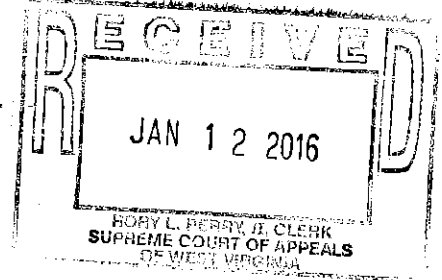


**IN THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA**

**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 KLOOP,  
DAVID THOMPSON, LINDA PHILLIPS, STEPHEN EVANS,  
and PATRICIA BLEVINS, each individually, and in their capacity  
as the 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.**

**RESPONSE BRIEF FOR INTERVENOR STATE OF WEST VIRGINIA**

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## TABLE OF CONTENTS

QUESTION PRESENTED .....	1
INTRODUCTION .....	1
STATEMENT OF THE CASE.....	2
SUMMARY OF ARGUMENT .....	4
STATEMENT REGARDING ORAL ARGUMENT.....	5
ARGUMENT .....	5
I.    Section 5 Unambiguously Requires The Governor To Appoint An Individual With The Same Party Affiliation Of The Vacating Senator At The Time Of The Vacancy. ....	6
A.    Section 5 Can Only Reasonably Be Understood To Refer To A Vacating Senator's Party Affiliation At The Time Of The Vacancy. ....	6
B.    Petitioners' Textual Arguments Only Confirm That Section 5 Is Unambiguous. ....	13
C.    The Absurd Results Doctrine Does Not Justify Departing From The Plain And Only Reasonable Reading Of Section 5.....	17
II.  Even If The Statute Were Ambiguous, Section 5 Should Be Read To Refer To A Vacating Senator's Party Affiliation At The Time Of The Vacancy.....	20
A.    The Purpose Of Section 5 Is To Vindicate The Will Of The Voters Who Elected An Individual To Act As Their Agent And Not Merely A Political Party. ....	20
B.    There Is No Merit To Petitioners' Constitutional Avoidance Argument .....	24
CONCLUSION.....	25

## TABLE OF AUTHORITIES

### Cases

<i>Appalachian Power Co. v. State Tax Dep't of W. Va.</i> , 195 W.Va. 573, 466 S.E.2d 424 (1995).....	13
<i>Banker v. Banker</i> , 196 W. Va. 535, 474 S.E.2d 465 (1996).....	12
<i>Bd. of Trustees of Firemen's Pension &amp; Relief Fund of City of Fairmont v. City of Fairmont</i> , 215 W. Va. 366, 599 S.E.2d 789 (2004).....	7, 14
<i>Clark v. Martinez</i> , 543 U.S. 371 (2005).....	24
<i>Fruehauf Corp. v. Huntington Moving &amp; Storage Co.</i> , 159 W. Va. 14, 217 S.E.2d 907 (1975).....	8
<i>In re Estate of Lewis</i> , 217 W. Va. 48, 614 S.E.2d 695 (2005).....	8
<i>Jessee v. Aycoth</i> , 202 W. Va. 215, 503 S.E.2d 528 (1998).....	7, 8
<i>Keene Corp. v. United States</i> , 508 U.S. 200 (1993).....	12
<i>Lawson v. Cnty. Comm'n of Mercer Cnty.</i> , 199 W. Va. 77, 483 S.E.2d 77 (1996).....	7
<i>Mace v. Mylan Pharm., Inc.</i> , 227 W. Va. 666, 714 S.E.2d 223 (2011).....	20
<i>Moore v. Hope Nat. Gas Co.</i> , 76 W. Va. 649, 86 S.E. 564 (1915).....	10, 11, 15
<i>Newhart v. Pennybacker</i> , 120 W. Va. 774, 200 S.E. 350 (1938).....	18
<i>Perilli v. Bd. of Educ. Monongalia Cnty.</i> , 182 W. Va. 261, 387 S.E.2d 315 (1989).....	24
<i>Phillips v. Larry's Drive-In Pharmacy, Inc.</i> , 220 W. Va. 484, 647 S.E.2d 920 (2007).....	12
<i>Richards v. Board of County Commissioners of Sweetwater County</i> , 6 P.3d 1251 (Wyo. 2000).....	13, 14, 22, 23
<i>Sizemore v. State Farm Gen. Ins. Co.</i> , 202 W. Va. 591, 505 S.E.2d 654 (1998).....	7
<i>Slack v. Jacob</i> , 8 W.Va. 612 (1875) .....	24
<i>State ex rel. Corp. of Charles Town v. Sanders</i> , 224 W. Va. 630, 687 S.E.2d 568 (2009).....	4, 13
<i>State ex rel. Hall v. Schlaegel</i> , 202 W. Va. 93, 502 S.E.2d 190 (1998).....	7
<i>State ex rel. Kucera v. The City of Wheeling</i> , 153 W. Va. 538, 170 S.E.2d 367 (1969).....	6
<i>State ex rel. McLaughlin v. Morris</i> , 128 W.Va. 456, 37 S.E.2d 85 (1946).....	18

<i>State ex rel. Pub. Serv. Comm'n of W. Va. v. Lackawanna Transp. Co.,</i> 230 W. Va. 144, 736 S.E.2d 741 (2012).....	6
<i>State ex rel. Riffle v. Ranson,</i> 195 W. Va. 121, 464 S.E.2d 763 (1995).....	12
<i>State v. Chapman,</i> No. 13-0111, 2013 WL 5676630 (W. Va. Oct. 18, 2013) .....	8, 9
<i>State v. Gen. Daniel Morgan Post No. 548, Veterans of Foreign Wars,</i> 144 W. Va. 137, 107 S.E.2d 353 (1959).....	21
<i>State v. Harden,</i> 62 W. Va. 313, 58 S.E. 715 (1907).....	7
<i>State v. Schramel,</i> 581 N.W.2d 400 (Minn. App. 1998).....	18
<i>T. Weston, Inc. v. Mineral Cnty.,</i> 219 W. Va. 564, 638 S.E.2d 167 (2006).....	7, 15
<i>Taylor-Hurley v. Mingo Cnty. Bd. of Educ.,</i> 209 W. Va. 780, 551 S.E.2d 702 (2001).....	18, 19
<i>W. Va. Human Rights Comm'n v. Garretson,</i> 196 W. Va. 118, 468 S.E.2d 733 (1996).....	9
<i>White v. Wyeth,</i> 227 W.Va. 131, 705 S.E.2d 828 (2010).....	20
<i>Wilson v. Sebelius,</i> 72 P.3d 553 (Kan. 2003).....	13, 14, 23

#### Statutes and Constitutions

Ind. Code § 3-13-5 .....	12
Kan. Stat. Ann. § 25-3902 .....	14
Md. Const. art. III, § 13 .....	12
N.J. Const. art. IV, § 4 .....	12
W. Va. Code § 3-5-23 .....	21
W. Va. Code § 3-10-5 .....	passim
W. Va. Code § 5-3-1 .....	2, 3
Wyo. Stat. Ann. § 18-3-524 (1999) .....	14

#### Rules

W. Va. R. App. P. 20 .....	5
W. Va. R. App. P. 30 .....	2

#### Other Authorities

132 A.L.R. 574.....	29
2016 WL 97256 (W. Va. A.G. Jan. 5, 2016) .....	2

## QUESTION PRESENTED

Whether, when a legislative vacancy occurs, the plain language of West Virginia Code § 3-10-5 requires the Governor to select a replacement from a list prepared by an executive committee of the party with which the vacating member was affiliated at the time of vacancy?

## INTRODUCTION

This case involves the straightforward application of an unambiguous statute—an exercise this Court has dispassionately performed countless times. The subject of this particular dispute is West Virginia Code § 3-10-5 (hereinafter “Section 5”), the section of code written by the Legislature, which is constitutionally endowed with the authority to judge the qualifications of its members, to control how vacancies in its membership are filled. For any vacancy, the Legislature has designed a simple remedy: the Governor must select an individual affiliated with the party of the person who created the vacancy. As the lack of precedent illustrates, Section 5 has largely worked as designed.

The specific question in this case is how to fill a vacancy created by an individual who was a member of different party at the time of election than at the time of vacancy. Relying primarily on *out-of-state* cases interpreting differently-worded statutes *from other States*, Petitioners claim that Section 5 is ambiguous. On this thin reed, they urge this Court to read into Section 5 their policy belief that voters consider predominantly the party affiliations of the candidates at the time of election, not the actual individuals running for office. As such, Petitioners contend that Section 5 should be construed to require the appointment of an individual affiliated with the party of the vacating individual at the time of election. Petitioners’ view of what represents the will of the voters is well out-of-step with reality, but this Court need

not grapple with that question to decide this case. Contrary to Petitioners' assertion, the statutory text is quite clear, and is thus both the beginning and end of this matter.

Section 5 manifests only one meaning with reasonable certainty as to the issue at hand: the Governor must select an individual with the same party affiliation of the vacating senator *at the time of vacancy*. That is the conclusion of a legal opinion by the Attorney General rendered on January 5, 2016, at the request of the President of Senate pursuant to West Virginia Code § 5-3-1. *See* 2016 WL 97256 (W. Va. A.G. Jan. 5, 2016). For the reasons stated there and discussed further below, the Attorney General now intervenes on behalf of the State of West Virginia ("State") to ask that the Petition be denied.<sup>1</sup>

#### STATEMENT OF THE CASE

By the fall of 2014, Daniel J. Hall had been a member of both the House of Delegates and the State Senate, as well as a member of both the Democratic and Republican parties. In 2006, Hall was affiliated with the Republican Party when he ran unsuccessfully for a seat in the House of Delegates. Hall then switched his affiliation to the Democratic Party and ran successfully for the same office in 2008. He was reelected in 2010. Still a Democrat in 2012, Hall ran and won the race for the Ninth Senatorial District—which includes McDowell, Raleigh, and Wyoming counties—in the same election in which the same voters overwhelmingly supported the Republican candidate, Mitt Romney, for President. In both his service in the House of Delegates and first two years in the State Senate, Hall was a member of the majority party in those chambers.

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<sup>1</sup> If the State's motion to intervene is not granted, the State respectfully requests that this Court treat this submission as an amicus brief. *See* W. Va. R. App. P. 30(a) ("The State of West Virginia . . . may file an amicus curiae brief without the consent of parties or leave of the Court.").

In 2014, the composition of the Legislature shifted dramatically. Starkly illustrating this shift was the result of the election for the other State Senate seat in Hall's senatorial district. Republican challenger and now-Senator Jeff Mullins won that seat over two-term incumbent Democratic Senator Mike Green by nearly 14 points. The election left the House of Delegates with Republican members holding a 64-36 majority, and the State Senate with a 17-17 deadlock.

As a result, following that election but before the 82nd Legislature was seated, Hall changed his party affiliation back to Republican—an act that ensured he would continue to represent the people of the Ninth Senatorial District in the majority caucus. As Hall explained at the time of his switch: "I'm still going to be representing those people, even the ones who oppose me. . . . *This was a discussion made for the best interest of Raleigh, Wyoming, and McDowell counties.*" Staff Reports, *Update: WV Senator Daniel Hall speaks about party switch*, The State Journal (Nov. 5, 2014) (emphasis added).<sup>2</sup>

After serving in the State Senate majority as a Republican for nearly a year—including in the number three leadership post as Majority Whip—Hall resigned effective January 3, 2016. In advance of Hall's resignation, the President of the State Senate requested a written opinion from the Attorney General pursuant to West Virginia Code § 5-3-1, asking "which political party is responsible for submitting a list of potential replacements to the Governor to fill a vacancy created by the resignation of a State Senator who was elected to office as a member of one political party but was affiliated with another political party at the time of his or her resignation," and citing Section 5. On January 5, 2016, the Attorney General responded, concluding that Section 5 "can only be reasonably understood to refer to a vacating senator's party affiliation *at*

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<sup>2</sup> This source is available here: <http://www.statejournal.com/story/27295418/west-virginia-republicans-now-hold-a-majority-in-state-senate>.

*the time of the vacancy*,” and thus ““should be applied as written.”” 2016 WL 97256, at \*4 (W. Va. A.G. Jan. 5, 2016) (quoting *State ex rel. Corp. of Charles Town v. Sanders*, 224 W. Va. 630, 633, 687 S.E.2d 568, 571 (2009)) (emphasis added).

On January 8, 2016, before any party submitted a list of potential replacements to the Governor, the Chair of the West Virginia State Democratic Party, Belinda Biafore, and the members of the West Virginia Democratic Executive Committee for the Ninth Senatorial District filed an emergency petition for a writ of mandamus against Governor Tomblin and the members of the West Virginia Republican Executive Committee for the Ninth Senatorial District. The Petition asks this Court to direct the Governor to fill the current vacancy in the Senate with an individual from the party with which Hall was affiliated at the time of his election to the Senate in 2012.

On January 11, 2016, the Governor filed his response, asserting that he will appoint an individual affiliated with the Democratic Party unless directed otherwise by this Court. The Governor undertook no statutory analysis, citing only “sound public policy” as support for his decision. Governor’s Br. 5-6.

### **SUMMARY OF ARGUMENT**

The Petition can and should be denied for the sole reason that the statutory text of Section 5 can only be reasonably understood to refer to a vacating senator’s party affiliation *at the time of the vacancy*. Subsection 5(a) directs that “[a]ny vacancy in the office of State Senator . . . shall be filled by appointment by the Governor, from a list . . . submitted by the party executive committee of the party with which the person holding the office immediately preceding the vacancy was affiliated.” Read together with several other provisions of Section 5, there is no



question that the list referenced in Section 5(a) must be submitted by the political party with which the previous senator was “affiliated” at the time of the vacancy.

Petitioners’ brief arguments addressing the text only confirm the State’s reading of Section 5. Particularly telling is Petitioners’ heavy reliance on two out-of-state cases discussing differently-worded statutes from other States, revealing a clear lack of faith in their ability to show any ambiguity in the West Virginia law actually at issue. And in the two-plus pages that Petitioners do devote to addressing the text of Section 5, they utterly fail to show that Section 5 is susceptible of two *reasonable* constructions.

However, even if this Court were to find Section 5 ambiguous, it should reject the Petition in favor of the State’s reading of Section 5, which advances the statutory purpose of vindicating the voters’ will. Contrary to Petitioners’ contention, voters do not vote simply for parties but for individuals who act as their agents. The State’s “time of vacancy” interpretation vindicates that will of the voters by preserving their elected individuals’ choice of party affiliation at the time of the vacancy.

#### **STATEMENT REGARDING ORAL ARGUMENT**

Oral argument is unnecessary because this case presents a straightforward application of unambiguous statutory text. If this Court desires oral argument, Rule 20 argument would be appropriate. *See* W. Va. R. App. P. 20. In the event oral argument is ordered, the State respectfully requests an opportunity to participate.

#### **ARGUMENT**

Petitioners do not satisfy the requirements for a writ of mandamus. “A writ of mandamus will not issue unless three elements coexist-(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner

seeks to compel; and (3) the absence of another adequate remedy.” Syl. Pt. 1, *State ex rel. Pub. Serv. Comm’n of W. Va. v. Lackawanna Transp. Co.*, 230 W. Va. 144, 736 S.E.2d 741, 741 (2012) (quoting Syl. Pt. 2, *State ex rel. Kucera v. The City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969)). As explained below, Petitioners do not have a clear legal right to the relief sought, which is alone sufficient for this Court to deny the writ.<sup>3</sup>

**I. Section 5 Unambiguously Requires The Governor To Appoint An Individual With The Same Party Affiliation Of The Vacating Senator At The Time of The Vacancy.**

**A. Section 5 Can Only Reasonably Be Understood To Refer To A Vacating Senator’s Party Affiliation At The Time Of The Vacancy.**

Part of an article in Chapter 3 of the West Virginia Code that is devoted to filling vacancies in various elected offices throughout the State, Section 5 speaks to “Vacancies in State Legislature.” In full, the provision reads:

(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.

(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

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<sup>3</sup> The State does not concede that this matter is ripe for decision, but this Court need not decide that question to deny the Petition.

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 (emphases added). No cases of this Court have interpreted this statute. And although several previous Attorney General Opinions mention it, *see* 2013 WL 1287948 (W. Va. A.G. Jan. 13, 2013); 63 W. Va. Op. Att’y Gen. No. 19, 1989 WL 505721 (Nov. 6, 1989); 53 W. Va. Op. Att’y Gen. 93, 1968 WL 94121 (Sept. 12, 1968), only one addresses the question presented here, *see* 2016 WL 97256 (W. Va. A.G. Jan. 5, 2016).

As in any case of statutory meaning, the first task is to “determine whether the language at issue is ambiguous.” *Bd. of Trustees of Firemen’s Pension & Relief Fund of City of Fairmont v. City of Fairmont*, 215 W. Va. 366, 370, 599 S.E.2d 789, 793 (2004); *see also State ex rel. Hall v. Schlaegel*, 202 W. Va. 93, 96, 502 S.E.2d 190, 193 (1998). Critically, a statute is only ambiguous where a statutory provision “is susceptible of two *reasonable* constructions.” *Firemen’s Pension & Relief Fund*, 215 W. Va. at 370, 599 S.E.2d at 793 (emphasis added); *see also Lawson v. Cnty. Comm’n of Mercer Cnty.*, 199 W. Va. 77, 81, 483 S.E.2d 77, 81 (1996) (finding ambiguity where a “statute can be read by reasonable persons to have different meanings”); *Sizemore v. State Farm Gen. Ins. Co.*, 202 W. Va. 591, 596, 505 S.E.2d 654, 659 (1998) (finding ambiguity where “[r]easonable minds can differ”).

But as this Court has long cautioned, “[m]ere informality in phraseology or clumsiness of expression does not make it ambiguous, if the language imports one meaning or intention with reasonable certainty.” *Jessee v. Aycoth*, 202 W. Va. 215, 218, 503 S.E.2d 528, 531 (1998) (quoting Syl. Pt. 13, *State v. Harden*, 62 W. Va. 313, 58 S.E. 715 (1907)). “The fact that parties disagree about the meaning of a statute does not itself create ambiguity or obscure meaning.” *T. Weston, Inc. v. Mineral Cnty.*, 219 W. Va. 564, 568, 638 S.E.2d 167, 171 (2006) (citation

omitted). “A statute is not ambiguous simply because different interpretations are conceivable.” *State v. Chapman*, No. 13-0111, 2013 WL 5676630, at \*4 (W. Va. Oct. 18, 2013) (internal quotations omitted).

In this case, Section 5 is unambiguous because “the language imports one meaning or intention with reasonable certainty.” *Jessee*, 202 W. Va. at 218, 503 S.E.2d at 531. Following the instructions of this Court to read statutory language “in context,” *In re Estate of Lewis*, 217 W. Va. 48, 53, 614 S.E.2d 695, 700 (2005), and not to focus on “any single part, provision, section, sentence, phrase or word,” Syl. Pt. 5, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14, 217 S.E.2d 907 (1975), this conclusion follows from an examination of the entire statute and three sentences in particular.

As explained below, the following three sentences together convey “with reasonable certainty” that the political party responsible for the list of potential replacements is the one to which a legislator belonged at the time of his or her departure from office. *Jessee*, 202 W. Va. at 218, 503 S.E.2d at 531. *First*, “[a]ny vacancy in the office of State Senator . . . 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.” W. Va. Code § 3-10-5(a) (emphasis added). *Second*, “[i]f 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.” *Id.* (emphasis added). *Third*, “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.” *Id.* § 3-10-5(c) (emphasis added).

1. The first sentence—found in subsection 5(a)—is itself reasonably understood to require a replacement to be appointed from the vacating senator’s party at the time of vacancy. The sentence speaks directly to the party affiliation of the “party executive committee” responsible for submitting the list of potential replacements, providing that the list is to come from a party executive committee “of the party” with which “the person holding the office immediately preceding the vacancy was affiliated.” W. Va. Code § 3-10-5(a). There is an express temporal element in this sentence—“immediately preceding the vacancy”—that appears to indicate that the relevant party affiliation is that of the vacating senator just before the vacancy. Any other reading of the sentence—including Petitioners’—would seem to render the temporal reference superfluous. *See W. Va. Human Rights Comm’n v. Garretson*, 196 W. Va. 118, 123, 468 S.E.2d 733, 738 (1996) (“A statute must be construed to give effect to *all of its provisions*, and not to diminish any of them.” (emphasis added)).

To be sure, other readings of the sentence are *possible* though they may not be *reasonable*. Taken alone, the phrase “was affiliated” might be understood one of two ways: to refer to the senator’s party affiliation at the time of election or appointment, or to the senator’s party affiliation at the time of the vacancy.

Whether the other readings actually render the first sentence ambiguous, however, is a question this Court need not answer. *See Chapman*, 2013 WL 5676630, at \*4 (“A statute is not ambiguous simply because different interpretations are conceivable.” (internal quotations omitted)). Both the second and third sentences identified above provide more than sufficient context to definitively determine that the party affiliation at issue in the first sentence is that of the vacating officeholder at the time of the vacancy. As discussed below, each of those

sentences unequivocally refutes the notion that a replacement should come instead from the party of the vacating officeholder at the time of his or her election or appointment.

2. The second sentence—which follows later in subsection 5(a)—makes clear through the use of a present participle that the Legislature intended replacements to come from the vacating officeholder’s political party at the time of the vacancy. When a list of potential replacements is not timely submitted to the Governor by the responsible political party, the Governor is restricted to appointing a person “of the same political party as *the person vacating the office.*” W. Va. Code § 3-10-5(a) (emphasis added). By using the word “vacating”—a present participle—the statute refers unambiguously to the political party of the person at the time of vacancy. See Merriam Webster Online, *Present Participle*, <http://www.merriam-webster.com/dictionary/present%20participle> (last visited Jan. 4, 2016) (defining “present participle” as “a participle that typically *expresses present action* in relation to the time expressed by the finite verb in its clause” (emphasis added)).

This Court has previously relied on the established grammatical understanding of a “present participle” to read a subject word or phrase as signifying the “immediate present.” *Moore v. Hope Nat. Gas Co.*, 76 W. Va. 649, 649, 86 S.E. 564, 566 (1915). In *Moore*, this Court explained the immediacy of a present participle—the word “arising”—by way of example: “When we speak of the ‘fog rising from the river,’ or ‘clouds rising in the east,’ the expressions *import an instant progressive occurrence*, and not one that may arise in the future, however probable it may be.” *Id.* (emphasis added). The present participle “signifies the present”; it does not “import acts already done” or “futuraity.” *Id.*

Other examples easily illustrate this longstanding rule of English grammar. If an announcer referred to “the hat worn by the person hitting the ball,” the announcer would clearly

be referring to the hat worn by the person in the act of hitting the ball—not to a hat worn by that person months or years earlier. Yet more examples: the blood alcohol content of the person driving the car, the home address of the candidate applying for the job, the credit card used by the person paying the bill. In each case the antecedent identifying characteristic is easily interpreted as the one at the time the action is taking place, not some other time in the past.

The use of the present participle in this second sentence thus confirms that Section 5 can only reasonably be understood to refer to a vacating senator's party affiliation at the time of the vacancy. Though the sentence specifically addresses what the Governor may do in the absence of a timely-submitted list of potential replacements, it would make no sense for a different rule to apply to determining the political party responsible for submitting the list of potential replacements.

3. Were there any remaining doubt, the third sentence provides yet more context confirming the Legislature's intent for a replacement senator to come from the political party with which the vacating senator was affiliated at the time of the vacancy. In contrast to the first sentence, this sentence from subsection 5(c) addresses not the *party identity* of the responsible party executive committee but the *geographical identity* of that committee, and it expressly qualifies that geographical identity as "the senatorial district" in which the vacating senator resided at "the time of his or her election or appointment." W. Va. Code § 3-10-5(c). This sentence shows that the Legislature knew how to—and did—specify "the time of . . . election or appointment" when it saw fit to do so. *Id.* The Legislature specifically did not include that same qualifier when referring to the vacating senator's party affiliation in subsection (a), and this

Court has refused “to add to statutes something the Legislature purposely omitted.” *Banker v. Banker*, 196 W. Va. 535, 546–47, 474 S.E.2d 465, 476–77 (1996).<sup>4</sup>

This crucial difference between this third sentence (that addresses geographical identity) and the first sentence (that addresses party identity) is only amplified when the statutory history of Section 5 is taken into account. It is well-settled that the Legislature’s decision to include a term or phrase in one place in a statute and yet exclude the same in another place must be understood to have been intentional. See *Phillips v. Larry’s Drive-In Pharmacy, Inc.*, 220 W. Va. 484, 492, 647 S.E.2d 920, 928 (2007); *State ex rel. Riffle v. Ranson*, 195 W. Va. 121, 128, 464 S.E.2d 763, 770 (1995). This canon rings even truer where the specific inclusion and exclusion of a word or phrase are part of a single statutory provision, as here. See, e.g., *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993). But the rule is undoubtedly at its apex when all the language in question was written simultaneously by the Legislature in a single paragraph, as happened here in 1963. See *infra* at p.16.

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<sup>4</sup> In contrast, many States have laws that *expressly* provide that the party at the time of election fills a vacancy. See, e.g., Nev. Const. art. IV, § 12 (“In case of the death or resignation of any member of the legislature, either senator or assemblyman, the county commissioners of the county from which such member was elected shall appoint a person *of the same political party as the party which elected such senator or assemblyman* to fill such vacancy” (emphasis added)); Md. Const. art. III, § 13 (“the Governor shall appoint a person to fill such vacancy from a person whose name shall be submitted to him in writing, within thirty days after the occurrence of the vacancy, by the Central Committee of the political party, if any, with which the Delegate or Senator, so vacating, *had been affiliated, at the time of the last election or appointment of the vacating Senator or Delegate*” (emphasis added)); N.J. Const. art. IV, § 4, ¶ 1 (“the vacancy shall be filled within 35 days by the members of the county committee *of the political party of which the incumbent was the nominee* from the municipalities or districts or units thereof which comprise the legislative district” (emphasis added)); Ind. Code § 3-13-5-1(b) (“A vacancy in a legislative office that was last held by a person *elected or selected as a candidate of a political party* described by [Indiana Code] 3-8-4-10 shall be filled by the state committee of the political party.” (emphasis added)).



In sum, the statute is unambiguous and “should be applied as written.” *State ex rel. Corp. of Charles Town v. Sanders*, 224 W. Va. 630, 633, 687 S.E.2d 568, 571 (2009). Reading Section 5 in its entirety, as this Court must, the provision can only be reasonably understood to refer to a vacating senator’s party affiliation *at the time of the vacancy*. “[F]urther inquiry is foreclosed.” *Appalachian Power Co. v. State Tax Dep’t of W. Va.*, 195 W.Va. 573, 587, 466 S.E.2d 424, 438 (1995).

**B. Petitioners’ Textual Arguments Only Confirm That Section 5 Is Unambiguous.**

**1. Petitioners’ Primary Reliance On Out-of-State Cases Interpreting The Differently-Worded Statutes Of Other States Is A Telling Concession.**

In support of their assertion that Section 5 is ambiguous, Petitioners turn primarily to two cases from Wyoming and Kansas. In the six pages that Petitioners devote to discussing the text of Section 5, one is devoted to quoting the statute and another merely recites canons of statutory interpretation. Of the remaining four pages, more than two go to discussing what Petitioners describe as decisions “from other Supreme Courts [that] have had the occasion to interpret similar provisions.” Pet. 16.

Petitioners’ disproportionate reliance on the Wyoming and Kansas cases, which address statutes that are markedly different from Section 5, reveals a telling lack of faith in their ability to show any ambiguity in the statute actually at issue. In both *Richards v. Board of County Commissioners of Sweetwater County*, 6 P.3d 1251 (Wyo. 2000), and *Wilson v. Sebelius*, 72 P.3d 553 (Kan. 2003), the courts found ambiguity in their laws because it was not evident from the language of those statutes whether their respective legislatures had intended for the party at the time of election or at the time of vacancy to control. But in sharp contrast to Section 5, the statutes in those two cases referred *without any other context or elaboration* to “the party” or

“the political party” of the former official. *See Richards*, 6 P.3d at 1253 (interpreting statute that referred simply to “the political party to which the member whose office is vacant belonged”); *Wilson*, 72 P.3d at 555, 559 (interpreting statute that referred only to “the party”).<sup>5</sup> Those cases are therefore entirely inapposite as to the meaning of the West Virginia law at issue here. And Petitioners’ eagerness to focus on such obviously irrelevant cases even before discussing several critical parts of the statutory text, *compare* Pet. 16-18, *with id.* at 18-19, can only be taken as a tacit concession of the weakness of their textual analysis.

**2. Petitioners’ Very Limited Discussion Of The Statutory Text Fails To Show That Section 5 Is Susceptible To Multiple Reasonable Readings.**

In the two-plus pages that Petitioners devote to the actual text of Section 5, *see* Pet. 15-16, 19, they fail to show that Section 5 “is susceptible of two *reasonable* constructions.” *Firemen’s Pension & Relief Fund*, 215 W. Va. at 370, 599 S.E.2d at 793 (emphasis added). Petitioners address each of the three sentences that inform the State’s analysis, but none of their

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<sup>5</sup> At the time, the relevant Wyoming statute read as follows:

(a) Within thirty (30) days after the office of any county commissioner becomes vacant the remaining members of the board shall declare a vacancy to exist and immediately give notice of the vacancy in writing to the chairman of the county central committee of the political party to which the member whose office is vacant belonged.

*Richards*, 6 P.3d at 1253 (quoting Wyo. Stat. Ann. § 18-3-524 (Lexis 1999)). The Kansas statute provided:

[W]hen a district convention is provided by law to be held to elect a person to be appointed to fill a vacancy in a district office, the county chairperson designated in subsection (b) . . . , within 21 days of receipt of notice that a vacancy has occurred or will occur, shall call and convene a convention of all committeemen and committeewomen of the party of the precincts in such district for the purpose of electing a person to be appointed by the governor to fill the vacancy.

*Wilson*, 72 P.3d at 555 (quoting Kan. Stat. Ann. § 25-3902(a)).

arguments demonstrates true ambiguity. *See T. Weston, Inc.*, 219 W. Va. at 568, 638 S.E.2d at 171 (“The fact that parties disagree about the meaning of a statute does not itself create ambiguity or obscure meaning.”).

a. As to the first sentence in subsection 5(a), Petitioners assert that it can be “read two different ways.” Pet. 16. They explain: “The Legislature could be directing the Governor to a list ‘submitted by the party executive committee of the party with which the person holding the office immediately preceding the vacancy was affiliated’ either at the time of that person’s election or at the time that vacancy occurs.” *Id.* (quoting W. Va. Code § 3-10-5(a)).

But Petitioners fail completely to address the express reference in the sentence to the time “immediately preceding the vacancy.” They offer no answer for the fact that only one of their two readings actually gives that temporal reference any meaning: “the party with which the person holding the office immediately preceding the vacancy was affiliated . . . at the time that vacancy occurs.” The other reading seems to impermissibly read the phrase out of the sentence, as it does not change in meaning if the temporal reference is simply omitted: “the party with which the person holding the office . . . was affiliated . . . at the time of that person’s election.”

b. As to the second sentence in subsection 5(a), Petitioners entirely ignore the long established grammatical rule that present participles signify the “immediate present” without any ambiguity. *Moore*, 76 W. Va. 649, 86 S.E. at 566. If a passenger had the same blood alcohol content as the person driving the car, there is no question that the passenger’s blood alcohol content could be determined by finding the blood alcohol content of the person in the act of driving the car. There is no inherent ambiguity.

Petitioners’ claimed ambiguity is entirely manufactured. They assert: “[T]his provision could also be read two ways either as requiring appointment of ‘a legally qualified person of the

same political party as the person vacating the office [*was at the time of his or her election*]” or “a legally qualified person of the same political party as the person vacating the office [*was at the time of the vacancy*].” Pet. 19 (emphases on alterations in Petitioners’ brief). But the same could be done to any otherwise clear use of a present participle. Did the passenger have the same blood alcohol content as the person driving the car *had last Tuesday* or the same blood alcohol content as the person driving the car *will have next week*? Petitioners’ added words introduce an ambiguity that was not originally there.

c. As to the sentence in subsection 5(c), Petitioners willfully ignore its obvious meaning. Petitioners claim it includes “an ambiguous reference to ‘the party,’” but that contention simply does not hold up. Pet. 19. The plain language shows that subsections 5(a) and 5(c) are complementary provisions that speak to different questions related to identifying the precise party executive committee responsible for submitting a list of potential replacements to the Governor. Subsection 5(a) addresses the *party identity* of the responsible party executive committee, and subsection 5(c) defines the *geographical identity* of that committee.

The complementary roles of subsections 5(a) and 5(c) are even more apparent after an examination of the statutory history. Prior to an amendment in 2010, Section 5 consisted only of a single paragraph first enacted in 1963. *See* Ch. 64, Acts of the Legislature, 1963, at 377. In pertinent part, it read:

Any vacancy in the office of State Senator or member of the House of Delegates shall be filled by appointment by the Governor, in each instance from a list of three legally qualified persons submitted by the party executive committee of the delegate district in the case of a member of the House of Delegates, and by the party executive committee of the state senatorial district in the case of a state senator, *of the party with which the person holding the office immediately preceding the vacancy was affiliated, and of the county or state senatorial district, respectively, in which he resided at the time of his election or appointment.*

W. Va. Code § 3-10-5 (1963) (emphasis added). The pre-2010 statute clearly and distinctly answers two different questions related to identifying the precise party executive committee responsible for submitting a list of potential replacements to the Governor: the party identity and the geographical identity. In 2010, the Legislature separated those two issues into subsections 5(a) and 5(c) without changing the substance. *See* Ch. 78, Acts of the Legislature, 2010, at 950.<sup>6</sup>

Subsection 5(c) is not and never has been ambiguous. Thus, when current Agriculture Commissioner Walt Helmick resigned his seat in the State Senate, it was undisputed under subsection 5(a) that the Democratic Party would submit the list of potential replacements—but it was subsection 5(c) that dictated *which* county committees of the Democratic Party would participate in compiling the list. Though there had been redistricting since then-Senator Helmick took office as Agriculture Commissioner, the plain terms of subsection 5(c) required that the potential replacements be selected from the old senatorial district from which Helmick had been elected. *See* Marla Pisciotto, *WV Senate awaits Helmick's replacement*, State Journal (Jan. 4, 2013).<sup>7</sup>

**C. The Absurd Results Doctrine Does Not Justify Departing From The Plain And Only Reasonable Reading Of Section 5.**

Having failed to establish that their reading of Section 5 is a reasonable one, Petitioners resort to an alleged absurdity that could result if this Court adopts the correct reading of the statute. But the canon against giving a statute an interpretation that could lead to absurd results

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<sup>6</sup> An electronic version is available at: [http://www.legis.state.wv.us/Bill\\_Status/bills\\_history.cfm?INPUT=557&year=2010&sessiontype=RS](http://www.legis.state.wv.us/Bill_Status/bills_history.cfm?INPUT=557&year=2010&sessiontype=RS).

<sup>7</sup> This source may be found here: <http://www.statejournal.com/story/20507029/wv-senate-awaits-helmicks-replacement>. Subsection 5(c) might also be relevant were a senator to resign after having moved out of his or her district. For example, if Hall had moved his residence to Morgantown and then resigned, subsection 5(c) would operate to prevent his replacement from being selected from a list prepared by a Monongalia County party committee.

does not apply here. “The absurd results doctrine merely permits a court to favor an *otherwise reasonable construction of the statutory text* over a more literal interpretation where the latter would produce a result demonstrably at odds with any conceivable legislative purpose.” *Taylor-Hurley v. Mingo Cnty. Bd. of Educ.*, 209 W. Va. 780, 788, 551 S.E.2d 702, 710 (2001). When no alternative reasonable construction of a statute has been advanced, this Court cannot “construe the statute so as to avoid [an absurd] result and adopt a reasonable construction.” *State ex rel. McLaughlin v. Morris*, 128 W.Va. 456, 461, 37 S.E.2d 85, 87-88 (1946). Thus, this Court reads a statute to avoid an absurd result only when the interpreted provision lends itself to “some other reasonable construction, which will not produce such absurdity.” Syl. Pt. 2, *Newhart v. Pennybacker*, 120 W. Va. 774, 200 S.E. 350, 352 (1938). As explained above, Section 5 lends itself to only one reasonable construction when read in context: the Governor must select a replacement from a list submitted by the party to which a senator belonged at the time that the senator vacated his or her seat. Because Petitioners have failed to advance a reasonable contrary interpretation, the statute cannot be construed to avoid absurd results even if absurd results followed from the unambiguous meaning.

In any event, Petitioners’ reliance on two far-fetched hypotheticals is misplaced. Although this Court may presume that the Legislature does not intend an absurd result in the ordinary case, the legislature “need not address every hypothetical application of a statute.” *State v. Schramel*, 581 N.W.2d 400, 402 (Minn. App. 1998). In fact, as this Court is undoubtedly aware, it would be the rare statute in which a litigant could not dream up some hypothetical that would seem to lead to a result that seems inconsistent with legislative intent. And for this reason, this Court has warned that “the absurd results doctrine should be used sparingly because it entails the risk that the judiciary will displace legislative policy on the basis of speculation that

the legislature could not have meant what it unmistakably said.” *Taylor-Hurley*, 209 W. Va. at 787-88, 551 S.E.2d at 709-10 (quoting 2A Norman J. Singer, *Statutes and Statutory Construction* § 46:07, at 199 (6th ed. 2000)).

For example, Petitioners speculate that under the correct reading of the statute, a Governor could conspire with a newly elected senator of a different party to have the senator switch parties before taking an executive position so that the senator’s recent electoral opponent could take the vacated seat. But this hypothetical depends on a newly elected senator being both: (a) willing to give up his or her seat; and (b) willing to trust that a Governor who insists that the senator switch parties before accepting an executive appointment will not simply terminate the senator’s appointment after the Governor’s partisan goal has been achieved. And the hypothetical depends too on a Governor willing to fill a position in his administration with an elected representative from another party to accomplish a partisan goal. There may also be serious questions under the Ethics Act, which generally prohibits those in public service from using their positions for their own private gain or the private gain of another. This situation is thus hardly likely, and it would be unsurprising if the Legislature did not draft legislation with this fantastical situation in mind.

Moreover, Petitioners’ hypothetical is an absurd result only if one accepts that voters select candidates only because of their party affiliation. But as discussed further below, *see infra* p. 21-23, voters recognize that they are electing an individual who will act as the voters’ agent and often exercise his or her own judgment about how to represent the interests and desires of his

or her constituents. Party affiliation is one of many such decisions,<sup>8</sup> and a senator could faithfully represent the interests and will of his or her constituents by switching parties to ensure that he or she is a member of the legislative majority party.

Finally, Petitioners' interpretation lends itself equally to hypothetical absurd results. For example, if the party affiliation is determined at the time of the election, the statute would fail to advance the will of the people at any point in time if a significant party realignment has taken place. If after an election, the parties significantly realign both on membership and the issues, a newly elected senator might switch parties without changing any of the substantive positions that the constituents voted to support, because a different party now best represents those substantive positions. But if that senator vacates his or her seat, Petitioners' reading of the statute would require the Governor to select a replacement from a list submitted by the senator's previous party—a party that no longer fully represents the platform that the constituents supported at the time of the election.

**II. Even If The Statute Were Ambiguous, Section 5 Should Be Read To Refer To A Vacating Senator's Party Affiliation At The Time Of The Vacancy.**

**A. The Purpose Of Section 5 Is To Vindicate The Will Of The Voters Who Elected An Individual To Act As Their Agent And Not Merely A Political Party.**

1. Even if the Court finds a statutory provision ambiguous, "effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation." Syl. Pt. 5, *Mace v. Mylan Pharm., Inc.*, 227 W. Va. 666, 668, 714 S.E.2d 223, 225 (2011) (quoting Syl. Pt. 2, *White v. Wyeth*, 227 W.Va. 131, 705 S.E.2d 828 (2010)). This inquiry

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<sup>8</sup> Our country has long tradition of party switching. See, e.g., Rebecca Elliot, Politico, Dem joins GOP to run against Rahall (July 31, 2013), <http://www.politico.com/story/2013/07/evan-jenkins-party-switch-2014-election-094972>.



is not boundless. “The courts may not speculate as to the probable intent of the legislature apart from the words employed.” *State v. Gen. Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 145, 107 S.E.2d 353, 358 (1959).

There is no dispute that the purpose of this variety of vacancy-filling provision is to vindicate the will of the voters, but what divides the parties is how the Legislature would have understood that “will.” Petitioners contend that “protection of the mandate of the voters . . . requir[es] the selection of a person of the same party *that the voters chose*.” Pet. 20 (emphasis added). This misconceives, however, what voters choose at an election.

Ample real-world evidence shows that voters elect an individual to be their agent and not simply a political party. *First*, when voters cast a ballot, they are not constrained—much less instructed—to choose from among established parties. In fact, party-affiliated registration continues to decrease in West Virginia while registration as non-affiliated “independent” continues to increase apace.<sup>9</sup> Likewise, voters are free on Election Day to vote for non-affiliated candidates who may appear on the ballot. *See* W. Va. Code § 3-5-23. *Second*, unlike in decades past, ticket-splitting as a practical matter is now the rule, not the exception.<sup>10</sup> In 2012, for example, the same electorate using the same ballot on the same day both elected Daniel Hall as a Democrat and overwhelmingly supported Republican Mitt Romney.<sup>11</sup> *Third*, national polling

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<sup>9</sup> See Sarah Wisniewski and Shane Price, WVU Reed College of Media, *Independents Rising in West Virginia* (Nov. 21, 2014), <https://wvuelections.wordpress.com/2014/11/21/independents-rising-in-west-virginia/> (“West Virginia voters are abandoning both parties in favor of registering independent.”).

<sup>10</sup> Philip Bump, *The remarkable recent decline of straight ticket voting*, Washington Post, (Nov. 10, 2014), <https://www.washingtonpost.com/news/the-fix/wp/2014/11/10/polarization-and-the-decline-of-split-districts/>.

<sup>11</sup> Although there are no official results of the 2012 presidential election by state senatorial district, the three counties included (at least in part) in the Ninth Senatorial District each overwhelmingly voted for Republican Mitt Romney while also electing then-Democrat Daniel

demonstrates that an increasingly larger portion of the voter pool identifies as independent or unaffiliated.<sup>12</sup> *Fourth*, many candidates defy traditional party labels, such as Joe Manchin (D), Jon Huntsman (R), Susan Collins (R), Lincoln Chafee (R then D), and Joe Lieberman (D), whom voters know perfectly well may not toe the party line—and in such cases, that is often the very reason why these candidates win.<sup>13</sup> In fact, before Daniel Hall himself was elected and reelected as a member of the Democratic Party, he had previously run as a Republican—a fact well-known to his electorate.

2. Petitioners contend that the Wyoming and Kansas cases—*Wilson* and *Richards*—are “instructive and persuasive.” Pet. 20. But those cases offer little to support Petitioners’ view of the will of the voters. The primary reasons advanced in those cases for preserving the party structure at the time of election have nothing to do with vindicating or protecting the voters’ mandate. Rather, those courts sought to protect the interests of the political parties themselves, concluding that “[i]t would be contrary to public policy to allow an individual to frustrate the assumption of the political party which supported him that a person from that political party would hold that office until the next election.” *Richards*, 6 P.3d at 1253. They also attempted to

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Hall. A comparison of the percentage of the votes for Romney with the total percentage of registered Democrats in these counties demonstrates the voters’ preference for candidate over party in the 2012 general election: McDowell Co., Romney: 64.1%, Democratic registration: 76%; Raleigh Co., Romney: 71.5%, Democratic registration: 53%; Wyoming Co., Romney: 76.7%, Democratic registration: 68%. See W. Va. Sec’y of State, Elections Division, <http://www.sos.wv.gov/elections/history/Documents/Voter%20Registration%20Totals/VR%20Oct-1-2012.pdf> (2012 general election voter registration by county); <https://apps.sos.wv.gov/elections/results/> (2012 general election results by county).

<sup>12</sup> Jeffrey M. Jones, Gallup, *In U.S., New Record 43% Are Political Independents*, (Jan. 7, 2015), <http://www.gallup.com/poll/180440/new-record-political-independents.aspx>.

<sup>13</sup> See, for example, the rise of the self-proclaimed “No Labels” national movement that prominently advocates nonpartisan “problem solving” in response to partisan gridlock in Washington, D.C. See <http://www.nolabels.org/>.

divine whether the legislatures that authored the statutes in question would have thought it likely that elected officials would change parties. *Wilson*, 72 P.3d at 559; *Richards*, 6 P.2d at 1253.

One court rejected in passing the notion that “individuals rather than parties are elected,” but its reasoning is shallow and unpersuasive. *Wilson*, 72 P.3d at 558. The court asserted only that “if the official who resigned is treated strictly as an individual, there would be no more reason for [the official’s party at the time of the vacancy] to select the successor than for [the official’s party at the time of election] to do so.” *Id.* But the reason is simple. If voters elect an individual to act as their agent, then the individual’s party affiliation at the time of the vacancy reflects his or her most recent judgment about how best to represent the interests and desires of his or her constituents. As noted above, a senator could faithfully represent the interests and will of his or her constituents by switching parties to ensure that he or she is a member of the legislative majority party. Indeed, that is what Daniel Hall did when he chose to switch from the Democratic Party to the Republican Party in 2014.

3. Petitioners also suggest that the individual-based, rather than party-based, view of the will of the voters is an outlier among the States. Pet. 24. This claim rests, however, on an incomplete picture of the States’ laws. Only half the States “fill legislative vacancies through some form of appointment process, whether it be by the political party of the incumbent legislator, a board of county commissioners, the governor, the legislature or members of the same house and party as the incumbent legislator.” See Nat’l Conf. of State Legislatures, Filing Legislative Vacancies.<sup>14</sup> The other half require special elections in the circumstances presented here, which suggests a significant recognition of the view that voters elect individuals and not

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<sup>14</sup> This source may be found here: <http://www.ncsl.org/research/elections-and-campaigns/filling-legislative-vacancies.aspx>.

parties. Special elections reflect an acknowledgment that the best way to protect the voters' will in the case of a vacancy is to allow them to select a replacement of their own choosing. *Accord* 132 A.L.R. 574 (“[N]umerous cases have called attention to the fact that democratic principles require that elective offices shall, so far as possible, be filled at all times *by incumbents chosen by the electors.*” (emphasis added)).

**B. There Is No Merit To Petitioners' Constitutional Avoidance Argument.**

As a last-ditch argument, Petitioners assert that their interpretation should prevail because the constitutional rights of the voters of the Ninth Senatorial District would be violated otherwise. As a threshold matter, the constitutional avoidance doctrine applies only if this Court has a choice between two reasonable interpretations of a statutory text, which it does not for all the reasons explained in Part I above. *See* Syl. Pt. 1, *Perilli v. Bd. of Educ. Monongalia Cnty.*, 182 W. Va. 261, 262, 387 S.E.2d 315, 316 (1989) (“Wherever an act of the Legislature can be so construed and applied as to avoid a conflict with the Constitution, and give it the force of law, such construction will be adopted by the courts.” (quoting Syl. Pt. 3, *Slack v. Jacob*, 8 W.Va. 612 (1875))); *Clark v. Martinez*, 543 U.S. 371, 385 (2005) (“The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as *a means of choosing between them.*” (emphasis in original)).

But even assuming that the doctrine could apply, it should not here because there are no constitutional concerns. Petitioners argue that if Section 5 is not applied to “foster the preservation of the mandate of the electorate,” the statute will be subject to constitutional due process and equal protection attack. Pet. Br. 28. They contend that the State’s reading of Section 5 raises “serious questions” under the provision of the West Virginia Constitution that requires the “powers of government” to be exercised “in accordance with [the people’s] will and

appointment.” *Id.* at 29. And they assert, without elaboration or citation, that “allowing a legislator to change his party and resign” also “infringes on” the Governor’s constitutional power of appointment. *Id.*

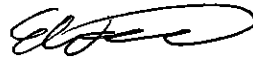
Distilled to their essence, Petitioners’ arguments are all premised on their erroneous view that voters elect parties and not individuals. But this is incorrect, for all the reasons already explained. And if it is properly understood that voters elect individuals who exercise their own judgment as agents of the electorate, then there are no constitutional concerns about the State’s reading of Section 5, which vindicates the decisions of the elected officials by preserving their choice of party affiliation at the time of the vacancy.

### **CONCLUSION**

This is not a hard case. A fair-minded reading of the plain statutory text, aided by this Court’s long-settled canons of interpretation, renders only one reasonable answer to the question presented. For the foregoing reasons, the State respectfully requests that the Petition be denied.

Dated: January 12, 2016

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of January, 2016, I caused the foregoing document to be filed with the Clerk of the Court by hand-delivery. The following counsel will be served by U.S. mail and electronic service:

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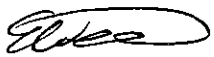
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