

IN THE SUPREME COURT OF APPEALS  
STATE OF WEST VIRGINIA

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STATE OF WEST VIRGINIA ex rel.  
THE WEST VIRGINIA DEMOCRATIC PARTY,  
and MIKE PUSHKIN,

Petitioners,

VS.

ROGER HANSHAW, in his Official Capacity  
as Speaker of the West Virginia House of  
Delegates, and PATRICK MORRISEY, in his  
Official Capacity as Governor of West Virginia,

Respondents.

**PETITION FOR MANDAMUS**

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## QUESTIONS PRESENTED

1. Whether the House of Delegates can declare vacant the seat of a duly elected, qualified, and ready-to-serve delegate for reasons related to misconduct.
2. Whether the “person holding the office immediately preceding [a declared] vacancy” in a House of Delegate seat, per West Virginia Code § 3-10-5(a), includes a person who was duly elected, assumed office on December 1<sup>st</sup> following his election, as provided in West Virginia Code § 6-5-1, but who had not yet taken the oath of office.

## STATEMENT OF THE CASE

### **Procedural History**

This petition is filed within the Court’s original jurisdiction pursuant to West Virginia Constitution, Article VIII, § 3, West Virginia Code § 51-1-3, and Rule 16 of the West Virginia Rules of Appellate Procedure.

### **Parties**

1. Petitioner West Virginia Democratic Party is a political party organized and acting under the laws of West Virginia and is dedicated to bettering the lives of all West Virginians.

2. Petitioner Mike Pushkin is a citizen, resident, and voter of Kanawha County, West Virginia, and is the Chairperson of the West Virginia Democratic Party, and as such is responsible for recruiting qualified political candidates, pursuing the Party’s goals, and overseeing its operations.

3. Respondent Roger Hanshaw is a citizen and resident of Clay County, West Virginia, and presently serves as the Speaker of the West Virginia House of Delegates; he is sued in his

official capacity.

4. Respondent Patrick Morrissey is a citizen and resident of Kanawha County, West Virginia, and presently serves as the Governor of West Virginia; he is sued in his official capacity.

### **Facts**

5. On November 5, 2024, the voters of the 91<sup>st</sup> West Virginia Delegate District in Berkeley County elected Republican candidate Joseph A. DeSoto to be their delegate in the West Virginia House of Delegates.

6. Pursuant to West Virginia Code § 6-5-1, Delegate DeSoto began his term of office as a delegate on December 1, 2024.

7. On or about December 11, 2024, plaintiff DeSoto switched his political affiliation from the Republican Party to the Democratic Party.

8. On January 8, 2025, the West Virginia Legislature convened for one day, certified the November, 2024, election results, and elected its leaders for the new session.

9. On that same date, the West Virginia House of Delegates passed House Resolution 4, which declared Delegate DeSoto's seat to be vacant because of perceived misconduct, notwithstanding Delegate DeSoto's willingness, desire, and qualifications to serve as a delegate. Appendix, Exhibit A.

10. Delegate DeSoto was unable to attend the January 8, 2025, swearing-in of House of Delegate members; other House members were also absent but their seats were not declared vacant.

11. Upon information and belief, elected delegates in prior legislative sessions have been

unable to take their oaths of office on the sessions' first day, but their seats were not declared vacant and they subsequently assumed their duties as elected delegates.

12. House Resolution 4 resolves that the Speaker shall transmit a letter to the Governor and "to the Republican Executive Committee of the County of Berkeley" to provide notice of the House's action.

13. West Virginia Code § 3-10-5(a) provides that a vacancy in the House of Delegates "shall be filled by appointment by the Governor, from a list of three legally qualified persons submitted by the party executive committee of the same political party with which the person holding the office immediately preceding the vacancy was affiliated at the time the vacancy occurred."

14. The person holding the office of Delegate from the 91<sup>st</sup> Delegate District immediately preceding the House's January 8, 2025, resolution declaring the seat vacant was Joseph A. DeSoto, a declared and registered member of the Democratic Party of West Virginia.

15. The loss of a Democratic seat in the House of Delegates adversely affects the petitioners' ability to implement the goals and programs of the West Virginia Democratic Party.

#### SUMMARY OF ARGUMENT

House Resolution 4 was void *ab initio* because the House of Delegates lacks authority to declare a seat vacant where the voters have elected a qualified delegate and he or she is willing to serve. Although Article VI, § 24 of the West Virginia Constitution provides that each House of the Legislature "shall . . . be the judge of the elections, returns and qualifications of its own members," that authority is limited to deciding who received the most votes for a legislative seat and whether that person meets the minimum constitutional qualifications. *See Powell v.*

*McCormack*, 395 U.S. 486 (1969) (House of Representatives may not exclude a duly elected, willing, and qualified member). If the House concludes that a member’s conduct warrants discipline, then it must follow the procedures in Article VI, § 25: “Each house may punish its own members for disorderly behavior, and with the concurrence of two thirds of the members elected thereto, expel a member, but not twice for the same offence.” That is, if a house is going to countermand the voters’ preference in denying a seat to an elected and qualified member and to act for reasons related to discipline, it *must* use the expulsion procedures of § 25 and comply with that section’s supermajority requirement (as well as other procedures provided by House rules). *Powell, supra*.

House Resolution 4 also conflicts with West Virginia Code §§ 3-10-5(a) and 6-5-1 because it orders referral for filling the vacancy in the 91<sup>st</sup> Delegate District to the Berkeley County Republican Executive Committee. According to West Virginia Code § 3-10-5(a), the vacancy must be filled from a list of three nominees put forth “by the party executive committee of the same political party with which the person holding the office *immediately preceding* the vacancy was affiliated at the time the vacancy occurred.” (Emphasis added.) Pursuant to West Virginia Code § 6-5-1, Delegate Joseph A. DeSoto began his term of office as delegate from the 91<sup>st</sup> Delegate District on December 1, 2024. At the time the seat was declared vacant on January 8, 2025, and “immediately preceding” that date, DeSoto was the delegate in office and was a registered Democrat.

Therefore, pursuant to West Virginia Code § 3-10-5(a), respondents have a mandatory duty upon a vacancy occurring in the 91<sup>st</sup> Delegate District to request the Berkeley County Democratic Executive Committee for a list of three qualified nominees to fill the office of

delegate from the 91<sup>st</sup> Delegate District and respondent Morrissey has a mandatory duty to make his appointment from that list of nominees.

#### STATEMENT REGARDING ORAL ARGUMENT

The Court should expeditiously set this matter for Rule 20 oral argument; the petition presents issues of utmost public importance and constitutional significance as well as suspending the representational rights of the voters of the 91<sup>st</sup> Delegate District.

#### ARGUMENT

##### I. MANDAMUS IS THE APPROPRIATE REMEDY IN THIS CASE.

“Mandamus is a proper remedy to require the performance of a nondiscretionary duty by various governmental agencies or bodies.” Syl. Pt. 1, *State ex rel. Allstate Ins. Co. v. Union Pub. Serv. Dist.*, 151 W.Va. 207, 151 S.E.2d 102 (1966). This Court has recognized the special need for judicial alacrity in the context of political and electoral rights. *E.g.*, *State ex rel. Biafore v. Tomblin*, 236 W.Va. 528, 532, 782 S.E.2d 223, 227 (2016); *State ex rel. Bromelow v. Daniel*, 163 W.Va. 532, 258 S.E.2d 119 (1979). Thus, “when a writ of mandamus has been invoked to preserve the right to vote or to run for political office . . . this Court has eased the requirements for strict compliance for the writ’s preconditions, especially those relating to the availability of another remedy.” Syl. Pt. 3, *State ex rel. Sowards v. County Commission of Lincoln Co.*, 196 W.Va. 739, 474 S.E.2d 919 (1996), *quoted in Biafore, supra*, 236 W. Va. at 532, 782 S.E.2d at 227.

##### II. THE HOUSE OF DELEGATES HAS NO AUTHORITY TO DENY A SEAT TO A MEMBER DULY ELECTED, QUALIFIED, AND WILLING TO SERVE UNLESS IT DOES SO USING THE PROCEDURES FOR EXPULSION SET FORTH IN ARTICLE VI, § 25 OF THE WEST VIRGINIA CONSTITUTION.



House Resolution 4 attempts to declare vacant the delegate seat from the 91<sup>st</sup> Delegate District because of the alleged misconduct committed by the elected delegate, Joseph A. DeSoto, in December, 2024. The House had no constitutional authority to enact that resolution.

Article VI, § 24 of the West Virginia Constitution does provide that each House of the Legislature “shall . . . be the judge of the elections, returns and qualifications of its own members,” but that authority is limited to deciding who received the most votes for a legislative seat and whether that person meets the constitutional qualifications. *See Powell v. McCormack*, 395 U.S. 486 (1969) (House of Representatives may not exclude a duly elected, willing, and qualified member). The constitutional qualifications to serve as a Delegate are limited to the requirements to vote stated in Article IV, § 1 and applied to public office holders by Article IV, § 4 and to district residency mandated by Article VI, § 12. (Article VI, § 13 lists certain grounds for disqualification from eligibility to serve in the Legislature, but they are not relevant here.)

The holding in *Powell* is dispositive here. Powell was Adam Clayton Powell, the flamboyant and iconoclastic Congressman from Harlem who some members of the House of Representatives believed had acted unethically in prior terms of service. On the opening of the Congressional session in 1967, the House of Representatives voted to deny him his seat because of the alleged improprieties. The United States Supreme Court held the House lacked the authority to do so. If the elected representative satisfied the objective requirements of Article I, § 1, cl. 2 of age, citizenship, and residency – just like those in Article IV, §§ 1 and 4 and Article VI, § 12 of the West Virginia Constitution – then the House had to give Powell his seat. Similarly, Article I, § 5, cl. 1 of the federal constitution provided – just like Article VI, § 24 – that each House shall be the judge of the “Elections, Returns and Qualifications of its own members.”

But that language did not authorize Powell’s exclusion because “qualifications” was limited to those provided in the Constitution. “[T]he Constitution leaves the house without authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution.” *Powell*, 395 U.S. at 522. If the House wanted to take action against Powell for the alleged improprieties, then it had to use the procedures for discipline in Article I, § 5, cl. 2, which – like Article VI, § 25 – required a 2/3 supermajority to expel an elected and qualified member.

The thrust of *Powell* is unmistakable: if a House of the Congress wants to deny a seat to an elected and qualified member, it can override the vote of the people in that member’s district *only* by allowing him to take his seat and then expelling him, if the vote to expel meets the supermajority requirement. That conclusion re-enforces the political and representational rights of the voters in the affected district. The ruling also guards against attempts to block seating elected legislators because of disapproval of the views they espouse. *See, e.g., Bond v. Floyd*, 385 U.S. 116 (1966) (Georgia Legislature unconstitutionally denied Julian Bond the seat to which he was elected because of his views opposing the Viet Nam War); [en.wikipedia.org/wiki/Victor\\_L.\\_Berger](http://en.wikipedia.org/wiki/Victor_L._Berger) (House of Representatives denied seat to elected Wisconsin Socialist Victor Berger because of his political and anti-war positions); *cf. Berger v. United States*, 255 U.S. 22 (1921). Although the *Powell* decision was interpreting the federal constitution, while petitioners in this case invoke the West Virginia Constitution, the clear similarity, indeed overlap, of the language between the two constitutions calls for the same result here as that reached by the High Court in *Powell*.

III. UNDER WEST VIRGINIA CODE §§ 3-10-5(A) AND 6-5-1, IF A VACANCY

OCCURS IN THE 91<sup>ST</sup> DELEGATE DISTRICT, RESPONDENTS HAVE A MANDATORY DUTY TO REQUEST FROM THE BERKELEY COUNTY DEMOCRATIC EXECUTIVE COMMITTEE THREE NOMINEES TO SERVE AS THAT DISTRICT'S DELEGATE AND THE GOVERNOR HAS A DUTY TO CHOOSE A DELEGATE FROM THAT LIST OF NOMINEES.

West Virginia Code § 3-10-5(a) provides that a vacancy in a legislative seat “shall be filled by appointment by the Governor, from a list of three legally qualified persons submitted by the party executive committee of the same political party with which the person holding the office immediately preceding the vacancy was affiliated at the time the vacancy occurred.” In *State ex rel. Biafore v. Tomblin*, 236 W. Va. 528, 782 S.E.2d 223 (2016), this Court confronted a vacancy in a Senatorial seat created by the resignation of the incumbent Daniel Hall. Senator Hall had been elected in 2012 as the Democratic candidate for the Wyoming County senatorial seat, but in November 2014, he switched his party to Republican. In December of the following year, he announced his resignation, thus creating a vacancy. The petitioners in *Biafore* contended that the nominee list required by § 3-10-5(a) had to come from the Wyoming County Democratic Executive Committee because Hall had been elected as a Democrat and that expressed the voters' wishes. This Court held, however, that such an interpretation conflicted with the clear language in § 3-10-5(a). Per that text, the list of nominees “is to be submitted by the party with which the officeholder was most recently affiliated.” 236 W. Va. at 534, 782 S.E.2d at 229. The Court emphasized the temporal reference in § 3-10-5 to “*immediately preceding*” the vacancy. In that case, “Senator Hall was affiliated with the Republican Party immediately preceding the vacancy and had been so affiliated since November 2014. The legislature’s use of the phrase ‘immediately preceding the vacancy’ is manifestly plain, enunciating a specific and incontrovertible time criterion for the determination of the vacating officeholder’s party

affiliation.” *Id.*

In the present case, Joseph DeSoto won the November 2024 election as the Republican candidate for delegate of the 91<sup>st</sup> Delegate District in Berkeley County. Under West Virginia Code § 6-5-1, DeSoto’s term as delegate began on December 1, 2024. That section provides that the term of an elected “member of the Legislature [begins] on December 1, next after his or her election. At that time, DeSoto was a Republican, but on December 11, 2024, he switched his party to Democrat and has remained as such. On January 8, 2025, House Resolution 4 attempted to declare a vacancy in the 91<sup>st</sup> Delegate District. On that date and “immediately preceding” that date, the officeholder was Joseph DeSoto and his political affiliation was Democrat. Therefore, if the attempted vacancy is valid and if it is to be filled, referral *must* be made to the Democratic Executive Committee in Berkeley County for a list of three qualified nominees and selection to fill the vacancy *must* be made from that list.

#### CONCLUSION

Based on the foregoing facts and argument, petitioners request the following relief:

- A. A writ of mandamus requiring the respondents to seat Joseph A. DeSoto as the delegate from the 91<sup>st</sup> Delegate District upon his appearance in the House Chambers for administration of his oath;
- B. A writ of mandamus requiring the respondents to request from the Berkeley County Democratic Executive Committee three nominations of qualified persons to serve as delegate of the 91<sup>st</sup> Delegate District and to choose a successor delegate from among those three nominees;
- B. An expedited hearing and resolution of this matter;

- C. Petitioners' expenses and attorneys' fees incurred in this action;
- D. All other relief to which the Court shall deem the petitioners to be entitled.

/s/ Robert M. Bastress, Jr.  
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CERTIFICATE OF SERVICE

I, Robert M. Bastress, Jr., have served copies of the foregoing petition and its appendix on each of the respondents and on the West Virginia Attorney General by mailing the same to each at his office in the State Capitol, 1900 Kanawha Blvd., East, Charleston, W. Va., on this the 14<sup>th</sup> day of January, 2025.

/s/ Robert M. Bastress, Jr.

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**APPENDIX**

Exhibit A – House of Delegates Resolution 4, January 8, 2025

## HOUSE RESOLUTION 4

(By Delegate Hanshaw (Mr. Speaker))

[January 8, 2025]

Declaring a vacancy in the Ninety-First Delegate District of the West Virginia House of Delegates due to the failure to take the Oath of Office by the Delegate Elect as required by Article VI, Section 16 of the Constitution of West Virginia:"

Whereas, The West Virginia House of Delegates finds that civil and respectful debate and behavior is a foundational principle of a free society; and

Whereas, The West Virginia House of Delegates vehemently condemns any menace, acts of violence, or terroristic threats directed at any of its members occasioned by their service to the State of West Virginia; and

Whereas, Members of the West Virginia House of Delegates have an absolute right to be safe and feel secure from threats and/or acts of violence directed at them, and in no manner shall the members be intimidated due to their membership in the House of Delegates; and

Whereas, On or about December 11, 2024, Delegate-Elect Joseph A. DeSoto threatened to kill several members of the West Virginia House of Delegates claiming he was directed by God to do so; and

Whereas, On December 11-12, 2024, the allegations against Delegate-Elect DeSoto were investigated by the West Virginia State Police. Evidence from that investigation was presented to the Magistrate Court of Berkeley County, West Virginia which found probable cause the alleged statements were feloniously made. The Court then issued an arrest warrant for Delegate-Elect DeSoto on charges of making terroristic threats against public officials. Delegate-Elect DeSoto was subsequently arrested; and

Whereas, On December 23, 2024, the Magistrate Court of Berkeley County conducted a felony preliminary hearing and bound Delegate-Elect DeSoto over to the Berkeley County Grand Jury. Delegate-Elect DeSoto was released on bond and placed on home confinement as term and condition of that bond. Delegate-Elect DeSoto will remain on bond and thus on home confinement until he is either indicted or until after the passing of three terms of court which will not occur for more than a year from the date of arrest; and

Whereas, Two members of the House of Delegates petitioned their respective Magistrate Courts for Personal Safety Orders which were granted. Pursuant to the terms of the Personal Safety Orders, Delegate-Elect DeSoto is not permitted any contact with said Delegates and is not permitted to be in their presence. Violation of the terms of the Personal Safety Order are grounds

for immediate arrest. The order is in effect until at least ten (10) days following the conclusion of the 2025 Regular Legislative Session; and

Whereas, Article VI, Section 16 of the Constitution of West Virginia requires each legislator take the Oath of Office in the hall of the house to which the member is elected to qualify. Failure to take the Oath of Office as required results in a forfeiture of the seat; and

Whereas, The Eighty-Seventh Regular Session of the West Virginia Legislature commenced on January 8, 2025, when the Delegates and Delegates-Elect took their Oaths of Office in accordance with Article VI, Section 16, or having made other arrangements to do so; and

Whereas, On January 8, 2025, Delegate-Elect DeSoto failed to take the Oath of Office in compliance with Article VI, Section 16 of the Constitution of West Virginia and is not reasonably expected to do so at any point in the future; and

Whereas, Article VI, Section 24 of the Constitution of West Virginia empowers the House of Delegates to be the exclusive judge of the qualifications of the delegates-elect prior to the delegates-elect being seated as members of the House; and

Whereas, The House of Delegates has determined that Delegate-Elect Joseph DeSoto does not qualify to serve as a member of the West Virginia House of Delegates, having failed to take the Oath of Office.

Resolved by the House of Delegates, a majority of the members being present and voting concurring herein:

The House of Delegates hereby declares vacant the seat heretofore designated for Delegate-Elect Joseph A. DeSoto, of the County of Berkeley, Ninety-First Delegate District in that he failed to take the Oath of Office; and, be it

Further Resolved, That the Clerk of the House certify a copy of this Resolution, and that the Sergeant at Arms of the House of Delegates deliver the same to Mr. Joseph A. DeSoto, or his agent, or post the same at his residence at his last known address in Gerrardstown, Berkeley County, West Virginia; and, be it

Further Resolved, That the Speaker of the House of Delegates transmit a letter to the Governor of the State of West Virginia, and to the Republican Executive Committee of the County of Berkeley, Ninety-First Delegate District, of this definitive action by the House.