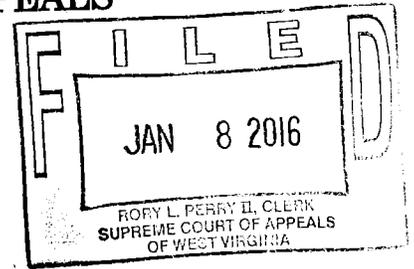


IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
No. 16-0013



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

Respondents.

EMERGENCY PETITION FOR A WRIT OF MANDAMUS

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QUESTION PRESENTED

West Virginia Code § 3-10-5(a) requires that the Governor fill a legislative vacancy from a list “submitted by the party executive committee of the party with which the person holding the office immediately preceding the vacancy was affiliated.” Subsection 5(a), however, does not specifically require the Governor to determine party affiliation at any specific point in time. The question presented here is as follows:

When a vacancy in the Senate occurs after a legislator changes political party affiliation post-election, must the Governor fill the vacancy from a list submitted by the party executive committee of the party with which the person holding the office immediately preceding the vacancy was affiliated at the time of that person’s election in order to serve the statute’s purpose of best preserving the mandate of the voters?

STATEMENT OF THE CASE

Daniel Jackson Hall was first elected to the West Virginia House of Delegates in 2008 after receiving the Democratic Party's nomination in the primary. He was re-elected the West Virginia House of Delegates as a Democrat in 2010. In 2012, however, Hall successfully challenged the then-incumbent Democratic Senator, Richard Browning in the Democratic primary. He ultimately was elected to a four-year term as a Democratic Senator in the Ninth Senatorial District (Raleigh, Wyoming, and McDowell Counties) in the 2012 general election.¹

Following the November 4, 2014 general election, there were seventeen Democratic senators and seventeen Republican senators.² On November 5, 2015, Hall switched parties becoming a Republican. The switch gave control of the Senate to the Republican Party with a one-vote margin.³

On December 29, 2015, Hall announced he would be resigning from the Senate effective January 3, 2016 to become a lobbyist for the National

¹ App:1.

² App:9,11,14.

³ App:9,11,14.

Rifle Association.⁴ Thereafter, a public debate ensued over whether Respondent Governor Tomblin was required to replace Hall with a Democrat or a Republican.⁵ On December 30, 2015, Hall announced that he would be delaying his resignation from the Senate until any legal questions regarding his replacement have a “clear resolution.”⁶ While no legal proceedings have been filed, on January 3, 2016, Hall tendered his letter of resignation from the West Virginia Senate effective that same day.⁷

Hall has never been elected to office as a Republican. He did run for the House of Delegates in 2006 as a Republican and lost.⁸ His current resignation from the Senate removes the opportunity of the voters to weigh in on his change in party in exchange for his selection as majority whip and the chairs of two Senate committees.⁹

⁴ App:9, 11, 14.

⁵ App:9, 11, 14.

⁶ App:13.

⁷ App: 8.

⁸ App: 1.

⁹ App: 9, 11, 13, 14.

On January 5, 2016, Attorney General Patrick Morrissey, at the request of Senate President William P. Cole, II, issued an opinion of the Attorney General concluding that Respondent Governor Tomblin was required to replace Senator Hall with a Republican from one of three names submitted by the Respondent members of the West Virginia Republican Executive Committee for the Ninth Senatorial District.¹⁰

Both parties have announced their intention to have their respective Ninth Senatorial District Executive Committees send three nominations for Hall's replacement to Respondent Tomblin. The Democratic Executive Committee for the Ninth Senatorial District has announced a meeting to select its three nominees for Monday, January 11, 2016.¹¹ Petitioners are not aware of the time or place for the anticipated meeting of Respondents' Republican Executive Committee for the Ninth Senatorial District; however, an announcement soliciting applications and scheduling interviews for Tuesday January 12, 2016 has been published.¹²

¹⁰ App:20.

¹¹ App:23.

¹² App:24.

The sixty-day legislative session commences on January 13, 2016. If Hall is replaced with a Democrat, there will be seventeen Republicans and seventeen Democrats in the Senate. If the vacancy is not filled or filled with a Republican, the Republicans will have a one-seat majority. The addition of an additional Democrat in the Senate would entitle the Senate Democrats to equal representation on all Senate committees and the ability to have some Democrats serve as committee chairs.

The current Republican Senate leadership has announced its intention to fast-track controversial legislation such as so-called “right to work” laws and the creation of an intermediate court of appeals.¹³ The ultimate legislation passed by the Senate will certainly be impacted by when the vacancy is filled and who is appointed to fill this vacancy. The ability of the Senate to override any veto by Respondent Tomblin also may be impacted by the choice and timing of any replacement for Senator Hall.¹⁴

Petitioner Belinda Biafore petitions in her capacity as Chair of the West Virginia State Democratic Executive Committee, which is the

¹³ App:26, 29.

¹⁴ App:26, 29.

governing body of the West Virginia Democratic Party. Petitioners Stephen Davis, Linda Klopp, David Thompson, Linda Phillips, Stephen Evans, and Patricia Blevins, petition both in their capacity as the six members of the West Virginia Democratic Executive Committee for the Ninth Senatorial District, and individually as voters in the Ninth Senatorial District.

This Petition is brought against Respondent Earl Ray Tomblin, in his capacity as Governor of the State of West Virginia, as the person charged by West Virginia Code § 3-10-5 with selecting the person to fill the vacancy in the Ninth Senatorial District. Respondents Beverly R. Lund, Justin M. Arvon, Sue "Waomi" Cline, and Tony Paynter, are all members of the West Virginia Republican Executive Committee for the Ninth Senatorial District. There are apparently two vacancies on that committee. Respondents John Doe and Jane Doe are included based on Petitioners' assumption that these vacancies will be promptly filled. The Republican Committee Respondents ("Republican Respondents") are included as parties in interest to this proceeding.

Respondent Tomblin will soon have presented to him names from both Executive Committees for the Ninth Senatorial District.

Respondent Tomblin has not indicated his views on the interpretation of West Virginia Code § 3-10-5.¹⁵ Given that control of the Senate is at stake, however, whichever choice he makes, that choice will likely result in a court challenge.¹⁶ A fast resolution of this dispute by this Court will permit the Senate to turn its full attention to the important issues facing the state.

For the reasons noted below, Petitioners believe that West Virginia Code § 3-10-5 exists to best preserve the mandate of the voters when a legislative vacancy occurs. As the voters of the Ninth Senatorial District elected a Democrat, their mandate can best be preserved interpreting West Virginia Code § 3-10-5 as requiring Respondent Tomblin to appoint a Democrat from the three names to be submitted by Petitioners.

¹⁵ App:11, 14.

¹⁶ App:11, 14.

SUMMARY OF ARGUMENT

West Virginia Code § 3-10-5(a) requires that the Governor fill a legislative vacancy from a list “submitted by the party executive committee of the party with which the person holding the office immediately preceding the vacancy was affiliated,” but it does not specifically require the Governor to determine party affiliation at any specific point in time.

This provision is ambiguous when it is applied after a legislator affiliated with one party at the time of election subsequently changes parties and then resigns. The Legislature could be directing the Governor to a list “submitted by the party executive committee of the party with which the person holding the office immediately preceding the vacancy was affiliated” at the time of that person’s election or at the time that the vacancy occurs.

There are no judicial decisions interpreting this provision. However, two other Supreme Courts have had the occasion to interpret similar provisions, and both found the provisions ambiguous as applied to a vacancy occurring when the elected official changes political parties after the election and then resigns.

The intent behind section 5 is obvious – the preservation of the mandate of the voters who elected the person creating the vacancy. As such, the provision should be interpreted as requiring a list submitted by the party executive committee of the party with which the person holding the office immediately preceding the vacancy was affiliated at the time of that person's election rather than the time of the vacancy. Every other Court which has considered a similar provision has reached the same conclusion as to purpose behind requiring appointment of person of the same political party.

Any interpretation that would require the Governor to appoint a person from the party of a Senator who has changed political parties and resigned would violate public policy because it would frustrate the assumption of a political party which supported him that a person from that political party would hold that office until the next election.

Finally, it is of no moment that the Legislature did not indicate explicitly that it meant some time other than the time of the vacancy. The Legislature likely assumed that the time would not be an issue because only in exceptional circumstances will the person leaving office not be affiliated with the political party that supported him or her in the

last election. This interpretation is consistent with West Virginia public policy in election cases which focuses on determining the intent of the voters.

Included in the Appendix filed herein is a summary of all states with similar statutory provisions.¹⁷ Some explicitly answer the temporal question by requiring the party determination to be made at the time of election while some are silent on the question. The cases interpreting these provisions are unanimous in resolving the inherent ambiguities in these later statutes in favor of determining party affiliation at the time of election not resignation. There are no statutes explicitly requiring party determination to be made at the time of the vacancy. If this Court were to accept the arguments of the Republican Respondents and the Attorney General, it would make West Virginia a far outlier as the only state that requires filling a vacancy by looking to *the party rejected by the voters*.

* * * *

This Court has long recognized that statutory interpretations that cause inconsistent or absurd results should be discarded. The

¹⁷ App:32.

interpretation of section 5 advanced by the Republicans Respondents if accepted will result in absurd and inconsistent results and should be rejected. First, the statutory policy underlying using party affiliation will be inconsistently applied if post-election party affiliation changes change which party committee provides the list to the Governor. Second, a contrary interpretation also could lead to absurd results.

* * * *

Statutory provisions should not be interpreted or applied in a manner that raises constitutional questions. The interpretation of section 5 advanced by the Republican Respondents and the Attorney General raises serious constitutional questions.

First, a review of decisions challenging similar statutes on due process and equal protection grounds evidences the fact that the statutes foster the preservation of the mandate of the electorate serves as an important basis for upholding the constitutionality of the provisions. Second, the interpretation of section 5 advanced by the Republican Respondents and the Attorney General raises serious questions under the West Virginia Constitution apart from due process and equal protection including the Article 2, Section 2 guarantee that the powers of

government reside in its citizens and the violation of separation of powers.

* * * *

This Court's precedent supports the use of a writ of mandamus under the facts of this case. Mandamus is a proper remedy where the essential purpose of the proceeding is to obtain an authoritative interpretation of the law for the guidance of public officials in their administration of the public business. Petitioners have filed this writ in advance of the submission of names by them and the anticipated submission of names by the Republican Respondents. However, given the immediacy of the commencement of the upcoming legislative session and the significance the dispute may have on the control and/or leadership of the Legislature, it is in the public interest of the citizens of this State for this Court to promptly resolve this dispute.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners request that this Court forthwith enter an expedited briefing schedule sufficient to permit the Court to reach a decision as close to the commencement of the legislative session on January 13, 2016 as possible.

Petitioners believe that this case involves issues of first impression and issues of fundamental public importance as set forth in Rev. Rule App. Pro. 20(a). Given the short time available, Petitioners' counsel will make himself available for a Rule 19 or Rule 20 argument at the Court's convenience should the Court deem oral argument is necessary.

Petitioners believe that a published opinion would be appropriate as the statutory issues here have not been decided by this Court. Given the timeframe involved, however, Petitioners respectfully suggest that it may be appropriate for the Court, as it has in other election cases, to enter a summary order and follow in due course with an opinion explaining the decision.

ARGUMENT

I. THE CODE'S PROVISIONS FOR FILLING LEGISLATIVE VACANCIES ARE AMBIGUOUS WHEN APPLIED TO A VACANCY OCCURRING WHEN A LEGISLATOR RESIGNS AFTER CHANGING PARTIES FOLLOWING ELECTION TO OFFICE.

The West Virginia election code addresses the filling of the vacancy in state legislative offices as follows:

(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. . . . 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. . . .

(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. . . .¹⁸

Notably, while subsection (a) requires that the Governor fill a legislative vacancy from a list "submitted by the party executive committee of the

¹⁸ W. Va. Code § 3-10-5.

party with which the person holding the office immediately preceding the vacancy was affiliated,” it does not specifically require the Governor to determine party affiliation at any specific point in time.

In addressing this provision, this Court must first determine whether the provision is ambiguous.¹⁹ A statute is ambiguous when “it [is] susceptible of two or more constructions or [is] of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning.”²⁰ When a legislator affiliated with one party at the time of election subsequently changes parties and then resigns, application of the statute is ambiguous because it fails to direct the Governor to the time at which party identification is to be determined.

¹⁹ *Appalachian Power Co. v. State Tax Dep't*, 195 W.Va. 573, 587, 466 S.E.2d 424, 438 (1995) (“If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed.”); syl. pt. 2, *Crockett v. Andrews*, 153 W.Va. 714, 172 S.E.2d 384 (1970) (“[w]here the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation.”); syl. pt. 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951) (“[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.”).

²⁰ *Davis Mem'l Hosp. v. W. Virginia State Tax Com'r*, 222 W. Va. 677, 682-83, 671 S.E.2d 682, 687-88 (2008) (quoting *Sizemore v. State Farm Gen. Ins. Co.*, 202 W.Va. 591, 596, 505 S.E.2d 654, 659 (1998) (internal quotations and citation omitted by Court)).

When a vacancy occurs after the legislator changes party post-election, the statute can be in read two different ways. The Legislature could be directing the Governor to a list "submitted by the party executive committee of the party with which the person holding the office immediately preceding the vacancy was affiliated" either at the time of that person's election or at the time that the vacancy occurs. The existence of these multiple constructions renders section 5 ambiguous. Indeed, while reaching a different ultimate conclusion, the Attorney General concedes that subsection 5(a) is "arguably ambiguous" and susceptible to being "understood one of two ways: to refer to the senator's party affiliation at the time of election or appointment, or to the senator's party affiliation at the time of vacancy."²¹

There are no judicial decisions interpreting this provision. However, two other Supreme Courts have had the occasion to interpret similar provisions, and both found the provisions ambiguous as applied to a vacancy occurring when the elected official changes political parties after the election and then resigns.

²¹ App:19.

In *Richards v. Bd. of Cty. Comm'rs of Sweetwater Cty.*, the Wyoming Supreme Court was faced with a statute requiring “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.”²² The parties made arguments identical to the positions of the parties in the instant case:

The Republican Central Committee argues the notice of the vacancy should have been given to it, as the county central committee of the political party to which Mr. McGrew belonged “when the vacancy occurred.” On the other hand, the Democratic Central Committee claims the board of county commissioners correctly notified it, as the county central committee of the political party to which Mr. McGrew belonged “at the time of the last general election.” As such, the parties come to us with a question which requires this Court to finish the first sentence in subsection (a), that is, “the political party to which the member whose office is vacant belonged” *when*?²³

The Court explicitly rejected the argument urged by the Republican Respondents here and held that because “the statute does not address or

²² 6 P.3d 1251, 1253 (Wyo. 2000) (quoting Wyo. Stat. Ann. § 18-3-524(a)).

²³ *Id.*

anticipate the situation presented in this case, we hold the statute is ambiguous.”²⁴

Similarly, the Court in *Wilson v. Sebelius*, addressed the same question in the context of a statute that defined “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.’”²⁵ The Kansas Supreme Court noted the *Richards* Court’s finding of as applied ambiguity and proceeded to interpret the similarly ambiguous Kansas provisions. The Court concluded that the Wyoming Court’s reasoning was more persuasive than the reasoning of the Respondents who were arguing that the statute clearly required looking to the party affiliation at the time of the vacancy.²⁶ Section 5(a) is similarly ambiguous when applied to the facts of this case.

The fact that the last sentence of subsection 5(a) directs the Governor to appoint “a legally qualified person of the same political party

²⁴ *Id.*

²⁵ 276 Kan. 87, 89, 72 P.3d 553, 555 (2003) (quoting K.S.A. 25–3901(b)).

²⁶ 276 Kan. at 95-96, 72 P.3d at 559.

as the person vacating the office” if a list is not timely submitted does not change this analysis. The use of the present participle “vacating” could reasonably be understood to be an identification of the person whom the Governor is required to look to to determine party affiliation. Like the first sentence of section 5(a), this provision could also be read two ways either as requiring appointment of “a legally qualified person of the same political party as the person vacating the office [was at the time of his or her election]” or “a legally qualified person of the same political party as the person vacating the office [was at the time of the vacancy].”

Nor does subsection 5(c) provide any clarity to the issue. The explicit requirement in subsection 5(c) that “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” contains the same ambiguous reference to “the party” as is included in subsection 5(a). Indeed, if anything, subsection 5(c) confirms that the operative time for determining which committee must submit the list is the time of election not vacancy.

In sum, like the statutes in *Richards* and *Wilson*, the West Virginia provisions do not provide a clear answer to the temporal question. As

such, this Court must construe the provisions to determine the Legislature's intent.²⁷

II. THE CODE'S PROVISIONS FOR FILLING LEGISLATIVE VACANCIES SHOULD BE INTERPRETED CONSISTENT WITH THEIR OBVIOUS INTENT – BEST PRESERVING THE MANDATE OF THE VOTERS WHO ELECTED THE PERSON CREATING VACANCY BY APPOINTING A PERSON WHO IS OF THE SAME POLITICAL PARTY AS THE PERSON ELECTED BY THE VOTERS.

The intent behind section 5 is obvious – the preservation of the mandate of the voters who elected the person creating the vacancy. As such, the provision should be interpreted as requiring a list submitted by the party executive committee of the party with which the person holding the office immediately preceding the vacancy was affiliated at the time of that person's election rather than the time of the vacancy.

The reasoning of *Richards* and *Wilson* are instructive and persuasive. In *Richards* and *Wilson*, the courts concluded that because the purpose of the provision was the protection of the mandate of the voters by requiring the selection of a person of the same party that the voters chose, the statutes should be interpreted as requiring appointment for a vacancy based on party affiliation at the time of election not

²⁷ *Richards, supra; see also Davis Mem'l Hosp., supra.*

vacancy.²⁸ Every other Court which has considered a similar provision has reached the same conclusion as to purpose behind requiring appointment of person of the same political party.²⁹

Notably, no legislative purpose for requiring appointment for a vacancy of a person from the party of the predecessor when the predecessor has changed political parties after the election has been advanced by the Republican Respondents or the Attorney General here. Indeed, no Court has found such purpose. In *Wilson* the Court rejected the contrary conclusion on public policy grounds based on *Richards*:

²⁸ *Wilson*, 276 Kan. at 95-96, 72 P.3d at 559; *Richards*, 6 P.3d at 1253.

²⁹ *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 12, 102 S. Ct. 2194, 2201, 72 L. Ed. 2d 628 (1982) (“The Puerto Rico Legislature could reasonably conclude that appointment by the previous incumbent’s political party would more fairly reflect the will of the voters than appointment by the Governor or some other elected official.”); *Baker v. Martin*, 330 N.C. 331, 341, 410 S.E.2d 887, 893 (1991) (“The General Assembly in this case has chosen to protect the mandate of the previous election by providing that the appointed judge should be of the same political party as his or her predecessor.”); *Cintron-Garcia v. Barcelo*, 671 F.2d 1, 5 (1st Cir. 1982) (noting appointment statutes motivated by “the need to preserve the political balance obtained in previous general elections”); *Kluk v. Lang*, 125 Ill. 2d 306, 328-29, 531 N.E.2d 790, 800 (1988) (citing *Rodriguez, supra* and *Cintron-Garcia, supra*).

The conclusion—individuals rather than parties are elected—that respondents urge is a bromide rather than an aid in interpreting the statute. Moreover, if the official who resigned is treated strictly as an individual, there would be no more reason for respondent, the Shawnee County Republican party, to select the successor than for the petitioner to do so. Respondents' argument, hence, is not that an individual is replaced, but that the party selected by an individual after election is replaced. The Wyoming court, as we have seen, rejected this argument on public policy grounds.³⁰

Richards aptly described the public policy in the following terms:

In addition, we acknowledge that a county commissioner with a major party affiliation is often supported, financially and otherwise, by the political party he has pledged his allegiance to in preparation for his election bid. It would be contrary to public policy to allow an individual to frustrate the assumption of the political party which supported him that a person from that political party would hold that office until the next election. Therefore, considering the "public policy of the state," we hold that the statute calls for the board of county commissioners to notify the central committee of the party to which the former member belonged at the time of the last election.³¹

Finally, both *Richards* and *Wilson* rejected the idea that had the legislatures there intended time other than the time of the vacancy, they would have so indicated explicitly:

³⁰ 276 Kan. at 95, 72 P.3d at 558.

³¹ 6 P.3d at 1253.

Respondents argue that because the only time the statutory provisions have application is when a vacancy occurs, the plain meaning of “of the party” is the official's party at the time of the vacancy. They further argue that if the legislature meant some time other than the time of the vacancy, it would have identified that other time. The Wyoming court in *Richards* reasoned, contrary to respondents' position, that the legislature did not identify the time because it assumed that the time would not be an issue. The Wyoming court reasoned that the legislature enacted the statutory scheme with the rule in mind rather than the exception, and only in exceptional circumstances will the person leaving office not be affiliated with the political party that supported him or her in the last election. Hence, the legislature's silence is not to be taken as indicating that the party to be notified of the vacancy must be the official's party at the time the vacancy occurred. The Wyoming court's reasoning, because it seems unlikely that the legislature considered the possibility of an elected official's switching parties, is more persuasive than that of Respondents.³²

These interpretations are consistent with West Virginia public policy in election cases which focuses on determining the intent of the voters.³³

³² *Wilson*, 276 Kan. at 95-96, 72 P.3d at 559 (citing *Richards, supra*); see also *Richards*, 6 P.2d at 1253 ([W]e find it more reasonable that, when the legislature fails to provide for a certain situation, the legislature enacts the law assuming the situation that occurs in the majority of instances. Changing party affiliation after being elected is a relatively rare and infrequent occurrence. Therefore, in the majority of instances, a county commissioner leaving office is still affiliated with the political party which supported him in the last election.”).

³³ *State ex rel. Thomas v. Bd. of Ballot Comm'rs of Kanawha Cty.*, 127 W. Va. 18, 31 S.E.2d 328, 333-34 (1944) (“In so doing, we have not lost sight of the principle that, where possible, the will of the majority of the voters

Petitioners have been unable to locate any constitutional provision, statute or case law enacting the policy advanced by the Republican Respondents and the Attorney General. Included in the Appendix filed herein is a summary of all states with similar statutory provisions.³⁴ Some explicitly answer the temporal question by requiring the party determination to be made at the time of election. Alternatively, some, like the statute at issue here are silent on the question. As noted herein, the cases interpreting these provisions are unanimous in resolving the inherent ambiguities these later statutes in favor of determining party affiliation at the time of election not resignation. There are no statutes explicitly requiring party determination to be made at the time of the vacancy. If this Court were to accept the arguments of the Republican Respondents and the Attorney General, it would make West Virginia a far outlier as the only state that requires filling a vacancy by looking to *the party rejected by the voters*.

should be made effective.”); *State ex rel. Bowling v. Greenbrier Cty. Comm'n*, 212 W. Va. 647, 649, 575 S.E.2d 257, 259 (2002) (“Initially, we observe that we must in cases like the instant one remain ever mindful of the paramount principle that election laws are to be construed in favor of enfranchisement, not disenfranchisement.”)

³⁴ App:32.

III. THE POSITION OF THE REPUBLICAN RESPONDENTS AND THE ATTORNEY GENERAL SHOULD BE REJECTED BECAUSE IT WILL LEAD TO ABSURD AND INCONSISTENT RESULTS.

This Court has long recognized that statutory interpretations that lead to inconsistent or absurd results should be discarded.³⁵ The interpretation of section 5 advanced by the Republicans if accepted will result in absurd and inconsistent results and should be rejected.

First, the statutory policy underlying using party affiliation will be inconsistently applied. When a vacancy occurs and no post-election party affiliation changes have occurred, the policy of respecting the mandate of the voters will be upheld. When, however, as is the case

³⁵ Syl. pt. 2, *Conseco Fin. Serv'g Corp. v. Myers*, 211 W.Va. 631, 567 S.E.2d 641 (2002) (“ ‘It is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold the law and further justice. It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity.’ Syllabus Point 2, *Click v. Click*, 98 W.Va. 419, 127 S.E. 194 (1925).”); *Expedited Transp. Sys., Inc. v. Vieweg*, 207 W.Va. 90, 98, 529 S.E.2d 110, 118 (2000) (“It is the ‘duty of this Court to avoid whenever possible a construction of a statute which leads to absurd, inconsistent, unjust or unreasonable results.’” (quoting *State v. Kerns*, 183 W.Va. 130, 135, 394 S.E.2d 532, 537 (1990) (emphasis omitted))); *see also* syl. pt. 2, *Newhart v. Pennybacker*, 120 W.Va. 774, 200 S.E. 350 (1938) (same); *Jefferson Utilities, Inc. v. Jefferson County Bd. of Zoning Appeals*, 218 W.Va. 436, 447, 624 S.E.2d 873, 884 (2005).

here, there has been a post-election change in party affiliation, the mandate of the voters will be frustrated. This Court should avoid such an inconsistency by interpreting section 5 to require the Governor to fill the vacancy from a list submitted by the party executive committee of the party with which the person holding the office immediately preceding the vacancy was affiliated *at the time of that person's election*.

Second, the contrary interpretation also could lead to absurd results. If the party affiliation is determined at the time of the vacancy, a person elected could immediately after an election switch parties and resign, allowing the Governor to appoint the person who lost the election and was explicitly rejected by the voters. Alternatively, given that one of the most common reasons for resignation from the Legislature is appointment to an executive position, a Governor could frustrate the will of the voters by promising a valuable executive branch appointment to a member of the opposite party if the legislator switched parties prior to resigning. This would allow the Governor to pick up a valuable legislative seat for his or her party. Such a result, which would be permitted by the interpretation advanced by the Republican

Respondents and the Attorney General, would be absurd. This is reason enough for their interpretation to be rejected by this Court.

IV. THE CODE'S PROVISIONS FOR FILLING LEGISLATIVE VACANCIES SHOULD BE INTERPRETED TO AVOID SERIOUS CONSTITUTIONAL QUESTIONS BY REQUIRING APPOINTMENT OF A PERSON WHO IS OF THE SAME POLITICAL PARTY AS THE PERSON ELECTED BY THE VOTERS.

Statutory provisions should not be interpreted or applied in a manner that raises constitutional questions:

It is axiomatic that

... wherever an act of the legislature can be so *construed and applied* as to avoid a conflict with the constitution, and give it the force of law, such construction will be adopted by the court.

(Emphasis added.)

Peel Splint Coal Co. v. State, 36 W.Va. 802, 15 S.E. 1000, 1004 (1892). A narrow-breadth reading of a statute to assure that its application is constitutionally proper is appropriate as a less-intrusive remedy, *cf. Weaver v. Shaffer*, 170 W.Va. 107, 111, 290 S.E.2d 244, 248 (1980).³⁶

³⁶ *Morris v. Crown Equipment Corp.*, 219 W.Va. 347, 355, 633 S.E.2d 292, 300 (2006); *see also State ex rel. Downey v. Sims*, 26 S.E.2d 161, 170 (1943) ("The duty of the courts so to construe a statute as to save its constitutionality when it is reasonably susceptible of two constructions includes the duty of adopting a construction that will not subject it to a succession of doubts as to its constitutionality, for it is well settled that a statute must be construed, if fairly possible, so as to avoid not only the

The interpretation of section 5 advanced by the Republican Respondents and the Attorney General raises serious constitutional questions.

First, a review of decisions challenging similar statutes on due process and equal protection grounds evidences the fact that the statutes foster the preservation of the mandate of the electorate serves as an important basis for upholding the constitutionality of the provisions.³⁷ Absent this rationale, the constitutionality of section 5 would be in grave doubt.

Second, the interpretation of section 5 advanced by the Republican Respondents and the Attorney General raises serious questions under the West Virginia Constitution apart from due process and equal protection. Indeed, Article 2, Section 2 guarantees that the powers of government reside in its citizens: "The powers of government reside in all the citizens of the state, and can be rightfully exercised only in

conclusion that it is unconstitutional but also grave doubt upon that score.").

³⁷ See authorities cited *supra* n.28.

accordance with their will and appointment.”³⁸ The legislative vacancy provisions in section 5 permit political party to serve as a proxy for that will of the voters: “appointment by the previous incumbent's political party would more fairly reflect the will of the voters than appointment by the Governor or some other elected official.”³⁹ This contrary interpretation also potentially infringes on separation of powers. The State’s chief executive power is vested in the Governor.⁴⁰ Indeed, the Constitution explicitly makes the power of appointment an executive power which the legislative branch is barred from exercising.⁴¹ By allowing a legislator to change his party and resign, so that the Governor is forced to appoint someone to the Legislature who is of a different party than the voters selected infringes on this power. And, the interpretation of section 5 advanced by the Republican Respondents and the Attorney General infringes upon this power without any countervailing

³⁸ W.Va. Const. art. 2, sec. 2.

³⁹ *Rivera-Rodriguez*, 457 U.S. at 12, 102 S.Ct. at 2201.

⁴⁰ W.Va. Const. art. 7, sec. 5.

⁴¹ W.Va. Const. art. 7, sec. 8 (“no such officer [established by this constitution] shall be appointed or elected by the Legislature”).

consideration such as fostering the mandate of the electorate. Rather, the interpretation rewards and fosters the individual whims of a legislator.⁴² These serious constitutional questions are avoided by the rejection of the the interpretation of section 5 advanced by the Republican Respondents and the Attorney General.

V. ISSUANCE OF THE WRIT OF MANDAMUS IS THE APPROPRIATE REMEDY.

This Court's precedent supports the use of a writ of mandamus under the facts of this case. This Court has set forth the elements of a writ of mandamus:

This Court has explained that the purpose of mandamus is to enforce "an established right" and a "corresponding imperative duty created or imposed by law." *State ex rel. Ball v. Cummings*, 208 W.Va. 393, 398, 540 S.E.2d 917, 922 (1999) (citation omitted). In determining the appropriateness of mandamus in a given case, our law is clear that

A writ of mandamus will not issue unless three elements coexist—(1) a clear legal right in

⁴² *The Register-Herald*, "Turn about – again" (January 5, 2016), App. at pp. 9-10 (Commenting on the Hall resignation: "All citizens should demand and expect some degree of fidelity. No politician should feel bigger than the body they serve or the people he or she represents. Elected politicians are public servants — of, by and for the people. Their business is the public's business. They are not elected to jigger the system to their own benefit. It's cheap and tawdry — and we expect more from our elected representatives.").

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. Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969).⁴³

This Court “does not hold an election mandamus proceeding to the same degree of procedural rigor as an ordinary mandamus case.”⁴⁴ This relaxed standard was first adopted in the context of cases where the petitioner sought to preserve the right to vote or to run for political office,⁴⁵ and has been expanded to cases seeking to prohibit a candidate from running.⁴⁶

⁴³ *State ex rel. West Virginia Citizen Action Group v. Tomblin*, 227 W.Va. 687, 692, 715 S.E.2d 36, 41 (2011).

⁴⁴ Syl. pt. 2, *State ex rel. Bromelow v. Daniel*, 163 W.Va. 532, 258 S.E.2d 119 (1979); syl. pt. 3, *State ex rel. Carenbauer v. Hechler*, 208 W.Va. 584, 585, 542 S.E.2d 405, 406 (2000).

⁴⁵ See, e.g., syl. pt 3, *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).

⁴⁶ *State ex rel. Carenbauer v. Hechler*, 208 W.Va. at 588, 542 S.E.2d at 409.

Petitioners have joined the Governor and the Republican Respondents as original party respondents to avoid any delay to receive a motion to intervene.⁴⁷

In the end, it is clear that Petitioners are entitled to the writ. As the Court noted in *Wilson* when it granted the relief Petitioners seek here: “Numerous prior decisions have recognized mandamus is a proper remedy where the essential purpose of the proceeding is to obtain an authoritative interpretation of the law for the guidance of public officials in their administration of the public business. . . .”⁴⁸ Petitioners have filed this writ in advance of the submission of names by them and the anticipated submission of names by the Republican Respondents. The parties’ actions and public pronouncements leave no doubt that this dispute is quickly headed to this Court. Given the immediacy of the commencement of the upcoming legislative session and the significance

⁴⁷ *Cf. White v. Manchin*, 173 W.Va. 526, 532-534, 318 S.E.2d 470, 476-478 (1984).

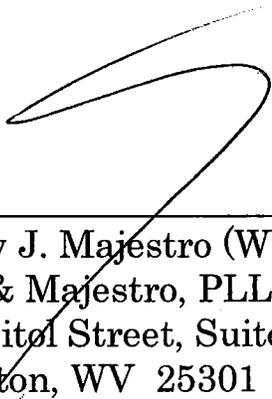
⁴⁸ *Wilson v. Sebelius*, 276 Kan. at 90, 72 P.3d at 556; *see also State ex rel. W. Virginia Citizen Action Grp. v. Tomblin*, 227 W. Va. 687, 696-97, 715 S.E.2d 36, 45-46 (2011) (granting writ of mandamus requiring an election finding “there is a clear legal right in the petitioners to the relief sought and a legal duty on the part of Respondent Tomblin, in his official capacity, to do the thing which the petitioners seek to compel.”).

the dispute may have on the control and/or leadership of the Legislature, it is in the public interest of the citizens of this State for this Court to promptly resolve this dispute as they will have no adequate remedy at law which will permit them to replay precious legislative days that will otherwise pass without the thirty-fourth Senator being seated.

CONCLUSION

Petitioners respectfully request that the Court grant a rule to show cause, enter an expedited briefing schedule, and after due consideration, grant Petitioners a writ of mandamus. Petitioners believe that the writ should order the Respondent Governor Tomblin to fill the current vacancy in the Senate from the list of three candidates to be selected by Petitioners.

STATE OF WEST VIRGINIA
ex rel. BELINDA BIAFORE, et al.,
By Counsel



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IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. _____

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.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the attached "**EMERGENCY
PETITION FOR A WRIT OF MANDAMUS**" was served upon the persons listed below
a true copy thereof as required by Rule 37, Revised Rules of Appellate Procedure, on
this 8th day of January 2016:

Via Hand Delivery

The Honorable Earl Ray Tomblin
State of West Virginia
Office of the Governor
State Capitol
1900 Kanawha Blvd., E
Charleston, WV 25305

Via USPS, first-class, postage pre-paid

WV Republican Executive Committee
PO Box 2711
Charleston, WV 25301

Via USPS, first-class, postage pre-paid

Beverly R. Lund
136 Wade Road
Beckley, WV 25801-8876

*Via USPS, first-class, postage
pre-paid*
Naomi "Sue" Cline
PO Box 46
Brenton, WV 24818-0046

Via USPS, first-class, postage pre-paid
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