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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 21-0051

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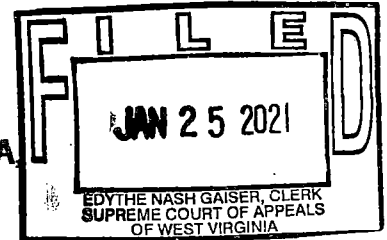
**STATE OF WEST VIRGINIA, ex rel, JEFF MAYNARD,
Chair of the WAYNE COUNTY REPUBLICAN EXECUTIVE COMMITTEE,**

Petitioner,

v.

JAMES C. JUSTICE, II, GOVERNOR OF WEST VIRGINIA

Respondent.



**PETITION FOR WRIT OF MANDAMUS AND INCORPORATED
MEMORANDUM OF LAW IN SUPPORT**

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QUESTION PRESENTED

This petition presents the question of whether the Governor of the State of West Virginia is mandated to fill the vacancy in the West Virginia House of Delegates created by the resignation of Del. Derrick Evans, of Delegate District 19, from the list of three qualified candidates chosen and submitted to the Governor by the Wayne County Republican Executive Committee of Delegate District 19, which was received by the Governor on January 14, 2021, in accordance with W. Va. Code § 3-10-5?

STATEMENT OF THE CASE

- I. WEST VIRGINIA'S GOVERNOR IS MANDATED TO FILL THE VACANCY CREATED BY DELEGATE DERRICK EVANS' RESIGNATION FROM THE LIST OF THREE QUALIFIED CANDIDATES SUBMITTED TO HIM BY THE WAYNE COUNTY REPUBLICAN EXECUTIVE COMMITTEE ON JANUARY 14, 2021 IN ACCORDANCE WITH W. VA. CODE § 3-10-5.**

On January 13, 2021, the Wayne County Republican Executive Committee members who reside in the 19th Delegate District submitted three names to the West Virginia Governor to fill the vacancy for the seat formerly held by Del. Derrick Evans, who resigned his seat on January 9, 2021. The list included qualified candidates Mark Ross, Chad Shaffer and Jay Marcum, who were selected by vote of the committee. Petitioner, Jeff Maynard, Chairman of the Wayne County Republican Committee, sent a letter dated January 13, 2021 to the Governor's office, certified mail, return receipt requested. The Governor's office signed for and accepted the letter on January 14, 2021. See Appendix at 1-2. These actions were taken pursuant to W. Va. Code § 3-10-5, in accordance with guidance provided to the committee by the West Virginia Secretary of State's office.

Subsequent to the Governor's receipt of the list of three qualified candidates the vacant seat, Chairman Maynard received a phone call from counsel for the Governor, Brian Abraham, who advised that the Governor would not be choosing from the list of three qualified candidates submitted on January 14, 2021, because the Acting Chair of the West Virginia State Republican

Executive Committee, Roman Stauffer, had not participated in the vote. Thereafter, Acting Chairman Stauffer unilaterally engaged in a second selection process, ultimately creating a new list (hereinafter "second list") of three candidates. The second list also included two of the original qualified candidates from the first list: Mark Ross and Chad Shaffer. However, instead of Jay Marcum - who had been a candidate for the 19th Delegate District in the 2020 Republican primary - a new name replaced him: Jeff Booth. Acting Chair Stauffer, of the State Republican Executive Committee, then submitted the new list to the Governor on or about Friday, January 22, 2021.

SUMMARY OF ARGUMENT

The West Virginia Governor is mandated by W. Va. Code § 3-10-5 to fill the vacant 19th Delegate District seat from among the three qualified candidates presented to him in the January 14, 2021 letter from the Petitioner and the Wayne County Republican Executive Committee. The Governor does not have the discretion to choose from a second and subsequent list of qualified candidates, which would usurp the statutory rights of the Wayne County Republican Executive Committee members of the 19th Delegate District, as well as their constituents. The first list was provided to the Governor within the fifteen day time period prescribed by W. Va. Code § 3-10-5 and the Governor is mandated to choose from it.

STATEMENT REGARDING BRIEFING, ORAL ARGUMENT AND DECISION

Petitioner seeks to have the Clerk schedule this case for oral argument under Rule 19 of the Rules of Appellate Procedure, if the Court deems oral argument necessary. Petitioner seeks expedited briefing, oral argument and decision, based on the emergency and time-sensitive nature of the circumstances. Petitioner moves for the suspension of any requirements or provisions of the Rules of Appellate Procedure which are necessary on the grounds of good cause shown, to enable an expedited decision in this matter.

ARGUMENT

I. THE REQUIRED ELEMENTS FOR A WRIT OF MANDAMUS ARE SATISFIED

"Mandamus lies to require the discharge by a public officer of a *nondiscretionary* duty."

Syl. Pt. 3, State ex rel. Greenbrier County Airport Authority v. Hanna, 151 W.Va 479, 153 S.E.2d 284 (1967); Syl. Pt. 1, State ex rel. West Virginia Housing Development Fund v. Copenhaver, 153 W.Va. 636, 171 S.E.2d 545 (1969). Syl. Pt. 1, State ex rel. Williams v. Department of Mil. Aff., 212 W.Va. 407, 573 S.E.2d 1 (2002). It is well-established that a writ of mandamus requires three elements:

(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. 1, State ex rel. McGraw v. West Virginia Ethics Comm'n, 200 W.Va. 723, 490 S.E.2d 812 (1997).

A. Petitioner possesses a clear right to the relief sought

Petitioner is the duly elected Chair of the Wayne County Republican Executive Committee and is the signatory of the January 13, 2021 letter to the Governor supplying the list of three qualified candidates for the Governor's consideration, pursuant to W. Va. Code § 3-10-5. A copy of the letter is contained in the Appendix. The statute vests the exclusive power, responsibility and obligation of supplying the list to the Governor in the Chair of the Wayne County Republican Executive Committee following the deliberation and vote of those committee members residing in the 19th Delegate District.

Whether a petitioner has a clear legal right, "is generally a question of standing. Thus, where the [petitioner] has a special interest in the sense that he is part of the class that is being affected by the action then he ordinarily is found to have a clear legal right." State ex rel. Billy Ray C. v. Skaff, 438 S.E.2d 837, 850 (W. Va. 1993). The county executive committee is being disenfranchised by the State executive committee acting leadership, in violation of W. Va. Code

§ 3-10-5, which provides appropriate standing to the county executive committee to object and seek relief herein.

Cognizant of the need for alacrity in matters affecting the right to political office, this Court has recognized that "[i]n West Virginia a special form of mandamus exists to test the eligibility to office of a candidate in either a primary or general election." Syl. Pt. 5, in part, State ex rel. Maloney v. McCartney, 159 W.Va. 513, 223 S.E.2d 607 (1976). In special mandamus election cases, "[b]ecause there is an important public policy interest in determining the qualifications of candidates in advance of an election, this Court does not hold an election mandamus proceeding to the same degree of procedural rigor as an ordinary mandamus case." Syl. Pt. 2, State ex rel. Bromelow v. Daniel, 163 W.Va. 532, 258 S.E.2d 119 (1979). This Court has further explained that "when a writ of mandamus has been invoked to preserve the right to vote or to run for political office ... this Court has eased the requirements for strict compliance for the writ's preconditions, especially those relating to the availability of another remedy." Syl. Pt. 3, in part, State ex rel. Sowards v. Cty. Comm'n of Lincoln Co., 196 W.Va. 739, 474 S.E.2d 919 (1996).

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 a vacancy of the 19th Delegate District. He presided over the deliberations and the vote of the committee members. W. Va. Code § 3-10-5 does not authorize the statewide party executive committee to override or usurp the selection process. Nor does the statute authorize the Governor the ability to override or usurp the selection process, should he not be satisfied with the qualified candidates selected by the committee.

B. Respondent has a clear duty to fill the legislative vacancy for Delegate District 19 from among the list of three qualified candidates submitted to the Respondent and received by him on January 14, 2021.

State Code mandates that the Governor choose from among the three candidates supplied by the Wayne County Republican Executive Committee. He may not add to the list. Nor may any third party, such as the Acting Chairman of the State Republican Executive Committee, alter the list of candidates already-supplied by the Petitioner within the fifteen day timer period prescribed by statute:

§3-10-5. Vacancies in state Legislature.

(a) Any vacancy in the office of state senator or member of the House of Delegates shall be filled by appointment by the Governor, from a list of three legally qualified persons submitted by the party executive committee of the same political party with which the person holding the office immediately preceding the vacancy was affiliated at the time the vacancy occurred. The list of qualified persons to fill the vacancy shall be submitted to the Governor within 15 days after the vacancy occurs and the Governor shall duly make his or her appointment to fill the vacancy from the list of legally qualified persons within five days after the list is received. If the list is not submitted to the Governor within the 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.

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

This Court has already reviewed § 3-10-5 in the case of State ex rel. Biafore v. Tomblin, 782 S.E.2d 223 (W. Va. 2016) and concluded that its text is clear and unambiguous, and that the Governor's duty to fill an open vacancy from the list is nondiscretionary:

As explained above, this Court is obligated to enforce the statute in accordance with its plain meaning. State ex. rel. Safe-Guard Products Int'l. v. Thompson, 235 W.Va. 197, 200, 772 S.E.2d 603, 606 (2015)(holding that clear and unambiguous statute can not be interpreted by courts); Stanley v. Stanley, 233 W.Va. 505, 510, 759 S.E.2d 452, 457 (2014)(recognizing that statute is open to construction only where legislation is ambiguous); Martin v. Hamblet, 230 W.Va. 183, 187, 737 S.E.2d 80, 84 (2012)(finding that clear and unambiguous statutory provision will not be interpreted by courts).

State ex rel. Biafore v. Tomblin, 782 S.E.2d 223, 229 (W. Va. 2016). Indeed, the Court cannot seek to amend the statute in order to provide for the selection of any other individual for selection by the Governor in his appointment of the vacancy for Delegate District 19:

"Preserving the separation of powers is one of this Court's most weighty responsibilities." Wellness Int'l Network, Ltd. v. Sharif, — U.S. —, 135 S.Ct. 1932, 1954–55, 191 L.Ed.2d 911 (2015)(Roberts, C.J., dissenting). In performing our constitutional duties, we decline the petitioners' request to encroach upon the power of the Legislature. "Liberty is always at stake when one or more of the branches seeks to transgress the separation of powers." Clinton v. City of N.Y., 524 U.S. 417, 450, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998)(Kennedy, J., concurring).

State ex rel. Biafore v. Tomblin, 782 S.E.2d 223, 229 (W. Va. 2016). At the time Biafore was before this Court, the Republican leadership, the Attorney General's Office, and others, argued that § 3-10-5 mandated the Governor to select a vacancy replacement from a list submitted by the Republican Party's District Executive Committee:

To the contrary, the respondents, as well as amicus curiae, West Virginia Chamber of Commerce, the Attorney General's Office, and Senate President William Cole, argue that the language of the statute is unmistakably clear and requires the governor to select a replacement from a list submitted by the Republican Party's Ninth Senatorial District Executive Committee.

State ex rel. Biafore v. Tomblin, 782 S.E.2d 223, 228 (W. Va. 2016). This Court found the statute clear and unambiguous:

Upon this Court's review, we find West Virginia Code § 3–10–5 clear and unambiguous. It succinctly states the requirements for filling a vacancy in the West Virginia Legislature. Subsection (a) provides that a vacancy is to be filled through appointment by the governor. The list to be utilized by the governor in selecting the appointee is to be composed of "three legally qualified persons submitted by the party executive committee of the party with which the person holding the office immediately preceding the vacancy was affiliated." W. Va.Code § 3–10–5(a).

State ex rel. Biafore v. Tomblin, 782 S.E.2d 223, 228 (W. Va. 2016). This Court further warned that, "The statute applied with equal force to each situation and must be interpreted in precisely the same fashion regardless of the underlying party disloyalty demonstrated by the changeling." Id. 782 S.E.2d at 232.

It is undisputed that Petitioner submitted a list of three qualified candidates for the 19th Delegate District vacancy in a timely fashion and well within the 15 days required by statute. Del. Derrick Evans submitted his resignation to Speaker Hanshaw on January 9, 2021. That same day, Chairman Maynard began taking phone calls from interested parties and public officials, as well as concerned citizens, from all over the State. Chairman Maynard gathered committee members residing in the 19th Delegate District for discussion and selection of the three qualified candidates for submission to the Governor, pursuant to W. Va. Code § 3-10-5.

By January 13, 2021, the committee had presented and voted on their selections which resulted in a list of three qualified candidates. Petitioner, as Chair of the committee presented the selections to the Governor in writing. The Governor received the letter conveying the three selections on January 14, 2021 - less than fifteen days from the creation of the vacancy on January 9, 2021. Since the selection of three qualified candidates were delivered to the Governor during the fifteen day time period, the Governor is mandated to fill the position with a candidate from the list. He may not seek a second list from the Acting Chair of the State Republican Executive Committee for alteration or substitution. Nor may the Acting Chair of the State Republican Executive Committee provide a second or subsequent list for the Governor's consideration. The Governor has a *nondiscretionary* duty to choose from the first list, in accordance with the mandate contained in the clear and unambiguous text of W. Va. Code § 3-10-5

Because of the foregoing, the Petitioner has demonstrated that Respondent has a clear duty to fill the vacancy in the 19th Delegate District with the list of three qualified candidates supplied to the Governor by the Petitioner on January 14, 2020.

C. Petitioner possesses no other adequate remedy

The existence of any remedy will not suffice. "Mandamus will lie, notwithstanding the existence of another remedy, if such other remedy is inadequate or is not equally beneficial,

convenient and effective." State ex rel. Wheeling Downs Racing Ass'n v. Perry, 148 W. Va. 68, 73, 132 S.E. 2d 922 (1963). "A remedy cannot be said to be fully adequate to meet the justice and necessities of a case, unless it reaches the end intended, and actually compels a performance of the duty in question." State ex rel. Bronaugh v. Parkersburg, 148 W. Va. 568, 573, 136 S.E. 2d 783, 786 (1964) (quoting 12B Michie's Jurisprudence of Va. & W. Va. Mandamus § 9).

Such other remedy, in order to constitute a bar to mandamus, must also be adequate to place the injured party, as nearly as the circumstances of the case will permit, in the position he occupied before the injury or omission of duty complained of. The controlling question is not "Has the party a remedy at law?" but "Is that remedy fully commensurate with the necessities and rights of the party under all the circumstances of the particular case?"

12B Michie's Jurisprudence of Va. & W. Va. Mandamus § 9.

Only Mandamus will lie to force the Governor to choose from the list of candidates supplied by the Wayne County Republican Executive Committee. Even if there was some other "adequate" remedy, this Court has been reticent in finding other remedies "adequate." See generally, State ex rel. Billy Ray C. v. Skaff, 438, S.E.2d 837, 850 (W. Va. 1993). Thus, so long as a party is not attempting to substitute a mandamus for an appeal, "if such other remedy is not equally as beneficial, convenient, and effective, mandamus will lie." Syl. Pt. 4, State ex rel. Boggs v. County Court, 11 S.E. 72 (W. Va. 1980); State ex rel. ACF Indust., Inc. v. Vieweg, 514 S.E.2d 176, 186 (W. Va. 1999).

Because of the importance of the attempted usurpation and disenfranchisement of the Republican voters of the 19th Delegate District of West Virginia, whether by the Governor, or the State Republican Executive Committee Acting Chairperson, the Petitioner has demonstrated that he possesses no other adequate remedy than Mandamus from this Court.

II. INAPPLICABILITY OF PRE-SUIT NOTICE PROVISIONS OF § 55-17-3

W. Va. Code Section § 55-17-3 provides for written pre-suit notice to be provided to the chief officer of the government agency of any state agency defendant and the attorney general, by certified mail, return receipt requested, of any alleged claim and the relief desired 30 days prior to the inception of any suit against the State or any of its agencies, which in turn carries with it requirements to notify and inform the Legislature, and so on. However, it is inapplicable to the instant petition, for a number of reasons. Construed liberally, the statute expressly exempts mandamus actions exercising the original jurisdiction of this Court. Moreover, even if the Legislature intended to make pre-suit notice provisions applicable to the action *sub judice*, it would be unconstitutional as a violation of the Doctrine of Separation of Powers, as well as the Certain Remedy Clause.

W. Va. Code § 55-17-3(a)(1) provides an exception to actions seeking "injunctive" relief, where there are important and time-sensitive issues to be decided:

The provisions of this subdivision do not apply in actions seeking injunctive relief where the court finds that irreparable harm would have occurred if the institution of the action was delayed by the provisions of this subsection.

Being that the instant petition is a petition for writ of mandamus, exercising the original jurisdiction of this Court, "injunctive relief," *per se*, is not procedurally available.

Where a petition for writ of mandamus is filed alleging and supporting an imminent and ongoing constitutional crisis, asserted by active members of the West Virginia Legislature, who are seeking to compel and restrain the actions of their Governor, according to the law, the action is outside the ambit of cases contemplated by § 55-17-3. As with "injunctive relief" claims, petitions for writs of mandamus seek no award of damages, for which the Legislature requires prospective notification, but rather asserts entitlement to judicial review by the judicial branch on important issues pertaining to separation of powers and constitutionality of the assertion of the Governor's emergency powers.

An "injunction" is "[a] court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury." Black's Law Dictionary, Sixth Edition. Likewise, a "writ," generally, is a "written judicial order to perform a specified act, or giving authority to have it done" Id. W. Va. Code § 55-17-6(a) provides that "It is the express intent of the Legislature that the provisions of this article be liberally construed to effectuate the public policy set forth in section one of this article." Therefore, liberally construed, the exception for "injunctive relief" is equally applicable to writs asserting the original jurisdiction of the Court, as both identically seek the order of a court compelling or prohibiting a state official, rather than traditional money damages.

Moreover, to allow the Legislature to control or limit the original jurisdiction of this Court in such a manner as to disallow the instant filing, would be a violation of the Doctrine of Separation of Powers. The Separation of Powers Clause literally "compels courts, when called upon, to thwart any unlawful actions of one branch of government which impair the constitutional responsibilities and functions of a coequal branch." State ex rel. Brotherton v. Blankenship, 158 W.Va. 390, 402, 214 S.E.2d 467, 477 (1975). the Supreme "[C]ourt shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to writs, warrants, process practice and procedure, which shall have the force and effect of law." W. Va. Const. art. 8, § 3. See also State v. Arbaugh, 215 W.Va. 132, 138, 595 S.E.2d 289, 295 (2004) (Davis, J., dissenting) (quoting People v. Hollis, 670 P.2d 441, 442 (Colo.Ct.App.1983)). See also Syl. pt. 1, Bennett v. Warner, 179 W.Va. 742, 372 S.E.2d 920 (1988) ("Under article eight, section three of our Constitution, the Supreme Court of Appeals shall have the power to promulgate rules for all of the courts of the State related to process, practice, and procedure, which shall have the force and effect of law."); See also State v. David K., 238 W.Va. 33, 792 S.E.2d 44 (W. Va. 2016) ("The Legislature exceeds its power in the area of rulemaking if its action prohibits the due and orderly processes by which [a] court functions,

or prevents it from properly functioning,' or disturbs the functions and orderly processes of the court[.]'), *citing* Schoenvogel ex rel. Schoenvogel v. Venator Grp. Retail, Inc. -, 895 So.2d 225, 234 (Ala. 2004). The Legislature cannot enact a jurisdictional bar to legislators seeking original jurisdiction judicial review of the emergency actions of a Governor without violating the Doctrine of Separation of Powers and the Rule-Making Clause.

Lastly, to foreclose legislators seeking assistance from the judicial branch would also violate the Certain Remedy Clause of Article 3, Section 17 of the West Virginia Constitution. It is provided in Article III, Section 17 of the state constitution that "[t]he courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law [.]". The Certain Remedy Clause is a constitutional guarantee that all citizens have a right to seek redress for injuries in the courts of this state. See Syl. pt. 8, Bennett v. Warner, 179 W.Va. 742, 372 S.E.2d 920 (1988) ("It is beyond argument that the courts of this state are open to all and that parties in litigation should have access to their legal proceedings, W. Va. Const., Art. 3, Sec. 3-17, and such access to court proceedings is also required as a part of due process, W. Va. Const., Art. 3, Sec. 3-10.").

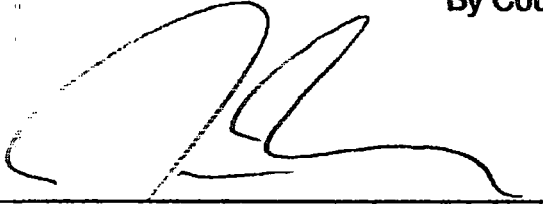
Therefore, the petitioners are not bound by the pre-suit notice provision contained in W. Va. Code Section § 55-17-3, since they are asserting a petition for writ of mandamus under the original jurisdiction of this Court, and should the said statute be interpreted so as to include the instant action, it would do so in violation of the West Virginia Constitution.

CONCLUSION

As the foregoing makes clear, petitioners have unquestionably demonstrated that the conditions for a writ of mandamus have been met. The petitioner, as the Chairman of the Wayne County Republican Executive Committee and the West Virginia Republican Executive Committee for the Nineteenth Delegate District, respectfully request that this Court grant the writ

of mandamus; award the petitioners such costs or fees as allowable by law that this Court finds appropriate; and grant such other relief as may be just and equitable, or as the Court deems fit.

JEFF MAYNARD, Chairman of the
WAYNE COUNTY REPUBLICAN EXECUTIVE
COMMITTEE,
By Counsel,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. _____

**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.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served the foregoing PETITION FOR WRIT OF MANDAMUS AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT and APPENDIX TO PETITION FOR WRIT OF MANDAMUS AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT and MOTION FOR EXPEDITED RELIEF, upon the following individuals via U.S. Certified mail, facsimile and hand delivery on this the 25th day of January, 2021, to:

**JAMES C. JUSTICE, II, Governor
Office of the Governor
State Capitol, 1900 Kanawha Blvd. E.
Charleston, WV 25305**

**Patrick Morrissey, West Virginia Attorney General
State Capitol, Room E-26, 1900 Kanawha Blvd. E.
Charleston, WV 25305**



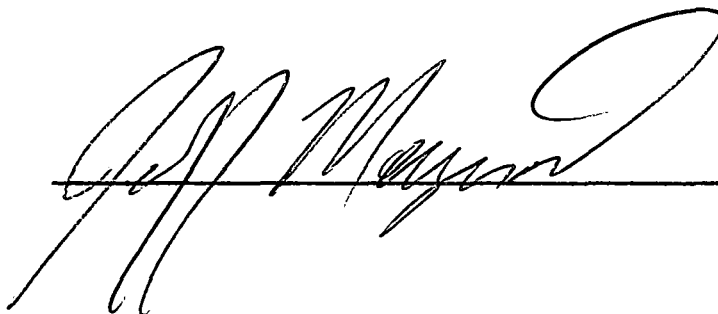
JOHN H. BRYAN (WVBN 10259)

VERIFICATION

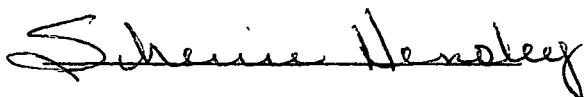
STATE OF WEST VIRGINIA

COUNTY OF cabell, TO WIT:

I, JEFF MAYNARD, after first being duly sworn upon oath, state that I am a Petitioner in the attached and foregoing Petition, that I have read the document, and that the facts and allegations contained therein are true and correct, except insofar as they are stated to be on information and belief, and that insofar as they are stated to be on information and belief, I believe them to be true.



Taken, sworn to, and subscribed before me on this 25 day of January, 2021.



My commission expires Sept 3, 2023

