

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 25-587

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

Petitioners,

v.

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

Respondents.

RESPONSE TO PETITION FOR MANDAMUS

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INTRODUCTION

In mid-December of last year, one-time Delegate-Elect Joseph de Soto was arrested after he (allegedly) threatened to kill Speaker Roger Hanshaw and several other Delegates-Elect. Mr. de Soto was placed on home confinement, barring him from traveling to the Capitol. Unsurprisingly, then, Mr. de Soto failed to appear in the House of Delegates to appear and take his oath of office. And when Mr. de Soto failed to take his oath, the House understandably found his seat vacant. After all, the West Virginia Constitution requires Delegates to “take” the oath of office “before they enter upon their duties” and declares that “[a]ny member who ... refuse[s] to take the oath ... forfeit[s] his seat.” W. VA. CONST. art. VI, § 16. Petitioners responded by filing this action (and two other nearly identical actions before it).

Petitioners’ challenge here fares no better than their first two; it fails on multiple, independent grounds. For one, Petitioners have still failed to provide statutorily compliant pre-suit notice, depriving the Court of jurisdiction to decide this case. For another, even if Petitioners had provided timely notice, they would still lack standing for the relief they seek. Beyond that, even if they did have standing, Petitioners would still be wrong on the merits. Only the House can decide whether Mr. de Soto forfeited his seat, and the House got it right when it said he did for failing to take his oath. And worse still, the Court can’t give Petitioners’ their alternative relief, either. Petitioners think a Democrat should be appointed to fill Mr. de Soto’s vacant seat. But because Mr. de Soto has never been sworn in (and never will be), he isn’t a *qualified* Delegate and has never *held* that office. Hence, his party affiliation has no bearing on which party should fill the seat; a Republican was the last officeholder, so a Republican must replace him under state law. Were all that not enough, one regular legislative session has already come and gone, and the seat has been filled, so Petitioners’ case is moot, too.

Altogether, Petitioners have failed to show a clear right to the relief they seek, and they’ve failed to show a legal duty by Speaker Hanshaw or Governor Morrisey to do the things Petitioners say they must do. The Court should therefore deny the writ.

QUESTIONS PRESENTED

Petitioners raise two questions. The first asks “[w]hether the House of Delegates can declare vacant the seat of a [purportedly] duly elected, qualified, and ready-to-serve delegate for reasons related to misconduct.” Pet. 1. The second reduces to a question whether a Delegate-Elect whose term of office began on December 1—but who has yet to be sworn in—“hold[s] the office” of Delegate for purposes of West Virginia Code § 3-10-5(a). Pet. 1.

STATEMENT OF THE CASE

Petitioners’ questions assume several things that aren’t correct. For one thing, Mr. de Soto was never a “qualified” or “ready-to-serve delegate.” Pet. 1. For another, he didn’t “assume[] office on December 1st.” *Id.* And the seat he might have filled was not declared vacant because of Mr. de Soto’s “misconduct” (although his misconduct might have precipitated some of these events). *Id.* A fuller account of the facts makes that much clear.

I. Mr. de Soto was elected as a Republican.

In May 2024, Mr. de Soto won the Republican primary for the 91st Delegate District, defeating Delegate Don Forsht and another opponent. W. Va. Sec’y of State, *Official Results: House of Delegates, 91st District - REP*, RESULTS.ENR.CLARITYELECTIONS.COM (Aug. 26, 2024, 4:22:18 pm), <https://shorturl.at/Lms7F> (Secretary of State: 2024 Republican Primary). No Democratic primary was held for the 91st Delegate District because no Democrat filed to run. W. Va. Sec’y of State, *Official Results: House of Delegates, 91st District - DEM*, RESULTS.ENR.CLARITYELECTIONS.COM (Aug. 26, 2024, 4:22:18 pm), <https://tinyurl.com/bdfte3ps>. When Mr. de Soto won the general election in November 2024, he won as a Republican and

defeated a single opponent who ran on the Constitution Party ticket. W. Va. Sec’y of State, *Official Results: House of Delegates, 91st District*, RESULTS.ENR.CLARITYELECTIONS.COM (Dec. 18, 2024, 8:58:00 am), <https://shorturl.at/cJJ6o>.

II. Mr. de Soto (allegedly) threatened to kill other Delegates-Elect.

On Sunday, December 8, Mr. de Soto met with other Republican Delegates-Elect at the Capitol. Amelia Ferrell Knisely, *Incoming WV House member de Soto arrested for making terroristic threats against lawmakers*, WESTVIRGINIAWATCH.COM (Dec. 12, 2024, 11:58 am), <https://tinyurl.com/4kxbthtb>. But other Republicans, it seems, feared that Mr. de Soto had embellished his life story, and the caucus reportedly became a vehicle for interrogating Mr. de Soto. *Id.* It began considering a vote to remove him. Resp’ts’ App. 4.

Tuesday afternoon, Mr. de Soto (allegedly) began threatening to kill several Delegates-Elect, including Speaker Hanshaw. Resp’ts’ App. 4. One email reportedly stated, “I have only begun....and won’t stop, I had a vision to destroy them from the angel of Moroni.” *Id.* “[T]hey can all go to hell[.] I will send them there as commanded.” *Id.* When he was urged by text to stop saying such things, he (allegedly) replied, “I did say I am going to kill people[.] I said I am going [sic] what is necessary to put them from office.” *Id.* Perhaps driven by anger towards his fellow Republicans, Mr. de Soto also changed his political party. He became a Democrat on Wednesday, December 11. *See* Pet. 2.

At around 3:00 p.m. that Wednesday, Mr. de Soto’s threats reached the State Police. Resp’ts’ App. 4. The informant was the person (allegedly) who received the email and text described above. *Id.* She was also (allegedly) on the phone with Mr. de Soto when he said “God called him to kill” five Delegates-Elect. *Id.* Based on this information, the State Police charged Mr. de Soto with threatening to commit terrorist acts. *Id.* at 1-3. He was arrested later that day, as the Magistrate Court understandably found probable cause. *Id.* at 1.

III. Mr. de Soto agreed to bond conditions that barred his swearing-in.

Mr. de Soto seems to have been arraigned on Thursday, December 12, and he signed a “Criminal Bail Agreement” that day that imposed strict limits on his behavior. Resp’ts’ App. 5 (cleaned up). Among other things, he “agree[d] ... to have no direct or indirect physical or verbal contact with any Eastern Panhandle Delegate.” *Id.* He also pledged not to “be within 1,000 ft. of any Eastern Panhandle Delegates or WV State Legislators” and to have “[n]o contact [with them] by any electronic media of any kind.” *Id.* at 6. These restrictions were “effective and enforceable immediately” and “regardless of whether ... [he] posted bail.” *Id.* The Magistrate Court set bail at “\$300,000.00 Cash Only.” *Id.* at 5.

That bail was too high for Mr. de Soto. On December 23, he asked the Magistrate Court to reduce his bail and confine him at home. Toni Milbourne, *De Soto has bail lowered; home confinement approved*, JOURNAL-NEWS.NET (Dec. 23, 2024), <https://tinyurl.com/ea5u38ke>. He also promised to avoid “any contact with any potential victims involved in his case.” *Id.*

Though the State opposed Mr. de Soto’s request, the Magistrate Court reduced his bond to “\$150,000 cash or surety” and granted his request to be “placed on home confinement.” *Id.* As Mr. de Soto had proposed, the court ordered him to have “no contact with any of [his] potential victims.” *Id.* Later that day, a bonding company posted security on his behalf, allowing him to be confined at home in Berkeley County. Resp’ts’ App. 8, 10-11. Put another way, Mr. de Soto paid \$15,000 for the privilege of being out of jail and hundreds of miles from the Capitol. *Id.* at 10, 13.

IV. The Legislature declared Mr. de Soto’s seat vacant.

Thus—and to no one’s surprise—Mr. de Soto was absent on January 8 when the House of Delegates called the roll. Amelia Ferrell Knisely, *WV House Republicans vacate seat of Joseph de Soto, lawmaker accused of threatening to kill members*, WESTVIRGINIAWATCH.COM (Jan. 8, 2025, 6:35 pm), <https://tinyurl.com/msr36t2h> (Knisely, *Republicans vacate seat*). The House

responded with House Resolution 4, which declared Delegate-Elect De Soto's seat "vacant" and instructed the Speaker to notify the Governor and the Republican Executive Committee for the 91st Delegate District. App. 2. The Resolution's rationale and authority were clear. Mr. de Soto had "threatened to kill several members of the West Virginia House of Delegates." *Id.* at 1. These threats had led to his felony arrest and confinement at home. *Id.* His threats had also prompted Magistrate Courts to issue Personal Safety Orders in favor of two Delegates, orders that forbade "any contact" with those Delegates and that would remain effective "until at least ten (10) days" after the session ended. *Id.* at 1-2.

These realities posed a problem, the Resolution explained, because "Article VI, Section 16 of the Constitution ... requires each legislator [to] take the Oath of Office in the hall of the house to which the member is elected to qualify"; it also provides that "[f]ailure to take the Oath of Office as required results in a forfeiture of the seat." App. 2. Though other Delegates-Elect had failed to be sworn in on January 8, they had "made other arrangements to do so." *Id.* Mr. de Soto couldn't do that. Thanks to his (alleged) terroristic threats and resulting confinement, he was "not reasonably expected to" be sworn in "at any point in the future." *Id.* The Resolution observed that "Article VI, Section 24 of the Constitution ... empowers the House of Delegates to be the exclusive judge of the qualifications of ... delegates-elect" before they are "seated as members." *Id.* Based on this authority, the Resolution reported the House's conclusion "that Delegate-Elect Joseph DeSoto [sic] does not qualify to serve as a member of the House of Delegates" because he had "failed to take the Oath of Office." *Id.*

At least some House Democrats opposed the motion, though not because they doubted Mr. de Soto's guilt or hoped he would join their caucus. "Look, this guy needs to go. I completely agree with that," said Delegate Shawn Fluharty. Steven Allen Adams, *West Virginia House*

declares de Soto seat vacant, NEWSANDSENTINEL.COM (Jan. 9, 2025), <https://tinyurl.com/8eehy9dc> (Adams, *West Virginia House declares*). The “proper motion,” he argued, was “to expel the member for his acts,” not to find that he had forfeited his seat. Knisely, *Republicans vacate seat, supra*.

Petitioner Pushkin was less concerned with the vacancy and more concerned with how to fill it. He moved to amend the Resolution “by striking out the word ‘Republican’ and inserting ... the word ‘Democratic’” in the portion of the Resolution that addresses which party’s executive committee was to receive notice of the vacancy. H. Res. 4, 2025 Leg., Reg. Sess. (W. Va. 2025), H. Floor Amendment Pushkin 1-8, <https://tinyurl.com/5c9zenvv> (last visited Oct. 8, 2025) (Pushkin Amendment). This maneuver accords with Petitioner Puskin’s earlier reported comments that he didn’t “foresee any future where” Mr. de Soto would be “seated in the House of Delegates” or “be a member of the Democratic caucus in the House.” Brad McElhinny, *Delegate-elect accused of violent threats could be blocked from House seat*, WVMETRONNEWS.COM (Dec. 18, 2024, 2:27 am), <https://tinyurl.com/2s3fa84h> (McElhinny, *Delegate-elect accused*). It also accords with Delegate Sean Hornbuckle’s reported comments that he didn’t “think [Mr. de Soto] would be caucusing with us”; “that’s a nonstarter.” *Id.* These remarks may explain why Mr. de Soto hasn’t joined this litigation.

In the end, Delegate Pushkin’s amendment failed, and the House adopted the Resolution as proposed. W. Va. Leg., *Bill Status – 2025 Regular Session: House Resolution 4*, WVLEGISLATURE.GOV, <https://tinyurl.com/3ym865bs> (last visited Oct. 8, 2025).

V. The Governor appointed a Republican, and the House kept working.

Within 15 days of the House adopting Resolution 4, both the Republican and Democratic Executive Committees for Berkeley County submitted competing slates of three candidates who might be considered to fill the seat to which Mr. de Soto was elected. *See Resp’ts’ App.* 14-15.

On January 23, the Governor appointed Ian Masters, a Republican, to fill the seat. *See id.* at 16. Mr. Masters was sworn in the next day. *See id.* at 17.

After convening briefly on January 8, the 87th Legislature adjourned until February 12. *See* W. VA. CONST. art. VI, § 18. While the Legislature was in session, it passed 249 bills. W. Va. Leg., *Bill Status – 2025 Regular Session: Completed Legislation*, WVLEGISLATURE.GOV, <https://tinyurl.com/mr35uzxa> (last visited Oct. 8, 2025). Nearly all those bills have become law. W. Va. Leg., *Bill Status – 2025 Regular Session: Actions by the Governor*, WVLEGISLATURE.GOV, <https://tinyurl.com/yavhxx72> (last visited Oct. 8, 2025).

VI. Mr. de Soto’s criminal case continues.

Meanwhile, Mr. de Soto’s criminal case has continued on. A preliminary hearing was held after three months. W. Va. Judiciary, *Magistrate Court Record Search: Joseph de Soto (Case ID: 24-M02F-00753)*, COURTSWV.GOV, <https://tinyurl.com/yr6cutwb> (last visited Oct. 8, 2025). Now his case has been “bound over to the Berkeley County Grand Jury.” Marsha Chwalik, *Berkeley magistrate: deSoto case headed to grand jury*, METRONews.COM (Mar. 19, 2025, 3:41 pm), <https://tinyurl.com/4jy8up64>. Though the grand jury convened in May, it did not yet indict Mr. de Soto, *see* Berkeley Cnty. Prosecuting Atty., FACEBOOK (May 23, 2025, 9:05 am), <https://tinyurl.com/2cd8c5ay>, and the next term of court won’t begin until October, W. Va. T.C.R. 2.27 (providing that Berkeley County terms commence “on the third Tuesday in February, May, and October”). Given the apparent strength of the State’s evidence, it’s safe to assume Mr. de Soto will be indicted. And though he has a right to be tried within “three regular terms of ... court,” W. VA. CODE § 62-3-21, the term of indictment doesn’t count, *Frank A. v. Ames*, 246 W. Va. 145, 166, 866 S.E.2d 210, 231 (2021).

Thus, if the grand jury indicts Mr. de Soto in October, his three terms won’t *begin* until February 2026 and won’t *end* until half-way through February 2027. *See* W. VA. T.C.R. 2.27. By

that point, we'll have a new Legislature. That's assuming he doesn't extend the deadline by moving for a "continuance." W. VA. CODE § 62-3-21. Mr. de Soto seems in no hurry to be tried. Ultimately, it's anyone's guess how long Mr. de Soto's felony prosecution will take, and there's no reason to suppose he will be released from home confinement at any point during his case, including while his case is on appeal. *See* W. VA. CODE § 62-1C-6 (providing that "bail as initially given may continue in effect pending indictment, arraignment, continuance, trial and appeal after conviction, as the court may direct"). Mr. de Soto could therefore remain at home—or some other place of confinement—until long after his two-year term has expired.

SUMMARY OF ARGUMENT

1. Petitioners have shown no jurisdiction for relief. They filed this action without providing statutorily compliant pre-suit notice. Petitioners' error deprived the Court of jurisdiction. Petitioners also lack standing. Neither the Speaker nor the Governor has any duty to do the things Petitioners request, and granting their requested relief would not redress their alleged harms.

2. Petitioners fare no better on the merits. Because the House has exclusive authority to judge its members' qualifications, this Court has no authority to second-guess the House's judgment that Mr. de Soto isn't qualified to serve. This case is not one in which the House has usurped the Court's powers, and Petitioners aren't before the Court to protect Mr. de Soto's interests (if any). What's more, the House got it right when it found that Delegate-Elect de Soto had forfeited his seat. Taking the constitutional oath is a bona fide qualification for office, and Mr. de Soto refused his oath when he chose to be confined at home hundreds of miles from the Capitol. The House could not afford to wait and see if Mr. de Soto's circumstances might change, and the Court can't grant mandamus relief based on speculation.

3. Likewise, the Governor properly appointed a Republican to fill the vacant seat. Mr. de Soto never “held office” because he never took the required oath of office. That makes *his* party affiliation irrelevant. The delegate who held the office immediately preceding the vacancy was a Republican. Hence, the Governor’s statutory duty was to appoint a Republican, not a Democrat.

4. Petitioners’ claims are moot now that the House has seated Delegate Masters and the 87th Legislature’s first regular session has ended. The Court cannot second-guess the House’s decision to seat Delegate Masters any more than it can unwind the clock on the hundreds of bills that have become law. Even if the Court could do such things, the equities provide no reason to do so for these Petitioners.

5. Finally, laches bars these claims. Petitioners have slept on their rights time and again. And ordering relief now would substantially prejudice innocent third parties, including the voters of the 91st District.

Because Petitioners have no basis for relief, the Court should deny the writ.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

As explained below, Petitioners failed to give statutorily compliant pre-suit notice, depriving the Court of jurisdiction. Petitioners also lack standing. Because the Court’s lack of jurisdiction is clear from prior precedent and from “the briefs and record on appeal,” oral argument is “unnecessary” and inappropriate. W. VA. R. APP. P. 18(a)(3), (4). The Court should deny the writ in a memorandum decision or summary order. *Cf.* W. VA. R. APP. P. 21(c)(3). If the Court somehow finds jurisdiction, the Court should schedule this case for Rule 20 argument because it would then raise significant constitutional questions and other issues of high public importance. W. VA. R. APP. P. 20(a).

ARGUMENT

Petitioners claim the House of Delegates has no “authority to declare a seat vacant where the voters have elected a qualified delegate and he or she is willing to serve.” Pet. 4. Likening this case to *Powell v. McCormack*, 395 U.S. 486 (1969), they say that the only way to deny Mr. de Soto a seat was to expel him from the House under Article VI, Section 25 of the Constitution. Pet. 6-7. And likening this case to *State ex rel. Biafore v. Tomblin*, 236 W. Va. 528, 782 S.E.2d 223 (2016), they assert that—if there is a real vacancy—the Democratic Party gets to pick Mr. de Soto’s replacement. Pet. 8-9. They ask the Court for three things. *First*, they want the Court to “requir[e] the respondent Hanshaw to seat” Mr. de Soto “upon his appearance in the House Chambers for administration of his oath.” *Id.* at 10. *Second*—if the seat must be filled—they want the Court to “requir[e] respondent Hanshaw” to seek “nominations” “from the Berkeley County Democratic Executive Committee.” *Id.* *Third*, and relatedly, they want the Court to “requir[e] respondent Morrissey to choose a successor delegate from among those ... nominees.” *Id.*

Petitioners’ claims fail on multiple, independent grounds.

I. Standard of Review.

The “jurisdictional issues” raised in this original writ petition “are questions of law” subject to “de novo” review. *State ex rel. Univ. Underwriters Ins. Co. v. Wilson*, 239 W. Va. 338, 343, 801 S.E.2d 216, 221 (2017). Petitioners bear the burden of establishing the Court’s jurisdiction. *State ex rel. Healthport Techs., LLC v. Stucky*, 239 W. Va. 239, 243, 800 S.E.2d 506, 510 (2017).

Even assuming the Court’s jurisdiction, Petitioners face an uphill climb. Though “[m]andamus lies to require the discharge by a public officer of a nondiscretionary duty,” syl. pt. 3, *State ex rel. Greenbrier Cnty. Airport Auth. v. Hanna*, 151 W. Va. 479, 153 S.E.2d 284 (1967), it is “a drastic remedy to be invoked only in extraordinary situations,” Syl. pt. 2, *State ex rel. Sowards v. Cnty. Comm’n of Lincoln Cnty.*, 196 W. Va. 739, 474 S.E.2d 919 (1996). “Issuance

... is not a matter of right, but of discretion sparingly exercised.” W. VA. R. APP. P. 16(a). Hence, a petitioner’s “right to the writ” must be “clear and indisputable.” *City of Point Pleasant*, 194 W. Va. at 303, 460 S.E.2d at 438. Indeed, the “party seeking a writ of mandamus shoulders a heavy burden.” *Freeland v. Marshall*, 249 W. Va. 151, 157, 895 S.E.2d 6, 12 (2023). He or she must show (1) the lack of other “adequate means ... to obtain the desired relief”; (2) his or her “clear and indisputable right to the ... writ”; and (3) “a legal duty on the part of the respondent to do [what] ... the petitioner seeks to compel.” Syl. pt. 2, *Sowards*, 196 W. Va. 739, 474 S.E.2d 919.

Although Petitioners suggest these mandamus requirements should be “eased” here, Pet. 6, they are mistaken. To be sure, the Court has “eased” (somewhat) the requirements in cases that “preserve the right to vote or to run for political office.” Syl. pt. 3, *Sowards*, 196 W. Va. 739, 474 S.E.2d 919; *see also State ex rel. Carenbauer v. Hechler*, 208 W. Va. 584, 588, 542 S.E.2d 405, 409 (2000). But this case is not an elections case, so the looser standards should not apply. Even if they did, easing the standard is not the same thing as abandoning all restraints on the writ.

II. Petitioners failed to provide compliant pre-suit notice.

Talk of mandamus is premature if the Court has no jurisdiction. Here, the Court lacks jurisdiction because Petitioners failed to provide statutory, pre-suit notice.

The West Virginia Code requires “complaining ... parties [to] provide ... written notice” “at least 30 days” before they file “an action against a governmental agency.” W. VA. CODE § 55-17-3(a)(1). Save certain exceptions not relevant here, an “action” includes “a proceeding instituted against a governmental agency ... in the Supreme Court of Appeals.” *Id.* § 55-17-2(1). The Speaker (“public official”) and the Governor (“Constitutional officer”) are, each, a “[g]overnment agency.” *Id.* § 55-17-2(2). Failure to provide pre-suit notice is no mere peccadillo. This requirement applies “[n]otwithstanding any provision of law to the contrary,” W. VA. CODE § 55-

17-3(a)(1), and “[c]ompliance ... is a *jurisdictional pre-requisite* for filing an action,” syl. pt. 3, *Motto v. CSX Transp., Inc.*, 220 W. Va. 412, 647 S.E.2d 848 (2007) (emphasis added).*

To understand why Petitioners still have not complied with the pre-notice requirement, some context is required. Petitioners Pushkin and the Democratic Party initially filed a petition for mandamus against the Speaker and the Governor on January 14. *See* Pet. for Mandamus, *State ex rel. Pushkin v. Hanshaw*, No. 25-22 (W. Va. filed Jan. 14, 2025) (*Pushkin I*). But they didn’t provide pre-suit notice. Three days later, Speaker Hanshaw filed a notice that stayed *Pushkin I* until May 12. *See* W. VA. CODE § 4-1-17(e). Stymied, Petitioners eventually filed a new action against just the Governor. *See* Resp’ts’ App. 18 (Pet. for Mandamus, *State ex rel. Pushkin v. Morrisey*, No. 25-65 (W. Va. filed Jan. 28, 2025) (*Pushkin II*)). But once again, Petitioners sued without giving pre-suit notice. When the Governor objected to their lack of notice, *see* Resp’ts’ App. 56-57, Petitioners said no notice was necessary, *id.* 83-85. They were wrong, and the Court dismissed their petition for lack of jurisdiction. *Id.* at 92-94. “With limited exception,” the Court observed, Section 55-17-3 “requires ... notice prior to instituting an action against a governmental agency.” *Id.* at 93. Soon after the Court dismissed *Pushkin II*, Petitioners Pushkin and the Democratic Party mailed a copy of their original petition in *Pushkin I* to the Governor, the Speaker, and the Attorney General. Resp’ts’ App. 95. The March 14, 2025 letter to the Governor, the Speaker, and the Attorney General says it “ensures compliance with West Virginia Code § 55-17-3 and provides notice” that Petitioners Pushkin and the Democratic Party would “pursue [*Pushkin*

* In *Pushkin I*, Petitioners have argued that this entire notice scheme is an unconstitutional infringement on the Court’s powers. The Court has never hinted at that novel idea. This Court has not held that any statute touching on court practice or jurisdiction is unconstitutional. Rather, the Court has said that certain procedural statutes must yield when they conflict with the Court’s Rules. *See Louk v. Cormier*, 218 W. Va. 81, 94, 622 S.E.2d 788, 801 (2005). Petitioners have never identified any conflict, so *Louk* and like cases do not apply.

I] when the [legislative] stay has lapsed.” *Id.* Under the terms of the statute, this notice would “expire[]” “90 days ... after service”—that is, on June 12, 2025. W. VA. CODE § 55-17-3(e). A few months later, the stay in *Pushkin I* ended when the Legislature finished its work, and the Court issued a scheduling order in June 2025. But Respondents noted that Petitioners had still not filed *pre-suit* notice in *Pushkin I*. Instead, Respondents explained that Petitioners had tried to provide *post-suit*, which wasn’t enough to sustain jurisdiction. *See State ex rel. PrimeCare Med. of W. Va., Inc. v. Faircloth*, 242 W. Va. 335, 345, 835 S.E.2d 579, 589 (2019) (construing similar pre-suit notice requirement).

Apparently prompted by the jurisdictional arguments in *Pushkin I*, Respondents wrote to the Governor, the Speaker, and the Attorney General again in a letter dated July 14, 2025. Resp’ts’ App. 113. This letter explained that “the West Virginia Democratic Party, its Chairperson Mike Pushkin, and a[n] [unnamed] registered voter of the 91st District of the West Virginia House of Delegates” planned to “institute a petition for a writ of mandamus” premised on the same allegations as *Pushkin I* and *Pushkin II*. *Id.* But according to Section 55-17-3(e), Petitioners’ notice should have “be[en] 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.” That’s because Petitioners had previously served a Section 55-17-3(a) notice (back in March 2025) and allowed it to expire without subsequently “institut[ing]” an “action.” W. VA. CODE § 55-17-3(e). Yet Petitioners did not pay any fee to anyone. Even so, Petitioners filed this action roughly two months later.

Petitioners have therefore *still* not complied with the pre-suit notice statute, as they have not paid the required successive-notice fees. The statute is unequivocal—the fees “shall” be paid “before an action may be instituted.” W. VA. CODE § 55-17-1(e); *see also Fenton Art Glass Co.*

v. W. Va. Off. of Ins. Comm’r, 222 W. Va. 420, 431, 664 S.E.2d 761, 772 (2008) (“The word ‘shall’ is mandatory.”). Excusing Petitioners’ lack of a timely, compliant notice *with fees* “would amount to a judicial repeal of” the statute. *PrimeCare*, 242 W. Va. at 345, 835 S.E.2d at 589 (paraphrasing *Motto*, 220 W. Va. at 419, 647 S.E.2d at 855). It would also defeat the statute’s purpose. The Legislature imposed a pre-suit notice requirement because “[g]overnment agencies ... require more notice of and [more] time to respond to” the “numerous actions, suits and proceedings ... against” them that “affect the public interest.” W. VA. CODE § 55-17-1(a). And the fee requirement is an important tool to ensure these purposes aren’t thwarted—that litigants won’t just send notices *seriatim* until they get serious about filing suit.

The Court should dismiss this case for lack of jurisdiction, just as it did in *Pushkin II*—and as it should in *Pushkin I*.

III. Petitioners lack standing.

Even if the Court could overlook the lack of pre-suit notice, Petitioners have another jurisdictional problem: lack of standing to bring the claims they purport to bring.

A. Petitioners must prove their standing for each claim they make.

“[S]tanding” refers to “a party’s right to make a legal claim”—or in this case, to “seek judicial enforcement of a duty or right.” *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 94, 576 S.E.2d 807, 821 (2002) (cleaned up) (quoting BLACK’S LAW DICTIONARY 1413 (7th ed.1999)). This issue is a matter of subject matter jurisdiction, *State ex rel. Paul B. v. Hill*, 201 W. Va. 248, 256, 496 S.E.2d 198, 206 (1997), and “cannot be waived” or ignored, *Pavone v. NPML Mortg. Acquisitions, LLC*, 246 W. Va. 418, 421, 874 S.E.2d 21, 24 (2022) (quoting Franklin D. Cleckley, Robin J. Davis & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 12(b), at 21 (Supp. 2004)).

Standing requires three things: (1) “an ‘injury-in-fact,’” (2) “a causal connection between the injury and the [defendant’s] conduct,” and (3) a “likel[ihood] that the injury will be redressed through a favorable decision.” Syl. pt. 5, *Findley*, 213 W. Va. 80, 576 S.E.2d 807. Standing’s causation prong looks for a “causal connection between” the alleged injury and the “conduct forming the basis of” the suit. *Id.* That is, the alleged injury must be “fairly traceable to the challenged conduct of the defendant.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). The redressability prong, in turn, requires that the alleged injury will “likely ... be redressed by a favorable judicial decision.” *Id.* Both elements “become problematic” if a nonparty “must act in order for an injury to ... be cured.” *Doe v. Va. Dep’t of State Police*, 713 F.3d 745, 755 (4th Cir. 2013). In that case, an order could not redress the alleged injury “because it would not [be] binding upon the” absent parties. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 569 (1992).

Standing has an additional set of requirements when—as here—the party seeks mandamus relief. Here, standing also requires a “clear legal right to the relief” and a corresponding “legal duty” on the part of the specific state official “to do the thing” the plaintiff “seeks to compel.” *Smith v. W. Va. State Bd. of Educ.*, 170 W. Va. 593, 595-96, 295 S.E.2d 680, 682-83 (1982) (“The clear legal right to the relief sought is generally a question of standing” and is “entwined” with the official’s “legal duty.”). To be “non-discretionary” the duty must be “so plain” “that no element of discretion is left as to the precise mode of its performance.” Syl. pt. 5, *State ex rel. Justice v. King*, 244 W. Va. 225, 852 S.E.2d 292 (2020) (cleaned up). Critically, standing is an all-or-nothing proposition. “[I]f one element is absent, there is no standing.” *State ex rel. W. Va. Univ. Hosps.-E., Inc. v. Hammer*, 246 W. Va. 122, 132, 866 S.E.2d 187, 197 (2021).

What’s more, “standing is not dispensed in gross.” *Town of Chester, N.Y. v. Laroe Ests., Inc.*, 581 U.S. 433, 439 (2017) (quoting *Davis v. Federal Election Comm’n*, 554 U.S. 724, 734

(2008)). Rather, it “is gauged by the specific common-law, statutory or constitutional claims” laid before the court, *Int’l Primate Prot. League v. Adm’rs of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991), and “must [be] demonstrate[d] ... separately for each form of relief” the party seeks. *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000). Petitioners do not get the benefit of the doubt. The Court must “careful[ly] ... examin[e]” their claims “to ascertain whether [each] particular plaintiff is entitled to an adjudication of the particular claims asserted.” *Int’l Primate Prot. League*, 500 U.S. at 77 (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984)). So for Petitioners to have standing, they must *separately* prove their standing to seek mandamus relief against each Respondent. And it doesn’t matter if this inquiry entails some “overlap” with the merits. *Nat’l R. R. Passenger Corp. v. Nat’l Ass’n of R.R. Passengers*, 414 U.S. 453, 456 (1974).

Petitioners can’t meet this burden.

B. Petitioners lack standing for their claims against the Speaker.

First take the Speaker. As noted, Petitioners want the Court to order the Speaker to do two things: (a) to “seat” Mr. de Soto if he “appear[s] in the House Chambers for administration of his oath”; and (b) to “request” a set of “nominations” “from the Berkeley County Democratic Executive Committee.” Pet. 10.

Consider first the Speaker’s supposed duty to “request ... nominations.”

The West Virginia Code requires a “list of qualified persons to ... be submitted to the Governor within 15 days after the vacancy occurs.” *Id.* § 3-10-5(a). But that duty lies with the relevant “county executive committee,” not with the Speaker. *Id.* § 3-10-5(b). More to the point, nothing in Section 3-10-5 requires the Speaker, the Governor, or anyone else to *request* a list from the relevant executive committee. In fact, the word “request” appears nowhere in the section. Section 3-10-5 only speaks of the Governor’s duty to appoint and the committee’s duty to submit

a list—or at most “to compose and submit [a] list.” *Id.* § 3-10-5(d). Again, Petitioners lack standing for mandamus relief unless they can show some “legal duty” the Speaker “is required to perform.” *Smith*, 170 W. Va. at 596, 295 S.E.2d at 683. Petitioners haven’t shown a duty to request a list; they simply assume this duty exists. *See* Pet. 5, 8. That’s not how mandamus works. *See State ex rel. Maynard v. Justice*, 245 W. Va. 179, 186, 858 S.E.2d 229, 236 (2021) (requiring the duty to be “plainly prescribed” (cleaned up)).

Worse, even if Petitioners had shown a legal duty to request a list from someone, they still couldn’t show “an ‘injury-in-fact,’” much less “a causal connection between [their supposed] injury and the [Speaker’s] conduct.” Syl. pt. 5, *Findley*, 213 W. Va. 80, 576 S.E.2d 807. For one thing, the Berkeley County Democratic Executive Committee has already submitted a list. *See* Resp’ts’ App. 15. Petitioner Pushkin *signed* it. *Id.* For another, Petitioner Pushkin was present when the House of Delegates declared Mr. de Soto’s seat vacant. *See* Pushkin Amendment, *supra*. And if anyone were to request a list from the Berkeley County Democratic Executive Committee, it would be the “Chairperson of the West Virginia Democratic Party.” Pet. 1.

Consider also Petitioners’ request for a writ “requiring” the Speaker to “seat” Mr. de Soto if he “appear[s] in the House Chambers for administration of his oath.” Pet. 10.

Petitioners’ first problem is they have no injury. Syl. pt. 5, *Findley*, 213 W. Va. 80, 576 S.E.2d 807. As explained below, the House of Delegates rightly determined that Mr. de Soto did “not qualify to serve,” App. 2, and the House is the only body with authority to make that determination. *See* W. VA. CONST. art. VI, § 24. Petitioners can hardly claim an injury from the House’s lawful action.

Petitioners’ second problem is the strikingly low probability that an order from this Court would “redress[]” their supposed “injury.” Syl. pt. 5, *Findley*, 213 W. Va. 80, 576 S.E.2d 807.

Petitioners' injury, they say, is their "[l]oss of a Democratic seat in the House of Delegates." Pet. 4. Elsewhere, Petitioners invoke "the representational rights of ... voters." Pet. 5. Yet, there is little reason to suppose these harms would be solved by an order "to seat" Mr. de Soto because there is little reason to suppose he will ever "appear[] in the House Chambers." Pet. 10.

For one thing, Mr. de Soto is confined to his home by court order. *See* Resp'ts' App. 9. That order could remain in place for years—indeed, long after the 87th Legislature has passed from the scene. *See* W. VA. CODE § 62-1C-6 (providing that "bail ... may continue in effect pending indictment, arraignment, continuance, trial and appeal after conviction"). For another, Mr. de Soto is charged with threatening to commit *terrorist acts*. Resp'ts' App. 2-3. That sounds like the sort of "infamous crime" that renders a person "[in]eligible to a seat in the Legislature." W. VA. CONST. art. VI, § 14; *see also* syl. pt. 6, *State v. Bongalis*, 180 W. Va. 584, 586, 378 S.E.2d 449, 451 (1989) (stating that any "felony is an 'infamous crime'"). To be sure, Mr. de Soto stands innocent until he is proven guilty. But the State's case looks formidable. *See, e.g.*, Resp'ts' App. 4.

Even if Mr. de Soto manages to avoid a felony conviction, Petitioner Pushkin and others have signaled what sort of reception Mr. de Soto would receive from House Democrats. *See* McElhinny, *Delegate-elect accused, supra* (reporting Petitioner Pushkin's and Delegate Hornbuckle's December 2024 comments). Delegate Fluharty put a fine point on it: "Look, this guy needs to go"; the Delegate just wanted "to do it properly." Adams, *West Virginia House declares, supra*. With friends like these, why would Mr. de Soto ever "appear[] in the House Chambers"? Pet. 10. Thus, Petitioners' proposed relief would not afford even a "speculative" chance of fixing their alleged injury. *Lujan*, 504 U.S. at 561 (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 43 (1976)). Standing requires more. *See id.* (quoting *Simon*, 426 U.S. at 38).

Petitioners’ third problem is that the Speaker has no authority, much less a “legal duty,” “to do the thing” Petitioners “seek[] to compel.” *Smith*, 170 W. Va. at 595-96, 295 S.E.2d at 682-83. Authority to “judge” members’ “qualifications” lies with the House of Delegates, W. VA. CONST. art. VI, § 24, and the Speaker is just one member out of 100, W. VA. CODE § 1-2-2(b). Furthermore, it’s not even clear the Speaker would have a duty to vote on Mr. de Soto’s qualifications, if it ever came to that. If the vote were by “yeas and nays,” he would likely have good cause to be “excused.” H. Rule 14 (requiring “the Speaker [to] vote, unless excused). He was, after all, an alleged target of Mr. de Soto’s threats. Resp’ts’ App. 4; *see also* H. Rule 25 (allowing members to abstain from voting when they are “immediately and particularly interested therein, or the House excuses” them). If the vote were by other means, the Speaker would have no duty to vote unless it was to make or break a tie. H. Rule 14. A tie seems unlikely.

Moreover, the Court could hardly order any Delegate to vote for seating Mr. de Soto while it remains possible for him to arrive with a felony conviction, *cf.* W. VA. CONST. art. VI, § 14, much less bind any Delegate who isn’t *present* before the Court. Courts cannot “simply assume that everyone (including those who are not proper parties to an action) will honor the legal rationales that underlie their decrees,” no matter how “persuasive or even awe-inspiring” they may be. *Franklin v. Massachusetts*, 505 U.S. 788, 825 (1992) (Scalia, J., concurring). A writ of mandamus is void in the absence of a necessary party. *Cf. O’Daniels v. City of Charleston*, 200 W. Va. 711, 716, 490 S.E.2d 800, 805 (1997). At best, the Court’s decision would give absent Delegates the Court’s *opinion* about a feature of the Constitution. But courts lack jurisdiction to “advis[e]” anyone without a valid case or controversy—including a coequal branch of government. *Kanawha Cnty. Pub. Libr. Bd. v. Bd. of Educ. of Cnty. Kanawha*, 231 W. Va. 386, 403 n.22, 745 S.E.2d 424, 441 n.22 (2013). Because the Court cannot compel absent Delegates to “seat” Mr. de

Soto—and it cannot, for a host of reasons—it cannot redress Petitioners’ supposed injury. *See Lujan*, 504 U.S. at 569.

Thus, Petitioners have no standing for *any* relief they seek against the Speaker.

C. Petitioners lack standing for their claims against the Governor.

Now consider Petitioners’ claim against the Governor. As noted, Petitioners ask the Court to compel the Governor to “choose a successor delegate from among those ... nominees” submitted by the Democratic committee. Pet. 10. They have no standing on this claim, either.

The Governor has no duty to do what Petitioners want. Petitioners locate the Governor’s supposed duty to do so in West Virginia Code § 3-10-5(a) (2022). *See* Pet. 8-10. The 2022 version of Section 3-10-5(a) required the Governor to fill any Delegate vacancy “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.” But a petitioner requesting a writ of mandamus must show that he has a “clear right to relief *at the time the action was filed*.” *Veltri v. Parker*, 232 W. Va. 1, 5, 750 S.E.2d 116, 120 (2013) (emphasis added); *see also, e.g., Pratt v. Nebraska Bd. of Parole*, 252 Neb. 906, 910, 567 N.W.2d 183, 187 (1997) (“[I]n considering whether to grant a writ of mandamus, we consider whether the duty to be enforced was one which existed at the time the petition was filed.”). And by the time Petitioners filed this action, Section 3-10-5(a) had been amended. Now, the Governor selects from a list presented 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 of the previous election for that office.” W. VA. CODE § 3-10-5(a) (eff. Apr. 12, 2025). So even if Petitioners were right that Mr. de Soto was the person “holding office immediately preceding the vacancy,” the Governor would still have replaced him with a Republican because Mr. de Soto was a registered Republican “at the time of the previous election.” *Id.*

Yet even if it applied, the 2022 version of Section 3-10-5(a) still does not help Petitioners. As explained below, Mr. de Soto didn't *hold* the office of Delegate on January 8 when the House of Delegates determined that his seat was vacant. Therefore, his party membership on January 8 has no bearing on the Governor's duty to appoint a Delegate to fill the vacancy created by Mr. de Soto's failure to qualify. If anything, the Governor's duty is to do the *opposite* of what Petitioners would have him do. Lastly, Petitioners ignore the obvious contradiction in their own Petition: if they're right about the outcome on the first question presented (that is, whether a vacancy existed), then the Governor would have no obligation to act *at all*.

But Petitioners have another redressability problem: the appointment they seek to compel has already happened. Pet. 3-4. "Relief granted in a mandamus judgment is prospective only." 52 AM. JUR. 2d *Mandamus* § 396 (2025 update); *see also Blair v. Brunett*, 248 W. Va. 495, 500 n.9, 889 S.E.2d 68, 73 n.9 (2023) (indicating that a court should "identify the specific conduct that the [respondents] could be ordered to adjust prospectively" before contemplating mandamus). Because the Governor has "already discharged" his duty to appoint someone, *Freeland v. Marshall*, 249 W. Va. 151, 158 n.5, 895 S.E.2d 6, 13 n.5 (2023), any order purportedly compelling him to appoint someone else—that is, to make a second appointment for the same seat—would be "unavailing, fruitless or nugatory," *State ex rel. Massey v. Hun*, 197 W. Va. 729, 731, 478 S.E.2d 579, 581 (1996).

Because Petitioners have no "clear legal right to the relief" they seek—and because neither the Speaker nor the Governor has any corresponding "legal duty" to do what they want him to do—Petitioners have no standing to seek mandamus relief from either Respondent. The Court should dismiss the entire Petition for a lack of standing.

IV. The Court cannot “undeclare” the vacancy.

Even if the Court were inclined to reach the merits, Petitioners’ claims still would not warrant relief.

A. Only the House of Delegates can determine whether Mr. de Soto is qualified.

Petitioners claim the House of Delegates has no “authority to declare a seat vacant where the voters have elected a qualified delegate and he or she is willing to serve.” Pet. 4. Likening this case to *Powell*, 395 U.S. 486, they say the only way to deny Mr. de Soto a seat was to expel him from the House under Article VI, Section 25 of the Constitution. Pet. 6-7. Petitioners are mistaken on both points.

1. The House’s authority to decide whether Mr. de Soto was qualified includes the oath.

The Constitution vests the House of Delegates with express authority (and duty) to “be *the judge* of the ... qualifications of its ... members.” W. VA. CONST. art. VI, § 24 (emphasis added). And though Petitioners purport to offer an exhaustive list of “constitutional qualifications to serve as a Delegate,” Pet. 6-7, they omit a qualification that’s directly at issue here: an oath.

After winning the election, “taking ... the requisite oath ... is the essential ... qualification for ... office.” *Hertzog v. Fox*, 141 W. Va. 849, 857, 93 S.E.2d 239, 243 (1956). Indeed, it has been recognized that the oath is a qualification of office from the moment West Virginia was founded. *See Calwell’s Ex’r v. Prindle’s Adm’r*, 19 W. Va. 604, 642 (1882) (“[T]hose elected to fill vacancies, who should qualify by taking the oath prescribed by the convention, should constitute the [first] Legislature of the State.”) *see also, e.g., Slater v. Varney*, 136 W. Va. 406, 428, 68 S.E.2d 757, 770 (1951) (describing how former statute governing oaths made clear that “a candidate elected to an office for a regular term can not qualify for the office until he takes the oath prescribed by law”).

This requirement is clear from the Constitution. It prescribes both the oath every Delegate must “take”—really, two oaths concerning fidelity to the constitutions and abstinence from corruption, W. VA. CONST. art. VI, § 16—and how it must “be administered,” *id.* art. VI, § 16. That is, all “oaths [must] be administered *in the hall of the house* to which the member is elected” and “*before*” a Delegate-Elect “enter[s] upon [his] duties.” *Id.* (emphasis added); *accord* W. VA. CODE § 6-1-2 (“Every person elected or appointed a ... member of the House of Delegates ... shall, before entering upon the discharge of his duties, take and subscribe the oath or affirmation prescribed by, and in the manner specified in, section 16 of article VI.”). The Constitution also prescribes a penalty for failing to take the oath. It declares that “[a]ny member who ... refuse[s] to take the oath ... forfeit[s] his seat.” W. VA. CONST. art. VI, § 16.

2. This Court cannot review the House’s qualification decision.

Even Petitioners acknowledge that the House decides “whether [a] person meets the minimum constitutional qualifications.” Pet. 4. That’s all it did here.

Again, the Constitution makes the House “*the judge*” of its members’ qualifications, not “[a] judge.” W. VA. CONST. art. VI, § 24 (emphasis added). This language means the House of Delegates “is the *sole judge* of the election and qualifications of its own members.” *Luther v. McClaren*, 87 W. Va. 133, 136, 104 S.E. 294, 295 (1920) (emphasis added). Indeed, “[t]he exclusion of others—and in particular of others who are judges—could not be more evident.” *Morgan v. United States*, 801 F.2d 445, 447 (D.C. Cir. 1986).

It also means that a court cannot review the House’s exercise of this authority. In *Sutherland v. Miller*, 79 W. Va. 796, 91 S.E. 993 (1917), the Court struck down a State statute that tasked circuit judges with investigating and deciding whether federal legislators-elect had won by corruption. Syl. pt. 1, *id.*, 79 W. Va. 796, 91 S.E. 993. Though the Court applied the federal Constitution to reach this result, the Court’s rationale is instructive. It reasoned that, regardless of

any judicial findings, it was still up to Congress to “decide whether the election and qualification of the member were such that he ought to be expelled and the election declared void.” *Id.* at 809, 91 S.E. at 998 (quoting *Dinan v. Swig*, 223 Mass. 516, 519, 112 N.E. 91, 93 (1916)). “That decision, when made by the branch of the Legislature concerned, ... could not be disputed or revised by any court or authority.” *Sutherland*, 79 W. Va. at 809, 91 S.E. at 998. *Sutherland* adopted a syllabus point to that effect, holding that because “an express declaration of the federal Constitution (article 1, § 5)[] vests” the Senate with “exclusive power and authority to judge of the election, returns, and qualification of its members, ... no other power or body lawfully can interpose or in any wise attempt to control or influence the determination of these questions.” Syl. pt. 3, *id.*, 79 W. Va. 796, 91 S.E. 993; accord *Roudebush v. Hartke*, 405 U.S. 15, 19 (1972) (stating that “[w]hich candidate is entitled to be seated in the Senate is, to be sure, a nonjusticiable political question—a question that would not have been the business of this Court even before the Senate acted”); *Isaacs v. Bd. of Ballot Comm’rs*, 122 W. Va. 703, 707, 12 S.E.2d 510, 512 (1940) (Fox, J., concurring) (explaining why only the Legislature, not courts, can assess the qualifications of its members).

Other courts have reached similar conclusions. In fact, the Supreme Court of Montana went so far as to hold that “[e]ither house may even act arbitrarily and in disregard of fundamental rights.” *State v. Porter*, 178 P. 832, 833 (Mont. 1919). *Porter* concluded that a legislative house could even “oust a member whose election is beyond controversy, and seat as a member a person who is disqualified for the office.” *Id.* Even then, the court reasoned, “there is still no recourse” because the “decision is conclusive upon the courts.” *Id.* Justice Cooley of the Supreme Court of Michigan took a similar view in *People ex rel. Drake v. Mahaney*, reasoning that “[i]t [wa]s sufficient ... to say that the constitution has not conferred upon us this jurisdiction, and whether

the decision made is right or wrong, [the court] shall leave it where it has been left by the fundamental law of the state.” 13 Mich. 481, 494 (1865).

Although the principle is longstanding, this sort of holding isn’t limited to antediluvian cases. *See, e.g., Berry v. Crawford*, 990 N.E.2d 410, 421 (Ind. 2013) (“[W]here a particular function has been expressly delegated to the legislature by our Constitution without any express constitutional limitation or qualification, disputes arising in the exercise of such functions are inappropriate for judicial resolution.”); *Harrington v. Carroll*, 239 A.2d 437, 439 (Pa. 1968) (quoting 18 AM. JUR. § 288) (“A constitutional provision that each house of the legislature shall be the judge of the election and qualifications of its own members is an exclusive grant of power and constitutes each house the sole and ultimate tribunal to pass upon the qualifications of its own members, which power cannot be granted away of [sic] transferred to any other tribunal or officer.”); *Raney v. Stovall*, 361 S.W.2d 518, 521-22 (Ky. 1962) (“[T]he right of a legislative body to judge the qualifications of its members includes the right to decide finally whether or not one of them has become disqualified during his term of office, and this decision is not subject to court review.”). Indeed, as the Supreme Court of Pennsylvania put it, “[t]o say ... that ... qualifications of ... members may be determined by another tribunal is equivalent to saying that Hot may mean Cold, that Up may signify Down, and that Full can be interpreted as Empty.” *Harrington*, 239 A.2d at 441 (discussing a charter provision that made the city council “sole judge” of its members’ “qualifications” (cleaned up)).

3. State ex rel. Workman v. Carmichael *doesn’t say otherwise.*

That’s not to say that legislative decisions are unrestrained. In *State ex rel. Workman v. Carmichael*, this Court asserted “its constitutional authority to issue an extraordinary writ against the Legislature when the law requires.” Syl. pt. 3, *id.*, 241 W. Va. 105, 819 S.E.2d 251 (2018).

But *Workman* must be understood before it can be applied. *Workman* involved an original writ petition brought by a Justice to stop the Legislature's ongoing efforts to impeach her. *Workman*, 241 W. Va. at 113, 819 S.E.2d at 259. Because the Constitution vests the House of Delegates with "sole power of impeachment" and the Senate with "sole power to try impeachments," W. VA. CONST. art. IV, § 9, the Court was forced to address its jurisdiction upfront, *Workman*, 241 W. Va. at 117, 819 S.E.2d at 263. The Court found jurisdiction because the Constitution goes beyond saying who gets to "try impeachments"; it also requires Senators "to do justice according to law and evidence." W. VA. CONST. art. IV, § 9. This language, according to the Court, "imposes a mandatory duty ... to follow the law" and creates "an implicit right of an impeached official to have access to the courts." *Workman*, 241 W. Va. at 118-19, 819 S.E.2d at 264-65. The court also found an express right to redress in the Constitution's promise that "[t]he courts of this state shall be open" and that "every person ... shall have [a] remedy" for the "injury done to him." *Id.* at 119, 819 S.E.2d at 265 (quoting W. VA. CONST. art. III, § 17). The Court then found that several articles of impeachment trespassed on the Court's own jurisdiction, *see id.* at 130-40, 819 S.E.2d at 277-86, and that Justice Workman had "a liberty interest in not having her reputation destroyed ... and ... a property interest in obtaining her pension," *id.* at 142, 819 S.E.2d at 288. Ultimately, the Court prohibited the Legislature from pursuing several grounds for impeachment. *Id.* at 143, 819 S.E.2d at 289. As the Court summarized its holding, "the judiciary may intervene in an impeachment proceeding to protect constitutional rights." *Id.* at 124, 819 S.E.2d at 270. Yet *Workman* also recognized that "no one branch [of State government] may usurp the power of any other coequal branch of government," *id.* at 115, 819 S.E.2d at 261, and it expressly disavowed "jurisdiction over an appeal of a final decision by the Court of Impeachment," syl. pt. 1, *id.*, 241 W. Va. 105, 819 S.E.2d 251.

This case is not *Workman*. Most importantly, there's no express constitutional duty "to do justice according to law and evidence," W. VA. CONST. art. IV, § 9, so there's no standard against which to measure the House's judgment on qualifications. *Cf. State ex rel. Cooper v. Tennant*, 229 W. Va. 585, 606, 730 S.E.2d 368, 389 (2012) (describing how a lack of "judicially manageable standards" can render a case non-justiciable). Beyond that, there's no concern that the House has trespassed on the Court's "power to promulgate rules for ... cases and proceedings," W. VA. CONST. art. VIII, § 3, and no claim that the House has interfered with the Court's authority to police the judiciary or recall "[a] retired justice or judge," *id.* art. VIII, § 8; *see Workman*, 241 W. Va. at 118, 132-40, 819 S.E.2d at 264, 278-286. And Petitioners aren't before the Court to seek a "remedy" for some "injury done" to Mr. de Soto, W. VA. CONST. art. III, § 17, or to protect his "reputation" or "pension," *Workman*, 241 W. Va. at 142, 819 S.E.2d at 288. Mr. de Soto is not involved in this proceeding at all, so his potential liberty interests are beside the point. Nor did Petitioners file this case to make sure the House of Delegates is following its own rules. *Id.* at 143, 819 S.E.2d at 289; *see* Pet. 6-8; Pushkin Amendment, *supra*. If Petitioners had any real interest in these matters (and standing to raise them), they would have raised them in the Petition. As for their purported interest in "implement[ing] the goals and programs of the West Virginia Democratic Party," that affiliation is not alleged to rise to the level of a constitutional injury, Pet. 4—even putting aside the dubious nature of this interest when no Democrat even stood for election in the 91st District.

Altogether, the only relevant constitutional provisions before the Court are the ones that make the House of Delegates "the judge" of its members' "qualifications," W. VA. CONST. art. VI, § 24; that impose a duty on all Delegates to "take and subscribe" to their oath of office "before

they enter upon the[ir] duties,” *id.* art. VI, § 16; and that impose forfeiture on any Delegate who “refuse[s]” to do so, *id.* These provisions relate to the House’s internal business alone.

4. *This case is not Powell v. McCormack.*

Petitioners hope to draw the Court into second-guessing House Resolution 4 by likening this case to *Powell*. See Pet. 6-8. According to Petitioners, *Powell* teaches that “if a House of the Congress [or the House of Delegates] wants to deny a seat to an elected and qualified member, it can ... *only* [do so] by allowing him to take his seat and then expelling him.” Pet. 7. Petitioners err—chiefly because they assume Mr. de Soto is a “qualified member.”

In *Powell*, 395 U.S. 486, the House of Representatives refused to seat a Congressman who met all Constitutional eligibility requirements, *id.* at 489, including presenting himself to take the oath of office, *id.* at 490; see U.S. CONST. art. VI, cl. 3 (requiring “Senators and Representatives ... [to] be bound by Oath or Affirmation, to support this Constitution”). The Congressman, it seems, had committed financial improprieties in the 89th Congress, so the 90th Congress barred him from taking the oath of office. *Powell*, 395 U.S. at 489-90. Congress later voted to exclude him and declare his seat “vacant.” *Id.* at 493. Unlike Mr. de Soto here, the Congressman responded by personally suing several House members and employees in federal court to vindicate his claims for his seat and his salary. *Id.* at 494-500.

Because the House of Representatives—like the House of Delegates—has express authority to judge its members’ qualifications, U.S. CONST. art. I, § 5, cl. 1, the U.S. Supreme Court examined this power closely. The question, according to the Court, was whether the Constitution gave the House of Representatives (a) an “unreviewable power to set qualifications for membership and to judge whether prospective members meet those qualifications” or merely (b) a “power to judge ... whether elected members possess the three standing qualifications set forth in the Constitution.” *Powell*, 395 U.S. at 520. The Court concluded the House had no “power to

exclude any member-elect who meets the Constitution’s requirements for membership.” *Id.* at 547. To the contrary, the power to judge qualifications is “at most a ‘textually demonstrable commitment’ to Congress to judge only the qualifications expressly set forth in the Constitution,” not “a discretionary power to deny membership by a majority vote.” *Id.* at 548.

Powell’s holding remains good law, *see Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 481 (2022), but it does nothing for Petitioners. That’s because, unlike Congressman Powell, Mr. de Soto “was [not] asked to step aside while the oath was administered to the other members-elect.” *Powell*, 395 U.S. at 490. He wasn’t *there*. He couldn’t be there because his own (alleged) criminal conduct, combined with his own agreement with the Magistrate Court, kept him hundreds of miles from the Capitol. *See Resp’ts’ App.* 4-6, 8-9, 13. What’s more, he isn’t likely to be sworn in anytime soon. *See App.* 2. More to the point, unlike the U.S. House of Representatives (which imposed something akin to a new morality qualification in *Powell*), the House of Delegates didn’t invent a qualification when it invoked Mr. de Soto’s duty to “take the Oath of Office in the hall of the [H]ouse” of Delegates. *App.* 2. Nor did it invent the forfeiture provision in Article VI, Section 16 of the Constitution. *App.* 2. The House applied pre-existing constitutional qualifications to Delegate-Elect de Soto and rightly found he wasn’t qualified to serve. *App.* 2.

Rather than try to shoehorn this case into the U.S. Supreme Court’s decision in *Powell*, this Court should follow its own decisions. It should hold that “under [the] express declaration” contained in Article VI, Section 24 of the West Virginia Constitution, the House of Delegates has “exclusive power and authority to judge ... the ... qualification[s] of its members.” *Syl.* pt. 3, *Sutherland*, 79 W. Va. 796, 91 S.E. 993. “[N]o other power or body,” including this Court, may “lawfully ... interpose or in any wise attempt to control or influence the determination of [such] questions,” *id.*—that is, except perhaps “when the law requires” the Court “issue an extraordinary

writ,” syl. pt. 3, *Workman*, 241 W. Va. 105, 819 S.E.2d 251, to either “protect constitutional rights,” *id.* at 124, 819 S.E.2d at 270, or prevent “one branch” of State government from “usurp[ing] the power of ... [a] coequal branch of government,” *id.* at 115, 819 S.E.2d at 261. Because neither exception applies, the Court has no authority to second-guess the House’s qualification decision or otherwise grant Petitioners’ request for declaratory relief.

B. Mr. de Soto is not qualified to serve because he refused to take his oath.

If this Court somehow finds authority to review the House’s qualification decision, the Court should find that the House made the right call.

To begin, the Court must be clear about why the House determined Mr. de Soto’s seat is vacant. It wasn’t, as Petitioners suggest, “because of [de Soto’s] misconduct allegedly committed ... in December[] 2024,” Pet. 6—far from it. True, House Resolution 4 begins by condemning Mr. de Soto’s (alleged) criminal conduct, but the real point becomes clear when the Resolution describes his arrest and the bond conditions and personal safety orders that constrained his movements. App. 1. The point becomes even clearer when the Resolution recites de Soto’s constitutional duty to take the oath of office in the House Chambers, his failure to do so, and the fact that “[f]ailure to take the Oath of Office as required results in a forfeiture of the seat.” App. 2. If that’s not clear enough, the Resolution expressly “declares vacant the seat heretofore designated for Delegate-Elect Joseph A. DeSoto [sic] ... in that he failed to take the Oath of Office.” *Id.*

No one claims Delegate-Elect de Soto has ever taken his oath, *see* Pet. 2-3; App. 2, and a person can “refuse” an action without expressly disclaiming their intent to do it. This Court has held, for example, that a “refusal” to submit to a chemical analysis test by a suspected drunk driver includes a “failure to respond.” *In re Matherly*, 177 W. Va. 507, 509, 354 S.E.2d 603, 605 (1987). Even an “extreme state of inebriation” does not render the driver’s choice something less

than a refusal when the driver “bec[a]me intoxicated by *voluntarily* consuming an alcoholic beverage.” *Id.*; *see also, e.g., Smith v. Godby*, 154 W. Va. 190, 199, 174 S.E.2d 165, 171 (1970) (explaining how “[t]he word ‘refuse[.]’” encompasses “an intentional or deliberate failure or unwillingness to discharge [a] duty”). Examples can be found elsewhere, too. The U.S. Supreme Court has held, for example, that a party “‘refuses to obey’ simply by failing to comply with an order” in the discovery context. *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 208 (1958). In another context, the Ninth Circuit has held that “a person over the age of 18 ... [who] knowingly fails to register [for the draft] ... has in a very real sense refused to register.” *Kaohelauii v. United States*, 389 F.2d 495, 498 (9th Cir. 1968). “Refused admittance” allowing a forced entrance to execute a warrant “is not restricted to an affirmative refusal” but also “encompasses circumstances that constitute ... reasonably inferred refusal.” *United States v. Bonner*, 874 F.2d 822, 824 (D.C. Cir. 1989). Understandings of the word when our Constitution was adopted were the same. *See* 4 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 734 (1866) (defining “refuse” as “[t]o deny what is solicited or required”); THE CABINET DICTIONARY OF THE ENGLISH LANGUAGE 610 (1871) (defining “refuse” as “[t]o decline to accept something offered; not to comply”); NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 831 (1867) (defining “refuse” as “to decline to accept; not to comply”); 2 JOHN BOUVIER, A LAW DICTIONARY ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA 436 (1856) (defining “refusal” as “[t]he act of declining to receive or to do something” and stating that “[i]n some cases, a neglect to perform a duty which the party is required by law or his agreement to do, will amount to a refusal”).

Mr. de Soto’s conduct fits any sensible definition of “refuse.” He (allegedly) put his terroristic threats in multiple emails over multiple days. Resp’ts’ App. 4. That’s not something

one does inadvertently or without a sense of how it might affect his liberty. Indeed, one might infer that a person who (allegedly) makes terroristic threats *intends* to get himself confined. *Cf.* Syl. pt. 2, *State v. Wright*, 162 W. Va. 332, 249 S.E.2d 519 (1978) (approving an “instruction that ‘the jury may infer that a person intends to do that which he does, or which is the natural or necessary consequence of his act’”). He later (allegedly) doubled down. Resp’ts’ App. 4. And it’s not just that he threatened to kill *someone*; Mr. de Soto (allegedly) threatened to kill the Speaker and other members (or members-elect) of the House of Delegates—the people he was elected to serve with. *Id.* Then, when his (alleged) threats predictably led to his arrest, *id.* at 1, he voluntarily signed a written bail agreement that made it impossible for him to take his oath of office, *id.* at 5-6. When he couldn’t make bail, he affirmatively sought to be confined to his home—hundreds of miles from the Capitol—and paid \$15,000 for the privilege. *See id.* at 8-11. Again, these agreements made it impossible for him to take his oath of office. And even though he knew by law when and where he would be expected to swear in, he was in no hurry to have the preliminary hearing that could have terminated his criminal case. *See id.* at 12-13.

Ultimately, the meanings courts assign to “refuse” turn on practical considerations. *See, e.g., Matherly*, 177 W. Va. at 509, 354 S.E.2d at 605 (refusing to adopt an understanding of “refusal” that “would open a loophole in the statute so enormous that even the most intoxicated motorist could drive a truck through it”); *Rogers*, 357 U.S. at 208 (emphasizing the need for “flexibility ... in framing an order appropriate to a particular situation”). Practical considerations warrant finding a refusal here. Delegates serve for just two years, W. VA. CONST. art. VI, § 3, and legislative sessions normally last for just 60 days, *id.* art. VI, § 22. The House can’t afford to wait months or years to find out whether a Delegate-Elect will be able to take the oath of office that qualifies him to “enter upon [his] duties.” *Id.* art. VI, § 16. As reflected by the tight appointment

timeframes found in West Virginia Code § 3-10-5(a), a seat should not sit empty for too long; Mr. de Soto's refusal and the subsequent appointment should thus put this matter swiftly to rest. *See Duffy v. Edson*, 84 N.W. 264, 269 (Neb. 1900) ("It is probably true that if the office in question ... had been declared vacant for want of an official oath, or if another had properly qualified, under appointment or otherwise, and had been inducted into such office, an elected or appointed officer, having failed to qualify, could not thereafter take the proper official oath and claim the office.").

If the Court has jurisdiction to review the House's decision, it should find that the House correctly found Delegate-Elect de Soto's seat vacant due to his refusal to be sworn in. App. 2.

C. Mandamus relief cannot depend on an event that may never happen.

Additionally, Petitioners' "right to Mandamus ... must exist *when the proceeding is instituted*." *State ex rel. Booth v. Bd. of Ballot Comm'rs of Mingo Cnty.*, 156 W. Va. 657, 676, 196 S.E.2d 299, 312 (1972) (emphasis added). It's not something to "be established in the proceeding itself," *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 542, 170 S.E.2d 367, 369 (1969), and not by speculating about what *might* occur sometime. To the contrary, the writ of mandamus exists only to "enforce" obvious—and obviously extant—rights, not to figure out whether they exist at all. *Booth*, 156 W. Va. at 675, 196 S.E.2d at 311.

Like the other obstacles to relief in this case, this requirement is insurmountable. When Petitioners filed this action, Mr. de Soto was on home confinement, hundreds of miles from the Capitol. *See Resp'ts' App.* 9-11. He had not presented himself to take the oath or expressed any intent to do so. Petitioners have no idea when Mr. de Soto may leave his home. And by failing to join him as a petitioner, Petitioners have deprived this Court of any opportunity to even hear directly from Mr. de Soto about his wishes (or lack thereof) to ever reengage with the Legislature in any way. *But see* Pet. 1 (assuming that Mr. de Soto is "ready[]to[]serve"). Thus, even if the

Speaker or the Governor had a duty (or capacity) to do the things Petitioners want them to do (and they don't), Petitioners had no right to mandamus relief when they filed the Petition.

V. The Court cannot order the Governor to appoint someone from a Democratic list.

As an alternative to their vacancy argument, Petitioners request “[a] writ of mandamus ... requiring the” Governor “to choose a successor delegate from” a list of three candidates submitted by the Berkeley County Democratic Executive Committee. Pet. 10. Petitioners’ second request for relief fares no better than their first.

West Virginia Code § 3-10-5(a) prescribes the procedure for filling “[a]ny vacancy in the office of state senator or member of the House of Delegates.” Petitioners rely on the 2022 version of the statute, which required the Governor to appoint a Delegate “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.*” *Id.* § 3-10-5(a) (emphasis added). If no list was “submitted to the Governor within 15 days after the vacancy occurs,” the Governor was required to “appoint ... 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). So under that version, Mr. de Soto’s party membership at the time of election would not have mattered. *See also Biafore*, 236 W. Va. at 534, 782 S.E.2d at 229.

Even if one assumed that Mr. de Soto’s affiliation at any time matters (it doesn’t—more on that in a moment), Petitioners are looking to the wrong version of the statute; thus, they are considering Mr. de Soto’s party affiliation at the wrong time. Remember that mandamus depends on a clear legal duty at the time the petition was filed. *Veltri*, 232 W. Va. at 5, 750 S.E.2d at 120. And as of the time this petition was filed (in September 2025), the statute had been amended. Now, it says the Governor must select from a list presented by a committee “of the same political party

with which the person holding the office immediately preceding the vacancy was affiliated at the time of the previous election for that office.” W. VA. CODE § 3-10-5(a). If, as Petitioners argue, Mr. de Soto was the person “holding the office immediately preceding the vacancy,” then his relevant party affiliation—his affiliation “at the time of the previous election for that office”—was Republican. *Id.* It doesn’t matter that Mr. de Soto switched his affiliation *after* the election.

But Mr. de Soto’s party membership at *any time* wouldn’t be relevant (no matter which version of the statute applies)—because he wasn’t in office on January 8. As Petitioners point out, Mr. de Soto’s term of office nominally began on December 1. *See* W. VA. CONST. art. IV, § 7; W. VA. CODE § 6-5-1. Yet that doesn’t mean Mr. de Soto held the office of Delegate on December 1 or at any time since then. “[B]efore [Delegates] enter upon their duties, [they must] take and subscribe” to an oath prescribed by the Constitution. W. VA. CONST. art. VI, § 16; *accord* W. VA. CODE § 6-1-2. This oath is an “absolute requirement ... before [a] person can *hold or possess* a public office.” *Hertzog*, 141 W. Va. at 856, 93 S.E.2d at 243 (emphasis added). Because Mr. de Soto has never taken his oath of office, he has never *held* the office of Delegate.

Here again, West Virginia law is consistent with the law elsewhere. In Texas, “[u]ntil one qualifies or enters upon the duties of an office, he does not ‘hold’ the office.” *Purcell v. Carrillo*, 349 S.W.2d 263, 263 (Tex. Civ. App. 1961). In Alabama, “[h]olding office is no more nor less than filling office, and ... an office is filled only when the commission is received, the official bond executed, and *the oath of office taken.*” *State ex rel. Bland v. St. John*, 13 So. 2d 161, 166 (Ala. 1943) (emphasis added). In New Mexico, “[t]o ‘hold’ the office, one must take the oath of office after having been elected or appointed.” *Chavez v. Yontz*, 720 P.2d 300, 301 (N.M. 1986). And the list goes on. *See, e.g., People ex rel. Melony v. Whitman*, 10 Cal. 38, 44 (1858) (“The person appointed to the office of Surveyor-General is required to give a bond and take an oath

before he can possess the office. These acts constitute conditions precedent to the *holding* of the office.”); *Simmons v. Tucker*, 281 A.2d 902, 904 (Pa. 1971) (“It is our view that one does not hold office as a federal judge until the oath of office is administered.”).

So the person whose political affiliation matters is the person who held the Delegate seat for the 91st Delegate District on January 8: Delegate Forsht. Under the Constitution, elected officers “continue to discharge the duties of their respective offices until their successors are elected, or appointed and qualified.” W. VA. CONST. art. IV, § 6; *accord* W. VA. CODE § 6-5-2 (“The term of every officer shall continue (unless the office be vacated by death, resignation, removal from office, or otherwise) until his successor is elected or appointed, and shall have qualified.”); *see also Carr v. Wilson*, 32 W. Va. 419, 431, 9 S.E. 31, 36 (1889) (describing W. VA. CONST. art. IV, § 6 as a “clause[] declaring that all officers shall continue to discharge their duties until their successors are elected and qualified”). He continued to hold office until the House—the “competent authority”—declared his seat vacant. *State ex rel. Wayne v. Sims*, 141 W. Va. 302, 308, 90 S.E.2d 288, 292 (1955).

Because Delegate Forsht is a Republican, *see* Secretary of State: 2024 Republican Primary, *supra*, the Governor’s duty was to appoint a Delegate “from [the] list of three legally qualified persons submitted by the [Republican] executive committee” for the 91st Delegate District, or, failing the timely submission of such a list, another qualified Republican from the 91st District. W. VA. CODE § 3-10-5(a). The Governor could *not* select from the list of nominees provided by the Berkeley County Democratic Executive Committee. Pet. 10.

In arguing otherwise, Petitioners conflate the beginning of a Delegate’s *term* with the moment a Delegate begins to *hold office*. Pet. 9. Recall that the statute refers to the latter, not the former. “[T]he term of office as fixed by law is entirely different from the period of time such

office is held by the incumbent thereof.” *People ex rel. Holdom v. Sweitzer*, 117 N.E. 625, 628 (Ill. 1917). “As applied to [public] office[,] the word ‘term’ speaks with reference to the office itself, and not to the tenure of the incumbent.” *City of Owensboro v. Hazel*, 17 S.W.2d 1031, 1034 (Ky. 1929). Although delegates might start their terms on December 1, each delegate must also be declared the winner of his or her election—a process that happens on the “first day of the next session of the Legislature” after the Secretary of State receives the certificates of election—before holding office. W. VA. CODE § 3-6-11. And as should be clear by now, the delegate must also take his or her oath. W. VA. CONST. art. VI, § 16; *accord* W. VA. CODE § 6-1-2. Only then can the delegate “hold office,” regardless of when the delegate’s formal fixed term might have begun. *State ex rel. Dingess v. Scaggs*, 156 W. Va. 588, 591, 195 S.E.2d 724, 725 (1973) (describing how a person’s “term of office” must begin *and* certain qualifications must be met before “a person may ... discharge the duties of an office”); *see also, e.g., McKye v. State Election Bd. of State of Okla.*, 890 P.2d 954, 957 (Okla. 1995) (explaining how an elected official “is inducted into office when that official’s term begins” only when he or she also “possesses a valid certificate of election, takes and files the required oath, and fulfills any bonding requirement”); *State ex rel. Jones v. Farrar*, 66 N.E.2d 531, 535 (Ohio 1946) (describing how “[t]he object of [certain Ohio] statutes [placing time limits on taking of oath and other items] is to have an officer-elect prepared to take office when his term begins”). Petitioners effectively mean to rewrite Section 3-10-5(a) to say that the Governor must look to the political party of the person *elected* to the office “immediately preceding the vacancy” *at the time that they vacated or resigned*. Rewriting statutes is something this Court refuses to do. *See McVey v. Pritt*, 218 W. Va. 537, 540, 625 S.E.2d 299, 302 (2005).

And despite what Petitioners say, *Biafore* does not control this case. In *Biafore*, the Senator in question had been in office for nearly three years before he “changed parties and became a

Republican.” 236 W. Va. at 531, 782 S.E.2d at 226. Again, Mr. de Soto has *never* held the office of Delegate, and because he has never held that office, his party membership—whether before or after his election—has no bearing on the Governor’s duty to fill a vacancy. Thus, Petitioners’ request for mandamus relief fails because Petitioners have no “right to the relief” they “seek” and because the Governor has no “legal duty ... to do the thing” Petitioners want him to do. Syl. pt. 2, *Myers v. Barte*, 167 W. Va. 194, 279 S.E.2d 406 (1981). His duty cuts the other way.

VI. Petitioners’ claims are moot.

Another problem lurks for Petitioners: mootness. Much has happened since Petitioners filed their first petition. Most importantly, Delegate Masters has been seated in the House. He’s taken his oath of office. Resp’ts’ App. 17. He’s received his committee assignments. W. Va. Leg., *Ian T. Masters (R – Berkeley, 091)*, WVLEGISLATURE.GOV, <https://tinyurl.com/s2v96zk3> (last visited Oct. 8, 2025). He’s voted. These developments are significant.

“[W]hen the House chose to administer the oath to and seat Mr. [Masters], it acted within its power under Article [VI], section [24] of the ... Constitution,” *In re Protest of Whittacre*, 743 S.E.2d 68, 69 (N.C. Ct. App. 2013), to “be the judge of” his “qualifications,” W. VA. CONST. art. VI, § 24. Now, “[b]ecause [Delegate Masters] has been seated, it is not possible for a ... court to opine on the propriety of that decision or award relief.” *McIntyre v. Fallahay*, 766 F.2d 1078, 1082 (7th Cir. 1985). Indeed, “the conclusive effect of the ... decision to seat [Delegate Masters] compels [the Court] to assume” that he “was in fact *entitled* to be seated.” *Morgan*, 801 F.2d at 451 (emphasis added). So regardless of whether the Governor made his appointment from the right list (and he did), that the House of Delegates *seated* the Governor’s choice ends all discussion and moots Petitioners’ case. *See Morgan*, 801 F.2d at 451 (“[O]nce the outcome of the contest has been conclusively adjudged by the House there is no meaningful relief [the court] can provide, and

the dispute is therefore moot.”); *Whittacre*, 743 S.E.2d at 69–70 (“[P]etitioner’s appeal” was “moot” because the “decision to seat Mr. Butterfield [was] not subject to judicial review.”).

Further, the legislative session has come and gone. Hundreds of bills have been passed and signed into law. The Court can’t roll back the clock on these things—and even if it could, the Court shouldn’t do so for these Petitioners. Though the pre-suit notice statute expressly advised Petitioners they could skip pre-suit notice *if* they sought “injunctive relief” (and *if* delay would have caused “irreparable harm”), W. VA. CODE § 55-17-3-(a)(1), Petitioners still brought this case (thrice) as a petition for mandamus relief. Predictably, suing the Speaker (in *Pushkin I*) led to a months’-long stay. *See* W. VA. CODE § 4-1-17(e). The consequences were equally predictable when Petitioners filed both *Pushkin I*, *Pushkin II*, and this case without providing appropriate pre-suit notice. *See Motto*, 220 W. Va. at 414, 647 S.E.2d at 850. To top it all off, though Petitioners said they wanted “expedited hearing and resolution of this matter,” Pet. 10, they have yet to file the “motion for expedited relief” that the rules plainly state must be filed “separate and distinct from [other] filings,” W. VA. R. APP. P. 29(c). In short, Petitioners have slept on their rights and have no claim on the Court’s discretion. *See* Syl. pt. 9, *State v. Buchanan*, 24 W. Va. 362, 363 (1884) (noting that “*mandamus* is a discretionary writ”). All the more so given that the party purportedly entitled to the seat—Mr. de Soto—is not even here. *See State ex rel. Sandy v. Johnson*, 212 W. Va. 343, 348, 571 S.E.2d 333, 338 (2002) (explaining that mandamus can properly lie where “*the relator* has a clear legal right to the office claimed by him” (emphasis added)).

VII. Petitioners’ claims are barred by laches.

Relatedly, the doctrine of laches bars this petition. “The writ of mandamus will be refused when the petitioner has unreasonably delayed his application for such writ and by reason of the delay the rights of the defendant or innocent third parties will be prejudiced by the issuance of the writ.” Syl. pt. 1, *Colobro v. Mercer Cnty. Bd. of Educ.*, 196 W. Va. 90, 468 S.E.2d 343 (1996).

So even if Petitioners could establish all the other prerequisites for relief, “the burden of showing sufficient excuse for what appears from the record to be an unreasonable delay in the assertion of a clear legal right through the remedy of mandamus [still] rests upon the person asserting such right.” Syl. pt. 2, *State ex rel. Waller Chemicals, Inc. v. McNutt*, 152 W. Va. 186, 160 S.E.2d 170 (1968). So in *Waller Chemicals*, for instance, an unsuccessful bidder for a state contract was barred by laches when he tried to bring an action voiding the contract about three-and-a-half months after the contract became effective. *Id.* at 193, 160 S.E.2d at 192; *see also, e.g.*, Syl., *Cunningham v. City of Huntington*, 97 W. Va. 672, 125 S.E. 810 (1924) (holding that mandamus action was barred by laches where, among other things, the individual seeking reinstatement to office waited nine months to file).

Petitioners here have delayed to the public’s detriment. This petition was filed in September 2025, even though all the relevant events happened in December 2024 and early January 2025. Since that time, the Legislature passed—and the Governor signed—hundreds of bills. But if Petitioners succeed here, then substantial doubt could arise about the vote count on each of those bills. At the very least, it could create substantial confusion in the House. What’s more, under Petitioners’ apparent theory, the voters of the 91st District have effectively been without representation for months, including through an entire legislative session. But the “right of representation in the Legislature” is “a right inestimable to them.” THE DECLARATION OF INDEPENDENCE (1776); *contrast with Hertzog*, 141 W. Va. at 865, 93 S.E.2d at 247 (finding no laches in bringing mandamus action where it was not shown that any party was prejudiced by delay). The Court should avoid such a result by denying relief so late in the day.

CONCLUSION

For all these reasons, this Court should deny Petitioners’ request for a writ of mandamus and any other relief requested in the Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael R. Williams, do hereby certify that the foregoing **Response to Petition for Mandamus** is being served on counsel of record by File & Serve Xpress this the 10th day of October 2025.

/s/ Michael R. Williams
Michael R. Williams