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C. CASEY FORBES, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 25-587 – *State of West Virginia ex rel. Mike Pushkin, Stephen Willingham, and the West Virginia Democratic Party v. 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*

Justice Wooton, concurring:

As a member of West Virginia's court of last resort, one of my foundational duties is to do justice. I concur in the majority's decision in this case that the petitioners were not the right people with "standing" to plead for Joseph A. de Soto to keep his elected seat in the House of Delegates. I believe that any other decision disrupting the term of Mr. de Soto's replacement, who is now a sitting member of the West Virginia House of Delegates, would itself constitute an injustice. Nonetheless, as a member of this Court, I have a disturbing unease about the majority's decision, a profound feeling that in the path this Court has followed to get to this point in the history of this case we have failed in our duty to ensure justice was done for the people of this State.

This case began (allegedly) with criminal misconduct by a newly elected member of the House of Delegates. Mr. de Soto was elected in November 2024, and by December fellow delegates reported to law enforcement that he was making terroristic

threats.[1] Mr. de Soto ran and was elected as a Republican, but before his arrest he changed his party affiliation to the Democratic Party. Nobody disputes this.

In December 2024 and January 2025 state law was clear: if a vacancy occurred in the seat of a member of the House of Delegates, then the Governor was required to appoint an individual from the same political party which the missing member "was affiliated at the time the vacancy occurred." W. Va. § 3-10-5(a) (2022).[2]

Mr. de Soto was arrested in December 2024 and, as the majority opinion relates, the terms of his bail agreement precluded him from going within 1,000 feet of any State legislator and placed him on home confinement in the Eastern Panhandle, far from the legislative chambers in Charleston. Those terms ensured that Mr. de Soto could not take his seat or, more importantly, take the oath of office in Charleston in January 2025.

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[1] It is my understanding that Mr. de Soto ran for election claiming he was a doctor and had been a medic for the U.S. Army Rangers. He is apparently now under indictment for making threats of terroristic acts against fellow legislators; engaging in the unlicensed practice of medicine; misrepresenting or falsely indicating to others that he was authorized to practice medicine; misrepresenting his past military status or military awards; and filing grossly inaccurate campaign financial statements. These charges have not been resolved, and I take no position on the validity of any of these allegations.

[2] W. Va. Code § 3-10-5(a) (2022) provided, in part:

> Any vacancy in the office of . . . member of the House of Delegates shall be filled by appointment by the Governor, from a list of three legally qualified persons submitted by the party executive committee of the same political party with which the person holding the office immediately preceding the vacancy was affiliated at the time the vacancy occurred.

Irrespective of Mr. de Soto's individual acts or misconduct, the January 2025 actions of the Legislature and Governor gave rise to this case by putting political machinations over the law and the Constitution. On January 8, 2025, the House of Delegates convened and, by a majority vote, passed a resolution which declared a vacancy in Mr. de Soto's seat. The petitioners in this case make a compelling argument that the House resolution is invalid. A Legislative house cannot simply declare "empty" the seat of a duly elected, qualified citizen who is willing to serve, and do so by a majority vote; the Legislature must follow the procedures for expulsion in Article VI, § 25 of the West Virginia Constitution, which requires the vote of two-thirds of the members of the House or Senate. The House of Delegates ignored the Constitution and adopted a majority-vote resolution.

Compounding the situation, the House and the Governor then completely ignored West Virginia Code § 3-10-5(a), the State law enacted in 2022. The law unequivocally provided that any House vacancy was required to be filled by a Democrat, because Mr. de Soto was a Democrat at the time the House declared the seat empty. The House resolution, for all intents and purposes, told the Governor and the local Republican Executive Committee to ignore the law and work together to appoint a Republican nominee to Mr. de Soto's House seat. Within weeks, by the end of January 2025, a Republican (Delegate Ian Masters) had been appointed by the Governor and taken the oath for the House seat.

As soon as it became apparent that the Governor intended to break the law and appoint a Republican, the petitioners filed suit. In an unsuccessful attempt to kill the suit, effective April 12, 2025, the Legislature amended West Virginia Code § 3-10-5(a) to read that any vacancy in a legislative seat must be filled by a person from "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." Still, the petitioners sought relief under the 2022 version of the statute.

Nonetheless, I join the majority opinion because the petition in this case has a significant threshold "standing" problem. The petition asserts that the House of Delegates wrongfully expelled Mr. de Soto by a majority vote rather than a 2/3 expulsion vote, and it asserts that Mr. de Soto essentially assumed his elected office in December 2024 irrespective of whether he formally took an oath in Charleston. As the majority opinion makes clear, the party who could properly assert those arguments is Mr. de Soto – and he is *not* a party to this litigation. The petitioners in this case certainly have good intentions in seeking to force the Governor and the House to follow the law and operate within the restraints of the Constitution. Unfortunately, they lack legal standing to seek to restore Mr. de Soto to his elected office. On this narrow point, I concur with the majority. This result is the technically correct legal result; however, this result does not achieve justice for the People.

I am bothered that the majority opinion's factual discussion is laced with ire for the petitioners and their counsel, repeatedly suggesting the outcome of this case is

somehow driven by whether the Governor or Speaker or other State actor got 30 days of notice before the petitioners filed suit. It is tempting to attribute perceived procedural errors on the part of the petitioners and their counsel as creating a dilemma that impelled the Court's decision. It did not. But in hindsight, the petitioners would have been more successful if they had drafted their petition to seek an injunction, from either this Court or a circuit court, because state law specifically exempts "actions seeking injunctive relief" from pre-suit notice. *See* W. Va. Code § 55-17-3(a)(1) (2022).

But, more importantly, in a 100-member House of Delegates, had the Governor complied with the law, the Republican super-majority in the House would have been 90 to 10. Instead, by engaging in gamesmanship with the Legislature, the Republican majority was increased by one delegate. My concern is that those elected representatives vested with the responsibility to establish procedures for filling vacancies in the Legislature, and the representative charged with appointing new members to the Legislature in case of a vacancy, sacrificed the law and the Constitution to achieve a meaningless numerical gain. Their actions leave the public with the impression that our elected leaders do not care what the law is. What the Legislature and Governor did in this case leaves the public with a sense our leaders will change the law on a whim for no other purpose than for partisan advantage. What the Legislature and Governor did has escaped a fair review by this Court. And, in the end, the People of this State have been deliberately deprived of justice.