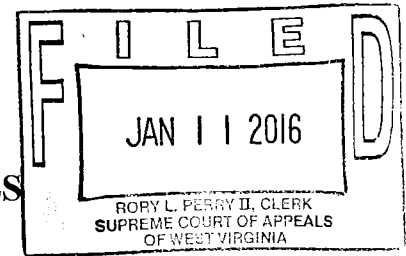


**IN THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA  
No. 16-0013**



**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.**

**GOVERNOR EARL RAY TOMBLIN'S SUMMARY RESPONSE  
TO EMERGENCY PETITION FOR A WRIT OF MANDAMUS**

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*Counsel for Respondent Governor Tomblin*

## QUESTION PRESENTED

Whether West Virginia Code § 3-10-5 requires Governor Earl Ray Tomblin to appoint a Democrat or a Republican to the vacant Senate seat in West Virginia's Ninth Senatorial District where:

- The voters of the district elected a Democrat in the 2012 general election;
- The Democrat Senator who was elected switched his political party affiliation to Republican in November 2014;
- He resigned in January 2016, and the Democratic and Republican Executive Committees for the Ninth Senatorial District each have indicated they will submit to Governor Tomblin a list of individuals to be considered for appointment; and
- Section 3-10-5 tasks Governor Tomblin with appointing a replacement from the list submitted by the party executive committee to which the former Senator "was affiliated," but does not clarify *when* party affiliation is relevant (*i.e.*, at the time the former Senator was elected or at the time he vacated office?).

## SUMMARY RESPONSE

COMES NOW his Excellency, West Virginia Governor Earl Ray Tomblin, by counsel, and pursuant to W. Va. R. App. P. 16(h) responds to the Emergency Petition for a Writ of Mandamus that has been filed in this matter.

The Emergency Petition spotlights an unresolved issue of West Virginia law relating to Governor Tomblin's statutory duty to appoint a replacement State Senator. Specifically, the issue is whether W. Va. Code § 3-10-5 requires Governor Tomblin to appoint a Democrat or a Republican replacement where a unique factual scenario is presented; that is, where the officeholder who tendered his resignation from the Senate was elected as a Democrat by the voters of his district, but switched parties approximately two years later, and thereafter resigned as a Republican.

Section 3-10-5 provides, in pertinent part, as follows:

(a) 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 office immediately preceding the vacancy was affiliated. The list . . . 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 . . . 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.

It is uncontested that Daniel Hall, the State Senator who resigned his office, “was affiliated” both with the Democratic Party and the Republican Party during the relevant term of office. Further, there is no dispute that § 3-10-5 obligates Governor Tomblin to appoint a replacement from the party of which Hall “was affiliated,” even if neither executive committee submits a list.

The specific unanswered question of West Virginia law for this Court to resolve is the “when” issue: *When is political party affiliation relevant for purposes of applying § 3-10-5, as only in rare instances—like the Daniel Hall scenario—do officeholders switch parties after an election?* Put another way, does Governor Tomblin—in carrying out his appointment duty—honor Hall’s party affiliation at the time of election or vacancy?

The Attorney General of West Virginia believes Daniel Hall’s switch to the Republican Party and subsequent resignation while a Republican compels Governor Tomblin to appoint from the list submitted by the Republican Executive Committee for the Ninth Senatorial District. *See Morrissey Op. Ltr to Cole, App. to Pet’r Emergency Pet.*, pp. 17-22. He reasons that, although the first sentence of § 3-10-5 is “arguably ambiguous,” the statute when read in its entirety conveys “with reasonable certainty” that the political party responsible for the list of potential

replacements is the one to which Daniel Hall belonged at the time of his resignation. *Id.* at p. 19. The Attorney General diagrams § 3-10-5 to reach the conclusion that its language is unambiguous. *Id.* at pp. 19-20. It is anticipated the Republican Party Respondents also will advance this argument.

The Democrat Petitioners, on the other hand, assert § 3-10-5 is ambiguous when applied to the Daniel Hall scenario, contending that his party affiliation at the time he was elected controls. *See generally* Pet'r Emergency Pet. They argue, among other things, that the obvious legislative intent of § 3-10-5 is to preserve the mandate of the voters who elected a Democrat and who are therefore entitled to a Democratic replacement. *Id.* at pp. 20-24. The Democratic Petitioners maintain the Attorney General's contrary reading of § 3-10-5 would, in application, trigger absurd results (frustration of voter mandate) and raise significant constitutional concerns (infringement on equal protection and the power of the people to select their representatives). *Id.* at pp. 25-30.

As the Attorney General points out in his opinion letter, no West Virginia cases are on point to provide guidance to Governor Tomblin in applying § 3-10-5. *See* Morrissey Op. Ltr to Cole, App. to Pet'r Emergency Pet., p. 18. There are, however, two persuasive out of state authorities that feature facts analogous to the Daniel Hall scenario and that examine statutes similar to § 3-10-5. *See Wilson v. Sebelius*, 72 P.3d 553, 276 Kan. 87 (Sup. Ct. Kan. 2003) (holding phrase "of the

party” in vacancy statute means political party to which officeholder belonged at time of election; mandamus appropriate to require governor to appoint Democrat where voters had elected Democrat who later switched parties and resigned); *see also Richards v. Board of Co. Comm’rs of Sweetwater Co., Wyo.*, 6 P.3d 1251, 2000 Wyo. LEXIS 132 (Sup. Ct. Wyo. 2000) (holding phrase “party to which member whose office is vacant belonged” in vacancy statute ambiguous under party switch facts; public policy necessitates honoring voter mandate and giving party to which former member belonged at time of last election notice of vacancy).

Governor Tomblin appreciates and respects the divergent positions outlined by the Attorney General and the Democratic Petitioners on this unresolved issue of West Virginia law. Unless Governor Tomblin is directed otherwise by this Court, he intends to appoint a Democrat to the vacant seat in the Ninth Senatorial District within five days of receiving the list submitted by the Democratic Petitioners.

Daniel Hall ran for office as a Democrat. He was supported by the Democratic Party in that endeavor. The voters of the Ninth Senatorial District elected a Democrat. Daniel Hall served the majority of his term of office as a Democrat. And while affiliated with the Democratic Party, Hall served as the Vice-Chair of the Senate’s Labor Committee and caucused with the Senate Democrats. Governor Tomblin’s intention to apply Daniel Hall’s party affiliation at the time of his last election in appointing his replacement is supported by sound

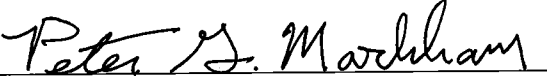
public policy. It honors the mandate of the voters of the Ninth Senatorial District and avoids a constitutional challenge. It is further reinforced by the *Wilson* and *Richards* cases.

With that said, Governor Tomblin recognizes he is not the final arbiter of this issue, and that if he makes an appointment in advance of a ruling issued by this Court, it would be challenged by Republican Respondents and that party's nominees. Accordingly, Governor Tomblin responds to the Emergency Petition by praying for this Court to resolve this controversy forthwith by announcing a new Syllabus Point or Points of West Virginia law interpreting W. Va. Code § 3-10-5 in the circumstances of a party-switch. Governor Tomblin then will honor the mandate of this Court—whatever it may be—and perform his constitutional duty to “take care that the laws [of West Virginia] be faithfully executed.” *See* W. Va. Const. Art. VII, § 5.

## CONCLUSION

Governor Tomblin respectfully requests this Court address and resolve the issues raised in the Emergency Petition forthwith and provide clarity on whether he is obligated to appoint a Democrat or a Republican in filling the vacancy in the Ninth Senatorial District. As Governor Tomblin was named as a Respondent only to effectuate the mandate of this Court, he does not request the opportunity to participate in oral argument.

**His Excellency, West Virginia  
Governor EARL RAY TOMBLIN,  
By Counsel,**

  
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General Counsel  
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*By Special Appointment of the Attorney General*



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**Respondents.**

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the attached "**Governor Earl Ray Tomblin's Summary Response to Emergency Petition For a Writ of Mandamus**" was served upon the persons listed below as required by Rule 37, Revised Rules of Appellate Procedure, on this 11<sup>th</sup> day of January, 2016:

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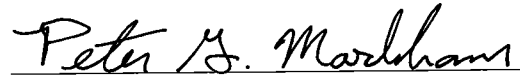
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