

IN THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA

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STATE OF WEST VIRGINIA ex rel.
MIKE PUSHKIN, STEPHEN WILLINGHAM,
and THE WEST VIRGINIA
DEMOCRATIC PARTY,

Petitioners,

VS.

No. 25-587

PATRICK MORRISEY, in his
Official Capacity as Governor of West Virginia,
and ROGER HANSHAW, in his
Official Capacity as Speaker of the
West Virginia House of Delegates,

Respondents.

PETITIONERS' REPLY TO
THE RESPONSE TO THE PETITION

INTRODUCTION

This is the petitioners'¹ third attempt to challenge the respondents' failures to seat a duly elected delegate, Joseph A. DeSoto, to his position as the representative for the 91st Delegate District and, subsequently, to appoint a Democrat to fill the vacancy thus created. The first petition (No. 25-22) was initially stalled by respondent Hanshaw's invocation of West Virginia Code § 4-1-17, which automatically stays legal actions against legislators during a legislative

¹The "petitioners" in this case include Stephen Willingham, who was not a party in the preceding actions.

session. That case remains pending and has been briefed on all issues. (Petitioners have moved to consolidate that case with this one.) One of those issues was whether petitioners had complied with W. Va. Code § 55-17-3, which requires 30 days notice to state agencies and officials (and the attorney general) before filing suit against them. The petitioners in that case argued that they had effectively complied. A second petition rejected the petitioners' argument that their mandamus petition fit within § 55-17-3(a)(1)'s exception to the pre-filing notice requirement for "equitable actions" presenting irreparable harm.

This petition, filed September 9, 2025, ensued after pre-filing notice had been made on the respondents and the Attorney General by letter dated July 14, 2025, Respondents' App. 113, and obviously attempts to eliminate any issue regarding petitioners' compliance with § 55-17-3. Yet, somewhat incredibly, respondents have still mounted an argument based on that section. Petitioners' reply to that argument is set forth below in Part I. Parts II through V then reply to other arguments made by the respondents and essentially repeat the arguments made in petitioners' reply brief in *Pushkin I* (No. 25-22).

I. PETITIONERS FULLY COMPLIED WITH WEST VIRGINIA CODE § 55-17-3.

West Virginia Code § 55-17-3(a)(1) requires that "at least 30 days prior to the institution of an action against a governmental agency, the complaining party or parties shall provide the chief officer of the governmental agency and the Attorney General written notice, by certified mail, return receipt requested, of the alleged claim and the relief desired." On July 14, 2025, petitioners mailed to respondents and the attorney general a letter that satisfied that requirement. Respondents' App. 113. As noted above, this petition was filed September 9, 2025, or 57 days after the pre-suit notice. Nevertheless, respondents argue that the notice failed because it was not

accompanied by a \$250 fee payable to the recipient, which respondents maintain was required by § 55-17-3(e). That provision states:

If 90 days elapse after service of notice required by subsection (a) of this section has been effected and action has not been instituted, then the notice shall be considered to have expired, and before an action may be instituted, the complaining party or parties must provide new notice as required by subsection (a) of this section which shall be accompanied by a second or subsequent notice fee of \$250 to the attorney general and by a second or subsequent notice fee of \$250 to the chief officer of the governmental agency[.]

As noted above, pre-suit notice antedated this petition's initiation by 57 days – well within the 90 days allotted by (e). Yet, say respondents, because the petitioners served a notice on the respondents back in March 2025, subsection (e) dictates that they had to supply the \$250 fees with the July notice. That is nonsensical. The March notice related to *Pushkin I*, No. 25-22; the July notice pertained to this petition, a separate civil action. The two cases are independent actions. Moreover, petitioner Willingham was not a party to *Pushkin I* and cannot, therefore, be limited by the March notice.

Petitioners are simply trying to get to the merits, which responded obviously want to avoid. Those merits present important issues relating to the electoral process and legislative composition and cry for resolution by this Court.

II. PETITIONERS HAVE STANDING.

To have standing, petitioners must establish (1) that they have suffered, or are about to suffer, an injury in fact; (2) that the injury (or threatened injury) is fairly traceable to the conduct of the respondent; and (3) that their requested relief will redress (or prevent) that injury. *E.g.*, *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

Here, petitioners have suffered a distinct injury. By their actions, the House and the Governor have deprived the Democratic Party of a Democratic seat in the House of Delegates. That, in turn, results in a diminution of the Party's ability to advance its platform and policies – the *raison d'être* for a political party. Petitioner Willingham, a citizen and voter in the 91st Delegate District suffers the additional injury of being deprived of a lawfully elected or appointed delegate to represent him in the House of Delegates. These injuries are traceable to the respondents: the House of Delegates declined to seat the elected Delegate, a Democrat, Joseph A. DeSoto. Speaker Hanshaw then requested a list of nominees for a replacement from the Berkeley County Republican Executive Committee, not the Democratic Party Committee; and the Governor appointed a Republican, not a Democrat, to fill the “vacancy.”

Finally, the petitioners' requested relief would redress their injuries. They ask (at page 10 of the petition) for an order requiring the seating of Joseph A. DeSoto as the delegate for the 91st Delegate District or in the alternative that a Democrat from that District be appointed as the replacement. Such relief, if granted, would cure the above-described injuries to the petitioners incurred by the respondents' actions.

Respondents' arguments on standing muddle standing issues with the issues on the merits. Respondents insist at page 16 of the response that the Speaker has no “duty,” let alone the authority, to appoint *any* person to fill a House vacancy. Similarly, respondents argue (at 20-21) that the Governor has no ability to “seat” anyone in the House of Delegates. Respondents are obviously correct on both assertions. They are also beside the point of standing. Their contentions really go to fashioning the appropriate order as part of the relief – *i.e.*, which respondent must be mandated to perform which duty. The contentions have naught to do with

whether the petitioners have suffered an injury traceable to the respondents that can be redressed by the relief that they have requested. Further, the standing question relates to whether the petitioners' *requested* relief will redress their injury, not to whether they are entitled to the requested relief. That's a question for the merits.

III. TAKING THE OATH OF OFFICE IS NOT A "QUALIFICATION" FOR THE OFFICE OF DELEGATE WITHIN THE MEANING OF ARTICLE VI, § 24 OF THE WEST VIRGINIA CONSTITUTION.

Respondents maintain that the House is the sole judge of the qualifications of its members, and petitioners concede that point. W. Va Constitution, Art. VI, § 24. That, however, does not support the action of the House in denying Mr. DeSoto his seat. The principal qualifications for serving as a delegate are stated in Article IV, § 4 of the State's Constitution, and those require that the person be eligible to vote. Article IV, § 1 determines that eligibility: the person must be an adult, mentally competent, not under conviction of a felony, and thirty days a resident of the State and of the county in which he or she seeks to vote. Article VI, § 12 adds that senators and delegates must have been residents of their district or county for at least one year prior to their election and must remain such residents during their tenure in office.² Taking the oath is not, as respondents argue, a "qualification" for serving as delegate; rather, it is a prerequisite for exercising the duties of the office. Unlike the qualifications listed in Article IV, the oath requirement is imposed by Article VI, § 16, which provides that the oath must be taken by legislators before "they may enter upon their duties." In contrast, Article IV, § 4 says that no person may "elected" to office unless he or she satisfies the Article IV, § 1 voting

²Several provisions in Articles IV and VI can render ineligible an otherwise "qualified" candidate. *E.g.*, Article IV, § 10; Article VI, §§ 13-15. They are not, however, relevant to this case.

requirements. Obviously, taking the oath cannot possibly be a “qualification” for election because one is not eligible to take the oath until *after* he or she is elected.

Persons elected as delegates assume that office on December 1 after their election, W. Va. Code § 6-5-1, but they cannot exercise the duties of the office until they have taken the oath in the House chambers (which can be done at any time after December 1). W. Va. Constitution, Article VI, § 16.

Thus, while each House is the judge of the qualifications of its members, the qualifications to be determined are limited to those stated in Article IV, §§ 1 and 4 and in Article VI, § 12. *See Powell v. McCormack*, 395 U.S. 486 (1969). When a delegate fails to appear to take his oath of office, the House’s remedy is not to exclude him, but to expel him pursuant to Article VI, § 25. The distinction is critical because § 25 requires a two-thirds supermajority vote; that requirement ensures there will be an extraordinary consensus to override an electoral decision made by the voters.³ *Id.* at 536, 540-41, and 547-48. Moreover, when the House declared Mr. DeSoto’s seat vacant, he was already a member of the House by virtue of West Virginia Code § 6-5-1. Thus, the House’s only option was expulsion under § 25. Presumably, too, a decision to expel would only be made after notice and appropriate procedures have been provided to the delegate in question. *Compare* the impeachment process in Article IV, § 9; *see State ex rel. Workman v. Carmichael*, 241 W. Va. 105, 819 S.E.2d 251 (2018).

IV. THE DECISION BY THE HOUSE OF DELEGATES TO DECLARE MR. DeSOTO’S SEAT VACANT VIOLATED THE WEST VIRGINIA CONSTITUTION, AND THE APPOINTMENT OF A REPUBLICAN, RATHER THAN A DEMOCRAT, TO

³*Compare* § 25 with its antecedent provision in Article IV, § 29 of the 1863 Constitution, which required a two-thirds concurrence of only the members present, rather than “the members elected.”

REPLACE HIM VIOLATED WEST VIRGINIA CODE § 3-10-5(a).

The Petition filed in this case spelled out the claims on the merits (at pages 4-10). They are straightforward. In November 2024, Joseph DeSoto was elected to serve as the delegate in the 91st Delegate District. On December 1, 2024, Mr. DeSoto began his term as a delegate, and on December 11, 2024, he switched his political party registration to Democrat. The House convened on January 8, 2025, and declared the seat of the absent Joseph DeSoto to be vacant,⁴ notwithstanding that he satisfied the qualifications for office. The House referred the matter to the Governor and to the Berkeley County Republican Executive Committee. The Governor subsequently appointed a Republican to take Mr. DeSoto's seat.

First, the declaration of vacancy was void because the House could reject the voters' choice only if DeSoto failed to satisfy the "qualifications" for office. Article VI, § 24; *Powell v. McCormack, supra*. He met them: he was eligible to vote and he had lived in the 91st District for a year preceding his election. Article IV, §§ 1 and 4 and Article VI, § 12. Second, the declaration was void because Mr. DeSoto had already begun his term as a delegate by virtue of West Virginia Code § 6-5-1. Thus, the House could only take action against Mr. DeSoto by expelling him under Article VI, § 25, which requires a two-thirds concurrence of House members.

Third, the appointment of a Republican to replace DeSoto was void because the Governor was required by West Virginia Code § 3-10-5(a) to appoint a 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." That person was Mr. DeSoto, and his political party was the

⁴House Resolution 4 (Appendix to the Petition).

Democratic Party. Thus, any appointment by the Governor of anyone other than a Democrat was invalid.

V. PETITIONERS' CLAIMS ARE NOT MOOT.

“[A] case is moot when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *Powell, supra*, 395 U.S. at 496. The Petition in this involves a live controversy – the term of Delegate for the 91st Delegate District has a full legislative term remaining on it, and the petition insists that seat belongs to a Democrat, yet respondents have given it to a Republican. A writ of mandamus from this Court can still correct the wrongs committed against the petitioners for the remainder of the delegate’s term. Contrary to the respondents’ arguments, this Court has sustained the instatement of an elected official and the displacement of the person who had wrongfully taken that official’s seat. *Hertzog v. Fox*, 141 W.Va. 849, 93 S.E.2d 239 (1956).

/s/ Robert M. Bastress, Jr.

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CERTIFICATE OF SERVICE

I have served the foregoing Reply on respondent's counsel, Michael R. Williams through the Court's electronic filing system, on this the 22nd day of October, 2025.

/s/ Robert M. Bastress, Jr.