

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 KLOPP, 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 in their capacity as the
members of the West Virginia Republican
Executive Committee for the Ninth Senatorial District,

Respondents.

REPLY IN SUPPORT OF
EMERGENCY PETITION FOR A WRIT OF MANDAMUS

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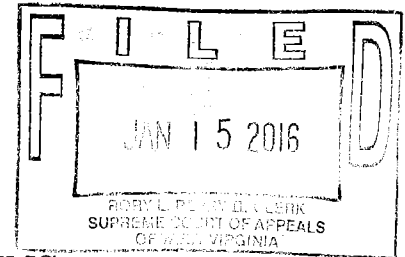


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INTRODUCTION

Petitioners file this supplemental brief in support of their Petition for a Writ of Mandamus.

ARGUMENT

I. THE CODE'S PROVISIONS FOR FILLING LEGISLATIVE VACANCIES ARE AMBIGUOUS WHEN APPLIED TO A VACANCY OCCURRING WHEN A LEGISLATOR RESIGNS AFTER CHANGING PARTIES FOLLOWING ELECTION TO OFFICE.

A statute is ambiguous when “it susceptible of two or more constructions or [is] of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning.”¹ There can be no question that W. Va. Code § 3-10-5(a) is susceptible to two or more reasonable constructions when applied to the facts of this case.

West Virginia Code § 3-10-5(a) states: “Any 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

¹ *Davis Mem'l Hosp. v. W. Virginia State Tax Com'r*, 222 W. Va. 677, 682-83, 671 S.E.2d 682, 687-88 (2008) (quoting *Sizemore v. State Farm Gen. Ins. Co.*, 202 W.Va. 591, 596, 505 S.E.2d 654, 659 (1998) (internal quotations and citation omitted by Court)).

immediately preceding the vacancy was affiliated.” The Republican Respondents and Senator Cole argue that W. Va. Code § 3-10-5(a)’s reference to “immediately preceding” somehow makes it clear that the statute requires submission of a list from the party committee of the vacancy creating person at the time of the vacancy as opposed to the time of the election.² The problem with this argument is the unfounded assumption that the phrase “immediately preceding” was conclusively intended to apply to selection of the party as opposed to the identification of the person. Thus, in this case there is no dispute over what the phrase “immediately preceding” means; the question is whether it is intended to modify the person or the party.

In the context here, where a person has changed political parties after an election, subsection 5(a) can be read as requiring the list to be submitted from the “committee of the party with which the person holding the office immediately preceding the vacancy was affiliated [at the time of that person’s election].” Alternatively, while no discernable public policy supports the interpretation, section 5(a) can be read as requiring the list to be submitted from the “committee of the party with

² Republican Respondents Brief at 7-8; Cole Brief at 4-5

which the person holding the office immediately preceding the vacancy was affiliated [at the time of the vacancy].” Indeed, the Attorney General concedes that “the phrase ‘was affiliated’ might be understood one of two ways: to refer to the senator’s affiliation at the time of election or appointment, or to the senator’s party affiliation at the time of the vacancy.”³ This ability to alternatively construe the statute easily meets the *Davis Memorial* test for ambiguity. Indeed, the authority cited by the Attorney General establishes that the absence of a reference to a time requirement is precisely the kind of omission that creates an ambiguity that requires examination of intent.⁴

The Respondents, the Attorney General, and Senator Cole, each offer many reasons for finding this statutory provision clear. But in doing so they in essence interpret the statute to reveal this supposed clarity rather than apply clear statutory provisions. None of these arguments is compelling.

³ Morrissey Brief at 9.

⁴ See *Jessee v. Aycoth*, 202 W. Va. 215, 218, 503 S.E.2d 528, 531 (1998) (looking beyond agreement to determine parties intent when agreement silent regarding “when” a certain action was required).

The Attorney General's argument is based on reading the first sentence of subsection 5(a) in the context of other provisions of section 5. First, to be clear, the doctrine of reading provisions of a statute together is a rule of construction to aid in determining legislative intent.⁵

The Republican Respondents and the Attorney General first point to the second sentence of section 5(a) which states: "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." The Attorney General focuses on the use of the present participle "vacating" as supporting his analysis. Grammatical analysis cannot be used to "justify an interpretation that is contrary to the intent of the Legislature."⁶ Of course, this provision is subject to the same ambiguity as the first sentence in the context of this case as it is not explicit whether the reference is to party is to be determined at the time of the election or the

⁵ *In re Estate of Lewis*, 217 W. Va. 48, 53, 614 S.E.2d 695, 700 (2005); *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14, 21-22, 217 S.E.2d 907, 911-12 (1975)

⁶ *Davis Mem'l Hosp. v. W. Virginia State Tax Com'r*, 222 W. Va. 677, 686-87, 671 S.E.2d 682, 691-92 (2008).

time of the vacancy. The need to resort to rules of grammar of another provision of the statute hardly makes the reading of the former provision clear. If, based on the obvious legislative intent, one reads the ambiguous first sentence of subsection 5(a) as referring to the time of election, it is no great jump to imply the same intent and imply a reference to the party at time of the election.

Nor does the language of subsection 5(c) establish that the first sentence of subsection 5(a) clearly refers to party affiliation at the time of the vacancy. Subsection 5(c) notes that “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 Attorney General would limit the reach of this provision to the geographical location of the committee not the party identification. The problem with 5(c) is that it contains the equally ambiguous reference to “the party” without specifying which party. Indeed, subsection 5(c)’s explicit temporal reference to the time of the election is evidence that all the references to “the party” in subsection 5 were intended to imply the same temporal reference to the time of his or her election or appointment.”

In the end this statute is ambiguous because it “does not address or anticipate a[n] elected official’s changing his party affiliation during a term in office.”⁷ That this omission occurs throughout section 5 is not surprising because the Legislature did not contemplate this problem precisely because “[c]hanging party affiliation after being elected is a relatively rare and infrequent occurrence.”⁸

II. THE CODE’S PROVISIONS FOR FILLING LEGISLATIVE VACANCIES SHOULD BE INTERPRETED CONSISTENT WITH THEIR OBVIOUS INTENT – BEST PRESERVING THE MANDATE OF THE VOTERS WHO ELECTED THE PERSON CREATING VACANCY BY APPOINTING A PERSON WHO IS OF THE SAME POLITICAL PARTY AS THE PERSON ELECTED BY THE VOTERS.

The intent behind section 5 is obvious – the preservation of the mandate of the voters. The Respondents and the Attorney General argue that the relevant policy is the election of the particular representative as an agent of the voters rather than as a representative of the party.

⁷ *Wilson v. Sebelius*, 276 Kan. 87, 94, 72 P.3d 553, 558 (2003); *Richards v. Bd. of Cty. Comm’rs of Sweetwater Cty.*, 6 P.3d 1251, 1253 (Wyo. 2000).

⁸ *Richards*, 6 P.3d at 1253.

This argument completely overlooks the explicit focus on replacement with the party in section 5. If the policy were nonpartisan as they argue, the Legislature would have provided another means of selecting the replacement that did not rely on party committees. The question here is whether the choice of party replacement should be in the hands of the voters or the person elected.

Second, with respect to states which rely on party affiliation, it is undisputed and significant that no state has the rule proffered by the Respondents and the Attorney General.

Third, much is made of subsequent demographic changes and legislative changes. With respect to the legislative changes in 2015 regarding straight ticket voting and nonpartisan election of judges, it is doubtful that these changes would have happened in the absence of Senator Hall's switch in party. In any event, how these amendments bare on section 5 which was enacted in relevant part decades prior is never explained. With respect to the alleged shifts in this Senate district, it is clear that the district was and is at all times a district made up of voters who are predominately members of the Democratic Party

with the Republicans being barely one-quarter of the district.⁹ With respect to the 2014 Senate election in this district, there are any number of explanations for the Republican win, not the least of which may have been the substantial difference in campaign expenditures by the Republican candidate.¹⁰

III. THE POSITION OF THE REPUBLICAN RESPONDENTS AND THE ATTORNEY GENERAL SHOULD BE REJECTED BECAUSE IT WILL LEAD TO ABSURD AND INCONSISTENT RESULTS.

This Court has long recognized that statutory interpretations that lead to inconsistent or absurd results should be discarded.¹¹ The interpretation of section 5 advanced by the Republicans, if accepted, will result in absurd and inconsistent results and should be rejected.

⁹ Sup. App. 43.

¹⁰ Sup. App. 45, 51.

¹¹ Syl. pt. 2, *Conseco Fin. Serv'g Corp. v. Myers*, 211 W.Va. 631, 567 S.E.2d 641 (2002) (“It is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold the law and further justice. It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity.”); *Click v. Click*, 98 W.Va. 419, 127 S.E. 194 (1925).”); *Expedited Transp. Sys., Inc. v. Vieweg*, 207 W.Va. 90, 98, 529 S.E.2d 110, 118 (2000) (“It is the ‘duty of this Court to avoid whenever possible a construction of a statute which leads to absurd, inconsistent,

It is important to note that this doctrine applies even when the statute is clear:

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. *See State ex rel. McLaughlin v. Morris*, 128 W.Va. 456, 461, 37 S.E.2d 85, 88 (1946) (citing *Newhart v. Pennybacker*, 120 W.Va. 774, 200 S.E. 350 (1938)). It does not, however, license a court to simply ignore or rewrite statutory language on the basis that, as written, it produces an undesirable policy result.¹²

unjust or unreasonable results.’” (quoting *State v. Kerns*, 183 W.Va. 130, 135, 394 S.E.2d 532, 537 (1990) (emphasis omitted)); see also syl. pt. 2, *Newhart v. Pennybacker*, 120 W.Va. 774, 200 S.E. 350 (1938) (same); *Jefferson Utilities, Inc. v. Jefferson County Bd. of Zoning Appeals*, 218 W.Va. 436, 447, 624 S.E.2d 873, 884 (2005).

¹² *Taylor-Hurley v. Mingo Cty. Bd. of Educ.*, 209 W. Va. 780, 787-88, 551 S.E.2d 702, 709-10 (2001).

While Respondents and the Attorney General discount the potential absurd and inconsistent results, the facts of this case establish that they within the realm of circumstances likely to occur. The Republican Respondents have nominated, among others, the very individual the voters of the Ninth Senatorial District rejected in when electing Daniel Hall.¹³ Moreover, by his own omission, Hall's conversion to the Republican party had as much to do with gaining favorable committee assignments as it did the supposed will of the voters of his senate district.¹⁴

IV. THE CODE'S PROVISIONS FOR FILLING LEGISLATIVE VACANCIES SHOULD BE INTERPRETED TO AVOID SERIOUS CONSTITUTIONAL QUESTIONS BY REQUIRING APPOINTMENT OF A PERSON WHO IS OF THE SAME POLITICAL PARTY AS THE PERSON ELECTED BY THE VOTERS.

Statutory provisions should not be interpreted or applied in a manner that raises constitutional questions. This proposition is not disputed by either Respondents or the Attorney General.

¹³ Sup. App. 42.

¹⁴ Sup. App. 89.

The first argument in response is that this doctrine is applicable only when the statute is not capable of multiple constructions – an argument based on the incorrect premise that the statute is clear.

The next argument in opposition discounts the potential constitutional questions. The cases and constitutional provisions cited in the Petition expose many potential constitutional challenges – whether they ultimately are successful is beside the point. The point of the doctrine is a recognition that construction of the statute to avoid this doubt is the favored option.¹⁵

CONCLUSION

Petitioners respectfully request that the Court grant Petitioners a writ of mandamus. Petitioners believe that the writ should interpret West Virginia Code § 3-10-5(a) as requiring the Respondent Governor

¹⁵ *State ex rel. Downey v. Sims*, 26 S.E.2d 161, 170 (1943) (“The duty of the courts so to construe a statute as to save its constitutionality when it is reasonably susceptible of two constructions includes the duty of adopting a construction that will not subject it to a succession of doubts as to its constitutionality, for it is well settled that a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubt upon that score.”).

Tomblin to fill the current vacancy in the Senate from the list of three candidates submitted by Petitioners.¹⁶

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ex rel. BELINDA BIAFORE, et al.,
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¹⁶ Supp. App. 41.

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and JANE DOE, in their in their capacity as the
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Executive Committee for the Ninth Senatorial District,

Respondents.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the attached "REPLY IN
SUPPORT OF EMERGENCY PETITION FOR A WRIT OF MANDAMUS" was
served upon the persons listed below a true copy thereof as required by Rule 37,
Revised Rules of Appellate Procedure, on
this 15th day of January 2016:

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