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August 21, 2018

Hand Delivered

Edythe Nash Gaiser, Clerk of Court
State Capitol Room E-317
1900 Kanawha Blvd., East
Charleston, WV 25305

Re: ***State of West Virginia ex rel., Donald L. Blankenship, candidate for U.S. Senate in West Virginia; and Constitutional Party of West Virginia v. Mac Warner, in his official capacity as West Virginia Secretary of State***
In the Supreme Court of Appeals of West Virginia
Case No.: 18-0712

Dear Ms. Gaiser,

Enclosed please find an original and 10 copies of ***"Respondent Mac Warner's, in his official capacity as West Virginia Secretary of State, Response to Petitioners' Writ of Mandamus and Incorporated Memorandum of Law in Support"*** in regard to the above-referenced matter. Please file in the customary manner.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

Marc E. Williams

MW7/ls6
Enclosures

cc: Robert M. Bastress, Esq. (regular mail only)

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 18-0712

STATE OF WEST VIRGINIA *ex rel.* DONALD L. BLANKENSHIP, CANDIDATE FOR U.S. SENATE IN WEST VIRIGINIA, and, CONSTITUTION PARTY OF WEST VIRGINIA,

Petitioners,

v.

MAC WARNER, IN HIS OFFICIAL CAPACITY AS WEST VIRGINIA SECRETARY OF STATE,

Respondent.

RESPONDENT MAC WARNER'S, IN HIS OFFICIAL CAPACITY AS WEST VIRGINIA SECRETARY OF STATE, RESPONSE TO PETITIONERS' WRIT OF MANDAMUS AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT

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QUESTIONS PRESENTED

1. Retroactivity is not implicated when a statutory amendment is a mere clarification of existing law. Moreover, where the statute is not operating on events completed prior to its passage, the application is prospective, not retroactive and due process is not implicated. W. Va. Code § 3-5-23(g) merely clarified existing law. Furthermore, W. Va. Code § 3-5-23(g)'s bar on Mr. Blankenship's use of the nomination-certificate process did not implicate events completed prior to § 3-5-23(g)'s passage and Mr. Blankenship had prior notice of its effect, raising no due process implications. Does W. Va. Code § 3-5-23(g) apply to preclude Mr. Blankenship from utilizing the nomination-certificate process?

2. W. Va. Code § 3-5-23(a), which precludes use of the nomination-certificate process by persons "who are not already candidates in the primary election," was created as part of a statutory regime that used deadlines to precluded individuals from using both the nomination-certificate and primary election processes. In *Daly*, Judge Chambers struck the relevant deadline, rendering that provision vague. Does W. Va. Code § 3-5-23(a), a provision that was created as part of a statutory regime aimed at precluding parties from using both the primary and nomination-certificate processes bar Mr. Blankenship from using the nomination-certificate process after losing the Republican primary?

3. Article VI, Section 30 of the West Virginia Constitution renders unconstitutional amendments that fail to describe the substance of the amendment. When the Legislature amended W. Va. Code § 3-5-23(a) in 2009, it stated precisely what the amendment to that provision did—make technical corrections to conform it with other election law provisions effectively limiting candidates to using either the nomination-certificate process or the primary/convention process. Did the 2009 amendment violate Article VI, Section 30 of the West Virginia Constitution?

4. To show that a ballot access restriction violates the West Virginia Constitution's guarantee of equal protection, the party challenging the law must show that "the state has imposed a significantly higher burden on the independent or third-party candidate than it has imposed on major-party candidates." *W. Virginia Libertarian Party v. Manchin*, 165 W. Va. 206, 222 (1980) (emphasis added). Under W. Va. Code § 3-5-23, unrecognized parties may use the nomination-certificate process to nominate anyone except a major party's primary loser. Does W. Va. Code § 3-5-23 pose a significantly higher burden on the unrecognized parties and their candidates in violation of the equal protection guarantee where it solely limits them from using the nomination-certificate process to nominate primary losers?

5. Although the West Virginia Constitution protects individuals' freedom of association, the Legislature may enact provisions "to prescribe reasonable rules for the conduct of elections, reasonable procedures by which candidates may qualify to run for office, and the manner in which they will be elected." Syl. Pt. 4, *Sowards v. County Comm'n of Lincoln Cty.*, 196 W.Va. 739 (1996). In so doing, ballot restrictions will be reviewed deferentially if the State can show that the ballot restriction does not severely burden associational rights and furthers an important state interest. W. Va. Code § 3-5-23 does not infringe on unrecognized parties' or candidates' ultimate ability to choose their own candidates or parties because a candidate's inability to run is ultimately premised on their own choices, and the law furthers the state's compelling interest in preventing party

factions and protecting its electoral process. Does W. Va. Code § 3-5-23 violate the Petitioners' freedom of association?

STATEMENT OF THE CASE

On May 8, 2018, Mr. Blankenship lost his bid to win the Republican nomination for United States Senate. That night, Republican voters spoke, and they chose to nominate Patrick Morrissey instead of Mr. Blankenship. And so, after months of holding himself out as a Republican, availing himself of the publicity afforded by associating with the Republican Party, and participating in high-profile events, such as debates, Mr. Blankenship decided he was not a Republican after all and switched to the Constitution Party, an unrecognized party under West Virginia law. On May 19, 2018, the Constitution Party named Blankenship its nominee for the United States Senate.

As an unrecognized party, the Constitution Party is able to avail itself of the nomination-certificate process to designate candidates for office. *See* W. Va. Code § 3-5-23. In its current iteration, the nomination-certificate process affords independent and unrecognized party candidates an easier path to the ballot by allowing them ballot access to the general election if they collect and submit a sufficient number of signatures from registered voters. *Id.* Mr. Blankenship, a candidate who took advantage of the publicity and structure afforded by associating with the Republican Party—and lost the Republican Party's Primary election—now seeks to commandeer a procedure that this Court determined served "as a primary-election bypass for [independent and third-party candidates]," *W. Virginia Libertarian Party v. Manchin*, 165 W. Va. 206, 226 (1980), in an effort to claw his way onto the general election ballot. In short, Mr. Blankenship is a sore loser—the very sort of sore loser West Virginia law has sought to keep off the ballot since 1919.

Mr. Blankenship's effort to commandeer a process reserved for independent and unrecognized party candidates not only undermines the purpose behind the nomination-certificate process, it has also opened the door for political chicanery that challenges the stability of West

Virginia's political system. Indeed, the Constitution Party admits that a primary driving factor in its efforts to place Mr. Blankenship on the ballot is the "rare opportunit[y] to obtain the rights and privileges of a State-recognized party." Writ Ex. E. Put simply, the Constitution Party admits that it is trying to bootstrap its way to recognized party status by using a particularly noteworthy primary loser to bolster its votes.

In short, Mr. Blankenship's sore loser candidacy commandeers a process reserved for independent and small party candidates seeking to bypass the primary election and uses the nomination-certificate process to thwart the will of Republican voters. Not only that, it opens the door for political chaos by creating splinter factions of the Republican Party, potentially artificially elevating the Constitution Party to recognized party status. Fortunately, West Virginia law has long prohibited Mr. Blankenship's conduct. Moreover, a recent amendment to West Virginia's election law, W. Va. Code § 3-5-23(g), further clarifies that sore losers may not commandeer the nomination-certificate process to claw their way back onto the ballot after a losing effort in a recognized party's primary. Accordingly, West Virginia law requires the Petition for Writ of Mandamus be **DENIED**.

A. West Virginia Election Procedure

In West Virginia, the Legislature created two paths to the ballot: a rigorous process whereby recognized parties engage in primaries and conventions to determine candidates and a more lax nomination-certificate process intended to give independent and unrecognized party candidates access to the ballot. Candidates desiring to run as a member of one of the recognized political parties,[1] which are the parties that received at least one percent of the votes for their candidate for governor in the last preceding general election, *see* W. Va. Code § 3-1-8, may

[1] Presently, the four recognized political parties are: (1) the Democratic Party, (2) the Libertarian Party, (3) the Mountain Party, and (4) the Republican Party.

participate in that party's primary election if they meet certain requirements. W. Va. Code §§ 3-5-4, 3-5-7. Any of the political parties which polled less than ten percent of the total vote cast for governor at the last general election may also elect to nominate candidates by party convention instead of by the primary process. W. Va. Code § 3-5-22.

On the other hand, independent and unrecognized party candidates, may, under § 3-1-8, collect a specified number of signatures from registered voters to appear on the general election ballot through the process set forth in §§ 3-5-23 and 3-5-24. The nomination-certificate process contained in these sections are reserved for "Groups of citizens having no party organization . . . who are not already candidates in the primary election for public office." W. Va. Code § 3-5-23(a). In order to appear on the general election ballot, candidates utilizing this process must submit the required number of signatures not later than August 1st. W. Va. Code § 3-5-24.

B. House Bill 4434 Amends West Virginia Code § 3-25-23

On March 7, 2018, the West Virginia Legislature passed House Bill 4434, which amended § 3-5-23. The amended version of West Virginia Code § 3-5-23 went into effect on June 5, 2018, and it clarified West Virginia's longstanding prohibition on sore losers availing themselves of the nomination-certificate process. The amendment added the following subsections to § 3-5-23:

> (f) For the purposes of this section, any person who, at the time of the filing of the nomination certificate or certificates, is registered and affiliated with a recognized political party as defined in § 3-1-8 of this code may not become a candidate for political office by virtue of the nomination-certificate process as set forth in this section.
>
> (g) For the purposes of this section, any person who was a candidate for nomination by a recognized political party as defined in § 3-1-8 of this code may not, after failing to win the nomination of his or her political party, become a candidate for the same political office by virtue of the nomination-certificate process as set forth in this section.

C. Mr. Blankenship's Efforts to Circumvent His Republican Primary Loss.

On January 23, 2018, Mr. Blankenship filed a certificate of announcement declaring his intent to participate in the West Virginia Republican Party primary election for the United States Senate. After months of electioneering as a Republican Party candidate, Mr. Blankenship lost the Republican Primary on May 8th, 2018, garnering 19.9 percent of the primary vote. Patrick Morrissey, the current Attorney General of West Virginia won the nomination, collecting 34.9 percent of the votes.

On May 19, 2018, the Constitution Party named Mr. Blankenship its nominee for the United States Senate. Shortly thereafter, on May 21, 2018, Mr. Blankenship switched his political party registration from the Republican Party to the Constitution Party of West Virginia. The Constitution Party is not a recognized political party under § 3-1-8. On July 17, 2018, the West Virginia Secretary of State Mac Warner ("WVSOS") received a letter from Phil Hudok, Vice-Chairman of the Constitution Party of West Virginia Executive Committee stating that the Constitution Party intended Mr. Blankenship to serve as the party's nominee for the United States Senate Seat in the general election.

On July 17, 2018, Mr. Blankenship submitted nomination-certificate signatures, the filing fee, and a certificate of announcement declaring his intent to appear on the ballot as a candidate for United States Senate as a member of the Constitution Party. On July 26, 2018, the WVSOS declined to accept Mr. Blankenship's certificate of announcement on the grounds that West Virginia Code § 3-5-23 bars him from using the nomination-certificate process to become a general election candidate because he lost the Republican Party Primary. The WVSOS has not completed a final count to determine whether Mr. Blankenship has gathered the necessary number of signatures; however, the latest counts indicate that he likely has sufficient signatures to move forward. Mr. Blankenship thereafter filed this writ.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The WVSOS agrees with the Petitioners' assertion that this case implicates important constitutional and statutory questions that typically warrant oral argument under Rule 20 of the West Virginia Rules of Appellate Procedure. However, in order to ensure that the absentee ballots are printed in time for the September 21, 2018 absentee ballot deadlines, Casto and Harris, the provider of the majority of the State's ballot printing services, gave the State a drop dead date of September 7, 2018 by which it must receive county approval for ballot printing. Therefore, the State must resolve the issue by that time, and the WVSOS is willing to accept a decision without oral argument.

To the extent Petitioners insist upon oral argument, the WVSOS notes that the WVSOS notified Petitioners that Mr. Blankenship's position on the ballot was denied on July 26, 2018, but chose to wait until August 9, 2018 to file this Writ, despite knowing that the WVSOS had a limited timeframe to print the ballots for the general election.

SUMMARY OF ARGUMENT

Mr. Blankenship availed himself of the Republican Primary and lost. West Virginia law, old and new alike, prohibits individuals from availing themselves of the more lax nomination-certificate process after running in recognized parties' primary elections.

First, West Virginia Code § 3-5-23(g), a provision passed in 2018 to clarify the state of West Virginia's sore loser law, applies in this case. West Virginia Code § 3-5-23(g) applies to bar Mr. Blankenship's candidacy. West Virginia Code § 3-5-23(g) applies here and is not impermissibly retroactive and does not violate due process based on several grounds: West Virginia Code § 3-5-23(g) only clarified existing law; subsection (g) is only being applied prospectively to the date on which a candidate's certificates are submitted and Mr. Blankenship

could not qualify for office prior to the effective date of the amendment; and Mr. Blankenship had notice that he would not be permitted to use the nomination-certificate process after losing in the Republican Party primary when he filed his certificate of announcement for the Republican Party primary in November 2017. Due process principles are therefore not implicated. And, West Virginia Code § 3-5-23(g) does not create constitutional doubt under Article III, § 11 of the West Virginia Constitution because it applies only to the denial of privileges for service in the Southern cause and is therefore entirely inapplicable to § 3-5-23(g).

Additionally, West Virginia Code § 3-5-23(a) acts to bar Mr. Blankenship's candidacy even if West Virginia Code § 3-5-23(g) does not apply to this case. Subsection (a)'s language "who are not already candidates in the primary election" is ambiguous as to whether Petitioner Blankenship may now use the nomination-certificate process under this Court's decision in *Wells v. State ex rel. Miller*, 237 W. Va. 731 (2016). Because the statute is capable of two meanings, the Court must ascertain the legislative intent in subsection (a). Prior to the decision in *Daly v. Tennant*, 216 F. Supp. 3d 699 (S.D.W. Va. 2016), which held the pre-primary filing deadline for certificates of announcement unconstitutional as applied to nomination-certificate candidates, a nomination-certificate candidate could not have first participated in a primary. Indeed, West Virginia has used procedures prohibiting primary losers from using the nomination-certificate process as early as 1919. *See* Michael S. Kang, Sore Loser Laws and Democratic Contestation, 99 Geo. L.J. 1013, 1044 (2011). While *Daly* rendered the deadline in West Virginia Code § 3-5-7 unconstitutional as applied to nomination-certificate candidates, § 3-5-23(a)'s preclusion of primary party losers from utilizing the nomination-certificate process, before or after the primary remains. And, Petitioners' contrary interpretation that subsection (a) was to only target cross-filing is unattainable in that it fails to fit the literal construction of subsection (a) that Petitioners seek to apply to the WVSOS's

interpretation of this provision. Finally, subsection (a) is not rendered unconstitutional by the amendment's title given that the 2009 amendment did not change the law, but only stated the longstanding effect of filing deadlines. The "who are not already candidates" provision became the operative clause only after *Daly* struck down the filing deadline as applied to nomination-certificate candidates. Therefore, it did not need a title on passage to satisfy Article VI, Section 30 of the West Virginia Constitution.

Moreover, West Virginia's sore loser law does not run afoul of the equal protection guarantee of either the West Virginia or United States Constitution. To prevail on an equal protection challenge against a ballot access law, the Petitioners must show that "the state has imposed a significantly higher burden on the independent or third-party candidate than it has imposed on major-party candidates." *W. Virginia Libertarian Party*, 165 W. Va. at 222 (emphasis added). The Petitioners are incapable of doing so. The mere fact that West Virginia's sore loser law acts to bar a small subsect of individuals does not pose a significantly higher burden on the Petitioners. What little burden is borne by the Petitioners is far outweighed by West Virginia's compelling interest in preventing party factions and protecting its political system from ballot siphoning and bootstrapped major parties.

Finally, West Virginia's sore loser law does not run afoul of the Petitioners' associational rights. The Legislature has the power "to prescribe reasonable rules for the conduct of elections, reasonable procedures by which candidates may qualify to run for office, and the manner in which they will be elected." Syl. Pt. 4, *Sowards v. County Comm'n of Lincoln Cty.*, 196 W.Va. 739 (1996). The Legislature acted according to that power here, and the minor burden imposed on the Petitioners' is insufficient to outweigh the Legislature's ability to promulgate election laws aimed at preventing party splintering and protecting the electoral process. This is especially true where,

as here, the challenged law does not strip the Petitioners' right to choose who they associate with—the ultimate prohibition on association stems from Mr. Blankenship's decision to use the primary instead of the more lax procedure afforded to unrecognized party candidates.

West Virginia has long ensured that primary candidates may not also claw their way onto the ballot using the more lax nomination-certificate procedure. That procedure is designed to ensure that independent and unrecognized party candidates have an easier path to the ballot. Mr. Blankenship may not avail himself of that easier path by casting himself as an unrecognized party candidate where mere months ago he availed himself of the Republican Party's significantly larger platform. To allow him to do so would undermine the integrity of West Virginia's electoral system by promoting party splintering and encouraging ballot siphoning. Accordingly, the Petitioners' Petition for Writ of Mandamus must be denied.

ARGUMENT

I. Mr. Blankenship cannot use the nomination-certificate process after losing in the Republican Party primary pursuant to W. Va. Code § 3-5-23(g).

A. W. Va. Code § 3-5-23(g) contains a sore loser provision that bars Mr. Blankenship's candidacy via the certificate nomination process.

The current version of West Virginia Code § 3-5-23, House Bill 4434, was passed by the West Virginia Legislature on March 7, 2018 and became effective 90 days later, on June 5, 2018, well before both the August 1st deadline to file nomination certificates and the November 6th election. Section 3-5-23(g) provides that a candidate may not commandeer the nomination-certificate procedure after losing a party primary. W. Va. Code § 3-5-23(g) (2018). In addition, § 3-5-23(a), which remained unchanged through the amendment, provides that "Groups of citizens having no party organization may nominate candidates who are not already candidates in the primary election" through the nomination-certificate process. W. Va. Code § 3-5-23(a).

Accordingly, by virtue of his decision to participate in the May 2018 West Virginia Republican Party primary, § 3-5-23(g) expressly bars Mr. Blankenship from utilizing the more lax nomination-certificate process to appear on the general election ballot for the same Senate seat that he lost in the Republican Primary. The Petitioners concede, as they must, that application of § 3-5-23(g) precludes Mr. Blankenship from appearing on the general election ballot. Writ at 17.

B. West Virginia Code § 3-5-23(g) applies and bars Mr. Blankenship's second candidacy.

Section 3-5-23(g) applies to preclude Mr. Blankenship's use of the nomination-certificate process. First, because subsection (g) represents a clarification of prior law, retroactivity principles are not implicated. Second, § 3-5-23(g) is being applied prospectively not retroactively because it does not attach new legal consequences to completed events. Mr. Blankenship had not yet completed the events necessary for him to qualify as an unrecognized party candidate at the time the amendment became effective and he had prior notice that participating in a primary would thereafter bar him from using the nomination-certificate process. Therefore, due process principles are not implicated by application of § 3-5-23(g).

1. The retroactivity analysis set forth in *Martinez* governs.

This Court's recent decision *Martinez v. Asplundh Tree Expert Co.* sets forth the appropriate framework for determining whether a statute is being applied retroactively and whether that application is permissible.[2] 239 W. Va. 612 (2017). Petitioners wholly fail to delineate

[2] The Petitioners make the distinction between retroactive and retrospective application of the 2018 amendment to § 3-5-23. Writ at 25, n. 10. The Petitioners argue that the 2018 amendment to § 3-5-23 is retroactive because it was adopted during the current election cycle that started prior to the effective date of the amendment. (*See id.*) But, there is no support for this interpretation. Moreover, as explained, *infra* §§ I(B)(2), I(B)(3) impermissible retroactivity is not implicated because the amendment is a clarification of prior law and is being applied prospectively, not retrospectively.

any test for determining whether a statute is being applied retroactively, instead generally arguing that application of § 3-5-23(g) is impermissible. Petitioners are incorrect.

The Court should begin with the proposition that "[a] statute is presumed to be prospective in its operation unless expressly made retrospective." *Id.* at 616 (citing W. Va. Code. § 2-2-10(bb)). A statute

> Is intended to operate prospectively, and not retrospectively, unless it appears, by clear, strong and imperative words or by necessary implication that the Legislature intended to give the statute retroactive force and effect.

Syl. pt. 4, *Taylor v. State Comp. Comm'r*, 140 W. Va. 572 (1955). If this presumption is overcome, then the statute applies retroactively. *See id.* The Petitioners start and end their retroactivity analysis here. However, where the legislature has not made clear its intent for the statute to apply retroactively, the court must determine whether application of the statute to the case in question would have an impermissibly retroactive effect. *Pub. Citizen, Inc. v. First Nat. Bank in Fairmont*, 198 W. Va. 329, 335 (1996) (citation omitted). Only if the provision would "attach new legal consequences to events completed before its enactment" will the provision not apply retroactively. *Id.* First, as a clarification of prior law, § 3-5-23(g) may be applied retroactively. Second, even if § 3-5-23(g) represents a substantive change of law, retroactivity is not implicated because the statute is only being applied prospectively to the time Mr. Blankenship filed his nomination certificates, which was after the effective date of the amendment.

2. The Amendment to West Virginia Code § 3-5-23 applies to bar Mr. Blankenship's candidacy because it represents a clarification of prior law.

Where an amendment is intended only to represent a clarification of a statute, even if it changes the original statutory language, "this does not necessarily indicate that the amendment institutes a change in the law." *See, e.g., Brown v. Thompson*, 374 F.3d 253, 258-59 (4th Cir. 2004). The Petitioners wrongly assert that the WVSOS's description of the 2018 amendment in his denial

letter to Mr. Blankenship as a clarification presupposes that the law was ambiguous, and therefore should not apply to bar Mr. Blankenship's candidacy. Writ at 15. However, while a legislature may amend a statue to establish new law, it also may enact an amendment "to clarify existing law, to correct a misinterpretation, or to overrule wrongly decided cases." *United States v. Sepulveda*, 115 F.3d 882, 885 n. 5 (11th Cir. 1997) (internal citations and quotations omitted). A "change[ ] in statutory language need not ipso facto constitute a change in meaning or effect. Statutes may be passed purely to make what was intended all along even more unmistakably clear." *Brown*, 374 F.3d at 259 (internal citations omitted). In such a case, the clarification is applied retroactively. *Id.*

The addition of subsection (g) to § 3-5-23 represents an intent by the Legislature to clarify the classes of individuals who may not use the nomination-certificate process to appear on the ballot after this Court's decision in *Wells v. State ex rel. Miller*. As a clarification, subsection (g) can be applied regardless of whether the events predate its enactment. This Court in *Wells* examined the requirements necessary for a candidate for office to utilize the nomination-certificate process contained in §§ 3-5-7, 3-5-23, and 3-5-24. 237 W. Va. 731, 736 (2016). Unlike the present case, in *Wells*, a registered Democrat argued that he could utilize the nomination-certificate process to appear on the general election ballot as an Independent, after he did not participate in the Democrat Party's primary. In reaching the conclusion that the nomination-certificate process contained in § 3-5-23 was available only to independent and minor party candidates based on the Legislature's intent, the Court found that § 3-5-23(a) was ambiguous because it did not expressly state who could use the nomination-certificate process, and specifically did not state that a recognized political party candidate could not use this process. *Id.* at 742-43.

In response to the ambiguity found by the Court in *Wells*, the Legislature passed House Bill 4434, which amended West Virginia Code § 3-5-23 by adding subsections (f) and (g). These

subsections clarified that candidates who were a member of a recognized political party and those that failed to win a recognized party primary could not use the nomination-certificate process. Regardless of whether West Virginia Code § 3-5-23(a) is interpreted to prohibit primary election losers from using the nomination-certificate process, *see supra* II, it is evident that the Legislature intended to clarify that candidates meeting either subsections (f) or (g) could not qualify for the general election using the nomination-certificate process when it added these subsections. As a clarification to the previous version of this section, the amendment may be applied. *See Brown*, 374 F.3d at 258-59.

The Petitioners argue that § 3-5-23(g) was intended to change, not amend the law, based upon the contention that the Secretary's view "violates a basic rule of construction." Writ at 15. The Petitioners argue that because the Legislature did not amend § 3-5-23(a), and instead added subsection (g), "reading a different subsection as merely providing clarity would cause the two subsections to be duplicative and violate the cannon against surplusage." Writ at 16. However, this rule of construction is inapplicable given that Petitioners' reading of this section does not avoid a redundancy. To the extent the Petitioners argue that § 3-5-23(a) was intended to only prohibit present members of a recognized political party from utilizing the nomination-certificate process, their interpretation falls prey to the same problem by rendering (f) "mere surplusage" of § 3-5-23(a). Instead, the better reasoning is that the Legislature intended to clarify that section (a) unequivocally precluded both the scenarios listed in subsection (f) and (g) and they used separate provisions to ensure that these provisions could not be interpreted in an ambiguous manner.

3. The Amendment to West Virginia Code § 3-5-23 does not have a retroactive effect as applied to Mr. Blankenship and therefore bars his candidacy.

Even if this Court finds that § 3-5-23 is not a clarification of prior law, it may be applied to Mr. Blankenship because it does not have a retroactive effect. A "law is not retroactive merely because part of the factual situation to which it is applied occurred prior to its enactment." Syl. pt. 3, *Sizemore v. State Workmen's Comp. Comm'r*, 159 W. Va. 100 (1975). A law is only retroactive in application "when it operates upon transactions which have been completed or upon rights which have been acquired or upon obligations which have existed prior to its passage." *Id.*

The Court must ask whether "the new provision attaches new legal consequences to events completed before its enactment." *Pub. Citizen, Inc.*, 198 W. Va. at 335 (citing *Landgraf v. USI Film Prod.*, 511 U.S. 244, 270 (1994)). Determining whether a law's effect is retroactive demands a "commonsense, functional judgment . . . informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Martin v. Hadix*, 527 U.S. 343, 357-58 (1999) (citing *Landgraf*, 511 U.S. at 270).

"[R]etroactivity ought to be judged with regard to the act or event the statute is meant to regulate." *Martinez*, 239 W. Va. at 618. Clearly, § 3-5-23 is meant to regulate the types of candidates who can use the nomination-certificate process. It applies to all candidates seeking to utilize the nomination-certificate process to appear on the ballot for the 2018 West Virginia general election. Because the statute went into effect well in advance of the August 1st deadline for candidates to file certificates and other documents required by § 3-5-24, applying this provision to exclude Mr. Blankenship from using the nomination-certification process does not involve a retroactive application of § 3-5-23(g). Instead, it only requires the application of this statute prospectively, at the time the candidate must submit his nomination certificates, by August 1st.[3]

[3] Petitioners cite to *Libertarian Party of Ohio v. Husted* for the proposition that an amendment involving elections cannot be applied after the primary election has occurred. Writ at 17. *Libertarian Party of Ohio v. Husted*, No. 2:13-CV-953, 2014 WL 11515569, at *1 (S.D. Ohio Jan. 7, 2014). That case is readily distinguishable in that the defendant sought to apply an amendment to preclude plaintiffs' candidacy even

The amendment clearly does not attach new legal consequences to events completed before its enactment.[4] The Petitioners point to the fact that when the amendment came into effect, Mr. Blankenship had already participated in, and lost the primary, and therefore could no longer use the nomination-certificate process. Writ at 3-4. But, as of the effective date of the amendment, he could not have qualified to appear on the general election ballot. Mr. Blankenship had not been a member of the Constitution Party for sixty days before June 5th, meaning he could not have qualified for the ballot at that time. *See* W. Va. Code § 3-5-7(d)(6) (requiring candidates to state that they "ha[ve] not been registered as a voter affiliated with any other political party for a period of sixty days before the date of filing the announcement"). Prior to June 5th, Mr. Blankenship additionally had not submitted the necessary signatures and paid the filing fee required by §§ 3-5-23 and 3-5-24 to qualify by nomination certificates. Because Mr. Blankenship could not have qualified for the ballot when the amendment came into effect, it does not attach new legal consequences to events completed prior to its enactment.

The Petitioners also fail to note that prior to the effective date of the amendment, Mr. Blankenship had notice that he would not be able to appear on the general election ballot using the nomination-certificate process if he participated in the West Virginia Republican Party primary

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though plaintiffs had or would file their nomination certificates prior to the effective date of the amendment. *Id.* In this case, it is undisputed that Mr. Blankenship did not and could not qualify for candidacy prior to the effective date of § 3-5-23(g).

[4] Petitioners also argue that application of § 3-5-23(g) violates their due process rights because it "prohibit[s] certain candidates from ever running for office as a candidate for a minor political party," "caus[es] other candidates to lose the benefit of substantial efforts applied during primary campaigns," and "depriv[es] minor political parties of the opportunity to nominate certain candidates."[4] Writ at 26. Neither of the first two purported interests pertain to Petitioners and therefore cannot consist of a violation of Petitioners' rights. And, because § 3-5-23(g) does not operate retroactively as applied to Petitioners, its application here does not violate their due process rights.

and lost, and therefore cannot demonstrate reasonable reliance and settled expectations on the pre-amendment version of § 3-5-23.

Mr. Blankenship had notice that he could not run for the same position using both the primary process and the nomination-certificate process before he entered the Republican Party primary. Importantly, the Secretary of State's Office published the *2018 Running for Office in West Virginia* ("the Guide") in December 2017 which identified the "sore loser" restriction.[5] Each candidate who filed his certificate of announcement in-person, like Mr. Blankenship did, was offered a hard copy of the Guide. The Guide was also available electronically on the Secretary of State's website. Page 4 of the Guide states,

> THE "SORE LOSER" or "SOUR GRAPES" LAW (W. VA. CODE §§ 3-5-7(d)(6) and 3-5-23)
> Candidates affiliated with a recognized political party who run for election in a primary election and who lose the nomination **cannot** change her or his voter registration to a minor party organization/unaffiliated candidate to take advantage of the later filing deadlines and have their name on the subsequent general election ballot.

Exhibit A at p. 4 (emphasis in original). And, § 3-5-23(a), already prohibited use of the nomination-certificate process by losing primary participants. *See Wells*, 237 W. Va. at 749 (Davis, J.

[5] Petitioners argue that the Guide is meaningless because it contains a warning that it does not constitute legal advice and has not been adopted pursuant to the Administrative Procedure Act. Writ at 12. However, as the chief election official in the State, the Secretary's interpretation of an election statute is entitled to deference. *See State ex rel. ACF Indus., Inc. v. Vieweg,* 204 W. Va. 525, 534–35 (1999) ("When a governmental official or administrative agency has exerted its authority by interpreting an unclear statutory provision that it has the duty to implement and execute, this Court historically has extended great deference to such an interpretation, insofar as it comports with accepted notions of legislative intent and statutory construction."); *Wells*, 237 W. Va. at 744 (finding it noteworthy that the Court's interpretation of Sections 3-5-7 and 3-5-23 was "reached by the State's chief elections official"); *see also Wampler Foods, Inc.*, Syl. pt. 7, 216 W. Va. at 129 ("Interpretations as to the meaning and application of workers' compensation statutes rendered by the Workers' Compensation Commissioner, as the governmental official charged with the administration and enforcement of the workers' compensation statutory law of this State ... should be accorded deference if such interpretations are consistent with the legislation's plain meaning and ordinary construction.") (internal citations and quotations omitted). Mr. Blankenship cannot reasonably argue that he had no notice of the Secretary's interpretation of § 3-5-23 when he registered to be a candidate in November 2017. This belies his argument that the amendment acted to upset his reasonable reliance, settled expectations, or that he had no notice of its effect.

dissenting) (finding that West Virginia Code § 3-5-23 "prevent[s] unsuccessful primary election candidates from subsequently running as independent candidates" using the nomination-certificate process). Despite the clear notice that such act would foreclose his opportunity to use the nomination-certificate process in the event he did not win the Republican Party nomination, Mr. Blankenship decided to participate in the Republican Party primary anyway.

Because Mr. Blankenship had reasonable notice that he could not use the nomination-certificate process after losing the Republican Party primary, "the core principle disfavoring retroactive applications of laws—that 'settled expectations should not be lightly disrupted' is inapplicable here." *See GTE S., Inc. v. Morrison*, 199 F.3d 733, 741 (4th Cir. 1999) (citing *Landgraf*, 511 U.S. at 265 (finding that plaintiff had reasonable notice of amended SEC rules because the report containing the rules was published prior to arbitration and plaintiff "surely knew that the FCC's authority to issue pricing rules might ultimately be upheld by the Supreme Court."); *see also Gill v. Galvin*, No. CV 16-11720-DJC, 2016 WL 4698536, at *2 (D. Mass. Sept. 7, 2016) (finding retroactive deadline for candidate to unenroll or disaffiliate with a party to run in Senate special election was not impermissibly retroactive because there was evidence in the record that the general public was on notice of the likelihood of a special election prior to the deadline). Because Mr. Blankenship had clear notice that participation in the Republican Party primary would foreclose his ability to later use the nomination-certificate process, application of the amendment does not attach legal consequences to his decision to run in the primary in a way that offends "familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Martin v. Hadix*, 527 U.S. 343, 357-58 (1999) (citing *Landgraf*, 511 U.S. at 270). Therefore, application of § 3-5-23(g) is not retroactive and should be applied to exclude Mr. Blankenship from utilizing the nomination-certificate process. Because Mr. Blankenship has already participated in the

Republican Party primary and failed to win the nomination, he may not now use the nomination-certificate process.

C. W. Va. Code § 3-5-23(g) does not create "constitutional doubt" under Article III, § 11 of the West Virginia Constitution because that Article is wholly unaffected by W. Va. Code § 3-5-23(g).

Petitioners argue that § 3-5-23(g) should not be applied to Mr. Blankenship because doing so creates "constitutional doubt" under Article III, § 11 of the West Virginia Constitution in that Mr. Blankenship is "deprived by law, of a[] right, or privilege, because of an[] act done prior to the passage of such law." (Petition Brief, p. 17.) Petitioners are incorrect. Indeed, this Court has previously rejected this broad reading of Article III, § 11 in similar circumstances. Article III, § 11, provides, in pertinent part, "Nor shall any person be deprived by law, of any right, or privilege, because of any act done prior to the passage of such law."

This Court, in *Haddad v. Caryl*, had an opportunity to interpret Article III, § 11. 182 W. Va. 563 (1990). In that case, a taxpayer argued that a newly enacted tax provision which required him to pay a higher tax rate on property he sold prior to the enactment of the provision was unconstitutionally retroactive under Article III, § 11. *Id.* The Court examined the entirety of Section 11, which was ratified approximately seven years after the Civil War, finding that this provision "was designed to prohibit the State from denying such privileges as the privilege to practice law as a penalty for some act—specifically service in the Southern cause—committed before the passage of the statute denying the right or privilege." *Id.* at 568.

Because § 3-5-23(g) does not bar Mr. Blankenship's participation in the general election due to his "service in the Southern cause," there is no "doubt" as to its constitutionality under Article III, § 11 of the West Virginia Constitution.[6]

[6] Petitioners also cite, without explanation, to Article III, § 4 of the West Virginia Constitution. Writ at 17. To the extent Petitioners argue that application of § 3-5-23(g) to Mr. Blankenship violates this constitutional

II. W. Va. Code § 3-5-23(a) additionally bars Mr. Blankenship's sore loser nomination-certificate candidacy.

Even if the Court finds that § 3-5-23(g) does not apply to Mr. Blankenship's second attempt to general election ballot, he is additionally barred from using the nomination-certificate process by the prior version of § 3-5-23 because that version also contained a sore loser provision.

A. W. Va. Code § 3-5-23(a) bars Mr. Blankenship's use of the nomination-certificate process because that provision, when read in the context of the statutory scheme, was intended to reinforce primary candidates' inability to use the nomination-certificate process.

As already noted, § 3-5-23(a), both prior to and after the 2018 amendment, provided that,

> Groups of citizens having no party organization may nominate candidates ***who are not already candidates in the primary election for public office*** otherwise than by conventions or primary elections. In that case, the candidate or candidates, jointly or severally, shall file a nomination certificate in accordance with the provisions of this section and the provisions of section twenty-four of this article.

W. Va. Code § 3-5-23(a) (2009), (2018) (emphasis added).

The Petitioners contend that this provision does not bar Mr. Blankenship's use of the nomination-certificate process because he is not now a candidate in a primary for public office. Writ at 13-14. However, § 3-5-23 is ambiguous as to whether Mr. Blankenship may now utilize the nomination-certificate process for the reasons set forth by this Court in *Wells*. While it does not expressly forbid losing primary candidates from utilizing the nomination-certificate process,

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provision, that argument is unfounded. While Article III, § 4 forbids the passage of a "bill of attainder, ex post facto law, or law impairing the obligation of a contract," § 3-5-23(g) implicates none of these. Petitioners have not argued, and there is no support for, the contention that § 3-5-23(g) punitively targets and imposes criminal punishment on unaffiliated candidates based on past acts, such that it would qualify as a bill of attainder or ex post facto law. *See Baker v. Civil Serv. Comm'n*, 161 W. Va. 666, 679 (1978); *Richmond v. Levin*, 219 W. Va. 512 (2006) ("A fundamental principle of ex post facto law is that it only applies to criminal proceedings, not civil."). Indeed, the WVSOS is not attempting to criminally punish Petitioner. And, as explained in Sections III and IV, the Legislature had legitimate aims to support the passage of § 3-5-23(g). Additionally, Petitioners have not identified any contract with which § 3-5-23(g) would interfere.

the "who are not already candidates" language suggests that it is a mechanism to be used by those candidates who were not successful in a primary election. *See Wells*, 237 W. Va. at 742.

Because the statute is capable of two meanings, the Court must attempt to ascertain the legislative intent in § 3-5-23(a). *See id.* A court should "review the act or statute in its entirety to ascertain legislative intent properly." Syl. pt. 5, in part, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14 (1975). Review of §§ 3-5-7, 3-5-23, and 3-5-24 demonstrate the Legislature intended § 3-5-23(a) to preclude losing primary candidates from using the nomination-certificate process.[7]

In *Wells*, this Court held that § 3-5-7, which required candidates for office to file a "certificate of announcement" evidencing his or her intent to run for office in January prior to the primary election, applied to all candidates, including those utilizing the nomination-certificate process. Syl. pt. 3, 237 W. Va. at 731. That decision resulted in another court action, *Daly v. Tennant*, where the plaintiffs, two nomination-certificate candidates who submitted their nomination petitions prior to the August 1st deadline contained in § 3-5-24, challenged the already-passed January certificate of announcement deadline, which was applied to preclude them from appearing on the general election ballot. 216 F. Supp. 3d 699 (S.D.W. Va. 2016). The court held that the January certificate of announcement deadline, as applied to nomination-certificate candidates, imposed a significant burden on these candidates and was therefore unconstitutional. *Id.* at 707. Prior to that decision, a nomination-certificate candidate was required to file a certificate of announcement evidencing his intent to run in January, prior to the primary election. And, pursuant to § 3-5-7(d)(6) that candidate could not participate in both the primary and use the nomination-certificate process, because the candidate was required to affirm in the certificate of

[7] Indeed, this is the interpretation reached by the WVSOS, which is entitled to deference. *See supra* n. 5.

announcement that he was a registered member of the political party under which he was affiliated with for at least sixty days prior to the filing of the announcement. *See Syl. pt.* 3, *Wells*, 237 W. Va. at 731; W. Va. Code § 3-5-7(d)(6).

With the background that a nomination-certificate candidate was required to file a certificate of announcement in January, or otherwise was ineligible to appear on the general election ballot, the meaning of the "who are not already candidates" language in § 3-5-23(a) becomes clear. Because of the early filing deadline applicable to all candidates, a primary election loser could not thereafter use the nomination-certificate process to appear on the general election ballot. Indeed, as early as 1919, West Virginia affected this preclusion through filing deadlines. *See* Michael S. Kang, *Sore Loser Laws and Democratic Contestation*, 99 Geo. L.J. 1013, 1044 (2011). The language referring to persons "who are not already candidates" tracked the inability of a nomination-certificate candidate to decide to run after the primary occurred, and precluded candidates who were seeking office through the primary election from later using the nomination-certificate process. Although the deadline in § 3-5-7, as applied to nomination-certificate candidates was declared unconstitutional in *Daly*, § 3-5-23(a)'s preclusion of primary party losers from utilizing the nomination-certificate process, whether it be before or after the primary, remains.[8]

That § 3-5-23(a) was intended to act as a sore loser provision is further bolstered by the Petitioners' alternative interpretation of this provision as only prohibiting cross-filing. With no support, the Petitioners argue this subsection targets "'cross filing,' whereby a person may appear on the general ballot not only as the nominee of a recognized party but also as an independent

[8] This also explains why the Secretary's earlier versions of the Guide cited by Petitioners does not mention the sore loser provision: the statement of such provision was unnecessary given the early filing deadline applicable to nomination-certificate candidates.

candidate or as a candidate of an unrecognized party." Writ at 17. But, the Petitioners' interpretation fails to explain that no matter what it is labeled, pre-*Daly*, this provision combined with § 3-5-7(d) would have precluded Mr. Blankenship from using the nomination-certificate process after losing the Republican Party primary. This interpretation also fails fit the literal construction of subsection (a) that the Petitioners seek to apply to the WVSOS's interpretation of this provision: just as a candidate who lost a primary is not now a candidate in a primary election, a candidate who wins a primary is also not a candidate in a primary election. Therefore, as interpreted by the Petitioners, this provision would not bar a winning primary candidate from also becoming a nomination-certificate candidate in the general election. The Petitioners' interpretation suffers from another flaw, which is that cross-filing is already impermissible due to § 3-5-7(d)'s requirements that a candidate must be a registered member of the political party he or she is affiliated with. Since a candidate can only be affiliated with a single party, the Petitioners' reading of § 3-5-23(a) is superfluous.

The Petitioners alternatively appear to suggest that § 3-5-23(a) was intended preclude a current recognized party member from using the nomination-certificate process, as was the case in *Wells*. Writ at 13, 14. Importantly, Justice Davis describes § 3-5-23 as a sore loser law, stating it "prevent[s] unsuccessful primary election candidates from subsequently running as independent candidates" using the nomination-certificate process. *Wells*, 237 W. Va. at 749 (Davis, J. dissenting). In *Wells*, this Court's interpretation of §§ 3-5-7 and 3-5-23(a) were focused only on whether it precluded a recognized party candidate from using the nomination-certificate process where that candidate did not participate in his party's primary election. *See supra* § I.B.2. This Court's interpretation in *Wells* that recognized party candidates may not use the nomination-

certificate process does not foreclose the interpretation of § 3-5-23(a) as precluding losing primary candidates from using the nomination-certificate process.

The history of §§ 3-5-7 and 3-5-23, as well as the Petitioners' failed interpretation of § 3-5-23(a) demonstrate that the Legislature intended to bar losing primary candidates from subsequently using the nomination-certificate process in § 3-5-23(a). Because examination of the statute demonstrates that the Legislature intended § 3-5-23(a) to contain a sore loser provision, it applies to bar Mr. Blankenship's use of the nomination-certification process.

B. W. Va. Code § 3-5-23(a) is not rendered unconstitutional by the amendment's title.

As stated above, West Virginia's election code contained a cross-filing prohibition in the form of deadlines that effectively prohibited parties from using both the nomination-certificate process and the primary process concurrently. Therefore, when the Legislature enacted House Bill 2981 in 2009, its addition of the "who are not already candidates in the primary election" did not change the law, it simply stated the longstanding effect of filing deadlines—specifically, that those candidates in the primary election were incapable of candidacy through the nomination-certificate process based on filing deadline.[9] However, Judge Chambers' holding in *Daly v. Tennant*, 216 F.

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[9] In *State ex rel. Browne v. Hechler*, this Court held that the 1991 version of § 3-5-7, including the pre-primary filing deadline applied only to primary elections and therefore did not apply to nomination-certificate candidates. 197 W. Va. 612 (1996). This Court made that decision based on subsection (f), which stated that "[t]he provisions of this section shall apply to the primary election held in the year one thousand nine hundred ninety-two and every primary election held thereafter." *Id.*; W. Va. Code § 3-5-7(f) (1991). As this Court has since noted in *Wells*, 237 W. Va. at 738, n.9, the *Browne* Court failed to evaluate the introduction of § 3-5-7 which stated,

> Any person who is eligible to hold and seeks to hold an office or political party position to be filled by election in any primary or general election held under the provisions of this chapter shall file a certificate of announcement declaring as a candidate for the nomination or election to such office.

In light of this provision, the filing deadline should have applied to nomination-certificate candidates, and would have prohibited them from using the nomination-certificate process after losing in a party primary.

Supp. 3d 699 (S.D.W. Va. 2016) removed the filing deadlines underpinning the "who are not already candidates" provision, rendering the provision vague and properly interpreted as barring use of the more lax nomination-certificate process available to unrecognized parties after a candidate avails themselves of the primary or convention processes available to recognized parties. *See supra* § 2(A). Accordingly, the "who are not already candidates in the primary election" provision only became a freestanding, operative clause in the aftermath of *Daly*; therefore, it needed no Title on passage to satisfy Article VI, Section 30 of the West Virginia Constitution.

1. The "who are not already candidates in the primary election" clause did not require an "index" or "pointer" because it did not change the law.

Under Article VI, Section 30 of the West Virginia Constitution,

> No act hereafter passed shall embrace more than one object, and that shall be expressed in the title. But if any object shall be embraced in an act which is not so expressed, the act shall be void only as to so much thereof, as shall not be so expressed, and no law shall be revived, or amended, by reference to its title only; but the law revived, or the section amended, shall be inserted at large, in the new act.

Courts have interpreted that provision "to prevent the concealment of the true purpose of any act from the public and the legislature and to advise the legislators and the public of the contents of the proposed act of the legislature." *Benedict v. Polan*, 186 W. Va. 452, 455 (1991). To that end, courts require that "the title of an Act . . . contain a statement of the objects and purposes of a proposed enactment, so that there could not be incorporated in the body of the Act legislation to which there was no index in the title." *State v. Voiers*, 134 W. Va. 690, 693-94 (1950). Specifically, courts inquire into "whether the title imparts enough information to one interested in the subject matter to provoke a reading of the act." *State ex rel. Walton v. Casey*, 179 W.Va. 485, 488 (1988).

Moreover, pursuant to *Wheeling v. American Casualty Co.*, "[w]hen an act amends a designated chapter and section of the Code and in its title it refers specifically to the amended

chapter and section, it sufficiently complies with the constitutional requirements that the object must be expressed in the title." 131 W. Va. 584, 593 (1948). However, where a title lays out in detail the effect of an amendment, changes beyond the details in the title are unconstitutional and will not be given effect. *See C.C. "Spike" Copley Garage v. Public Serv. Comm'n*, 171 W. Va. 489 (1983).

The Petitioners contend that House Bill 2981 is unconstitutional because it "contains no reference whatsoever to the change in the law contained in the amendment to § 3-5-23(a)" and, as such, "failed to adequately inform that there were changes being made to the eligibility requirements for certificate nominees." Writ at 20. The Petitioners, however, fail to note that House Bill 2981 stated that it included provisions "making technical corrections." Whenever the "who are not already candidates" provision was added in 2009, that the provision was viewed as a technical correction because it merely stated the effect of filing deadlines; specifically, that the deadlines made it such that one could not be a candidate in primary and through the nomination-certificate process. *See* W. Va. Code § 3-5-7(c) (requiring that "[t]he certificate of announcement shall be filed with the proper officer not earlier than the second Monday in January next preceding the primary election day, and not later than the last Saturday in January next preceding the primary election day, and must be received before midnight, eastern standard time, of that day or, if mailed, shall be postmarked by the United States Postal Service before that hour.") In *Daly*, however, Judge Chambers invalidated filing deadline for nomination certificates. Therefore, the "who are not already candidates" provision was rendered vague, leaving courts to interpret the statute's intent. That the statute was subsequently rendered vague does not mean that it violated Article VI, Section 30 of the West Virginia Constitution or ran afoul of *Copeley Garage*; indeed, were this Court to hold otherwise, it would essentially expect the Legislature to be clairvoyant, foreseeing

that provisions will be stricken from a statute that render others operative, and draft a title accounting for every potential that could arise with the statute. Moreover, the title of the amendment specifically noted that the amendment was "making technical changes." Among the technical changes made by the amendment was the inclusion of the "who are not already candidates" provision, which merely denoted the fact that individuals could not use the primary and nomination-certificate processes due to filing deadlines. Accordingly, because the "who are not already candidates" only became an operative clause after Judge Chambers struck it in *Daly* and the title noted that the amendment made "technical changes," that clause does not run afoul of the West Virginia Constitution or *Copeley Garage*.[10]

III. W. Va. Code § 3-5-23(g) does not violate the equal protection guarantee because the burdens imposed by W. Va. Code § 3-5-23(g) are permissibly limits disparately situated parties and candidates from accessing a ballot procedure designed to help minor parties—not springboard sore losers to the general ballot.

Petitioners correctly state the basic premise of Due Process as guaranteed by Article III, Section 10 of the West Virginia Constitution; specifically, "equal protection of the law is implicated when a classification treats similarly situated persons in a disadvantageous manner." Syl. pt. 2, in part, *Israel v. W. Va. Secondary Sch. Activities Comm'n*, 182 W. Va. 454 (1989). However, this Court recognized, "The Constitution does not require things which are different in fact . . . to be treated in law as though that were the same." *Frasher v. W. Va. Bd. of Law Examiners*, 185 W. Va. 725, 729 (1991) (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940). Indeed, "legislation may impose special burdens upon defined classes in order to achieve permissible ends

[10] The Petitioners also argue that *State ex rel. Myers v. Wood*, 154 W. Va. 431, 442 (1970) indicates that this § 3-5-23(a) should not be interpreted as a "sore loser" provision because it would create a new crime. However, this case does not involve interpretation of that provision in a criminal context, and *Wood* only invalidated the statute "with regard to any crime or penalty contained in the Act," indicating that statutes will be left intact to the extent constitutionally permissible.

as long as 'the distinctions that are drawn have "some relevance to the purpose for which the classification is made."'" *Id.* (quoting *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966)). To that end, in election law cases implicating the equal protection clause, "the task is to determine whether the state has imposed *a significantly higher burden* on the independent or third-party candidate than it has imposed on major-party candidates." *W. Virginia Libertarian Party v. Manchin*, 165 W. Va. 206, 222 (1980) (emphasis added).

To determine whether a state has imposed a significantly higher burden on independent or third parties, this Court utilized the tests announced by the United States Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992). *See Wells v. State ex rel. Miller*, 237 W. Va. 731, 745 (2016).[11] Under the *Anderson* test,

> It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

[11] In *Wells*, this Court utilized the *Anderson/Burdick* test primarily to frame its analysis of Associational rights. *See Wells*, 237 W. Va. at 744–745. However, courts routinely apply the test to both challenges implicating Associational rights and challenges implicating Equal Protection rights. *See, e.g.*, *Sarvis v. Judd*, 80 F. Supp. 3d 692, 697 (E.D. Va. 2015), *aff'd sub nom. Libertarian Party of Virginia v. Alcorn*, 826 F.3d 708 (4th Cir. 2016) (determining that "[r]ather than conducting separate, crosscutting analyses of electoral restrictions under the rubrics of associative rights, expressive rights, due process, or equal protection, the Supreme Court has articulated a single framework for evaluating the constitutionality of state election laws 'based . . . directly on the First and Fourteenth Amendments.'"). Indeed, the Supreme Court indicated that its *Anderson* analysis, analysis focused primarily allegations that the plaintiff's First Amendment rights were breached, was equally applicable to Equal Protection cases. *Anderson*, at 786 n.7.

Anderson, 460 U.S. at 789 (citations omitted). The Supreme Court later clarified the *Anderson* test in *Burdick*, stating that "[u]nder [the *Anderson*] standard, a regulation must be narrowly drawn to advance a state interest of compelling importance only when it subjects the voters' rights to 'severe' restrictions. If it imposes only 'reasonable, nondiscriminatory restrictions' upon those rights, the State's important regulatory interests are generally sufficient to justify the restrictions." *Burdick*, 504 U.S. at 434.

Here, Petitioners are not similarly situated to the Mountain or Libertarian Parties because, unlike those parties, the (1) Constitution Party does not have the required polling history necessary to establish it as a recognized party and (2) Mr. Blankenship—unlike Ms. Jenkins and Mr. Tabb—is attempting to avail himself of the more lax nomination-certificate process, not another recognized party's convention. Therefore, this Court must ask whether West Virginia "has imposed a significantly higher burden on [Petitioners] than it has imposed on [recognized parties and other primary losers]." *W. Virginia Libertarian Party*, 165 W. Va. at 222. It has not.

A. Petitioners are not similarly situated to recognized parties or primary losers using recognized parties' ballot access procedures because they seek to supplant the more rigorous primary process previously used by Mr. Blankenship with the more lax nomination-certificate process available to unrecognized parties.

The Petitioners spend a significant amount of time trying to show that The Constitution Party, an unrecognized party, is similarly situated to "smaller recognized parties." *See* Writ 27–30. This argument appears to be grounded in the fact that "§ 3-5-22 provides that the Mountain and Libertarian Parties have access to use the same nomination-certificate process that is provided for unrecognized party and independent candidates."[12] *Id.* at 27–28. However, the fact that smaller

[12] W. Va. Code § 3-5-22 appears to allow recognized parties who polled under ten percent in the gubernatorial election to use the nomination-certificate process; however, House Bill 4434 removed that ability with the new W. Va. Code § 3-5-23(f) provision, which prohibits recognized parties from using the nomination-certificate process.

recognized parties are *arguably* (but almost certainly not) able, *see supra* n.12, to utilize the nomination-certificate process—and, like unrecognized parties, unable to utilize the nomination-certificate process to nominate someone who ran in a primary according to § 3-5-23(g)—does not mean that those smaller recognized parties are similarly situated to unrecognized parties. Indeed, there is a crucial difference that the Petitioners attempt to overlook—smaller recognized parties have, as the Petitioners admit, "polled more than 1 percent at the most recent governor election." *Id.* at 28. This difference is crucial, as West Virginia affords parties that have polled at a certain rate "political party" status and, with that status, the ability to nominate candidates via primary election or convention.[13] *See* W. Va. Code § 3-1-8 (stating that an officially recognized political party is established when an affiliation of voters polled at least one percent in the previous gubernatorial election); W. Va. Code § 3-5-4 (allowing recognized political parties to use the primary process to nominate candidates); W. Va. Code § 3-5-22 (allowing recognized political parties who polled less than ten percent in the prior gubernatorial election to use the convention process to nominate candidates). Importantly, this Court recognized that third-parties and independent candidates are factually distinct from major parties, and parties may prevail on equal protection challenges only where the state "has imposed a significantly higher burden on the independent or third-party candidate than it has imposed on major-party candidates." *W. Virginia Libertarian Party*, 165 W. Va. at 222.

The Petitioners have failed to show that the State imposed a significantly higher burden on the unrecognized Constitution Party than it imposed on recognized parties. The sole burden asserted by the Petitioners is the fact that "recognized parties . . . can circumvent [§ 3-5-23(g)'s

[13] The Supreme Court determined that creating separate processes for ballot access based on a party's prior demonstrated political support (i.e. parties' prior ballot performances) does not run afoul of equal protection. *Am. Party of Texas v. White*, 415 U.S. 767, 781–82 (1974).

prohibition of primary loser's access to the nomination-certificate process] by choosing the losing candidate by a nominating convention." Writ at 28. However, although the statute does limit the number of individuals who may serve as an unrecognized party candidate through the nomination-certificate process, that limitation alone is not a significant burden on Petitioners' rights. *See Wells*, 237 W. Va. at 747 ("It does not follow, though, that a third party or unaffiliated group of citizens who nominates a candidate pursuant to the provisions set forth in West Virginia Code § 3–5–23 is absolutely entitled to have its nominee appear on the ballot. . . . A particular candidate might be ineligible for office, unwilling to serve, or, as here, fail to comply with the State election law."); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997) ("That a particular individual may not appear on the ballot as a particular party's candidate does not severely burden that party's associational rights."); *S.C. Green Party v. S.C. State Election Comm'n*, 612 F.3d 752, 757 (4th Cir. 2010) ("Thus, we conclude that although the sore-loser statute prevented the Green Patty [sic] from having its preferred nominee on the ballot, this result did not, of itself, create a severe burden on the Green Party's association rights."). To prevail, then, the Petitioners must show that there is something beyond the state's minor limitation on who may utilize the nomination-certificate process that imposes a significantly higher burden on unrecognized parties than that faced by recognized parties. *W. Virginia Libertarian Party*, 165 W. Va. at 222. They cannot.

West Virginia Code § 3-5-23(g) is a "reasonable, nondiscriminatory restriction[]" that reinforces West Virginia's two-tiered path to the ballot. *See Burdick*, 504 U.S. at 434. West Virginia created two paths to the general election ballot: (1) a rigorous system for recognized parties that utilizes primary voting systems or party conventions to determine a candidate and (2) a more lax system wherein unrecognized parties or independent candidates use voter signatures to determine a candidate. In prohibiting primary losers from turning to the more lax nomination-

certificate process after their defeat, West Virginia is ensuring that those who choose to avail themselves of the structure, procedures, and publicity attendant with recognized parties and the primary process may not commandeer the nomination-certificate process—a procedure that this Court recognized "as a primary-election bypass for [independent and third-party candidates]"—to claw their way onto the general election ballot. *W. Virginia Libertarian Party*, 165 W. Va. at 226. Put simply, § 3-5-23(g) makes parties choose—take the benefits associated with an established political party and earn your spot through the primary or a convention or leave those benefits behind and use the more lax procedures created to help small parties and independent candidates access the ballot. This is precisely the sort of interest this Court recognized the State could promote when it determined that the State may enact measures intended to "maintain[] the integrity of different routes to the ballot and [] stabiliz[e] the political system." *Wells*, 237 W. Va. at 744 (citation omitted).

Moreover, although the Petitioners argue that recognized and unrecognized parties "pose the same threats of factionalism, party-splintering, and ballot confusion," recognized parties simply do not carry the same risk of factionalism that unrecognized parties do. Writ at 28. Recognized parties must have a demonstrated history of political performance in order to become recognized parties; therefore, it is unlikely that a recognized party nominating another recognized party's losing candidate will create a splinter faction comprised primarily of the loser's original party because an existing party base had to exist in order for the party to attain major party status. *See* W. Va. Code § 3-1-8 (stating that an officially recognized political party is established when an affiliation of voters polled at least one percent in the previous gubernatorial election). Most importantly, major political parties have internal checks, systems, and nominating procedures that govern whether they ultimately decide to nominate the other major party's losing candidate. *See,*

e.g., W. Va. Code § 3-5-11. The nomination-certificate process, however, has no such system of checks to preclude a jilted candidate from running—or even forming their own party—out of spite. Indeed, all one must do to secure nomination via the nomination-certificate process is gather signatures—no votes must be won and no party members must be won over. It makes sense to limit the ability of candidates who previously ran in primaries to use this relatively checkless process, as jilted primary losers could use it to create the very sort of party factions that the Supreme Court recognizes states have an interest in curtailing.

Furthermore, primary losers' access to the certificate nomination process poses a unique risk to the stability of West Virginia's political system. Specifically, primary losers are likely to garner support from other parties' supporters because that primary loser could siphon votes from the party for which they primaried. For example, parties opposing the Republican party in the primary might attempt to elevate Mr. Blankenship to the general election ballot through the certificate nomination process in an effort to siphon votes from the Republican party.Therefore, primary losers' access to the certificate nomination process poses unique risks to the stability of West Virginia's political system by allowing parties to siphon votes from opposing parties by nominating opposing parties' primary losers. Finally, the Petitioners' argument that Mr. Blankenship's equal protection rights were violated because other primary losers utilized other recognized parties' convention processes is equally unavailing. Writ at 29. Mr. Blankenship is being treated disparately because, as discussed above, he is attempting to avail himself of the more lax nomination-certificate process after first attempting to use a recognized party's primary platform. The nomination-certificate process is intended to serve "as a primary-election bypass for [independent and third-party candidates]"—not a way for jilted primary candidates to sidestep negative primary results via a more lax procedure. *W. Virginia Libertarian Party*, 165 W. Va. at

226. Had Mr. Blankenship attempted to avail himself of the ballot access measures associated with recognized parties, his candidacy would not have been barred. Accordingly, Mr. Blankenship is incapable of showing that the State "has imposed a significantly higher burden on the independent or third-party candidate than it has imposed on major-party candidates." *Id.* at 222. It is instead a "reasonable, nondiscriminatory restriction" on the Petitioners' rights.

B. House Bill 4434 is a "reasonable, nondiscriminatory restriction" on the Petitioners' Right of Access to the Ballot because it imposes a minor burden on unrecognized parties.

Next, although the Petitioner is correct that this Court has repeatedly recognized that ballot access is a fundamental right protected by the Equal Protection Clause of Article III, Section 17 of the West Virginia Constitution, this Court's Equal Protection test in ballot access cases does not solely turn on whether a law implicating fundamental rights treats minor parties differently. Indeed, although the Petitioners cite *WV Libertarian Party* in a seeming effort to imply that House Bill 4434 is invalid simply because "the West Virginia Legislature has now sought to restrict the availability of [the nomination-certificate process] to some candidates," *WV Libertarian Party* actually upheld certain measures that effectively precluded primary candidates from using the nomination-certificate process available to unrecognized party and independent candidates. The test, therefore, is not whether the State's regulations implicate the rights of unrecognized parties or unrecognized party candidates, the test is instead whether the State "has imposed a significantly higher burden on the independent or third-party candidate than it has imposed on major-party candidates." *W. Virginia Libertarian Party*, 165 W. Va. at 222. Based on this Court's recent decision in *Wells*, the Court uses the *Anderson/Burdick* framework to determine whether a law has imposed a substantially higher burden on unrecognized parties. *See Wells*, 237 W. Va. 745.

Therefore, "reasonable, nondiscriminatory restriction[s]" will be upheld if the state can demonstrate "important regulatory interests." *Burdick*, 504 U.S. at 434.

Here, the Petitioners reiterate their argument that the State imposed a significantly higher burden on the Petitioners by limiting unrecognized parties' ability to use the nomination-certificate process to nominate primary losers while allowing recognized parties to use the convention process. Again, however, the State is ensuring that its two-tiered ballot access system remains intact. Although it is true that § 3-5-23(g) prohibits unrecognized parties from nominating a very small number of individuals, that limitation is put in place to ensure that primary losers may not commandeer the more lax nomination-certificate process. The loss of a few candidates does not impose a significantly higher burden on independent and unrecognized party candidates; especially where the loss of those candidates is directly related to ensuring that the two-tiered ballot access system remains viable. Therefore, because § 3-5-23(g) works to preserve West Virginia's two-tiered ballot system by limiting recognized party candidates to the primary and convention process and independent and unrecognized party candidates to the nomination-certificate process, it constitutes a "reasonable, nondiscriminatory restriction." Accordingly, the regulation must be upheld if the State can demonstrate "important regulatory interests." The State can do so here.

C. As a reasonable, nondiscriminatory regulation, House Bill 4434 survives the Petitioners' equal protection challenge because it furthers West Virginia's compelling interests in preventing party factions and protecting its electoral process.

Despite the Petitioners' argument that "the principal beneficiaries of a sore loser law are the major parties," courts routinely uphold sore loser laws. *See, e.g.*, *Storer v. Brown*, 415 U.S. 724, 735–36 (1974); *S.C. Green Party*, 612 F.3d at 756 (4th Cir. 2010) (same). Notwithstanding courts' acceptance of sore loser laws, the Petitioners summarily state that "the State of West Virginia has

neither a compelling or credible reason for the discriminatory treatment caused by § 3-5-23(g)." However, § 3-5-23(g) furthers two compelling interests for the State of West Virginia.

First, the statute helps West Virginia prevent party splintering and factionalism by limiting primary losers' access to a more lax path to the general election ballot. The Supreme Court has routinely recognized that states have a compelling interest in preventing party splintering and factionalism. *See, e.g.*, *Timmons*, 520 U.S. at 367. Based on this justification alone, courts routinely uphold "sore loser" provisions similar to West Virginia Code § 3-5-23(g). *See, e.g.*, *S.C. Green Party* , 612 F.3d at 759. Although West Virginia's "sore loser" law slightly differs from other sore loser laws due to the fact that it creates two tiers of ballot access, that two-tiered system prevents factionalism by prohibiting recognized parties' primary losers from using the easier nomination-certificate path to the ballot. Accordingly, § 3-5-23(g), as a "reasonable, nondiscriminatory restriction," survives scrutiny under *Burdick* on the ground of preventing factionalism alone.

The statute also helps ensure West Virginia's "valid interest in making sure that minor and third parties who are granted access to the ballot are bona fide and actually supported, on their own merits, by those who have provided the statutorily required petition or ballot support." *Timmons*, 520 U.S. at 366 (1997). Permitting primary losers to run in the general election through the nomination-certificate process incentivizes minor parties to pick particularly popular primary losers and nominate those candidates in an effort to procure enough support to become a major party rather than out of actual support for the candidate. Indeed, The Constitution Party admits that it is interested in "gain[ing] support by associating with a candidate who may have better name recognition than they otherwise may be able to attract." Writ at 30. This is improper; unrecognized parties and candidates that seek them out after losing a primary should not be permitted to capitalize on the popularity garnered during the primary loser's stint on a recognized party's

primary ticket. Similarly, the statute prohibits parties from nominating opposing parties' primary losers in an effort to siphon votes from the primary loser's party. This statute thus ensures that minor political parties do not use popular primary losers to bootstrap their way to enough votes to attain major party status and that parties do not use the nomination certificate process to siphon votes from opposing parties.

Here, West Virginia is promoting two crucial interests through § 3-5-23(g): preventing factionalism and ensuring that third party candidates are bona fide in an effort to protect its political system. Accordingly, as a "reasonable, nondiscriminatory regulation," § 3-5-23(g) survives the lessened scrutiny afforded by the *Burdick* test. Therefore, West Virginia Code § 3-5-23(g) does not violate the equal protection clause.

IV. W. Va. Code § 3-5-23(g) does not violate the associational rights of the Petitioners because it is a minimally burdensome measure that the Legislature enact in support of its power to regulate elections.

Finally, the Petitioners note that this Court has stated that "'the West Virginia Constitution offers limitations on the power of the state' to curtail the rights of association and speech 'more stringent than those imposed on the states by the Constitution of the United States.'" Writ at 32 (citation omitted). Although this implies that all laws implicating associational rights are entitled to strict scrutiny, that is not the case. Indeed, the Court specifically noted that "The State of West Virginia through its Legislature retains the authority to prescribe reasonable rules for the conduct of elections, reasonable procedures by which candidates may qualify to run for office, and the manner in which they will be elected." Syl. Pt. 4, *Sowards*, 196 W.Va. at 739. To that end, the Court applied the *Anderson/Burdick* test discussed *supra* § III. *See Wells*, 237 W. Va. at 745. As described above, *supra* § IV, § 3-5-23(g) passes muster under the *Anderson/Burdick* test because

it is a "reasonable, nondiscriminatory regulation" aimed at furthering West Virginia's compelling interests in preventing factionalism and ensuring that third party candidates are bona fide.

In lieu of repeating the arguments showing that § 3-5-23(g)[14] satisfies the *Anderson/Burdick* test, the WVSOS will instead focus on the distinctions the Petitioners attempted to draw between § 3-5-23(g) and the sore loser provision at issue in *S.C. Green Party.*

In *S.C. Green Party*, the Fourth Circuit considered whether a provision that prohibited an individual who lost in a primary from later appearing on the ballot with another party constituted a severe restriction on a party's association rights. *S.C. Green Party*, 612 F.3d at 757. The Fourth Circuit ultimately determined that it did not, noting that

> The Green Party retained the right to select Platt, or any other candidate, at its state convention. It was Platt's own decision to seek the Democratic Party's nomination, not interference by members of the Democratic Party in the Green Party's nomination process, that affected the Green Party's ability to retain Platt on the general election ballot as its preferred nominee. In addition, the Green Party was 'free to try to convince' Platt to refrain from seeking the nomination of another political party.

Id. Therefore, the mere limitation of a party's ability to nominate certain individuals does not create a burden severe enough to warrant strict scrutiny. *Id.* Instead, the crucial issue is whether the challenged law "restrict[s] the ability of the [party] and its members to endorse, support, or vote for anyone they like." *Id.* (quoting *Timmons*, 520 U.S. at 363). Where, as in *S.C. Green Party*, the party "remain[s] 'free to try to convince' its nominee to refrain from seeking the nomination of another political party," the burden on a party's associational rights are not severe. *Id.* Therefore, in comparing § 3-5-23(g) to the statute at issue in *S.C. Green Party*, this Court should focus on

[14] WVSOS adopts and incorporates its arguments regarding the *Anderson/Burdick* test as applied to equal protection in Section III to the Petitioners' associational rights challenge.

whether § 3-5-23(g) permits, like the South Carolina statute, parties to choose their own candidates or foists a candidate upon them.

A. West Virginia's sore loser law does not impose a severe restriction on the Petitioners' associational rights because the Petitioners ultimately retain the ability to choose their preferred candidate.

In attempting to distinguish *S.C. Green Party*, the Petitioners focus on the fact that the South Carolina statute prevents primary losers from appearing on the general election for the same office in any capacity whereas the West Virginia statute forecloses only appearances obtained via the nomination-certificate process. The fact that all primary losers were precluded from appearing in the general election, however, is not the fact upon which *S.C. Green Party* turned. Instead, the Fourth Circuit determined that the South Carolina statute did not impose a "severe" restriction under the *Anderson/Burdick* framework because "the Green Party was 'free to try to convince' Platt to refrain from seeking the nomination of another political party." *Id.* The key inquiry, then, to determine whether a statute imposes a severe restriction is whether the statute limits the ability of a party to vote for who they like. *Id.* In arriving at this determination, the Fourth Circuit focused on the Supreme Court's decision in *California Democratic Party v. Jones*, 530 U.S. 567 (2000). In *Jones*, the Supreme Court determined that a blanket primary, wherein all voters voted regardless of party affiliation, stripped parties of their ability to choose their own candidates because it enabled members of other parties to influence who ultimately represented the party.

Here, § 3-5-23(g), precisely like the South Carolina statute, does not confer control of a party's candidate to anyone beyond the party or the candidate. Under § 3-5-23(g), The Constitution Party retained the ability to convince Mr. Blankenship to serve as its candidate instead of running in the primary, and Mr. Blankenship retained the ability to choose between running in the Republican primary and using the nomination-certificate process to run with the Constitution

Party.[15] Accordingly, because § 3-5-23(g) does not confer the Constitution Party's candidate choice on anyone beyond the party and the candidate, it does not confer a severe restriction on the Constitution Party's associational rights and the fact that it limits only the use of the nomination-certificate to appear on the general ballot is not a meaningful difference between the statute in *S.C. Green Party*.

B. West Virginia's sore loser law does not violate the Petitioners' associational rights because it was enacted in furtherance of the State's compelling interests in protecting the stability of its electoral system.

Petitioners next argue that "the West Virginia statute allows [party splintering] by enabling a small minority party to be a launch pad for a disappointed major party candidate." Writ at 35. However, as discussed above, the West Virginia statute protects the integrity of West Virginia's two-tiered ballot system by limiting primary losers' access to the more lax nomination-certificate process. Moreover, recognized parties' internal political checks limit splintering whereas the nomination certificate's lack of checks encourage it. Finally, the Petitioners contend that the WVSOS must proffer "evidence that allowing a candidacy through [an] unrecognized party is a greater threat to the cohesion of its two-party system than the" existing recognized parties "who remain free to nominate a person who lost the nomination of one of the two major parties." Writ at 36. However, the Supreme Court stated that is has "never required a State to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot." *Munro v.*

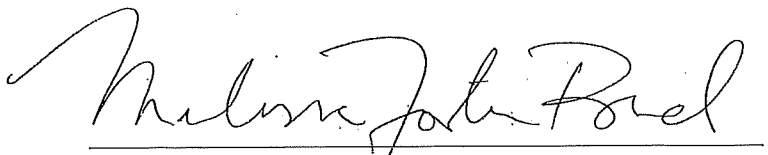
[15] Because the Petitioners retained the ultimate ability to control whether Mr. Blankenship appeared on their ballot or not, the speculative interests in § V(D) of the Petitioners' brief are unavailing. Parties' inability to proffer their preferred candidate after a failed primary run for another by that candidate and candidates' inability to run after a failed primary run have never outweighed the states' interests in sore loser laws. *See, e.g., De La Fuente v. Merrill*, 214 F. Supp. 3d 1241, 1258 (M.D. Ala. 2016) (upholding sore loser law where state had a compelling interest in preventing factionalism even where candidate and party had an interest in candidate running).

Socialist Workers Party, 479 U.S. at 194–95 (1986). Therefore, the WVSOS need not offer such evidence in this case.

Accordingly, because the Petitioners are incapable of showing that § 3-5-23(g) imposes a severe burden on their associational rights, the WVSOS prevails on the Petitioners' association rights claims if the WVSOS can demonstrate an important interest state supporting § 3-5-23(g). *Burdick*, 504 U.S. at 434. Here, § 3-5-23(g) furthers West Virginia's important interest in party splintering. Therefore, the Petitioners' associational rights claims fail.

CONCLUSION

The West Virginia Legislature has enacted a two-tiered ballot system whereby candidates of recognized political parties participate in party primaries or conventions in order to win a nomination to appear on the general election ballot. Conversely, candidates who are not members of a political party or who are members of unrecognized political parties must use the nomination-certificate process to gain access to the ballot. Under current or prior West Virginia law, a losing primary candidate, like Mr. Blankenship, is not afforded a second chance to appear on the general election ballot for that same position by using the nomination-certificate process. Because nomination-certificate candidates do undergo much less rigorous standards in order to get on the general election ballot, the State prohibits these candidates from losing a primary election and then using the easier nomination-certificate process in order to protect its interest in preventing factionalism and ensuring that third party candidates are bona fide. Because these interests survive under any standard of scrutiny, the Petitioners' claims fail. For these reasons, the WVSOS respectfully requests the court deny the Petitioners' writ of mandamus, deny Petitioners' request for attorney fees, and grant other such relief as the Court deems proper.



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 18-0712

STATE OF WEST VIRGINIA *ex rel.* DONALD L. BLANKENSHIP, CANDIDATE FOR U.S. SENATE IN WEST VIRIGINIA, and, CONSTITUTION PARTY OF WEST VIRGINIA,

Petitioners,

v.

MAC WARNER, IN HIS OFFICIAL CAPACITY AS WEST VIRGINIA SECRETARY OF STATE,

Respondent.

CERTIFICATE OF SERVICE

The undersigned counsel for Respondent, hereby certifies that on this ___ day of August, 2018, a true copy of the foregoing **"Respondent Mac Warner's, in his official capacity as West Virginia Secretary of State, Response yo Petitioners' Writ of Mandamus and Incorporated Memorandum of Law in Support"** upon the following individuals by U.S. Mail, postage prepaid at Huntington, West Virginia:

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