 (1941), overruled on other grounds by *Lee-Norse Co. v. Rutledge*, 170 W. Va. 162, 291 S.E.2d 477 (1982); Syl. Pt. 4, *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W. Va. 137, 107 S.E.2d 353 (1959) (“Generally the words of a statute are to be given their ordinary and familiar significance and meaning, and regard is to be had for their general and proper use.”).

The language “immediately preceding the vacancy” provides a specific temporal reference point that must be given meaning. The word “immediately” means “without interval of time.” *Merriam-Webster Online Dictionary*, “immediately”, <http://www.merriam-webster.com/dictionary/immediately> (accessed January 11, 2016). Similarly, the word “preceding” means “existing, coming, or occurring immediately before in time or place.” *Merriam-Webster Online Dictionary*, “preceding”, <http://www.merriam-webster.com/dictionary/preceding> (accessed January 11, 2016). This language unequivocally states that the executive committee must be determined according to the legislator’s party affiliation right before the resignation, not as it may have once existed.

The crux of Petitioners’ argument hinges on skipping this phrase while reading the statute. In fact, Petitioners state in their Question Presented and in the first paragraph of their Summary of Argument that “Subsection 5(a), however, does not specifically require the Governor to determine party affiliation at any specific point in time.” See Petition p.1. No

reasonable person could possibly conclude that the phrase "immediately preceding" is not a "specific point in time." Any other reading renders this phrase utterly superfluous.

Even more compelling, the Legislature has specifically addressed the vacancy appointment procedures for all public offices throughout Article 10. *See generally*, W.Va. Code §§ 3-10-3, -4, -5, -6, -7 and -8. In those offices where a vacancy is filled by appointment, no other provision includes an "immediately preceding" time requirement.⁴ The Legislature included this specific time mandate exclusively for legislative appointments.⁵

Article VI, §24 of the West Virginia Constitution mandates that each house of the Legislature "shall determine the rules of its proceedings and be the judge of the elections, returns and qualifications of its own members." To pretend the "immediately preceding" requirement is not a "specific point of time" not only ignores the most basic of statutory construction rules, but it also violates the Legislature's constitutional power to determine the qualifications of its own members. The Legislature included this phrase exclusively for its own vacancy procedures and this Court should defer to the Legislature's wishes.

C. READING W.VA. CODE §3-10-5 IN PARI MATERIA DEMONSTRATES THAT SUBSECTIONS (a) AND (c) ARE COMPLEMENTARY AND NOT CONTRADICTIONARY

Petitioners attempt to avoid the clarity of W.Va. Code §3-10-5 by manufacturing a feigned conflict between subsections (a) and (c). However, this alleged contradiction is easily explained as the two subsections address two different issues created by a Senate vacancy.

"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

⁴ The "immediately preceding" phrase was included originally in 1963.

⁵ It may be that the temporal language was included with respect to legislative vacancies because party affiliation is much more significant in the legislative context. Party affiliation impacts control of either chamber including the selection of officers and committee chairs. Party affiliation, therefore, has a corresponding effect upon the nature of legislation which may be passed.

the act or statute in its entirety to ascertain legislative intent properly.” Syl. Pt. 6 (in part), *Cnty. Antenna Serv. v. Charter Communs. VI, LLC*, 227 W. Va. 595, 712 S.E.2d 504 (2011). When a Senator resigns from office, there are two issues that must be addressed before replacements can be nominated. The first issue is which party’s executive committee is to submit a list for the Governor’s consideration. Section 5(a) specifically addresses that question: “the party executive committee of the party with which the person holding the office immediately preceding the vacancy was affiliated.”

The second issue is which of that political party’s executive committees is to nominate candidates. A basic understanding of West Virginia party structure demonstrates why that clarification is necessary. Each political party has multiple executive committees with overlapping geographic boundaries. For example, a party could have a State Executive Committee, a County Executive Committee, a Senatorial District Executive Committee, a Delegate District Executive Committee, and a Congressional Executive Committee. See e.g. W.Va. Code §3-1-9. Section 5(a) is silent on this issue because that is one purpose of Section 5(c). Section 5(c) states that if the vacancy is in the Senate, “the list shall be submitted by the party executive committee of the state senatorial district in which the vacating senator resided at the time of his or her election or appointment.” Section 5(c) clarifies that the Senate District Executive Committee nominates three candidates, and not for example, the State Executive Committee or the County Executive Committee where the resigning member resides.

Section 5(c) provides another clear solution for a second possible issue created by a Senator’s resignation. This second possible issue is best illustrated by former Senator Helmick’s resignation. In 2013, after having been re-elected in 2010, former Senator Helmick resigned his Fifteenth District seat to serve as agricultural commissioner. Between his re-election and his resignation, however, large scale redistricting occurred as a result of the 2010 census. At the time of his re-election, the Fifteenth District included all of Hampshire, Hardy, Morgan,

Pendleton, Pocahontas, and Randolph, and part of Berkeley, Grant and Upshur counties.⁶ After the 2011 redistricting, the Fifteenth District was limited to all of Mineral, Hampshire, Morgan, and Berkeley counties.⁷ In that scenario, the Fifteenth District had two different executive committees: the “old” configuration of counties at the time of Senator Helmick’s re-election in 2010 and a “new” configuration of counties after redistricting.

Section 5(c) states that if the vacancy is in the Senate, “the list shall be submitted by the party executive committee of the state senatorial district in which the vacating senator resided at the time of his or her election or appointment.” The phrase “at the time of election or appointment” does not modify the political affiliation already conclusively determined by Section 5(a). Instead, its clear purpose is to require that the “old” senatorial district is to nominate a replacement to serve the remainder of the resigning Senator’s term.

Section 5(a) and Section 5(c) must be read together to create a consistent result, with each subsection addressing a different issue. If one reads Section 5(a) and Section 5(c) as addressing the same “political party” question, then the provisions are redundant at best, or conflicting at worst. Either result is inconsistent with two of this Court’s oft repeated canons of construction. First, this Court presumes that the Legislature will not enact “a meaningless or useless statute.” Syl. Pt. 1, *Richards v. Harman*, 217 W. Va. 206, 617 S.E.2d 556 (2005). In other words, this Court presumes that the Legislature will not undertake “unnecessary, redundant, and futile acts.” *Newark Ins. Co. v. Brown*, 218 W. Va. 346, 352, 624 S.E.2d 783, 789 (2005). Second, “[a] statute should be so read and applied as to make it accord with the spirit, purposes, and objects of the general system of law of which it is intended to form a part[.]” Syl. Pt. 4, *Sheena H. v. W. Va. Office of the Ins. Comm’r*, _____ W. Va. _____, 772 S.E.2d 317, (2015).

⁶ Historical district maps for the 2000 year census district alignments are available on the West Virginia Legislature’s website at http://www.legis.state.wv.us/Districts/maps_2000.cfm.

⁷ Current district maps for the 2010 year census district alignments are available on the West Virginia Legislature’s website at <http://www.legis.state.wv.us/Districts/maps.cfm>.

Likewise, “[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.” Syl. Pt. 1, *UMWA by Trumka v. Kingdon*, 174 W. Va. 330, 325 S.E.2d 120 (1984). Section 5(a) specifically addresses the question of party affiliation: “the party with which the person holding the office immediately preceding the vacancy was affiliated.” Section 5(c) does not address party affiliation at all. It simply refers to “the party executive committee” without any explanation or guidance on which political party submits names to the Governor. Petitioners’ manufactured ambiguity attempts to force Section 5(a) and Section 5(c) into conflict. A simple *in pari materia* reading of the entirety of W.Va. Code §3-10-5 easily shows that the alleged contradiction is artificial.

D. OUT OF JURISDICTION AUTHORITY CITED BY PETITIONERS IS WHOLLY IRRELEVANT TO APPLICATION OF AN UNAMBIGUOUS WEST VIRGINIA STATUTE

Petitioners rely heavily on cases from Wyoming and Kansas which purport to have found similar vacancy provisions ambiguous when applied to cases where an elected official switches parties between the time of election and the time of resignation. When the language of the statutes in those cases is examined closely, however, it becomes evident that those cases are distinguishable and unpersuasive. In the Wyoming case, *Richards v. Bd. of County Comm’rs of Sweetwater County*, 6 P.3d 1251 (Wyo. 2000), the court examined the language of a Wyoming statute which prescribed the manner by which a county commissioner vacancy was to be filled. The statute provided:

Within thirty (30) days after the office of any county commissioner becomes vacant the remaining members of the board shall declare a vacancy to exist and immediately give notice of the vacancy in writing to the chairman of the county central committee *of the political party to which the member whose office is vacant belonged.*

Wyo. Stat. Ann. § 18-3-24 (1999) (emphasis added).

In the Kansas case, *Wilson v. Sebelius*, 72 P.3d 553 (Kan 2003), which relied upon *Richards*, the court examined the language of a series of Kansas statutes which prescribed the manner by which a county treasurer vacancy was to be filled. The relevant statute provided:

~~When a district convention is provided by law to be held to elect a person to be appointed to fill a vacancy in a district office, the county chairperson . . . within 21 days of receipt of notice that a vacancy has occurred or will occur, shall call and convene a convention of all committeemen and committeewomen of the party of the precincts in such district for the purpose of electing a person to be appointed by the governor to fill the vacancy.~~

A "party" is "a political party having a state and national organization and of which the officer or candidate whose position has become vacant was a member."

Kan. Stat. Ann. §25-3902(a) and (b) (emphases added).

Although both courts addressed an identical factual circumstance as that presented by the Petition, the ultimate holdings of *Richards* and *Wilson* are not controlling because the statutes at issue are distinguishable. In both cases, the statutes were found to be ambiguous because they neglected to provide a temporal specification for the political party to which the officer or candidate was a member. *See Richards*, 6 P.3d at 1253 ("finding the statute does not address or anticipate the situation presented in this case [of when the party affiliation is to be determined], we hold the statute is ambiguous"). Thus, those courts were forced to look beyond the plain meaning of the statute and examine factors such as legislative intent and public policy, and ultimately concluded that their respective legislatures intended that party affiliation be determined as of the last preceding election.

Unlike the Wyoming and Kansas statutes, however, W.Va. Code §3-10-5(a) provides a temporal specification that the party affiliation is to be determined *immediately preceding the vacancy*. By including this temporal language, our Legislature avoided the ambiguity found by the Wyoming and Kansas courts. Just as the absence of the temporal element in the Wyoming and Kansas statutes created an ambiguity for the courts interpreting them, the presence of the

temporal element here provides a clear and unequivocal directive which is to be applied without interpretation.

Moreover, contrary to Petitioners' representation, the *Richards* and *Wilson's* decisions are ~~not the only cases which have addressed a factual scenario similar to that presented in the~~ Petition. In *State ex. rel. Herman v. Klopfleish*, 651 N.E.2d 995 (Ohio 1995), the Supreme Court of Ohio considered an identical issue and reached a conclusion contrary to the Wyoming and Kansas courts. In *Herman*, a mayor was elected as a Democrat, quickly switched parties and then resigned five years later as a Republican. The relevant statute required the vacancy to be filled by a person "of the political party with which the last occupant of the office was affiliated [or], [i]f the last occupant of the office of mayor or the mayor-elect was elected as an independent candidate, the vacancy shall be filled by election by the legislative authority for the unexpired term." *Herman*, 651 N.E.2d at 996 (quoting Ohio Rev. Code §733.08). Both the relevant Democratic Party and Republican Party committees submitted nominees to the County Board of Elections which deadlocked on the matter. Thereafter, the Secretary of State certified the Republican nominee based upon an interpretation of "affiliated" which was consistent with Ohio's election laws which looked to the person's voting record for the prior two years.

While the Ohio Supreme Court found the statute to be ambiguous, it construed the statute *in pari materia* and determined that the Secretary of State's reliance on the definition of "affiliated" was consistent with Ohio's election laws and was reasonable. It therefore upheld the decision to appoint the Republican nominee. In doing so, the court rejected several assertions made by the Petitioners in this matter. Specifically, the court noted that the use of the word "elected as" in one portion of the statute and "affiliated" in another portion of the statute must be given different meanings. Additionally, although the petitioner in *Herman* alleged that the statute was unconstitutional "because it fails to preserve the will of the voters who elected [the Mayor] when he ran as a Democrat," that contention was rejected summarily on the ground that

statutes “are presumed to be constitutional unless shown beyond a reasonable doubt to violate a constitutional provision.” 651 N.E.2d at 999. Finally, the court further noted that the United States Constitution contains no mandate as to the “procedures that a state...must follow in filling vacancies in its own legislature.” *Id.*

Although President Cole disagrees with the Ohio Supreme Court’s finding in *Herman* that the statute at issue was ambiguous, the court’s *in pari materia* determination that the time of resignation was the relevant time period is nonetheless persuasive, and counsels against Petitioners’ representation that courts have uniformly decided the issue consistent with their position.⁸

⁸ Petitioners include in the Appendix a summary of state statutes which prescribe the filling of legislative vacancies by appointment. As Petitioners note, several of these statutes specifically provide that the vacancy is to be filled by a member of the same political party as the vacating legislator at the time he or she was elected. *See* 10 Ill. Comp. Stat. 5/25-6 (2015) (“of which the incumbent was a candidate at the time of his election”); Ind. Code § 3-13-5-0.1 (2015) (“last held by a person elected or selected as a candidate of a major political party”); Md. Const. Art. III § 13 (2015) (“last held by a person elected or appointment”); Nev. Const. Art. IV § 12 (“the same political party as the party which elected such senator or assemblyman”); N.J. Const. Art. IV § 4 (“of the political party of which the incumbent was the nominee”); N.C. Gen. Stat. § 163-11 (2015) (“elected as the nominee of a political party”); N.C. Gen. Stat. § 7A-142 (2015) (“party with which the vacating member was affiliated when elected”); N.D. Cent. Code § 16.1-13-10 (2015) (“[i]f the former member was elected as an independent candidate”); Ohio Const. Art. II § 11 (“as the person last elected by the electors to the seat”); Or. Rev. Stat. § 236.100 (2015) (“by which the elected predecessor in the office was designated on the election ballot [or, if not printed on the election ballot,] by which the elected predecessor in the office was designated on the elector registration card of the predecessor on the date of the election at which the predecessor was elected”); Wyo. Stat. Ann. § 18-3-524 (2015) (“which the member whose office is vacant represented at the time of his election”); Wyo. Stat. Ann. § 22-18-111 (“which the last incumbent represented at the time of his election”). It is axiomatic that different state legislatures may prescribe different solutions for the same problem, and that courts are to give deference to the intent of the legislative body in applying its laws. Because the legislatures in these states have opted to include temporal language requiring that the person appointed to fill the vacancy share the same political party of the vacating official at the time of election, these statutes and any cases interpreting them are of no moment here.

The remaining statutes cited by Petitioners do not provide any such language specifying that the political party affiliation is to be identical to the time of election. *See* Colo. Const. Art. V § 2; D.C. Code § 1-204.01 (2015); Haw. Rev. Stat. § 17-3 (2015); Idaho Code Ann. § 59-904A (2015); Kan. Stat. Ann. § 25-3902 (2015); Mont. Code Ann. § 5-2-403 (2015); Utah Code Ann. § 20A-1-503 (2015); Wash. Const. Art. II § 15. While Petitioners represent that “the cases interpreting these provisions are unanimous in resolving the inherent ambiguities these later statutes [sic] in favor of determining party affiliation at the time of election not resignation,” Pet. P. 24, there are only two such cases, arising out of Wyoming and Kansas, both of which have been distinguished above. Since the Wyoming case was decided, the statutory language has been revised consistent with the case’s directive. The remaining statutory provisions, which do not include the “immediately preceding the vacancy” language of the West Virginia statute, have not been interpreted as applied to the factual scenario at bar. As such, any alleged ambiguity in these statutes which include different language, and any cases interpreting them, are similarly of no moment here.

III. APPLYING THE CLEAR PROVISIONS OF W.VA. CODE §3-10-5 DOES NOT FRUSTRATE THE WILL OF THE VOTERS

Petitioners rely upon *Richards* and *Wilson*, as well as a string of additional cases contained in a footnote, for the proposition that the appointment of a member of the same party at the time of election furthers the public policy goal of “protect[ing] the mandate of the voters.” It should be noted, however, that aside from *Richards* and *Wilson*, no other case cited by Petitioners examines a situation where the vacating official switched political parties between election and resignation. Rather, those cases determine whether the applicable statutes require the appointment of a new official from the same political party as opposed to the holding of a special election or some similar device was constitutional. Moreover, Petitioners fail to cite *Herman* which summarily rejected the same will of the voters argument.

The discussion of the will of the voters in *Richards* and *Wilson* is unpersuasive here for two reasons. First, neither case considered the vacancy issue in the face of a clear statute, such as W.Va. Code §3-10-5(a), which contains a temporal definition of when party affiliation is to be determined. Perhaps the will of the voters might have some relevance if the appointment statute was ambiguous. Where the statute is clear, however, the will of the voters is actually embedded within the statute. After all, legislative enactments must be considered as reflecting the will of the people.

These distinctions aside, it should be noted that, contrary to Petitioners’ representation that “[t]here are no statutes explicitly requiring party determination to be made at the time of the vacancy,” Pet. P. 24, the District of Columbia statute clearly looks to the time of the vacancy by using present tense. D.C. Code § 1-204.01(d)(2) (“In the event of a vacancy in the Council of a member elected at large, other than a vacancy in the Office of Chairman, who is affiliated with a political party, the central committee of such political party shall appoint a person to fill such vacancy With respect to a vacancy on the Council of a member elected at large who is not affiliated with any political party, the Council shall appoint a similarly non-affiliated person”) The use of the present tense “is affiliated and “is not affiliated” indicate that the applicable timeframe is the time the office is vacated – not the time of election.

Second, the will of the voters discussion in *Richards* and *Wilson* is simply wrong when applied to West Virginia. The supposed harm caused by an elected official changing parties after the election occurs at the time the party affiliation switch is made. If there is any frustration of the will of the voters, that frustration is caused by the actions of the legislator. The remedy, of course, is either for the Legislature to prohibit such changes in party affiliation or for the voters to elect a new candidate at the next election, which will occur in West Virginia in November, 2016. The voters can then determine whether a Democrat or a Republican should serve as Senator from the Ninth Senatorial District. The electoral process is the proper method to express the will of the voters as opposed to using the appointment procedure to correct an alleged frustration caused by Senator Hall voluntarily switching party affiliation.

Moreover, despite the Kansas court's take on the election of "individuals" rather than "parties", it is clear that in West Virginia the voters elect individuals. This point is particularly true when viewed in light of West Virginia's recent passage of legislation in 2015 prohibiting straight-ticket voting. See 2015 W.Va. Acts 104, 2015 W.Va. SB 249. Additionally, in many communities, voters may very well vote for a candidate whom they know and trust, regardless of that candidate's particular party affiliation. It is the selection of the individual, for whatever reason, that reflects the true will of the voters. That will continues to be expressed by the actions of the elected official, including voting, introducing bills, serving on committees and, in some instances, switching parties. This is the very nature of the republican form of government, where citizens delegate to their representatives the power to act on their behalf and to carry out the duties of the office in whatever manner they think is in the best interest of the constituents. In performing any action, including switching parties, it should be presumed that the legislator's action reflects the will of the people. If it does not, the remedy is for the voters to elect another representative.

IV. APPLICATION OF THE CLEAR PROVISIONS OF W.VA. CODE §3-10-5 DOES NOT CREATE A CONSTITUTIONAL QUESTION

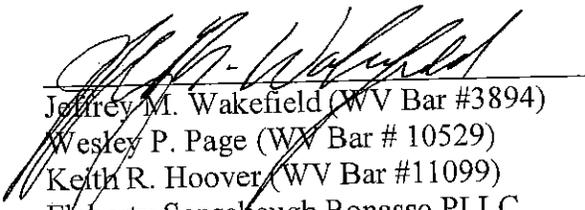
Applying the clear provisions of W.Va. Code §3-10-5(a) does not present any serious constitutional question as suggested by Petitioners. The statute is entirely consistent with the Legislature's constitutional authority to determine the qualifications of its members. *See* W.Va. Const. Article VI, §24. If any constitutional question is created by the Petition, it is the request that the clear provisions of the statute be ignored so as to achieve the political ends of the Petitioners. Granting the relief requested would undermine the unquestionable authority of the Legislature to regulate the qualifications of its members and create a serious separation of powers issue. Thus, it is the Petitioners that are seeking to create a constitutional problem by urging an interpretation of the vacancy statute which is inconsistent with not only the language of the statute, but the authority of the Legislature to regulate the issue.

CONCLUSION

The Emergency Petition for a Writ of Mandamus should be denied. The Petition seeks relief which is fundamentally at odds with a clear statutory directive for filling the vacancy in the Ninth Senatorial District. Thus, President Cole joins in the responses of the Republican Respondents and urges this Court to decline to issue the writ requested.

Dated: January 12, 2016

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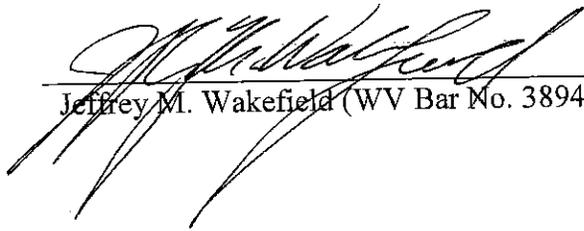
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CERTIFICATE OF SERVICE

I, Jeffrey M. Wakefield, counsel for the Honorable William P. Cole, III, hereby certify that I served a true copy of the foregoing **"BRIEF OF THE HONORABLE WILLIAM P. COLE, III, PRESIDENT OF THE WEST VIRGINIA SENATE, AS *AMICUS CURIAE* IN SUPPORT OF BRIEF OF RESPONDENTS, BEVERLY R. LUND, JUSTIN M. ARVON, SUE "WAOMI" CLINE, TONY PAYNTER, JOHN DOE, AND JANE DOE, IN THEIR CAPACITY AS THE MEMBERS OF THE WEST VIRGINIA REPUBLICAN EXECUTIVE COMMITTEE FOR THE NINTH SENATORIAL DISTRICT"** upon the following individuals, via regular U.S. mail, postage prepaid, on this the 12th day of January 2016:

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