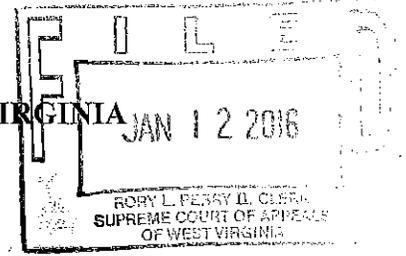


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 16-0013



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
capacity as the members of the West Virginia Republican
Executive Committee for the Ninth Senatorial District,

Respondents.

**Response in Opposition to Emergency
Petition for a Writ of Mandamus**

J. Mark Adkins (WVSB 7414)
Patrick C. Timony (WVSB 11717)
BOWLES RICE LLP
Post Office Box 1386
Charleston, West Virginia 25325-1386
Telephone: (304) 347-1100
Facsimile: (304) 347-1756
madkins@bowlesrice.com
*Counsel for Beverly R. Lund, Justin M. Arvon,
Sue "Naomi" Cline, and Tony Paynter*

Mark A. Carter (WVSB 4316)
DINSMORE & SHOHL LLP
Post Office Box 1887
Charleston, West Virginia 25339-1887
Telephone: (304) 357-0900
Facsimile: (304) 357-0919
mark.carter@dinsmore.com
*Counsel for Beverly R. Lund, Justin M. Arvon,
Sue "Naomi" Cline, and Tony Paynter*

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I. QUESTIONS PRESENTED

Petitioners' Emergency Writ of Mandamus ("Writ") involves the application of West Virginia Code § 3-10-5(a) and its impact on the Governor's selection of a replacement for the vacancy in the Ninth Senatorial District of West Virginia created by the resignation of Senator Daniel Hall ("Senator Hall"). Notwithstanding, Petitioners mistakenly pose a single question to this Court concerning whether public policy favors Petitioners' interpretation of West Virginia Code § 3-10-5(a). [Pet.'s Br. at p. 1.] First and foremost, the statute must contain ambiguous language before requiring any interpretation from this Court. Second, and assuming an ambiguity exists in the statute, Petitioners' question ignores this Court's longstanding statutory construction rules and the legislative intent of West Virginia Code § 3-10-5(a). Third, Petitioners' arguments inaccurately state that the application of the unambiguous language of West Virginia Code § 3-10-5(a) will result in absurd and inconsistent results as well as violations of the West Virginia Constitution. For these reasons, the Republican Respondents¹ respectfully suggest that the Writ below poses the following four (4) questions:

- A. Does the unambiguous language of West Virginia Code § 3-10-5(a) require the Governor to appoint a Republican replacement following Senator Hall's resignation?**
- B. Alternatively, if an ambiguity exists in the language of West Virginia Code § 3-10-5(a), does the application of West Virginia's statutory construction rules interpreting the West Virginia Code require the Governor to appoint a Republican to the West Virginia Senate to fill the vacancy created by Senator Hall's resignation?**
- C. Would the application of West Virginia Code § 3-10-5(a) that the vacating legislator's political party affiliation is set at the time the office is vacated lead to absurd and inconsistent results?**

¹ Respondents, Beverly R. Lund, Justin M. Arvon, Sue "Naomi" Cline and Tony Paynter, are hereinafter referred to as "Republican Respondents" in this Response in Opposition. In the style, Petitioners misidentified Ms. Cline's name as "Waomi" rather than "Naomi."

- D. Would the application of West Virginia Code § 3-10-5(a) that the vacating legislator's political party affiliation is set at the time the office is vacated violate the West Virginia Constitution?**

II. STATEMENT OF THE CASE

On November 6, 2012, Senator Hall, running as a Democratic candidate, defeated Epp E. Cline and was elected to the West Virginia Senate by the Ninth Senatorial District of West Virginia. [App. at 1-2.] Following his election, Senator Hall witnessed a shift in West Virginia's political climate.² Specifically, on November 4, 2014, Senator Hall saw his constituents elect Republican Jeff Mullins over incumbent Democrat Mike Green by a considerable margin.³ This changing political landscape led Senator Hall to reevaluate his affiliation with the Democratic Party and, ultimately, on November 5, 2014 Senator Hall changed party affiliation and became a registered Republican.⁴

On January 3, 2016, Senator Hall resigned his position. [App. at 9.] Petitioners' Writ requests this Court's interpretation of West Virginia Code § 3-10-5(a), and whether this provision requires Respondent, Governor Earl Ray Tomblin ("Governor"), to appoint a Democrat or Republican to fill the vacancy in the West Virginia Senate created by Senator Hall's resignation.⁵

² On November 5, 2014, the Charleston Daily-Mail reported that "[a] source close to Hall said the results in Green's race and other races across southern West Virginia made it clear that voters there no longer wanted the Democratic Party to represent them at the statehouse." [App. at 5-6.]

³ Of the twenty-five thousand four hundred thirty-five (25,435) votes, Republican Jeff Mullins received 56.87% (14,465) while Democrat Mike Green received 43.13% (10,970). [App. at 3-4.]

⁴ According to a November 6, 2014 article from MetroNews, Senator Hall explained why he switched to the Republican Party: "If I'm going to work for the people of my district, which is what I'm sent to Charleston to do, I've got to be a part of leadership and be a part of the majority party to do that." [App. at 7-8.]

⁵ Petitioners' Statement of Facts contains information superfluous to this Court's considerations. Particularly, Petitioners state that "[t]he current Republican Senate leadership has announced its intention

On January 6, 2016, at the request of Senate President, William P. Cole, III, Attorney General Patrick Morrissey issued an opinion regarding the application of West Virginia Code § 3-10-5(a). The Attorney General concluded that West Virginia Code § 3-10-5(a) contained unambiguous language, which required the Governor to appoint a Republican to the vacant Senate seat created by Senator Hall's resignation. [App. at 10-15.]

III. SUMMARY OF ARGUMENT

West Virginia Code § 3-10-5(a) contains unambiguous language, which requires the Governor to appoint a Republican replacement for resigning Senator Hall. West Virginia Code § 3-10-5(a) specifies how the Governor is to fill a vacant senate office "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." W. VA. CODE § 3-10-5(a) (emphasis added). The use of "immediately preceding" is clear and unambiguous in setting forth the time criteria to determine the prior officeholder's party affiliation. Petitioners' analysis ignores this unambiguous language and cites to legal decisions interpreting significantly dissimilar appointment statutes. Applying the plain meaning of West Virginia Code § 3-10-5(a) requires Governor Tomblin to appoint a Republican replacement to Senator Hall's vacant seat.

Secondly, and assuming *arguendo* ambiguities exist in West Virginia Code § 3-10-5(a), this Court's longstanding statutory construction rules would interpret the statute to require the Governor to appoint a Republican to Senator Hall's vacant seat. Since 1963, the West Virginia Legislature has used the phrase "immediately preceding" to qualify the time

to fast-track controversial legislation such as so-call 'right to work' laws and the creation of an immediate court of appeals." [Pet.'s Br. at p. 5.] Petitioners reference to this extraneous information amounts to nothing more than a red herring, to distract this Court from the crux of the issue: the language of West Virginia Code § 3-10-5(a).

limitation found in the “Vacancies in the State Legislature” statute, and the Legislature continued to use this limiting term in five (5) subsequent versions of this statute since 1963. Moreover, in considering the legislative intent, Petitioners ignore the premise that voters elect individuals, not parties. Petitioners’ interpretation, if accepted, hurts the people of the Ninth Senatorial District and may chill future officeholders’ constitutional rights to freedom of speech and association.

Third, the Republican Respondents’ interpretation does not create absurd or inconsistent results. Petitioners’ hypothetical ignores that the statutory language at issue existed for more than fifty-three (53) years without incident, and Petitioners can cite to no authority to support their position. More importantly, this Court interpreting West Virginia Code § 3-10-5(a) to require the Governor to appoint a Republican better reflects the will of the voters than Petitioners’ interpretation. Indeed, in the most recent general election, the voters in the Ninth Senatorial District elected a Republican candidate over an incumbent Democrat by a considerable margin. No justification exists to ignore these more contemporaneous election results when considering the will of the electorate.

Finally, absolutely no constitutional violations will occur through this Court enforcing the plain and unambiguous language of West Virginia Code § 3-10-5(a). The United States Supreme Court has provided states considerable latitude with respect to their procedures for filling vacancies in state government, and West Virginia’s appointment statute is no different. For all these reasons, this Court should reject Petitioners’ arguments and mold the Writ to require the Governor to fill the vacant senate seat with a Republican candidate.

IV. STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure, the Republican Respondents respectfully request oral argument. First, this case involves issues of fundamental public importance. With Senator Hall's resignation, the Ninth Senatorial District of West Virginia lacks representation. W. VA. R. APP. P. 20(a)(2). The new legislative session begins on January 13, 2016, and the constituents of the Ninth Senatorial District deserve to have a representative at the start of the legislative session. Second, while West Virginia Code § 3-10-5(a) is unambiguous on its face, this matter presents this Court the first opportunity to review this statutory provision. W. VA. R. APP. P. 20(a)(1). For these reasons, this Court should grant oral argument.

V. ARGUMENT

- A. The legislative intent of West Virginia Code § 3-10-5, as evidenced by its clear and unambiguous language, requires the Governor to appoint a Republican to replace Senator Hall.**

West Virginia Code § 3-10-5 entitled "Vacancies in State Legislature" sets forth the following procedure to be followed when a vacancy occurs in the West Virginia Legislature:

(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.

(b) In the case of a member of the House of Delegates, the list shall be submitted by the party executive committee of the delegate district in which the vacating member resided at the time of his or her election or appointment. The appointment to fill a vacancy in the House of Delegates is for the unexpired term.

(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.

W. VA. CODE § 3-10-5 (2013).

The issue presented by Petitioner requests this Court's direction regarding which political party the Governor is required to select a nominee from to make his appointment to fill the vacancy in the West Virginia Senate, when the vacating Senator changed political parties between the moment he was last elected to that office to when he resigned his office. To begin this analysis, "[t]he first step in statutory construction is to identify the intent expressed by the Legislature in promulgating the provision at issue." *Weimer v. Sanders*, 752 S.E.2d 398, 405 (W. Va. 2013). "The primary rule of statutory construction is to ascertain and give effect to the intention of the Legislature." *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 647 S.E.2d 920, 927 (W. Va. 2007) quoting Syl. pt. 8, *Vest v. Cobb*, 76 S.E.2d 885 (W. Va. 1953).

In order to analyze the intention of the Legislature in enacting West Virginia Code § 3-10-5, this Court should first determine whether the language in this statute is clear and unambiguous and, thus, may be applied as written without further analysis. "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." *Martin v. Hamblet*, 737 S.E.2d

80, 84 (W. Va. 2012) quoting Syl. pt. 2, *State v. Epperly*, 65 S.E.2d 488 (W. Va. 1951) (internal quotations omitted).⁶

Republican Respondents assert that West Virginia Code § 3-10-5(a) is not ambiguous and should be applied by its clear meaning. As such, this Court need not examine this statute further. The clear directive of § 3-10-5(a) requires the Governor to choose an appointee from a list of candidates submitted by the executive committee of the political party that the vacating legislator belonged to at the time he or she vacated that office. This directive is evidenced by the Legislature's inclusion of the phrase "immediately preceding" in the statute. Specifically, the statute states that when a vacancy occurs, the Governor is directed to appoint a replacement to fill the vacant office "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." *Id.* (emphasis added.) The use of this term specifically defines a timeframe so narrow it is specific to a date and hour "immediately preceding" a resignation from office. Here, that is the political party with which the vacating legislator was affiliated with immediately preceding the moment he or she vacated the legislative office and it is that political party that should submit a list of potential appointees to the Governor.

In the present matter, Senator Hall was a Republican at the time he resigned his Senate seat. [App. at 9.] In accordance with the language of § 3-10-5(a), the Governor should select his appointment from the list submitted to him by the Republican Respondents because

⁶ See also *DeVane v. Kennedy*, 519 S.E.2d 622, 632 (W. Va. 1999) ("Where the language of a statutory provision is plain, its terms should be applied as written and not construed."); Syl. pt. 3, *Meadows v. Wal-Mart Stores, Inc.*, 530 S.E.2d 676 (W. Va. 1999) ("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."); *State ex rel. Johnson v. Robinson*, 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.").

that is the political party Senator Hall was affiliated with immediately preceding the vacancy. In spite of this clear language, Petitioners argue that this statute is ambiguous because it could refer to Senator Hall's party affiliation at the time he was elected in December 2012 or the time he resigned his office on January 3, 2016. [Pet.'s Br. at p. 16.] This argument fails for several reasons. First, "[t]he fact that parties disagree about the meaning of a statute does not itself create ambiguity or obscure meaning." *T. Weston, Inc. v. Mineral Cnty.*, 638 S.E.2d 167, 171 (W. Va. 2006). Accordingly, Petitioners' theory that this statute can be read in two (2) ways does not, in and of itself, create ambiguity.

Second, Petitioners' argument completely ignores the presence of the term "immediately preceding" in the statute and awkwardly seeks to impress the phrase "at the time of that person's election" into § 3-10-5(a). This Court has opined that "[i]t is not for this Court arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted." *Phillips*, 647 S.E.2d at 927 *quoting Banker v. Banker*, 474 S.E.2d 465, 476-77 (W. Va. 1996); *see also, State ex rel. Frazier v. Meadows*, 454 S.E.2d 65, 69 (W. Va. 1994) ("Courts are not free to read into the language what is not there, but rather should apply the statute as written."). Moreover, "[a] statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten." Syl. pt. 1, *Consumer Advocate Div. v. Pub. Serv. Comm'n*, 386 S.E.2d 650 (W. Va. 1989); *see also Cavalry SPV I, LLC v. Morrissey*, 752 S.E.2d 356, 364 (W. Va. 2013). In order for Petitioners' interpretation to be valid, language would need to be added or inferred to direct the Governor to determine the vacating legislator's party affiliation at a moment in time

other than “immediately preceding” the moment the office was vacated. Pursuant to this Court’s holdings, such additions or inferences are not permitted.

It is undisputed that the term “immediately preceding” identifies a period in time. The word “immediately” is defined as “without interval of time.”⁷ The word “preceding” is defined as “existing, coming, or occurring immediately before in time or place.”⁸ Accordingly, this Court should apply the clear meaning of these words, because it is a “well-accepted canon of statutory construction, which requires that ‘the words of a statute are to be given their ordinary and familiar significance and meaning.’” *State ex rel. Youth Servs. Sys., Inc. v. Wilson*, 515 S.E.2d 594, 598 (W. Va. 1999) quoting *Keatley v. Mercer Cnty. Bd. of Educ.*, 490 S.E.2d 306, 310 (W. Va. 1997) (further citations omitted.)⁹

Despite the clear language of this statute, Petitioners assert that § 3-10-5(a) is ambiguous on its face and rely upon *Richards v. Board of County Commissioners of Sweetwater County*, 6 P.3d 1251 (Wyo. 2000), and *Wilson v. Sebelius*, 72 P.3d 553 (Kan. 2003). The holding in *Richards* is distinguishable from the present matter because the statute at issue was silent as to the time frame of the vacating county commissioner’s party affiliation. In *Richards*, the statute stated:

(a) 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

⁷ MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/immediately> (last visited on Jan. 9, 2016). [App. at 16.]

⁸ MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/preceding> (last visited on Jan. 9, 2016). [App. at 17.]

⁹ As further support that the term “immediately preceding” is unambiguous, this term is utilized in the West Virginia Code two hundred four (204) times and by this Court in three hundred eighty-eight (388) decisions. [App. at 18-53 and 54-126.]

of the political party to which the member whose office is vacant belonged.

Id. at 1253 quoting WYO. STAT. § 18-3-524 (1999). By its silence as to the timing of the vacating county commissioner's party affiliation, the Wyoming statute bears no resemblance to West Virginia Code § 3-10-5(a). In the present matter, inclusion of the term "immediately preceding" in § 3-10-5(a) identifies the time frame to determine the political party affiliation of the vacating legislator, a significant difference from the statute examined in *Richards*. For this reason, no ambiguity is present in West Virginia Code § 3-10-5(a) and, therefore, the analysis and holding in *Richards* lacks persuasive value to this Court.

Likewise, the holding in *Wilson v. Sebelius* cannot provide this Court with any guidance with respect to determining whether ambiguity exists in West Virginia Code § 3-10-5(a). In *Wilson*, the applicable statutory provisions considered are also dissimilar to West Virginia Code § 3-10-5(a) because they fail to include any language identifying the determinative time period of the vacating county treasurer. Specifically, the statutory procedure in Kansas required the convening of "a convention 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." *Wilson*, 72 P.3d at 555 quoting K.S.A. 25-3902(a). Importantly, the Kansas Supreme Court relied on a Kansas statute, "K.S.A. 25-3901(b), [which] define[d] 'party' as 'a political party having a state and national organization and of which the officer or candidate whose position has become vacant was a member.'" *Id.* Again, the holding in *Wilson* is not persuasive to this Court's analysis of whether the language in West Virginia Code § 3-10-5(a) is ambiguous due to the Kansas statute's absence of language identifying a set period in time.

If any confusion were to exist over the specific time period identified as “immediately preceding,” this Court need only read the remainder of § 3-10-5(a). The Legislature consistently requires the Governor, in a scenario where the appropriate District Executive Committee fails to provide a listing of three (3) replacements, to “appoint within five days thereafter a legally qualified person of the same political party as the person vacating the office.” The reality is that had Senator Hall determined to change his party affiliation back to the Democrat party three (3) or even two (2) hours prior to vacating the office, this issue would not be before this Court. The Petitioners would then be content with the common sense interpretation of the statute which the Respondents endorse, and the Respondents would not trouble this Court with the inane and self-serving argument the Petitioners have presented. However, Senator Hall maintained the party affiliation which he had “immediately preceding” his resignation and now this Court has been requested to resolve the argument.

The Legislature’s inclusion of the term “immediately preceding” in West Virginia Code § 3-10-5(a) distinctly and unambiguously sets the time period to determine which political party executive committee shall submit a list of potential appointees to the Governor. By applying this clear meaning to the facts of this matter, the Governor is required to choose a replacement from Senator Hall’s political party immediately preceding his vacancy from office; that is, the Republican Party. Therefore, this Court should conclude that West Virginia Code § 3-10-5(a) is unambiguous on its face and that the Governor should appoint a qualified candidate from the list submitted by the Republican Respondents.

- B. Alternatively, if this Court concludes that West Virginia Code § 3-10-5(a) is not unambiguous on its face, an analysis of the rules of statutory construction should identify the statute’s legislative intent and conclude that the Governor must appoint a Republican to replace Senator Hall.**

It is the Republican Respondents' steadfast assertion that the clear language of West Virginia Code § 3-10-5(a) should apply to this matter and the Governor should be directed to appoint a Republican to replace Senator Hall. *See State v. J.S.*, 757 S.E.2d 622, 631 (W. Va. 2014) (“A basic rule of statutory construction provides that ‘[w]hen a statute [or rule] is clear and unambiguous and the [drafter’s] intent is plain, the statute [or rule] 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 [or rule].’”) *quoting Snider v. Fox*, 627 S.E.2d 353, 357 (2006) (further citations omitted). However, if this Court finds that § 3-10-5(a) is not clear and unambiguous, “then the ordinary principles employed in statutory construction must be applied to ascertain such intent.” *State ex rel. Discover Fin. Servs., Inc. v. Nibert*, 744 S.E.2d 625, 641 (W. Va. 2013) *quoting State ex rel. Forbes v. Caperton*, 481 S.E.2d 780, 786 (W. Va. 1996).

Looking to the legislative history of West Virginia Code § 3-10-5, in 1963, the Legislature passed a bill to repeal Chapter 3 of the West Virginia Code and enact a new Chapter 3. [App. at 127-129] At that time, the Legislature purposefully included the term “immediately preceding” for the first time in § 3-10-5(a). While other sections of Article 10, Chapter 3 of the West Virginia Code addressed vacancies in elected offices, only § 3-10-5(a) includes the term “immediately preceding” as it relates to determining the political party that will submit candidates for the appointment.¹⁰ Since that time, § 3-10-5 was amended in 1964, 1967, 1975, 2010 and 2013. For fifty-three years, the Legislature’s inclusion of the term “immediately

¹⁰ West Virginia Code § 3-10-6. Vacancy in office of circuit court clerk (“(a) . . . by appointment of a person of the same political party as the officeholder vacating the office for the period required by section one of this article.”) West Virginia Code § 3-10-7. Vacancies in offices of county commissioner and clerk of the county commission (“(a) . . . Persons appointed shall be of the same political party as the officeholder vacating the office for the period stated by section one of this article.”) West Virginia Code § 3-10-8. Vacancies in offices of prosecuting attorney, sheriff, assessor and surveyor (“(a) . . . by appointment of a person of the same political party as the officeholder vacating the office.”)

preceding” in § 3-10-5(a) demonstrates the clear intent of the Legislature to expressly set the time period from which the determination of the political party of the vacating legislator must be made - the moment immediately preceding the legislator’s vacation of his or her office.

Petitioners argue that the intent behind § 3-10-5(a) is “the preservation of the mandate of the voters who elected the person creating the vacancy.” [Pet.’s Br. at p. 20]. Again, Petitioners rely upon the reasoning in *Richards* and *Wilson* to support this argument despite the fact that the statutes being interpreted in those decisions were silent as to the time period to determine the political party affiliation of the person vacating the office. Nevertheless, Petitioners assert that the mandate of the voters must be protected by appointing a person affiliated with the same political party that the vacating official belonged to at the time of his or her election to that office. While this result would disregard the clear language of § 3-10-5(a), the mandate of the voters bears closer analysis because if this Court decides to apply this analysis, the plain result should be that the Republican Respondents’ submission should contain the identity of Senator Hall’s replacement.¹¹

Finally, in West Virginia, the citizens elect people, not merely party representatives.¹² Whether a delegate or a senator, the people entrust their representative to act on behalf of their best interests. In switching to the Republican Party, Senator Hall noted that:

Political climates change, and I made a decision today to keep Raleigh, Wyoming and McDowell counties at the table in the West Virginia Senate. I have always picked our people over parties . . .

¹¹ See *infra* Argument C.

¹² Recent legislative enactments evidence an intent of the Legislature to emphasize this important public policy. For instance, this past session the Legislature enacted House Bill 2010, which implemented non-partisan election of judges. See W. Va. Code § 3-5-6(b) (2015). Also, the Legislature, through the passage of Senate Bill 249, eliminated straight party ticket voting. See W. Va. Code § 3-6-2(g) (2015).

and did today as well. This decision will upset some, but had to be made for our district to be relevant.

[App. at 130-131.] If this Court adopts Petitioners' interpretation of West Virginia Code § 3-10-5(a), it could have a chilling effect on future officeholders' constitutional rights of freedom of speech and freedom of association as set forth in the First and Fourteenth Amendments of the United States Constitution. U.S. CONST. amends. I, XIV. These officeholders should feel free to change their political affiliation, if they believe the change serves the best interest of their constituents. *See, e.g., Com. Ex rel. Teller v. Jennings*, 186 A.2d 916 (Pa. 1963) ("Finally, and most important, to attribute to the framers of the Pennsylvania Constitution the intention of requiring a public officeholder to continue after taking office as the representative of his political party, would be to charge them with a complete misunderstanding of the nature of the American political system. Once a person assumes political office he becomes the representative of all his constituents and not merely those who voted for him or happen to belong to his political party."). Petitioners' interpretation selfishly seeks to take away the seat "at the table" for the people of the Ninth Senatorial District. For this reason, this Court should conclude that West Virginia Code § 3-10-5(a) requires the Governor to appoint a qualified candidate from the list submitted by the Republican Respondents.

C. The application of the clear language and intent of West Virginia Code § 3-10-5(a) will not lead to absurd and inconsistent results.

Petitioners argue that identifying the political party affiliation of a vacating legislator at the time his or her office is vacated would lead to absurd and inconsistent results; thus providing this Court with support to disregard the rules of statutory construction and legislative intent. This Court noted, in *Charter Communications, VI, PLLC v. Community Antenna Service, Inc.*, "a well-established canon of statutory construction counsels against ... an

irrational result [for] “[i]t is the “duty of this Court to avoid whenever possible a construction of a statute which leads to absurd, inconsistent, unjust or unreasonable results.”” 561 S.E.2d 793, 799 (W. Va. 2002) quoting *State v. Kerns*, 394 S.E.2d 532, 537 (W. Va. 1990).

Petitioners cobble a hypothetical of misconduct perpetrated by a Governor to bribe a legislator with an executive branch appointment in exchange for the legislator agreeing to switch political parties prior to vacating his or her seat in the legislature as a means to support their requested interpretation of § 3-10-5(a). [Pet.’s Br. at p. 26.] This Court should not accept the Petitioners’ use of a scare tactic as grounds to ignore the rules of statutory construction and disregard the clear meaning and intent of § 3-10-5(a). Petitioners’ argument and hypothetical fails to recognize that the language contained in West Virginia Code § 3-10-5(a) has been in place for fifty-three (53) years without reported incident or challenge before this Court. Petitioners have not cited any relevant authority to suggest that the mandate of the voters is frustrated by a legislator’s post-election change in political party affiliation.

Furthermore, Petitioners implore this Court to accept their interpretation of West Virginia Code § 3-10-5(a) because, in Petitioners’ opinion, the political party at the time of the election best represents the intentions of the voters. [Pet.’s Br. at pp. 20-23.] If that is the case, Petitioners’ argument raises the issue as to the best manner in which to determine the mandate of the voters in the Ninth Senatorial District of West Virginia. Petitioners argue that it is the time Senator Hall was elected in 2012. However, this disregards the clear intent of the voters in the Ninth Senatorial District of West Virginia in the 2014 general election. Indeed, on November 4, 2014, the voters of Ninth Senatorial District elected Republican Jeff Mullins over incumbent

Democrat Mike Green by a considerable margin.¹³ Why should the political party affiliation of Senator Hall in 2012 more aptly reflect the intentions of the voters than a more recent election for a Senator in the same district? Accordingly, the Governor's selection of a Republican officeholder not only complies with the unambiguous language of § 3-10-5(a), it also more aptly reflects the sentiments of the voters.

This argument is further corroborated by the fact that following the election of Senator Mullins, Senator Hall recognized that the desires of his constituents changed and, to best represent his constituents, Senator Hall exercised his constitutional rights of freedom of speech and freedom of association and switched his political party affiliation to become a Republican. On November 5, 2014, the Charleston Daily-Mail reported that “[a] source close to Hall said the results in Green’s race and other races across southern West Virginia made it clear that voters there no longer wanted the Democratic Party to represent them at the statehouse.” [App. at 5-6.] Likewise, on November 6, 2014, Senator Hall explained why he switched to the Republican Party: “If I’m going to work for the people of my district, which is what I’m sent to Charleston to do, I’ve got to be a part of leadership and be a part of the majority party to do that.” [App. at 7-8.]

Unquestionably, the public policy of interpreting West Virginia Code § 3-10-5(a) to reflect the intentions of the voters supports the Governor appointing a Republican to Senator Hall’s vacated seat. Moreover, neither *Richards* nor *Wilson* address the facts of the present matter. For instance, in *Richards*, Elwin McGrew was elected as a Democrat as county commissioner to the Board of Sweetwater County in November of 1996; changed his affiliation

¹³ Of the twenty-five thousand four hundred thirty-five votes, Republican Jeff Mullins received 56.87% (14,465) while Democrat Mike Green received 43.13% (10,970). [App. at 3-4.]

to the Republican Party in January 6, 1999; and resigned on May 18, 1999, prior to the conclusion of his first electoral term. *See Richards*, 6 P.3d at 1253. Likewise, in *Wilson*, Rita Cline won the election for Shawnee County treasure on November 7, 2000. 72 P.3d at 89. On February 26, 2001, Ms. Cline switched to the Republican Party; however, she resigned her position on March 10, 2003, before the conclusion of her electoral term. *Id.* Importantly, neither opinion addresses the impact of a more contemporaneous election and whether that election more aptly reflects the intentions of the voters. Here, not only is there a more recent election, it is the same voters and involves a State Senatorial seat. For these reasons, the public policy of West Virginia to reflect the intentions of the voters is better served through the appointment of a Republican officeholder to Senator Hall's vacant seat.

D. The application of the clear language and intent of West Virginia Code § 3-10-5(a) is constitutional.

“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.” Syl. pt. 3, *State v. James*, 710 S.E.2d 98 (W. Va. 2011). Petitioners assert, without reference to any authority, that the appointment of a Republican to Senator Hall's vacant seat violates the West Virginia Constitution. [Pet.'s Br. at pp. 28-29.] This position lacks merit for several reasons.

First, the Republican Respondents have identified at least one (1) Court found no constitutional violations in an analogous situation. *See State ex rel. Herman v. Klopfleisch*, 651 N.E.2d 995 (Ohio 1995). In *State ex rel. Herman v. Klopfleisch*, the Mercer County Democratic Party Central Committee challenged the Secretary of State's appointment of a Republican officeholder following the resignation of James R. Mustard, who ran as a Democratic candidate

but, while in office, switched to the Republican Party. 651 N.E.2d at 996.¹⁴ The Democratic Petitioners challenged, through a writ, the Secretary of State's appointment based on the language of Ohio Revised Code § 733.08 and, alternatively, on constitutional grounds.¹⁵ *Id.* at 999. With respect to the constitutional arguments, the Supreme Court of Ohio found the Democratic Petitioners' challenge unavailing. Relying on *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982), the Ohio Supreme Court noted that the United States Supreme Court emphasized that "[n]o provision of the federal Constitution expressly mandates the procedures that a state * * * must follow in filling vacancies in its own legislature." *See State ex rel. Herman*, 651 N.E.2d at 999 quoting *Rodriguez*, 457 U.S. at 8.

Likewise, Petitioners' argument similarly fails. Courts have found appointment statutes constitutional. *See, e.g., Rodriguez*, 475 U.S. at 8; *Herman*, 651 N.E.2d at 999; *see also Fowler v. Beasley*, 472 S.E.2d 630, 467 (S.C. 1996) (statute requiring governor to fill vacancy upon recommendation of majority of the Members of the General Assembly complied with South Carolina Constitution separation of powers clause); *Kluk v. Lang*, 531 N.E.2d 790 (Ill. 1988) ("we hold that the statute does not represent an unconstitutional delegation of legislative power to private persons"). Finally, the appointment of a Republican absolutely does not infringe on the will of the people of the Ninth Senatorial District, as was evidenced by the most recent Senatorial election in that district. [App. at __.] Petitioners' attempted constitutional

¹⁴ Notably, in their Canvas of Similar State Election Laws, Petitioners refer this Court to Ohio.

¹⁵ This Code provision provided:

In case of the death, resignation, or removal of the mayor, the vacancy in the office of mayor shall be filled for the remainder of the unexpired term by a person chosen by the residents of the city who are members of the city central committee if there is one, or it not then **of the county central committee, of the political party with which the last occupant of the office was affiliated.** . . .

Ohio Revised Code § 733.08 (1992) (emphasis added).

challenge amounts to nothing more than an effort to distract this Court from the unambiguous language of West Virginia § 3-10-5(a) and, accordingly, this Court should disregard this argument and hold that the appointment of a Republican to the vacant Senate seat is the correct application of § 3-10-5(a).

VI. CONCLUSION

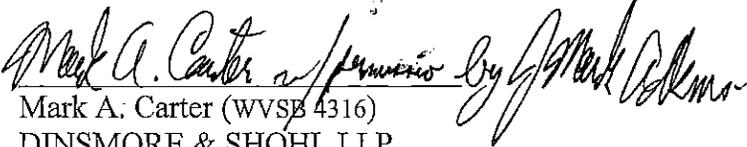
The language contained in West Virginia Code 3-10-5(a) is clear and unambiguous. As such, it should be applied to direct the appointment of a Republican to the vacant Senate seat in the Ninth Senatorial District of West Virginia. Likewise, a Republican should receive the appointment even if this Court chooses to construe the legislative intent of the statute. Therefore, based upon the foregoing arguments and authorities, the Republican Respondents respectfully request that this Court instruct the Governor to appoint a Republican to fill the vacancy in the West Virginia Senate created by Senator Hall's vacancy.

BEVERLY R. LUND, JUSTIN M.
ARVON, SUE "NAOMI" CLINE, and
TONY PAYNTER in their capacity as the
members of the West Virginia Republican
Executive Committee for the Ninth
Senatorial District,

By Counsel,



J. Mark Adkins (WVSB 7414)
Patrick C. Timony (WVSB 11717)
BOWLES RICE LLP
Post Office Box 1386
Charleston, West Virginia 25325-1386
Telephone: (304) 347-1100
madkins@bowlesrice.com
*Counsel for Beverly R. Lund, Justin M. Arvon,
Sue "Naomi" Cline, and Tony Paynter*



Mark A. Carter (WVSB 4316)
DINSMORE & SHOHL LLP
Post Office Box 1887
Charleston, West Virginia 25339-1887
Telephone: (304) 357-0900
mark.carter@dinsmore.com
*Counsel for Beverly R. Lund, Justin M. Arvon,
Sue "Naomi" Cline, and Tony Paynter*

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 16-0013

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
capacity as the members of the West Virginia Republican
Executive Committee for the Ninth Senatorial District,

Respondents.

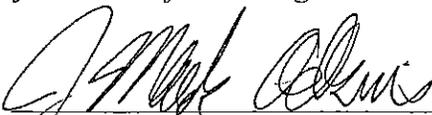
Certificate of Service

I, J. Mark Adkins, do hereby certify that I have caused copies of the hereto
attached *Response in Opposition to Emergency Petition for a Writ of Mandamus* to be served
upon the following:

Anthony J. Majestro, Esquire
Powell & Majestro, PLLC
405 Capitol Street, Suite P1200
Charleston, West Virginia 25301
Counsel for Petitioners

Peter G. Markham, Esquire
Office of Governor Earl Ray Tomblin
1900 Kanawha Boulevard, East, State Capitol
Charleston, West Virginia 25305
*Counsel for Earl Ray Tomblin, in his Capacity as
Governor of the State of West Virginia*

by hand-delivery on this 12th day of January 2016.



J. Mark Adkins (WVSB 7414)