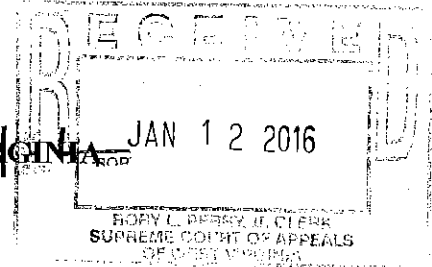


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 16-0013



STATE OF WEST VIRGINIA ex rel. BELINDA BIAFORE, in her capacity as Chair of the West Virginia State Democratic Executive Committee, and STEPHEN DAVIS, LINDA KLOPP, DAVID THOMPSON, LINDA PHILLIPS, STEPHEN EVANS, and PATRICIA BLEVINS, each individually, and in their capacity as members of the West Virginia Democratic Executive Committee for the Ninth Senatorial District,

Petitioners,

v.

EARL RAY TOMBLIN, in his capacity as Governor of the State of West Virginia, and BEVERLY R. LUND, JUSTIN M. ARVON, SU "WAOMI" CLINE, TONY PAYNTER, JOHN DOE, and JANE DOE, in their capacity as the members of the West Virginia Republican Executive Committee for the Ninth Senatorial District,

Respondents.

**BRIEF OF THE *AMICUS CURIAE*
WEST VIRGINIA CHAMBER OF COMMERCE
IN OPPOSITION TO PETITIONERS' EMERGENCY PETITION FOR A WRIT OF
MANDAMUS**

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. STATEMENT OF INTEREST.....	1
III. STATEMENT OF THE CASE.....	3
IV. ARGUMENT.....	4
A. The Language of W. Va. Code § 3-10-5 is Clear and Requires the Governor to Appoint a Candidate Submitted by the Republican Party's 9 th Senate District Executive Committee	4, 5
B. The Legislature's Intent was to Replace an Outgoing State Senator from a List of Candidates from the Party With Which the Outgoing Senator Was Affiliate.....	7
V. CONCLUSION.....	11

TABLE OF AUTHORITIES

West Virginia Cases

<i>Fleet v. Webber Springs Owners Ass'n</i> , 772 S.E.2d 369 (W. Va. 2015).....	8
<i>Reed v. Riner</i> , 778 S.E.2d 568, 571 (W. Va. 2015).....	7
<i>Shell v. Bechtold</i> , 175 W. Va. 792, 796, 338 S.E.2d 393, 395-396 (1985)	8
<i>Smith v. State Workmen's Comp. Comm'r</i> , 159 W. Va. 108, 115, 219 S.E.2d 361, 365 (1975).....	8
<i>Stanley v. Stanley</i> , 233 W. Va. 505, 510, 759 S.E.2d 452, 457 (2014).....	6
<i>State v. Epperly</i> , 135 W. Va. 877, 884, 65 S.E.2d 488, 492 (1951).....	5
<i>State v. White</i> , 188 W. Va. 534, 537, 425 S.E.2d 210, 213 (W. Va. 1992)	8
<i>State ex rel. Safe-Guard Prods. Int'l, LLC v. Thompson</i> , 772 S.E.2d 603, 606 (W. Va. 2015);	5

OTHER AUTHORITIES

W. Va. Code § 3-10-5	5, 6, 7, 8
W. Va. R. App. Proc. 30(e)(5)	1

I. INTRODUCTION

The Court's decision in this case has significant implications for all West Virginians and, indeed, for the moorings of the West Virginia state government. The West Virginia Chamber of Commerce ("Chamber") files this brief as *amicus curiae*¹ in opposition to the Petitioners' Emergency Petition for a Writ of Mandamus to stress the importance of a stable and uniform legal environment – one where laws are given their plain meaning and their execution is not affected by partisan politics – on businesses both presently located in West Virginia and those considering the Mountain State for future operations.

Here, the Petitioners ask this Court to interpret W. Va. Code § 3-10-5 in a manner that is inconsistent with the plain language of the statute and the manifest intent of the Legislature. Adoption of the tortured interpretation advocated by the Petitioners would call into question the extent to which other West Virginia statutes will, in the future, be interpreted and applied in a predictable and apolitical manner. Should that occur – should it appear that our laws are not being applied in accordance with accepted standards of statutory construction – businesses will question whether they can consider our state as a stable place for their business operations, now and in the future.

II. STATEMENT OF INTEREST

The Chamber is, above all else, a nonpartisan advocacy group that seeks to facilitate the continued operation and expansion of business in the State of West Virginia. The Chamber's

¹Pursuant to W. Va. R. App. Proc. 30(e)(5), *amicus curiae* West Virginia Chamber of Commerce states that no counsel for any party authored this brief in whole or in part and that no party or entity other than the *Amicus Curiae*, its members, or counsel made any monetary contribution to the preparation or submission of this brief. In addition, the Chamber notes that, pursuant to W. Va. R. App. Proc. 30(b), it provided notice to all parties of its intent to file an *amicus curiae* brief on January 12, 2016. The Chamber notes that, while this notice is not within the five day notice period mandated by Rule 30(b), it files this brief pursuant to the Court's January 8, 2015 Scheduling Order ("Interested parties who wish to file an *amicus curiae* brief may do so on or before noon on Tuesday January 12, 2016.").

member businesses come from every county in the state and employ more than half of West Virginia's workforce. Collectively, Chamber members constitute a major portion of the engine that drives the West Virginia economy. In facilitating the continued operation and expansion of these businesses, and while pursuing new businesses to relocate to our State, the Chamber consistently advocates for public policies that improve West Virginia's economic environment. Hence, the Chamber's ultimate objective is to build a business climate that promotes development sufficient to sustain employment in West Virginia, while simultaneously allowing certainty for employers. In furtherance of these efforts, the Chamber recognizes that a legal system that is predictable in its outcomes and functions within the mainstream of American jurisprudence is critical. Without it, businesses in West Virginia are deprived of the stable judicial climate upon which other businesses operating in our sister states can and do rely. The absence of such a judicial climate serves to discourage the growth of existing businesses within, and the relocation of new businesses into, West Virginia.

The Chamber's interest in the present case is in no way driven by political considerations. Throughout its history, the Chamber has aimed to be apolitical and, consistent with that, has a long history of working with both political parties to improve the West Virginia business climate. The Chamber's interest has always been to foster a stable legal environment in which our state laws and regulations are applied in a uniform and predictable manner.

This interest necessarily extends to the preservation of the fundamental concept – written into the very founding documents of our state – that there are three distinct branches of government, each with its own exclusive role. The Legislature, tasked by our State Constitution with creating the laws of the state; the Executive, weighted with the responsibility to execute

those laws in accordance with the Legislature's grant of authority; and the Judiciary where the laws, and in this case the Executive's enforcement of those laws, is reviewed and interpreted.

Succinctly, the Chamber has authored an *amicus curie* brief in this case because *words matter* and there are no more important words to the administration of our state government than those that make up the State Constitution and the laws of our state. Where one branch of our state government, equal yet intentionally distinct from its legislative counterpart, is permitted to ignore those words, here the plain language of W. Va. Code § 3-10-5, our citizens and business are left with an unpredictable legal climate in which to operate their businesses and participate in the West Virginia economy. This case presents the Court with an opportunity to reaffirm that justice is blind to politics and the laws of the State of West Virginia will be enforced with uniformity and stability.

III. RELEVANT BACKGROUND

In November of 2012, Daniel Hall was elected to represent the 9th Senate District seat in the West Virginia State Senate. *App. to Pet'r Emergency Pet.*, p. 1. At the time of his election, Senator Hall was "affiliated" with the Democratic Party of West Virginia. *Id.* Following the general election in 2014, Senator Hall changed his party affiliation by registering with the Republican Party of West Virginia. *Id.* Senator Hall then served the remainder of his time in office as a registered Republican, rising to the rank of Majority Whip in the West Virginia Senate. *Id.* On January 4, 2016, Senator Hall submitted his resignation from the Senate and created the vacancy that is the subject of this dispute. *Id.* At that time, he was indisputably "affiliated" with the Republican Party.

W. Va. Code § 3-10-5 requires the Governor to appoint Senator Hall's replacement for the 9th Senate District seat from a list of qualified candidates submitted by the party with which

Senator Hall was affiliated "*immediately preceding the vacancy*" that his resignation created. It does so because the plain language of the statute commands that result. No further discussion should be required.

In order to avoid the logical conclusion that the plain language of the statute dictates, however, Petitioners here attempt to introduce ambiguity where, in fact, none exists. It does so because, absent such ambiguity, its cause is lost. After positing the existence of this alleged ambiguity, it then argues, based on its view of the legislative intent behind the subject statute, that the language employed by the Legislature does not mean what it plainly says, but rather, just the opposite. The replacement for a retiring Senator in West Virginia, according to the Petitioner, is not to be chosen from the political party with whom he or she was affiliated "*immediately preceding*" resignation, but rather from the political party with whom he or she was affiliated "*at the time elected.*"

While perhaps clever, the Petitioners' reading of the statute in question conforms to no accepted theory of statutory construction ever articulated by this or any other judicial tribunal of which the Chamber is aware. Moreover, even if a resort to the principles of legislative intent were appropriate in construing the statute in question, those principles, as discussed below, would lead to the same, inevitable conclusion. The Legislature, through its adoption of § 3-10-5 meant what it said and said what it meant.

IV. ARGUMENT

- A. The Language of W. Va. Code § 3-10-5 is Clear and Requires the Governor to Appoint a Candidate Submitted by the Republican Party's 9th Senate District Executive Committee.**

Because the relevant language of the statute is plain and unambiguous, this Court should apply the statute as written and instruct the Governor to appoint a replacement from the Republican Party's 9th Senate District Executive Committee.

W. Va. Code § 3-10-5 provides in pertinent part:

(a) Any **vacancy** in the office of **State Senator** or member of the House of Delegates **shall be filled** by appointment by the Governor, from **a list** of three legally qualified persons submitted by the party executive committee **of the party with which the person** holding the office **immediately preceding the vacancy was affiliated**. The list of qualified persons to fill the vacancy shall be submitted to the Governor within fifteen days after the vacancy occurs and the Governor shall duly make his or her appointment to fill the vacancy from the list of legally qualified persons within five days after the list is received. If the list is not submitted to the Governor within the fifteen-day period, the Governor shall appoint within five days thereafter a legally qualified person of the same political party as the person vacating the office.

...

(c) In the case of a State Senator, the list shall be submitted by the party executive committee of the state senatorial district in which the vacating senator resided at the time of his or her election or appointment. The appointment to fill a vacancy in the State Senate is for the unexpired term, unless section one of this article requires a subsequent election to fill the remainder of the term, which shall follow the procedure set forth in section one of this article.

W. Va. Code § 3-10-5(emphasis added).

Here, no analysis of the Legislature's intent is required. The language of W. Va. Code § 3-10-5, specifically subsections (a) and (c), is plain and unambiguous. Senator Hall's replacement is to be chosen by the Governor from a list submitted by the executive committee of the party with which Senator Hall was "affiliated" at the time of his resignation.

This Court has long recognized that, where the language of a statute is clear, the Court is obligated not to construe or interpret the statute in question, but rather to enforce it in accordance with its plain meaning. *State ex rel. Safe-Guard Prods. Int'l, LLC v. Thompson*, 772 S.E.2d 603, 606 (W. Va. 2015); *State v. Epperly*, 135 W. Va. 877, 884, 65 S.E.2d 488, 492 (1951). In

addition, this Court has consistently held that “[a] statute is open to construction *only* where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning.” *Stanley v. Stanley*, 233 W. Va. 505, 510, 759 S.E.2d 452, 457 (2014)(internal citations omitted)(emphasis added). No such ambiguity exists here.

The language of W. Va. Code § 3-10-5 is not “susceptible of two or more constructions.” Instead, W. Va. Code § 3-10-5 mandates² that the Governor fill a vacancy in the office of State Senator from a list submitted by “the party with which the person holding the office *immediately preceding the vacancy* was affiliated.” Senator Hall, the individual who held the 9th Senate District seat, was affiliated with the Republican Party “immediately preceding the vacancy” and had been since November 2014.³ While Senator Hall’s 2014 decision to switch party affiliations from the Democratic Party to the Republican Party undoubtedly left many frustrated, his party switch did nothing to confuse the plain language of the statute. In short, former Senator Hall was “affiliated” with the Republican Party when he resigned from the State Senate and, as such, the Governor was required to replace him from a list submitted by the Republican Party.

In order to create the requisite ambiguity necessary to its case, the Petitioners argue that the language contained in subsection (c), “in which the vacating senator resided at the time of his or her election or appointment[.]” somehow renders the clear language of subsection (a) confusing and ambiguous.

Here, the Petitioners clearly desire to insert themselves in place of the Legislature. And yet, that desire notwithstanding, subsection (c) simply does not affect the question of the party from which the list designated in subsection (a) of replacements for a vacant Senate seat are to be

² “Any vacancy in the office of State Senator or member of the House of Delegates *shall be* filled by appointment by the Governor...” W. Va. Code § 3-10-5 (emphasis added).

³ Senator Hall became a registered Republican on November 5, 2014. See *App. to Pet’r Emergency Pet.*, p. 1.

chosen. Instead, subsection (c) simply instructs as to which geographic entity *within* the party mentioned in subsection (a) is to submit the list of qualified candidates for replacement. In other words, subsection (a) provides that the list is to come from the party with which the outgoing Senator was affiliated – here the Republican Party – while subsection (c) designates the subdivision of the Republican Party that is to provide that list – the party executive committee of the district in which the vacating Senator resided at the time of election or appointment. In this case, that is the Republican Executive Committee for the 9th Senate District.

As such, the plain language of the statute provides that the Governor must appoint a replacement for the vacant 9th Senate District seat, formerly held by Senator Hall, from a list of qualified candidates submitted by the Republican Party's 9th Senate District Executive Committee.⁴

B. The Legislature's Intent was to Replace an Outgoing State Senator from a List of Candidates from the Party With Which the Outgoing Senator Was Affiliated.

In the alternative, even if this Court finds that the language of W. Va. Code § 3-10-5(a) and (c), taken together, create some ambiguity that requires the Legislature's intent be considered, when read as a whole, W. Va. Code § 3-10-5 is nevertheless clear that the Legislature intended that Senator Hall's replacement come from a list submitted by the Republican Party's 9th Senate District Executive Committee.

This Court has long recognized and recently reaffirmed that the primary intent in construing a statute is to “ascertain and give effect to the intent of the Legislature.” *Reed v. Riner*, 778 S.E.2d 568, 571 (W. Va. 2015). Continuing, this Court has held that, “[s]tatutes

⁴ On January 5, 2016 Attorney General Patrick Morrisey issued an Opinion and found that the language of W. Va. Code § 3-10-5 is not ambiguous and requires the Governor to appoint a replacement from the party in which the outgoing Senator was affiliated at the time of the vacancy. While Attorney General Morrisey's Opinion is not binding on this Court, it provides a helpful overview of similar laws in other states and a thorough analysis of the relevant West Virginia Code sections.

which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments." *Fleet v. Webber Springs Owners Ass'n*, 772 S.E.2d 369 (W. Va. 2015); *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 115, 219 S.E.2d 361, 365 (1975). In addition, this Court has stated that:

A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.

State v. White, 188 W. Va. 534, 537, 425 S.E.2d 210, 213 (W. Va. 1992); *Shell v. Bechtold*, 175 W. Va. 792, 796, 338 S.E.2d 393, 395-396 (1985).

Here, if the Court determines that subsections (a) and (c) are somehow ambiguous, it should look to the entirety of W. Va. Code § 3-10-5, including subsection (b), in order to determine the legislative intent. W. Va. Code §§ 3-10-5(b) and 5(c) provide:

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

(c) In the case of a State Senator, the list shall be submitted by the party executive committee of the state senatorial district in which the vacating senator resided at the time of his or her election or appointment. The appointment to fill a vacancy in the State Senate is for the unexpired term, unless section one of this article requires a subsequent election to fill the remainder of the term, which shall follow the procedure set forth in section one of this article.

W. Va. Code §§ 3-10-5(b), 5(c)(emphasis added).

Here, both subsections, which fall after subsection (a) in order of appearance, refer to "the list." Neither subsections (b) or (c), however, provide any definition of, or reference to, any other list to which this common language could refer, an omission that cannot be ignored.

There is no reference to an alternative list in subsections (b) and (c) because the list referenced is the *same list* identified in subsection (a) of the same section. Importantly, subsection (a) *does* provide parameters for “the list” (i.e., that the list of candidates be provided by the executive committee of the party which the office holder “immediately preceding the vacancy was affiliated” and that the list contain three names). In other words, subsections (b) and (c), when read together,⁵ do not create new “lists”, nor do they modify the list identified in subsection (a), except to clarify the geographic location of the executive committee that will submit the replacement candidates to the Governor.

The language of the section, when taken as a whole, indicates that the Legislature intended for subsections (b) and (c) to work in concert with, as opposed to modify, the provisions of subsection (a). As such, even if the Court finds that subsections (a) and (c) are ambiguous, when W. Va. Code § 3-10-5 is read as a whole, it is clear that the Legislature intended for legislative replacements to come from the party with which the outgoing officeholder was affiliated.

Petitioners argue, however, that this reading somehow is at odds with the will of the electorate at the time Senator Hall was elected, that this could not have been the intent of the Legislature, and that it is the will of the electorate that the Legislature must have considered paramount in devising the method by which vacancies in the Legislature would be filled. In advancing this argument, Petitioners posit that, since Senator Hall was elected as a Democrat in 2012, the electorate necessarily voted him into office because of his party affiliation, and not because of his political views and philosophy. Stated somewhat differently, the electorate voted

⁵ The Chamber notes that, in the cases cited in support of this proposition, *Webber, et seq.*, the Court was required to analyze related portions of the Code found in separate articles and sections of the West Virginia Code. Here, the Court’s task is much easier in that, should a finding of legislative intent be deemed necessary, the Court may simply look within the confines of the same code section.

for the party and not for the man. As such, in order to give effect to the “will” of the electorate, Petitioners argue that Senator Hall’s replacement must be a Democrat.

And yet, it can be argued just as easily, that the intent of Senator Hall’s constituents at the time they voted him into office in 2012 was to elect someone espousing his particular political philosophy and not necessarily that of any larger political party – that they voted for the man and not the party. Moreover, when Senator Hall chose to switch parties, he did so because his new party rather than his old party more closely espoused not only his own political philosophy but that of his constituents. If that be the case, then, in order to give effect to the will of the electorate, Petitioners’ argument would dictate that Senator Hall’s replacement be a Republican rather than a Democrat.

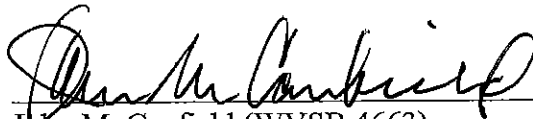
Unfortunately, the only way to truly know what the “will of the electorate” might be in such circumstances would be to hold a special election to fill every legislative vacancy. The Legislature, having elected not to do that, was left to establish an alternative means for filling such vacancies. The Legislature elected to adopt a clear and objective procedure that required that the party with which the person vacating his or her legislative office was affiliated “immediately preceding” the creation of that vacancy provide the Governor a list of replacements for the office in question. From that list, a replacement would then be chosen. If that replacement did not reflect the political philosophy of their constituency, he or she could be voted out at the next election.

The Legislature could certainly have said that the list from which a replacement was to be selected come from the party with whom the individual vacating office was affiliated at the time he or she was last elected. In this circumstance, Petitioner clearly wishes it had, but wishing does not make it so.

V. CONCLUSION

A blind, partisan-free application of the plain language of the law is necessary to create and maintain a stable, predictable legal environment that businesses such as members of the West Virginia Chamber of Commerce can rely on to conduct and grow their businesses and, in turn, West Virginia's economy. For these reasons, the West Virginia Chamber of Commerce urges the Court to require the Governor to apply the plain language of W. Va. Code § 3-10-5 and fill the 9th Senate District vacancy with one of the candidates submitted by the Republican Party's 9th Senate District Executive Committee.

AMICUS CURIAE WEST VIRGINIA CHAMBER OF COMMERCE



John M. Canfield (WVSB 4663)
Vice President & Counsel
West Virginia Chamber of Commerce
1624 Kanawha Boulevard East
Charleston WV 25311
Telephone: 304-342-1115
Email: jcanfield@wvchamber.com

and

Parween Sultany Mascari (WVSB 9437)
West Virginia Chamber of Commerce
1624 Kanawha Boulevard East
Charleston WV 25311
Telephone: 304-342-1115
Email: pmascari@wvchamber.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 16-0013

STATE OF WEST VIRGINIA ex rel. BELINDA BIAFORE, in her capacity as Chair of the West Virginia State Democratic Executive Committee, and STEPHEN DAVIS, LINDA KLOPP, DAVID THOMPSON, LINDA PHILLIPS, STEPHEN EVANS, and PATRICIA BLEVINS, each individually, and in their capacity as members of the West Virginia Democratic Executive Committee for the Ninth Senatorial District,

Petitioners,

v.

EARL RAY TOMBLIN, in his capacity as Governor of the State of West Virginia, and BEVERLY R. LUND, JUSTIN M. ARVON, SUE "WAOMI" CLINE, TONY PAYNTER, JOHN DOE, and JANE DOE, in their capacity as the members of the West Virginia Republican Executive Committee for the Ninth Senatorial District,

Respondents.

CERTIFICATE OF SERVICE

I, John , hereby certify that on this 12th day of January, 2016, a true and accurate copy of the foregoing **Brief of the *Amicus Curiae* West Virginia Chamber of Commerce in Opposition to Petitioner's Emergency Petition for a Writ of Mandamus** was sent as indicated below, to all counsel, addressed as follows:

VIA HAND-DELIVERY

The Honorable Earl Ray Tomblin
State of West Virginia
Office of the Governor
State Capitol
1900 Kanawha Blvd., East
Charleston, WV 25305

VIA U.S. MAIL

Anthony J. Majestro
Powell & Majestro, PLLC
405 Capitol Street, Suite P1200
Charleston, WV 25301
Counsel for Petitioners

VIA U.S. MAIL

WV Republican Executive Committee
P.O. Box 2711
Charleston, WV 25301

VIA U.S. MAIL

Beverly R. Lund
136 Wade Road
Beckley, WV 25801-8876

VIA U.S. MAIL

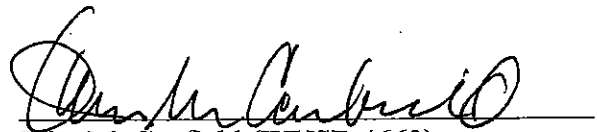
Naomi "Sue" Cline
P.O. Box 46
Brenton, WV 24818-0046

VIA U.S. MAIL

Justin M. Arvon
101 Triangle Lane
Beckley, WV 25801-7005

VIA U.S. MAIL

Tony Paynter
HC 68 Box 931
Hanover, WV 24839-9702



John M. Canfield (WVSB 4663)