IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Case No. 21-0051

STATE OF WEST VIRGINIA ex rel.
JEFF MAYNARD,
Chair of the Wayne County
Republican Executive Committee,

Petitioner,

v.

JAMES C. JUSTICE, II, Governor of West Virginia,

Respondent,

and

THE WEST VIRGINIA REPUBLICAN PARTY, INC.,

Respondent-Intervenor.

RESPONSE BRIEF FOR RESPONDENT-INTERVENOR WEST VIRGINIA REPUBLICAN PARTY, INC.

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INTRODUCTION

This case is about the straightforward application of West Virginia Code § 3–10–5. The statute delegates the power to nominate candidates to fill legislative vacancies to "the party executive committee" of the political party with which the vacating member was associated. W. Va. Code § 3–10–5(a). If the vacancy is in the House of Delegates, the nominating power is delegated to a specific type of subordinate party executive committee called a "delegate district" committee. *Id.*, § 3–10–5(b). But the statutory text grants no role to a party executive committee of a "county" or a county committee's "chair."

In his petition, however, Petitioner Jeff Maynard, Chairman of the Wayne County Executive Committee, seeks an extraordinary order from this Court to compel Governor Justice to appoint a candidate from a list that Petitioner submitted to the Governor as the "Chair" of his "county" executive committee (the "County Letter"). Petitioner's *only* argument is that the Governor must choose a nominee from the County Letter because West Virginia Code § 3–10–5 "vests" the right to submit such nominations in Petitioner as "Chair" of a "county" executive committee since the vacancy is for a district solely contained within his county. Pet. 3–4.

It does not. Nothing in the plain text of West Virginia Code § 3–10–5 authorizes a "chair" or even a "county" executive committee to fill legislative vacancies. And since the Legislature has elsewhere in the same chapter *separately* referred to party committees of a "delegate district" and of a "county" as *distinct* kinds of subordinate party committees, W. Va. Code § 3–1–9(b), and yet omitted

"county" committees from Section 3–10–5 altogether, this Court must assume the Legislature did so intentionally under well-established rules of statutory interpretation. It is enough for this Court to conclude that Petitioner's sole argument of statutory interpretation is wrong in order to deny the petition. It should do so and need not proceed further.

Even so, Petitioner has also failed to demonstrate a "clear legal right" to relief for several other independently sufficient reasons.

In this case, the County Letter that Petitioner asks this Court to compel the Governor to choose from is invalid *on its face* under the Bylaws of the West Virginia Republican Party, Inc. (the "Party"). The Bylaws not only create and regulate all subordinate party committees and their officials (like Petitioner and his county committee), but they also expressly implement the statutory delegation of power to the party under West Virginia Code § 3–10–5. The Bylaws empower subordinate party committees and set forth the procedures by which those committees submit nominees to the Governor in conformity with the statute. Despite Petitioner's invalid County Letter, dated January 13, the Governor *did* timely appoint a nominee—Joshua Booth—whose name was submitted by a letter dated January 21 ("District Committee Letter"), which conforms to the Bylaws on its face, including by being certified *with Petitioner's own signature*.

Finally, the petition can also be denied for any one of a number of other procedural reasons, including under the doctrine of waiver by acquiescence, failure to exhaust administrative remedies, and mootness.

Accordingly, the Party requests that this Court deny the petition as soon as practicable, with written opinion to follow in due course, to ensure that Delegate-designee Booth can fully perform the functions of the legislative office to which he was appointed when the House of Delegates begins session on Wednesday, February 10, 2021. *See* W. Va. Const. Art. VI, § 18.

QUESTIONS PRESENTED

1. Whether Petitioner has demonstrated a "clear legal right" to force Governor Justice to appoint a nominee from a list submitted by the "chair" of a "county" executive committee where West Virginia Code § 3–10–5(b) delegates vacancy nomination authority to "the party executive committee of a delegate district," and where statutory context shows that the Legislature employed "delegate district" and "county" party committees as distinct terms with different meanings and intentionally omitted "county" committees or their "chairs" from Section 3–10–5(b)?

2. Whether, even if ambiguous, Petitioner has demonstrated a "clear legal right" to relief where the letter he seeks to force the Governor to appoint from is invalid on its face under the Party's binding Bylaws, which establish and regulate all subordinate party committees and the process for how those committees perform their statutory nomination function under West Virginia Code § 3–10–5, because the County Letter lacks the three required certifying signatures?

3. Whether Petitioner has demonstrated a "clear legal right" to relief where, by his actions, he subsequently acquiesced to the Party's application of the statute and its Bylaws by certifying with his signature a list of nominees in the

District Committee Letter, from which the Governor appointed Delegate-designee Booth?

4. Whether Petitioner has demonstrated a "clear legal right" to relief where he failed to invoke or exhaust the specific administrative remedies available within the dispute resolution process contained in the Party's Bylaws to resolve intra-party disputes, including whether his County Letter and actions taken in furtherance thereof conformed with the Bylaws?

5. Whether Petitioner has demonstrated a "clear legal right" to compel the Governor to fill the House District 19 vacancy where the case is moot because the requested relief is impossible to provide, since the vacancy no longer exists?

STATEMENT OF THE CASE

A vacancy in House of Delegates District 19 occurred on January 9, 2021. Thereafter, in accordance with West Virginia Code § 3–10–5 and its own bylaws that further detail the specific process established by the statute, the West Virginia Republican Party, Inc., by and through its acting Chairman and subordinate party executive committees and officers, undertook the required process to provide three qualified names to the Governor in order to fill the vacancy.

I. West Virginia Code § 3–10–5 delegates the task of nominating candidates for legislative vacancies to political party organizations.

West Virginia Code § 3–10–5 provides that "[a]ny 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 same political party with which the person holding the

office immediately preceding the vacancy was affiliated at the time the vacancy occurred." W. Va. Code § 3–10–5(a). The list must be submitted to the Governor within 15 days, and the appointment must be made from the list within five days of receipt. *See id.* If the list is not submitted to the Governor within 15 days, the Governor is authorized to appoint any legally qualified person of the same political party with which the person holding the office immediately preceding the vacancy was affiliated. *See id.* "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." *Id.*

II. The bylaws of the Party define and implement the statutorily delegated task of nominating candidates to fill legislative vacancies.

The *Bylaws of the Republican State Executive Committee of West Virginia* (also known as the "West Virginia Republican Party" organization) provide for how the Party and its subordinate party committees and officers perform the statutory mandate under West Virginia Code § 3–10–5. Intv. App'x 1–16. In addition to creating and empowering *all* party committees, including county executive committees and their officers, the Bylaws carefully provide for the process by which particular party officials and committees nominate individuals to fill vacancies in the state legislature in accordance with Section 3–10–5. Intv. App'x 13–15. Bylaws Article XVI expressly creates State Senate District and House of Delegates District Committees, stating that they "exist for the purpose of filling vacancies in the

Senate or House of Delegates." *Id.*, 13–14. These committees may also be referred to as "Vacancy Committee[s]." *Id.*, 13.

Section 4 of Article XVI is where the rubber hits the road. It states at the outset: "Wherever else public or Party law requires the filling of an elected office by a Party Committee, the State Senate Executive Committee or House of Delegate Executive Committee, whatever the case may be, *shall fulfil their obligations in accordance with state law as provided in this rule.*" Intv. App'x 14. (emphasis added). The subsections of Section 4 thereafter set out in detail the process to be undertaken to develop, select, and submit the three nominees to fill each respective legislative vacancy that arises. *See id.* 14–15.

Relevant to this case, Bylaws Article XVI, § 4(d)(a)(v) sets forth how the process must occur when "there is no Senate Vacancy Committee or Delegate Vacancy Committee due to the district being wholly within one county"—which is the case with House District 19. Intv. App'x 15. Under such circumstances, "the County Chair shall appoint a subcommittee which shall act as the vacancy committee and the process of such committee be facilitated by the County Chair and State Chair." *Id.* The three selected nominees must be communicated to the Governor and Secretary of State "by letter on State Party letterhead" and as properly certified by certain party officials' signatures. *Id.* Specific to the process prescribed by subsection (v) when the district being filled is wholly within one county, "the names of the three (3) nominated candidates shall be certified by the County Chair, County Secretary, and State Chair." *Id.*

III. The tale of two letters.

Petitioner's County Letter. Petitioner is the Chairman of the Wayne County Republican Executive Committee. *See* Pet. App'x 1. In Petitioner's two-page appendix, he includes a copy of a letter dated January 13, 2021, the County Letter, that he addressed to the Governor, who apparently received it on January 14. *Id.* at 1–2. The County Letter purports to list the names of three individuals whom "the executive committee members of Wayne County, WV residing in the 19th Delegate District" submitted for consideration to fill the House District 19 vacancy. *Id.* at 1. The nominees listed are Mark Ross, Jay Marcum, and Chad Shaffer. *Id.* The letter appears to be on Wayne County Executive Committee letterhead and signed in some fashion by *only* Petitioner. *Id.*

The District Committee Letter. Although Petitioner neither mentions it in his petition nor includes it in his appendix, Petitioner signed a second letter to the Governor listing three nominees to fill the District 19 vacancy. *See* Intv. App'x 17. This letter—the District Committee Letter—was dated January 21, 2021, and presented to the Governor on January 22 at 4:13 p.m. *See id.*

Unlike the County Letter that was sent around a week prior, the District Committee Letter was on West Virginia Republican Party letterhead and listed the names Joshua Booth, Mark Ross, and Chad Shaffer as nominees to fill the District 19 vacancy. *See* Intv. App'x 17. Also unlike the County Letter, the District Committee Letter was certified by three signatories: (1) the acting Chairman of the West Virginia Republican Party (the "State Chair"), Roman Stauffer; (2) the

Secretary of the Wayne County Executive Committee, Janie Moyer, and (3) the Chairman of the Wayne County Executive Committee, *Petitioner himself*. *See id.*

IV. Petitioner files a mandamus petition, and the Governor fills the vacancy.

On January 25, 2021, just four days after he certified the District Committee Letter to the Governor, Petitioner invoked the original jurisdiction of this Court by filing a petition for writ of mandamus. The petition seeks an order compelling the Governor to fill the vacancy in House District 19 *exclusively* from the list of names on the County Letter. *See* Pet. 2–4.

Petitioner argues that the Governor is legally required to nominate from the County Letter because, in Petitioner's opinion, West Virginia Code § 3–10–5 "vests the exclusive power, responsibility, and obligation of supplying the list to the Governor in the Chair of the Wayne County Republican Executive Committee. . . ." Pet. 3; *see also id.* at 4 ("Petitioner is the Chair of the Wayne County Republican Executive Committee and is vested by statute with the responsibility of overseeing and communicating the selection of the list of qualified candidates for the filling [of] a vacancy of the 19th Delegate District."). The petition does not mention the binding Bylaws of the party of which he and his committee are subordinate components. Nor does the petition mention the District Committee Letter, which Petitioner himself certified on January 21.

On January 27, the Governor appointed Joshua Booth, whose name had been listed only on the District Committee Letter, to fill the vacancy in House District 19.

See Intv. App'x 18. This Court issued an Order and Rule to Show Cause on January 28 and granted the Party's motion to intervene as a Respondent the following day.

SUMMARY OF ARGUMENT

The petition should be denied for several reasons.

First, Petitioner's sole argument in support of his request for relief is based on an unreasonable reading of West Virginia Code § 3–10–5. Looking at the section in insolation, Petitioner asserts that the textual reference to party executive committee "of the delegate district" *must* refer to the "chair" of a "county" executive committee. That is incorrect, because the Legislature elsewhere distinguished between the terms "delegate district" party committee and "county" party committee, and intentionally omitted the latter from Section 3–10–5. Under traditional tools of statutory interpretation, those decisions must be presumed to have been intentional. Petitioner's sole argument that these terms are equivalent in Section 3–10–5 such that his County Letter is valid, is based on an unreasonable reading of the statute. The petition should be denied for this reason alone.

Second, even if this Court believes that Petitioner's statutory interpretation is reasonable, he is still not entitled to relief because his County Letter is facially invalid under the Bylaws of the Party that specifically govern the implementation of the nomination process delegated by the statute, including the form of the resulting submission to the Governor. On the other hand, the District Committee Letter adhered to the Bylaws and is entitled to a presumption of correctness because it is otherwise in compliance with the statute and the Bylaws on its face. But even if something was also wrong with the District Committee Letter, the Governor's

appointment must still be upheld because he was required to appoint any otherwise qualified Republican to the vacancy within the prescribed statutory period—and the Governor did so here.

Third, under equitable principles of waiver by acquiescence, the petition should be denied because Petitioner waived his right to relief by acting contrary to his argument here by acquiescing in the proper District Committee Letter by certifying it with his signature after previously submitting the County Letter.

Fourth, the petition should be denied because Petitioner failed to exhaust his administrative remedies under the Bylaws of the single Party organization to which he is a constituent part. Here, the Bylaws contain an internal dispute resolution process by way of a simplified arbitration procedure, but Petitioner never invoked it. Longstanding caselaw here and elsewhere require denying or dismissing court challenges until putative plaintiffs have exhausted such processes.

Finally, the petition should be denied as moot because the relief sought is now impossible to provide: there is no longer a vacancy in House District 19 to be filled. Petitioner failed to seek an order preserving the status quo, and the Governor adhered to his statutory duty by appointing Joshua Booth to the legislature in the meantime, thereby altering the status quo and mooting the petition's requested relief. It is well-settled that a case becomes moot "if an event occurs while a case is pending . . . that makes it impossible for the court to grant any effectual relief whatever to a prevailing party." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (cleaned up). That is the case here.

STATEMENT REGARDING ORAL ARGUMENT

The Court has already set this case for Rule 19 argument on February 9, 2021, at 2:00 p.m. *See* Order and Rule to Show Cause (Jan. 28, 2021).

ARGUMENT

Petitioner does not satisfy the requirements for a writ of mandamus. "A writ of mandamus will not issue unless three elements coexist—(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." Syl. Pt. 2, *State ex rel. Biafore v. Tomblin*, 236 W. Va. 528, 782 S.E.2d 223, 225 (2016) (quoting Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969)). Petitioner fails to demonstrate a "clear legal right" to relief or identify the "legal duty" on the part of the Governor to appoint a candidate from the County Letter. The petition should be denied.

I. Petitioner does not have a clear legal right to the relief he seeks.

For several independently sufficient reasons, Petitioner has failed to demonstrate a "clear legal right" to the relief that he seeks in the petition.

A. West Virginia Code § 3–10–5 does not authorize an executive committee of a "county" or its "chair" to submit a list of nominations for legislative vacancies to the Governor.

The Legislature has chosen to give the task of submitting a "list" of nominations to fill state legislative vacancies to "the party executive committee" of the same political party with which the person holding the office immediately preceding the vacancy was affiliated at the time the vacancy occurred. W. Va. Code

§ 3–10–5(a). For a vacancy in the House of Delegates, "the list" must 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." *Id.*, § 3–10–5(b) (emphasis added).

Although the statute does not expressly define the term, canons of statutory interpretation tell us—at minimum—that the term "party executive committee *of the delegate district*" cannot reasonably mean a "county" executive committee or its "chair," as Petitioner's sole argument asserts. *See* Pet. at 5–6. That position is surely mistaken because the Legislature has in another part of Chapter 3 separately referred to party executive committees "of the delegate district" *and* "county" executive committees *as distinct terms*—in the very same sections of Code, no less. *See* W. Va. Code § 3–1–9(b) & –9(f).[1] It is well-settled that "the Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning," *Keatley v. Mercer Cty. Bd. of Educ.*, 200 W. Va. 487, 495, 490 S.E.2d 306, 314 (1997) (cleaned up), including when different terms are employed, *Osborne v. United States*, 211 W. Va. 667, 674, 567 S.E.2d 677, 684 (2002) (presuming different meanings where legislature used "differentiation in terminology"). *See Sosa v. Alvarez–Machain*, 542 U.S. 692, 711 n.9 (2004) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.") (cleaned up).

[1] Reference to a party executive committee "of the delegate district" in West Virginia Code § 3–1–9(b) appears to be the only other time that term is mentioned in the West Virginia Code.

Since we know that party executive committees "of the delegate district" and of the "county" possess different meanings, this Court must also presume that the Legislature's decision to *omit* any language from West Virginia Code § 3–10–5 delegating power to a "county" executive committee or its "chair" was also intentional. *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 220 W. Va. 484, 492, 647 S.E.2d 920, 928 (2007) (negative implication canon).

Accordingly, Petitioner's sole argument that the statutory language alone authorizes him or his county executive committee to make the nominations called for under Section 3–10–5(b) is without merit. For this reason alone, the petition can and should be denied, since Petitioner advances no other argument for the right to relief that he seeks. This Court need not address any additional arguments in order to deny the petition.

B. Under the Party's Bylaws, the County Letter is invalid and the District Committee's Letter is facially valid.

Although Petitioner's only argument for mandamus is wrong as a matter of statutory interpretation, it is equally clear that, under the Party's controlling Bylaws, the County Letter is invalid, and the District Committee Letter of January 21 is facially valid.

1. The County Letter is invalid on its face.

The Party's Bylaws implement the statutory delegation of power to "district delegate" committees. Courts must give an undefined statutory term its "common, ordinary and accepted meaning *in the connection in which [it is] used.*" Syl. Pt. 6, *State v. Sulick*, 232 W. Va. 717, 753 S.E.2d 875, 877 (2012) (cleaned up; emphasis

added). Here, the only accepted meaning "in the connection in which" the term "delegate district" party committee is "used" is in the governing bylaws of each of the two dominant political parties in this State, in which the term is expressly referenced. It should be no surprise that members of the Legislature who enacted the statute delegating power to the political party organizations were also familiar with the subordinate party committees, including those at the "delegate district" level. *Compare* Intv. App'x 13–15 *with* the *Bylaws of the Democratic Party in West Virginia.*[2]

Like the State Code, the Republican Party's Bylaws also clearly distinguish between "county" and "delegate district" party committees. Intv. App'x 10–11, 12–16. As a "subordinate party committee" in the Party organization, the "senate district" and "delegate district" committees "exist for the purpose of filling vacancies in the Senate or House of Delegates." *Id.* Thus, these committees are also referred to as "Vacancy Committee[s]" under the Bylaws. *Id.*, 12–13.

Specifically, Section 4 of Article XVI of the Bylaws provides, "Wherever else public or Party law requires the filling of an elected office by a Party Committee, the State Senate Executive Committee or House of Delegate Executive Committee, whatever the case may be, shall fulfil their obligations in accordance with state law as provided in this rule." Intv. App'x 14. Section 4 then sets forth the required process of how the delegate district committee nominates three candidates "to send

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[2] Article IV, § C, Bylaws, The West Virginia Democratic Party, https://wvdem https://wvdemocrats.com/wp-content/uploads/2020/03/WVDEC-Bylaws-Updated-February-22-2020-Charleston-WV-1.docxocrats.com/bylaws/ (last visited January 31, 2021).

to the Governor within fifteen (15) days of the vacancy occurring," which tracks and implements the Party's statutory obligations under West Virginia Code § 3–10–5. *See* Intv. App'x 14–15.

When a vacancy occurs in a house or senate district "being wholly within one county," a special bylaw for undertaking the vacancy-filling process applies. Under Article XVI, § 4(d)(a)(v), "the County Chair shall appoint a subcommittee which shall act as the vacancy committee and the process of such committee be facilitated by the County Chair and State Chair." Intv. App'x 15. Critical for this case, the Bylaws go on to provide, "In such a case, the names of the three (3) nominated candidates shall be certified by the County Chair, County Secretary, and State Chair." *Id.*

Applying these party rules, the County Letter is invalid on its face because it lacks the necessary signatures of anyone other than Petitioner as the county chair. *See* Pet. App'x 1. It thus has no legal effect whatsoever and is equivalent to a fugitive filing. Because it is clear on the face of the County Letter that it is not valid, this Court need not and should not "look behind" either letter in order to deny the petition. And in any event, the petition has not alleged, much less clearly demonstrated as a matter of undisputed fact, that the District Committee Letter is in any way invalid. *See State ex rel. Smith v. Kanawha Cty. Court*, 78 W. Va. 168, 88 S.E. 662, 664 (1916) ("The law is that the writ of mandamus will not lie unless the relator shows a clear legal right to have the thing done which he asks for. If the

right be doubtful, the writ will be refused.") (cleaned up). The petition should thus be denied for these reasons.

2. The District Committee Letter complies with the statute and the Bylaws, and is entitled to a presumption of regularity.

Although it need not be addressed to deny the petition, if this Court also looks separately to the legitimacy of the District Committee Letter, this Court should presume, absent evidence to the contrary—and the petition presents none—that the Party's Bylaws were followed when the District Committee Letter was submitted because it is facially valid. It thus bears the hallmarks of what transpired here: The Bylaws and statute were followed by the Party, through its officials and subordinate committees, and the District Committee Letter is what resulted.

A presumption of regularity arises from the well-established judicial reluctance to intervene in or second-guess, intra-party disputes or affairs. This Court has long-cautioned courts against judicial intervention in intra-party disputes, including by scrutinizing the applicability of a political party's governing rules or internal affairs. *See State ex rel. Zagula v. Grossi*, 149 W. Va. 11, 19, 138 S.E.2d 356, 361 (1964) ("[I]t is a well settled principle that political committees have very broad powers in matters of party regulation, and the courts, respecting that power, seldom find basis of justification for interference therewith.") (citing cases).

As a result, this Court defers to party rules and party tribunals when faced with intra-party disputes. *See* Syl. Pts. 2–4, *State ex rel. Smith v. Kanawha Cty. Court*, 78 W. Va. 168, 88 S.E. 662 (1916); *see also id.*, 88 S.E. at 664 ("The right of a

voluntary association to interpret and administer its own rules and regulations is as sacred as is the right to make them, and there is no presumption against just and correct action or conduct on the part of *its* supervising or appellate authorities and tribunals. On the contrary, the presumption is in favor of it.").[3] This is also the approach nationwide. *See O'Brien v. Brown*, 409 U.S. 1, 4 (1972).[4]

The judicial reluctance of second-guessing party rules and affairs stems from political parties' constitutional right of free association. *See Fuller v. Repub. Cent. Comm. of Carroll Cty.*, 120 A.3d 751, 754 (Md. 2015) ("Under the First and

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[3] *See also Boggess v. Buxton*, 67 W. Va. 679, 69 S.E. 367, 371 (1910) ("It is much more proper that questions which relate to the regularity of . . . nominations of candidates and the constitution of committees should be determined *by the regularly constituted party authorities*, than to have every question relating to a caucus, convention, or nomination determined by the courts, and thus in effect compel them to make party nominations and regulate the details of party procedure, instead of having them controlled by party authorities.") (emphasis added); *State v. Fielder*, 110 W. Va. 240, 157 S.E. 597, 598–99 (1931) ("This rule that the courts will not ordinarily interfere in the management of political parties is not peculiar to this jurisdiction; it is general. Courts seek rather to maintain the integrity and independence of the several departments of the government *by leaving questions of party policy, the regularity of conventions, the nomination of candidates, and the constitution, powers, and proceedings of committees, to be determined by the tribunals of the party.*") (cleaned up; emphasis added); *Marcum v. Ballot Commissioners*, 42 W. Va. 263, 26 S.E. 281, 284 (1896) ("There must be a limit of reason to our powers. That is the convention whose nominations are in question before us. To hold otherwise would be for this court to assume power to supervise and review the organization of political conventions,—practically to organize them.").

[4] *See, e.g., Young v. Beshear*, 2016 WL 929653, at *3 (Ky. Ct. App. Mar. 11, 2016) (observing that courts "do not interfere with internal party matters") (cleaned up); *Cullen v. Auclair*, 714 A.2d 1187, 1189 (R.I. 1998) ("We discern no need or basis to interfere in these internal, procedural decisions of a political party."); *Nielsen v. Kezer*, 652 A.2d 1013, 1020–21 (Conn. 1996) (discouraging judicial intervention with internal party affairs); *State ex rel. Cain v. Kay*, 309 N.E.2d 860, 863 (Ohio 1974) (noting the "traditional reluctance of the court to interfere in the internal affairs of political parties"); *King Cty. Republican Cent. Comm. v. Republican State Comm.*, 484 P.2d 387, 390 (Wash. 1971) ("At the outset, we pause to observe that historically courts have been extremely reluctant to take jurisdiction of or interfere in the internal affairs of political parties.").

Fourteenth Amendments, political parties have the right of free association, giving them the right to determine their own rules and internal operating procedures." (citing *Eu v. San Francisco Cnty. Dem. Cent. Comm.*, 489 U.S. 214, 229 (1989)).

That is not to say that all disputes concerning the actions of party officials or party bylaws are never reviewable by courts. *See State ex rel. Robertson v. Kanawha Cty. Court*, 131 W. Va. 521, 525, 48 S.E.2d 345, 348 (1948) ("[T]he rights of members of a political party are to be determined by the rules and regulations within the party and by the party tribunals; and that, in the absence of fraud or violation of a statute or policy of law, the rights so determined by the party tribunal would be vindicated and upheld by the courts."); *Kump v. McDonald*, 64 W. Va. 323, 61 S.E. 909 (1908) ("Courts do not exercise jurisdiction in matters purely political pertaining to the management and proceedings of a political party, except so far as authorized by statute.").[5]

Applying these principles, this Court should presume the validity of the District Committee Letter because it was "certified" by the signatures of the County Chair, County Secretary, and State Chair, and the petition contains no evidence to the contrary. *See* Intv. App'x 15. It is thus proper on its face in accordance with the Party's Bylaws. *See supra* Part I.B.1. Not only does the petition not dispute the provenance or authenticity of the District Committee Letter, the petition pretends as if it never happened—which is surprising, given that Petitioner himself signed it

[5] *See also Cullen*, 714 A.2d at 1189 (citing *Smith v. Allwright*, 321 U.S. 649 (1944)) ("Only where the challenged action of a political party infringes on a specific constitutional or statutory right, usually the right to vote or hold public office, will the courts intervene.").

only days before the petition was filed. Having received the District Committee Letter on January 22 as indicated by the file stamp, *see* Intv. App'x 17, the Governor appointed Delegate-designee Booth from the list contained therein within five days, on January 27, *see id.*, 18.

3. Even if the District Committee Letter is invalid, the Governor's appointment of Delegate-designee Booth is still valid.

If for some reason this Court were to conclude that the District Committee Letter is ineffective, the Governor's appointment of Delegate-designee Booth is still legally valid and should be upheld, as the Governor rightly explains. *See* Gov. Br. 8.

The reason is timing. A party executive committee must provide the Governor with a list of three legally qualified persons to the Governor "within 15 days after the vacancy occurs." W. Va. Code § 3–10–5(a). Critically, however, if a list is "not submitted" to the Governor "within the 15-day period," the Governor "*shall* appoint within five days thereafter a legally qualified person" of the same political party with which the person holding the office immediately preceding the vacancy was affiliated at the time the vacancy occurred. *Id.* (emphasis added).

Whether the Governor was selecting from the list contained in the District Committee Letter or simply picking an otherwise legally qualified Republican within the allotted time, Delegate-designee Booth's appointment was valid when made and remains so. The vacancy occurred in this case on January 9, 2021. For the reasons already explained, Petitioner's County Letter is invalid. *See supra* Part I.B.1. But even assuming for the sake of argument that the District Committee Letter was also not effective for some reason, the Governor was still required by

West Virginia Code § 3–10–5(a) to appoint a legally qualified Republican no later than 5 days after the expiration of the 15-day period following the vacancy. He did so on January 27, and it was Delegate-designee Booth. *See* Intv. App'x 17; *see generally* Gov. Br. 8.

C. Petitioner has waived his right to relief by acting contrary to his argument for extraordinary relief here.

The petition should also be dismissed under the equitable doctrine of waiver by acquiescence. By certifying *with his own signature* the District Committee Letter upon which the Governor thereafter acted by appointing Delegate-designee Booth, Petitioner acted in manner that repudiated his apparent belief about the effect of his earlier letter, as well as the right to relief he now claims in his petition regarding the same. In short, Petitioner acquiesced to the proper application of the Party's Bylaws when he certified the January 21 District Committee Letter with his signature. He should be held to it—or at least not permitted to obtain mandamus from this Court to undo it.

Under traditional principles of equity, Petitioner's decision to certify the proper January 21 District Committee Letter *after* signing the letter he now seeks to enforce amounts to acquiescence and thus waiver of any right to extraordinary relief from this Court. *See, e.g.*, Syl. Pt. 1, *State ex rel. Kay v. Steinmetz*, 144 W. Va. 802, 111 S.E.2d 27 (1959) (applying equitable principle in mandamus action). "Where a party with full knowledge of his right and all material circumstances freely and advisedly does anything which amounts to a recognition of a transaction, or acts for a considerable length of time in a manner inconsistent with its

repudiation, there is acquiescence, and the transaction, although originally impeachable, may thereby become unimpeachable in equity." Syl., *Drake v. O'Brien*, 99 W. Va. 582, 130 S.E. 276 (1925). So too, "silence, where there is a duty to speak, may result in the waiver of one's rights." *Steinbrecher v. Jones*, 151 W. Va. 462, 472, 153 S.E.2d 295, 302 (1967).

Accordingly, equity demands that Petitioner not be permitted to benefit from abandoning the District Committee Letter, which he certified *after* the County Letter that he *now* desires this Court to resurrect. Questions about Petitioner's acquiescence must be resolved against granting the relief he seeks. *See Smith*, 78 W. Va. 168, 88 S.E. at 664 ("If the right [to relief] be doubtful, the writ will be refused.") (cleaned up).

D. Petitioner failed to exhaust his remedies under the Party's Bylaws.

The petition should be dismissed for the additional, sufficient reason that Petitioner failed to invoke, much less exhaust, the internal dispute resolution process under the Party's Bylaws to resolve the intra-party quarrel that he now places before this Court.

Although this action is procedurally framed as a mandamus action against the Governor, *granting* Petitioner relief will require this Court to determine whether the County Letter or the District Committee Letter was the proper correspondence containing the "list" required to be submitted to the Governor under West Virginia Code § 3–10–5. This question, as already discussed, requires turning to the Party's Bylaws to resolve. And given that *that question* is one entirely

concerned with the proper application of the party's internal rules and procedures, common law rules of exhaustion *require* a complaining party to invoke and conclude the dispute resolution process that exists within a party organization before seeking review by any external tribunal. *See* Syl. Pt. 4, *State ex rel. Smith v. Kanawha Cty. Court*, 78 W. Va. 168, 88 S.E. 662 (1916) ("[C]ourts will not undertake to settle and determine substantial controversies between rival political committees or factions of such a committee, the right in which is dependent upon party rules, usages, and customs, nor grant relief to either of such committees or factions, as the representative of the party, in those cases in which the party is entitled to relief, *but will refuse the relief asked until the controversy is settled and determined by some supervising board, committee or other tribunal* ***of the party.***") (emphases added).[6]

It follows that a premature request for judicial intervention in a dispute subject to resolution in a party tribunal necessitates denial or dismissal of the petition. *See, e.g., Bosworth*, 145 W. Va. at 769, 117 S.E.2d at 620 (prohibiting circuit court from adjudicating intra-party dispute where "the remedies provided by

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[6] This principle was echoed in later cases. *See, e.g., State v. Fielder*, 110 W. Va. 240, 157 S.E. 597, 599 (1931) ("Courts seek rather to maintain the integrity and independence of the several departments of the government by leaving questions of party policy, the regularity of conventions, the nomination of candidates, and the constitution, powers, and proceedings of committees, to be determined by the tribunals of the party.") (emphasis added) (cleaned up); *State ex rel. Smith v. Bosworth*, 145 W. Va. 753, 769, 117 S.E.2d 610, 620 (1960) ("The questions involved in those proceedings relate to the management and the proceedings of a political party which are not regulated by statute but are governed by the Rules and Regulations for the government of the Democratic Party in West Virginia, and which have not been settled by the regularly constituted committees or other tribunals of the party. It is clear that the remedies provided by such rules and regulations have not been invoked or exhausted by the petitioners in the proceedings in mandamus."); *see also State ex rel. Cain v. Kay*, 309 N.E.2d 860, 863 (Ohio 1974) ("Courts should defer to the appropriate party tribunals established by the members for the resolution of internal disputes of the party.").

[state party] rules and regulations have not been invoked or exhausted by" the underlying claimants).[7]

In this case, the Party's Bylaws expressly provide for an internal dispute resolution process by way of "final and "binding" arbitration for any "question" "controversy," or "issue" that "arises" among the party's constituent parts. *See* Intv. App'x 10–11. The process has the benefit of simplicity, efficiency, and finality, and it possesses the usual features attendant to procedures that provide fair process to those involved. *See, e.g., id.* 11 (providing that parties to arbitration are allowed legal counsel).

But Petitioner did not invoke, much less exhaust, the process to allow the Party's internal tribunal to determine whether his County Letter was proper under the Bylaws that govern the filling of legislative vacancies. As a result, this Court must dismiss the petition for, at minimum, failure to exhaust the available administrative remedies within the Party's organization before seeking judicial intervention.[8] Any doubts about Petitioner's failure to exhaust administrative

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[7] *See also Carney v. Pilch*, 296 A.2d 687, 688 (Conn. App. Ct. 1972) (affirming dismissal where plaintiffs "failed to exhaust their administrative remedies" by their failure to "comply with" a state party rule providing for "internal resolution of factional disputes"); *Lee v. Nielsen*, 388 A.2d 1176, 1180 (R.I. 1978) (reversing for entry of judgment in favor of party officials, stating, "In the absence of a clear statutory provision, the resolution of these issues is best left to the [party] Committee itself."); *Batko v. Sayreville Democratic Org.*, 860 A.2d 967, 972 (N.J. App. Ct. 2004) ("Under the principle of exhaustion of remedies, a court may decline to adjudicate the validity of a political party's bylaw when the challenger failed to utilize a part of that bylaw that would have allowed her to escape from the illegality she asserts."); *accord Smith*, 78 W. Va. 168, 88 S.E. at 665 (refusing mandamus in deference to internal party decisionmaking); *Fielder*, 110 W. Va. 240, 157 S.E. at 599 (refusing mandamus in dispute over decisionmaking of party executive committee).

[8] The Party does not concede that a final decision of an arbitration conducted under its Bylaws would be susceptible to plenary review in a court of law. That question need not

remedies must be resolved against him. *See Smith*, 78 W. Va. 168, 88 S.E. at 664 ("If the right [to relief] be doubtful, the writ will be refused.") (cleaned up).

E. The petition is moot.

"Moot questions or abstract propositions, the decision of which would avail nothing in the determination of controverted rights of persons or of property, are not properly cognizable by a court." Syl. Pt. 1, *State ex rel. Lilly v. Carter*, 63 W.Va. 684, 60 S.E. 873 (1908). Moreover, an "actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (cleaned up). As a result, a case becomes moot "if an event occurs while a case is pending on appeal that *makes it impossible* for the court to grant 'any effectual relief whatever' to a prevailing party." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (cleaned up).

The petition asks this Court to issue a writ of mandamus to the Governor, compelling him to select a candidate from the County Letter to fill the vacancy in House District 19. Pet. 2, 3–4, 7. But granting this requested relief is now impossible. There is no longer a vacancy in House District 19 to fill with someone from Petitioner's list, or any other, because the Governor appointed Joshua Booth

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be addressed or decided here since Petitioner did not even invoke the Party's internal dispute resolution process.

on January 27, a day before the Court issued the Rule to Show Cause.[9] *See* Intv. App'x 18.

Critically, the petition does not request that this Court should "undo" the appointment. Nor is it at all clear what legal power the Governor would possess to do so, meaning that the petition would fail under the second element of the mandamus standard. *See* Syl. Pt. 2, *State ex rel. Biafore v. Tomblin*, 236 W. Va. 528, 782 S.E.2d 223, 225 (2016) (quoting Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969)) (a successful mandamus petitioner must demonstrate "(2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel").

Even though this case is moot, this Court has heard otherwise moot cases if any of three factors are satisfied; none are here. Syl. Pt. 1, *Israel v. Secondary Schs. Activities Comm'n*, 182 W.Va. 454, 388 S.E.2d 480 (1989) (describing factors). *First*, there are no "sufficient collateral consequences" that "will result" from a determination on the merits "so as to justify relief." In fact, the opposite is true: granting Petitioner raises serious questions about what power the Governor has to "undo" the appointment that has already been made and what role, if any, the House of Delegates would have in such an eventuality. *Second*, the petition does not present a question of "great public interest." Rather, it presents a question—at best—that concerns how a political party has performed its statutory duty in

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[9] As explained above, the Governor's appointment of Delegate-designee Booth is still valid regardless of whether the District Committee Letter was effective, because after the expiration of the statutory time period the Governor could appoint any qualified Republican. *See supra* Part I.B.3. There is no allegation that Booth does not also fit the bill.

accordance with its own internal rules and proceedings. *Third*, there is no suggestion from the petition that this issue is likely to be repeated and escape judicial review in the future. Election and vacancy appointment cases can and are frequently litigated to their conclusion, on their merits, quite quickly. *See, e.g.*, Syl. Pt. 2, *State ex rel. Biafore v. Tomblin*, 236 W. Va. 528, 782 S.E.2d 223 (2016). That Petitioner waited twelve days after sending his letter before seeking purportedly urgent mandamus relief—yet not an emergency motion to stay or temporary restraining order—highlights why this factor is not satisfied.

Ultimately, even if the mootness question is a close one, any doubts must be resolved in favor of denying the writ of mandamus as moot. *See Smith*, 78 W. Va. 168, 88 S.E. at 664.

II. Granting the writ may encourage future parties to bring purely intra-party disputes into state courts.

Writing for this Court only a few years ago, acting Chief Justice McHugh wrote that "the bedrock of the public's submission to the judiciary's authority is the public's faith in its integrity, impartiality, and fairness." *Matter of Callaghan*, 238 W. Va. 495, 511, 796 S.E.2d 604, 620 (2017). That firm foundation is threatened, however, by the "[c]onsignment of judges to regular rough-and-tumble politics," which "makes the judiciary less capable of filling this role." *Id.* (cleaned up).

There is thus good reason for the long judicial tradition of avoiding intra-party disputes and deferring to party officials and their tribunals for the administration of internal party rules and resolution of party disputes. The judicial reluctance stems not only from "[h]ighly important questions . . . concerning

justifiability," but also from the "vital rights of association guaranteed by the [federal] Constitution." *O'Brien v. Brown*, 409 U.S. 1, 4 (1972). This Court recognized similar concerns over a century ago. *See Republican Exec. Comm. v. Wetzel Cty. Court*, 68 W. Va. 113, 69 S.E. 522, 526 (1910) ("The power to decide these disputes must rest somewhere, but it is far safer and much more in accord with our free institutions that it should remain with the judicatories of our political parties, where it of right belongs.").

Granting the relief sought by Petitioner may increase the future risk of individuals bringing purely intra-party disputes into courts of law. If Petitioner is granted relief here, Circuit Courts may be called upon with increased frequency to resolve disputes among quarreling party officials or subordinate committees over internal party rules or procedures that only indirectly affect the performance of some duty imposed by public law. Absent circumstances to justify such judicial intervention—like a clearly overriding constitutional or statutory command—it is not difficult to conjure up the mischief that might be made of such inherently political proceedings, thus risking the public's confidence in the impartiality of the judiciary. *Matter of Callaghan*, 238 W. Va. at 511, 796 S.E.2d at 620.

CONCLUSION

For the foregoing reasons, this Court should deny the writ. Because the House of Delegates is scheduled to convene on February 10, 2021 for the first day of session, *see* W. Va. Const. Art. VI, § 18, this Court should issue an order denying the writ and issue the mandate as soon as practicable, with written opinion to follow in due course.

Respectfully submitted,

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Dated: February 1, 2021

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 1, 2021, a copy of the **Response Brief for Respondent-Intervenor West Virginia Republican Party, Inc.** and **Appendix for Respondent-Intervenor West Virginia Republican Party, Inc.** was served on the parties to this case by U.S. Mail and email as set forth below:

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