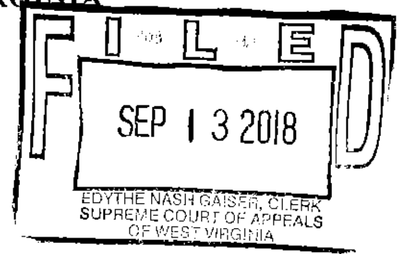
18-0789

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



State of West Virginia, ex rel)
William K. Schwartz, a registered)
voter in Kanawha County,)
West Virginia)
)
Relator,)
v.) Upon Original Jurisdiction in Prohibition and
) Mandamus No.
The Honorable James Justice,)
Governor of the State of West)
Virginia, and The Honorable)
Mac Warner, Secretary of State)
of the State of West Virginia, and)
Evan Jenkins, a real party in)
interest, and Tim Armstead,)
a real party in interest,)
Respondents.)

Relator William K. Schwartz's Combined Writ of Mandamus and Writ of Prohibition Directing the Secretary of State to Remove Evan Jenkins' Name from the Election Ballot on November 6, 2018 and to Prohibit Governor Justice's Appointments of Jenkins and Armstead to the Vacant Supreme Court Seats

Teresa C. Toriseva, Esquire
W.Va. Bar No. # 6947
Joshua D. Miller, Esquire
W.Va. Bar No. # 12439
TORISEVA LAW
1446 National Road
Wheeling, WV 26003
Telephone: (304) 238-0066
E-mail: justice@torisevalaw.com

S. Paige Flanigan, Esquire
WV Bar ID# 6015
Flanigan Law Office
1407 E Main Street
Princeton, WV 24740
Phone Number: (304) 487-2338
Email: paige.flaniganlaw@gmail.com

Table of Contents

I. QUESTIONS PRESENTED....................1

II. STATEMENT OF THE CASE....................1
Facts Specific to Evan Jenkins....................5
Facts Specific to Tim Armstead....................7

III. SUMMARY OF ARGUMENT....................8

IV. STATEMENT OF ORAL ARGUMENT AND DECISION....................9

V. ARGUMENT....................10

A. This Court has original jurisdiction to hear writs of mandamus and prohibition as to elections....................10

B. The constitutional requirement that a candidate can only be elected when he or she "has been admitted to practice law for at least ten years prior to his election", by its plain language and also as a matter of constitutional intent means that a candidate must have current experience practicing law by, being admitted to practice law in the decade prior to the election; and not merely at any time ever in the life of the candidate, as any other reading would render the words "prior to his election" superfluous....................12

1. The policy basis in ensuring West Virginia has a competent and qualified judiciary who understands the law of the jurisdiction is what is behind the framers' intent in the ten year admission to bar requirement....................12

2. The plain language of the constitutional provision demonstrates that continuous, uninterrupted admission to practice law during the ten years prior to his election is a constitutional prerequisite to run for election or hold the office of justice of the Supreme Court of West Virginia....................14

C. When voters elect two supreme court justices and a governor all as Democrats, and the Governor flips party loyalty to Republican after winning the election as a Democrat, and subsequently appoints two supreme court vacancies with "conservative" Republicans, has Art. II, § 2 and Art. VII, §7, been violated to deny the will of the people and to deny equal protection to those who elected three Democrats and instead got three Republicans, by means other than election....................19

D. Article VI, §15, The Emoluments Clause, is violated by the gubernatorial appointment of a legislator to a vacant supreme court of appeals seat, who voted affirmatively by official house resolution, to investigate and impeach the entire Supreme Court, and who then resigned to run for one of the two seats vacated, where the vacancies of the two seats at issue were "created" due to the House impeachment proceedings....................25

VI. CONCLUSION....................27

Table Of Authorities

Bromelow v. Daniel, 163 W.Va. 532, 258 S.E.2d 119 (1979)........11,12

Bullock v. Carter, 405 U.S. 134, 143, 92 S. Ct. 849, 856, 31 L. Ed. 2d 92, 99 (1972)........21

Clements v. Fashing, 457 U.S. 957, 968, 102 S. Ct. 2836, 2846, 73 L. Ed. 2d 508, 519 (1982)........14

Clinton v. City of N.Y., 524 U.S. 417, 450, 118 S. Ct. 2091, 141 L. Ed. 2d 393 (1998)........19

Davis Mem'l Hosp. v. W. Va. State Tax Comm'r, 222 W.Va. 677, 686, 671 S.E.2d 682........17

Harbert v. County Court, 129 W. Va. 54, 61-62, 39 S.E.2d 177, 184 (1946)........23

Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 665, 86 S. Ct. 1079, 1081, 16 L. Ed. 2d 169 (1966)........14, 24

Jenkins v. Heaberlin, 107 W. Va. 287, 148 S.E. 117, (1929)........24

Lance v. Board of Educ. of Cnty. of Roane, 153 W. Va. at 569, 170 S.E.2d at 789........23-24

Meadows v. Wal-Mart Stores, Inc., 207 W.Va. 203, 530 S.E.2d 676 (1999)........16

Powell v. McCormack, 395 U.S. 486, 548, 89 S. Ct. 1944, 1977, 23 L. Ed. 2d 491, 531 (1969)........21

Reynolds v. Sims, 377 U.S. 533, 555, 84 S. Ct. 1362, 1378, 12 L. Ed. 2d 506, 523 (1964)........20, 24

Simms v. Sawyers, 85 W. Va. 245, 101 S.E. 467 (1919)........13

State ex rel. Carenbauer v. Hechler, 208 W.Va. 584, 585, 542 S.E.2d 405, 406 (2000)........11

State ex rel. Ball v. Cummings, 208 W.Va. 393, 398, 540 S.E.2d 917, 922 (1999)........10

State ex rel. Biafore v. Tomblin, 236 W. Va. 528, 532, 782 S.E.2d 223, 227, (2016)........19,20

State ex rel. Billings v. City of Point Pleasant, 194 W. Va. 301, 460 S.E.2d 436 (1995)........19,21

State ex rel. Hash v. McGraw, 180 W. Va. 428, 429, 376 S.E.2d 634, 635, (1988)........11

State ex rel. Haught v. Donnahoe, 174 W. Va. 27, 28, 321 S.E.2d 677, 678, (1984)........13,14,18

State ex rel. Johnson v. Robinson, 162 W.Va. 579, 582, 251 S.E.2d 505, 508 (1979)........16

State ex rel. Kucera v. Wheeling, 153 W.Va. 538, 170 S.E.2d 367 (1969)........10

State ex rel Maloney v. McCartney, 159 W.Va. 513, 223 S.E.2d 607 (1976)........10,11,12

State ex rel. Rist v. Underwood, 206 W. Va. 258, 524 S.E.2d 179, (1999)....25-26

State ex rel. Sandy v. Johnson, 212 W.Va. 343, 348, 571 S.E.2d 333, 338 (2002)....11

State ex rel. Smith v. Gore, 150 W. Va. 71, 143 S.E.2d 791 (1965)....15,19,23

State ex rel. Sowards v. County Comm n of Lincoln Co., 196 W.Va. 739, 474 S.E.2d 919 (1996)....11,12

State ex rel. West Virginia Citizen Action Group v. Tomblin, 227 W.Va. 687, 692, 715 S.E.2d 36, 41 (2011)....10,13,15

Thompson v. Chesapeake & O. Ry. Co., 76 F. Supp. 304, 307-08 (S.D. W. Va. 1948)....17

T. Weston, Inc. v. Mineral Cnty., 219 W.Va. 564, 568, 638 S.E.2d 167, 171 (2006)....17

Wesberry v. Sanders, 376 U.S. 1, 17, 84 S. Ct. 526, 535, 11 L. Ed. 2d 481 (1964)....19

White v. Manchin, 173 W.Va. 526, 532-534, 318 S.E.2d 470, 476-478 (1984)....11

Young v. Apogee Coal Co., LLC, 232 W. Va. 554, 561 (2013)....17

2 Elliot's Debates, 257....21

W.Va. Code § 3-1-1 *et seq*....24

W. Va. Code § 3-5-6a....22

W. Va. Code § 3-10-3(b)....4,23,24

W. Va. Code § 3-10-3(d)(3)....4

W. Va. Code § 4-2A-2....8

W. Va. Code § 4-2A-3....8

W. Va. Code § 4-2A-4....8

W. Va. Code § 51-1-10a....8

W.Va. R. App. P Rule 18(a)....9

W.Va. R. App. P Rule 20....10

W. Va. State Bar Bylaws Art. II, § 6....17

EF Education First, Ltd, https://www.ef.edu/english-resources/english-grammar/present-perfect-continuous....15

W.Va. Const., art. II, § 2....1,19

W.Va. Const., art. II, § 4........19, 23, 24

W.Va. Const., art. III, § 7........1, 12, 15, 18,20

W.Va. Const., art. III, § 16........20

W Va. Const. art. VI, §15........25,26

W. Va. Const. art. VIII, § 7........12, 15, 18

The powers of government reside in all the citizens of the State and can be rightfully exercised only in accordance with their will and appointment. W.Va. Const., art. II, §2.

No person may hereafter be elected as a justice in the supreme court of appeals unless he has been admitted to practice law for at least ten years prior to his election. W. Va. Const. art. VIII, §7.

No senator or delegate, during the term for which he shall have been elected, shall be elected or appointed to any civil office of profit under this State, which has been created, or the emoluments of which have been increased during such term, except offices to be filled by election by the people. W.Va. Const. art. VI, §15.

I. QUESTIONS PRESENTED

A. When the West Virginia Constitution says:

"No person may hereafter be elected to a justice of the supreme court unless he has been admitted to practice law for at least ten years prior to his election"

1. Is the ten year requirement met with ten years accumulated at any time or with ten uninterrupted years accumulated the decade before the election?

2. Does the same Constitutional provision require ten years of actual experience practicing law or is holding a law license and performing non-lawyer jobs enough to rise to the office of Supreme Court Justice?

B. Has Article II, §2 (government power comes from the people) and Article II, § 4 (equal protection) been violated when voters elect two supreme court justices and a governor, all as democrats, and the governor flips party loyalty to republican after winning the election as a democrat, and subsequently appoints two supreme court vacancies with "conservative" republicans?

C. Is Article VI, §15, The Emoluments Clause, violated by the gubernatorial appointment of a legislator to a vacant supreme court of appeals seat who voted affirmatively by official house resolution to investigate and impeach the entire supreme court, and who then resigned to run for one of the two seats vacated where the vacancies of the two seats at issue were "created" due to the House impeachment proceedings?

II. STATEMENT OF THE CASE

This Writ is filed directly to the West Virginia Supreme Court of Appeals; there was no action filed in any lower tribunal. As such, there is no lower court record or Appendix created. Below are the facts, as the Relator asserts them:

a. William Schwartz is a West Virginia attorney who has been licensed, uninterrupted, in the State of West Virginia in excess of ten years. Attorney Schwartz was among those selected by the Judicial Vacancy Advisory Commission and recommended to the Governor to fill Robin Davis' vacated seat but was not appointed to that seat.
b. James Conley Justice II was a registered Republican until February 2015 when he changed his party affiliation to Democrat;
c. James Conley Justice II was elected Governor of the State of West Virginia as a Democrat on November 8, 2016;
d. On or about August 4, 2017, Governor Justice switched his party affiliation back to Republican;
e. Since West Virginia became a state in 1863, judges and justices have been chosen by the voters in partisan elections;
f. The voters of the State of West Virginia elected Democrat Robin Davis to the West Virginia Supreme Court first in 1996, and re-elected her in 2000 and 2012;
g. The voters of the State of West Virginia elected Democrat Menis Ketchum to the West Virginia Supreme Court on November 4, 2008;
h. In April of 2015, then Governor Tomblin signed a bill into law that made elections for all judges, including Supreme Court justices, non-partisan.
i. Since January 2018, allegations of overspending and other misuse of funds were levied against all five members of the West Virginia Supreme Court;
j. Menis Ketchum resigned his seat on or about July 27, 2018;

k.

On August 1, 2018 Governor Justice met with Evan Jenkins and discussed Jenkins running for the Supreme Court. See above. Justice, James (@WVGovernor), August 1, 2018, 3:00PM Tweet. (Twenty Four days later, Governor Justice appointed Jenkins a seat on the bench. See below).

l. On August 13, 2018, the Republican controlled West Virginia House of Delegates impeached the entire Supreme Court in a never before seen act in United States politics.

m. Public cries rang out across the state and country that the mass impeachment was actually a coup. For example:

- "No one has defended the lavish spending. But the prospect of a mass judicial impeachment struck opponents as a partisan power grab by Republicans who control the governor's office and both houses of the State Legislature." Campbell Robertson, *A Coup or a Couch? What's Behind the Impeachment of West Virginia's Supreme Court*, N.Y. Times, August 14, 2018.
- "A mass judicial impeachment, over lavish but legally permissible spending, he said, was unwarranted and possibly even a violation of the separation of powers. 'It's unprecedented in the United States that one branch of the

government goes in and lops off another,' he said." *Id.* Quoting Delegate Chad Lovejoy (D).

- "Republicans are attempting to stack it—but the justices made that task easy by engaging in conduct ranging from questionable to certainly illegal. Republicans are citing the serious allegations against two justices to justify removing all four, and they have timed their attacks to ensure that Republican Gov. Jim Justice, rather than West Virginia voters, will be able to select their replacements, thereby dragging the court far to the right." Mark Joseph Stern, *Why Republicans Just Impeached the Entire West Virginia Supreme Court*, (August 15, 2018, 4:56 PM) https://slate.com/news-and-politics/2018/08/west-virginia-supreme-court-why-republicans-just impeached-all-four-sitting-justices.html

n. Robin Davis resigned her seat August 13, 2018;

o. Thankfully, the timing of Ketchum's and Davis' resignations provided for their respective replacements to be chosen by the people of the State of West Virginia in a special election on November 6, 2018; See W. Va. Code § 3-10-3(d)(3);

p. Now-Republican Governor Justice is authorized to appoint justices to fill the vacancies created by the resignations until the citizens can fill the seats through the special election on November 6, 2018. See W. Va. Code § 3-10-3(b);

q. On August 25, 2015, Governor Justice appointed Republican Tim Armstead to fill Menis Ketchum's seat on the Court and Republican Evan Jenkins to fill Robin Davis' seat on the Court;

r. While the vacancies were created by the resignations of two (2) Democrats, Governor Justice appointed (2) Republicans to those vacancies which shifts the power of the Judicial Branch to match the Executive Branch and the Legislative Branch.

s. In a news conference and tweets lauding his appointments, Governor Justice made the following statements:

- "Both of these appointees are true conservatives, and both have the honor and integrity we need to restore trust to our highest court." Justice, James (@WVGovernor), August 25, 2018, 1:37 PM, Tweet.
- "What we need to do more than anything is repair, move on and show the nation how committed we are as West Virginians to have a solid court and, in my opinion, without any question, a conservative court." Lacie Pierson, *Justice selects Armstead, Jenkins for interim spots on WV Supreme Court*, Charleston Gazette Mail, August 25, 2018.

Facts Specific to Evan Jenkins

a. Evan Jenkins is a lifelong resident of Huntington, West Virginia. See Exhibit A, West Virginia Supreme Court of Appeals Vacancy Application Form for Evan Jenkins.

b. Jenkins was admitted to practice law in West Virginia April 5, 1988. Id.

c. From 1987 to 1992, Jenkins worked at his father's law firm, Jenkins Fenstermaker, PLLC in Huntington, West Virginia. This was the first and last job Jenkins held that required him to practice law. Id.

d. From 1992 to 1999, Jenkins worked for the West Virginia Chamber of Commerce as its General Counsel. Id.

e. From 1999 to 2014, Jenkins worked for the West Virginia Medical Association as its Executive Director. Id.

f. From 1994 to 2018, a 24 year time span, Evan Jenkins has run for five different offices ten different times. For 22 of the last 25 years, Evan Jenkins has been an elected official and running for one of five different offices.

g. Not one of those elected offices required a law license, or a law degree, or the exercise of legal or judicial judgement. See Id.

h. Of every position held by Evan Jenkins, a non-lawyer could hold that same position since 1992.

i. He has lost two elections, his only two statewide elections, where voters rejected him. In 2000, Evan Jenkins lost a bid for West Virginia Supreme Court of Appeals; in 2018, he was rejected by voters in his party's primary for United States Senate, who instead choose his opponent, Patrick Morrisey. Id.

j. In 2014, Jenkins placed his West Virginia law license on inactive status, an act he was not required to do, but did so voluntarily, after he was elected to the United States House of Representatives.

k. Until 2013, Jenkins was a registered Democrat.

l. On August 9, 2018, Jenkins reactivated his law license.

m. Although Jenkins stands appointed by the Governor as a Supreme Court Justice and is on the ballot for that same seat come November 6, he has nonetheless not yet resigned his United States House of Representatives seat.

n. Evan Jenkins himself, in his application for appointment, attached as Exhibit A, admits he has no recent trial experience. When asked to state the case number and court of all trials

handled to conclusion in the last five years, he can state only work from 1988 to 1992. Id at page 8 of 19, Question 7 and response.

o. When asked to list honors, prizes or awards received, Evan Jenkins lists 3 pages of awards, overwhelming in their volume, and each one of them political and none related to the practice of law. Id at pages 5 through 7 of 19.

Facts Specific to Tim Armstead

a. Tim Armstead is a lifelong resident of West Virginia. See Exhibit B, West Virginia Supreme Court of Appeals Vacancy Application Form for Tim Armstead.

b. Armstead was an active member of the West Virginia House of Delegates from 1998 to August 21, 2018. Id.

c. Armstead was Speaker of the House starting in 2015. Id.

d. As Speaker of the House, Armstead is the *de facto* leader of the statewide Republican party.

e. Armstead recused himself from presiding over the House impeachment proceedings citing "this process be free from any appearance of impropriety." See Exhibit C, Speaker Armstead Statement on Special Impeachment Session.

f. While Armstead recused himself from presiding over the impeachment special session, he stayed on the floor of the House and voted "yea" on HR 201 to investigate all members of the Supreme Court for impeachable offenses. See Exhibit D, House Roll Call #601.

g. On August 14, 2018 Armstead also voted "yea" on HR 203 recommending the public reprimand of four Supreme Court Justices. See Exhibit E, House Roll Call #619.

h. Justice Robin Davis issued a statement on August 14, 2018 notifying all West Virginians that she had resigned her seat because the "majority party in the legislature is positioning to impose their own party preferences." See Exhibit F, Justice Davis Statement.

i. The salary of a West Virginia Supreme Court Justice is $136,000.00 See W. Va. Code § 51-1-10a.

j. The salary of the West Virginia Speaker of the House is $20,000.00 per year base pay plus $150.00 per day additional compensation for each actually served during any regular, extension of regular or extraordinary session, and $150.00 per day attending to legislative business when the Legislature is not in any session and no committees are meeting. See W. Va. Code § 4-2A-2, § 4-2A-3, § 4-2A-4.

k. Tim Armstead was admitted to practice law in West Virginia in 1990. See Exhibit B.

l. Tim Armstead has not practiced law since 2006. Id.

III. SUMMARY OF ARGUMENT

Two Democrat Supreme Court Justices have resigned their seats. By rule, the Governor is to appoint their replacements to fill the seats until the November 6, 2018 election. Both appointees that Governor Justice appointed fail to meet the licensing and experiential qualifications required by the West Virginia Constitution. Further, Governor Justice violated the West Virginia Constitution and West Virginia state law by appointing replacement justices with opposite political affiliations from the vacating, previously elected, justices.

The facts that lead the parties and the court to this place are stunning, historical, unprecedented and described by some as a coup or power grab in a gross blending of the power of the three separate branches of government.

Evan Jenkins is disqualified to be on the ballot for election to Supreme Court of Appeals of West Virginia because the West Virginia Constitution requires a candidate be admitted to practice law in West Virginia for the decade prior to the election; he was inactive for four of the last ten years. Without current relevant legal experience this court has no way to ensure a candidate is qualified. The "has been admitted" language coupled with the "prior to his election" language is clear. The candidate must be admitted continuously and uninterrupted to practice law for the decade prior to his election.

Evan Jenkins' and Tim Armstead's appointments violate the West Virginia Constitution by abrogating the clear will of the voters and similarly deny equal protection to those who voted to elect three democrats. The party switch by the Governor coupled with these appointments are the filling of elected seats through means other than election and result in three "conservative" republicans in office where democrats were elected by the people at the last authorized election.

Tim Armstead's appointment violates the Emoluments Clause because he, as a sitting delegate, voted to investigate and impeach the entire court creating two vacancies and then resigned to run for one of the vacancies he helped "create". His base salary would go from about Thirty Thousand Dollars ($30,000.00) per year to about One Hundred and Forty Thousand Dollars ($140,000.00) per year. Such enrichment created by his vote on impeachment is specifically prohibited by the emoluments clause and can only be cleansed through he will of the voters.

IV. STATEMENT OF ORAL ARGUMENT AND DECISION

Oral argument is necessary in this matter because the criteria outlined in Rule 18(a), W.Va. R. App. P., do not render oral argument unnecessary; no party has waived oral argument; the appeal is not frivolous, the parties disagree whether the dispositive issues have been authoritatively

decided, and this Court's decisional process would be significantly aided by oral argument. Oral argument should be held pursuant to Rule 20, W.Va. R. App. P., because the decision in this case involves (1) several issues of first impression; (2) issues of fundamental public importance; and (3) constitutional questions regarding the validity of a statute, municipal ordinance, or court ruling.

V. ARGUMENT

A. This Court has original jurisdiction to hear writs of mandamus and prohibition as to elections

This Court's precedent supports the use of a writ of mandamus to challenge the candidacy of a person seeking elected office. This Court recently set forth the elements of a writ of mandamus:

> "This Court has explained that the purpose of mandamus is to enforce 'an established right' and a 'corresponding imperative duty created or imposed by law.' *State ex rel. Ball v. Cummings*, 208 W.Va. 393, 398, 540 S.E.2d 917, 922 (1999). In determining the appropriateness of mandamus in a given case, our law is clear that :
> 'A writ of mandamus will not issue unless three elements coexist-(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.'

Syllabus Point 2, *State ex rel. Kucera v. Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969). *State ex rel. West Virginia Citizen Action Group v. Tomblin*, 227 W.Va. 687, 692, 715 S.E.2d 36, 41 (2011).

"In West Virginia a special form of mandamus exists to test the eligibility to office of a candidate in either a primary or general election." Syl pt. 5 *State ex rel Maloney v. McCartney*, 159 W.Va. 513, 223 S.E.2d 607 (1976). Thus, "[b]ecause there is an important public policy interest in determining the qualifications of candidates in advance of an election, this Court does not hold an election mandamus proceeding to the same degree of procedural rigor as an ordinary mandamus case." Syl. pt. 2, *State ex rel. Bromelow v. Daniel*, 163 W.Va. 532, 258 S.E.2d 119

(1979); Syl. pt. 3, *State ex rel. Carenbauer v. Hechler*, 208 W.Va. 584, 585, 542 S.E.2d 405, 406 (2000). This relaxed standard was first adopted in the context of cases where the petitioner sought to preserve the right to vote or to run for political office, see, e.g., syl. pt 3, *State ex rel. Sowards v. County Comm n of Lincoln Co.*, 196 W.Va. 739, 474 S.E.2d 919 (1996); *State ex rel. Sandy v. Johnson*, 212 W.Va. 343, 348, 571 S.E.2d 333, 338 (2002), and has been expanded to cases seeking to prohibit a candidate from running:

> "While we countenanced easing the standard for issuing extraordinary relief in the context of 'preserving' the right to run for political office in *Sowards*, the issues raised in this case, although aimed at prohibiting a candidacy, suggest similar exigencies which require immediate, rather than deferred, resolution. Moreover, as we explained in *Bromelow*, '[t]he principal purpose of the liberalized election mandamus proceeding is to provide an expeditious pre-election hearing to resolve eligibility of candidates, so that voters can exercise their fundamental rights as to all eligible candidates.' Id. at 536, 258 S.E.2d at 122; see also *State ex rel. Maloney v. McCartney*, 159 W.Va. 513, 527, 223 S.E.2d 607, 616 (1976) (stating that 'intelligent and meaningful exercise of the franchise requires some method of averting a void or voidable election' and recognizing that 'some form of proceeding must be available by which interested parties may challenge in advance of a primary or general election the eligibility of questionable candidates in order to assure that elections will not become a mockery....')."

State ex rel. Carenbauer v. Hechler, 208 W.Va. at 588, 542 S.E.2d at 409.

> "As this Court has recognized, prompt resolution of candidate and vacancy appointment eligibility disputes furthers important public policies: A consistent line of decisions of this Court during the last fifteen years clearly recognizes that the intelligent and meaningful exercise of the franchise requires some method of averting a void or voidable election. Consequently this Court has recognized that some form of proceeding must be available by which interested parties may challenge in advance of a primary or general election the eligibility of questionable candidates in order to assure that elections will not become a mockery."

State ex rel. Maloney v. McCartney, 159 W.Va. at 526-27, 223 S.E.2d at 616; see also *White v. Manchin*, 173 W.Va. 526, 532-534, 318 S.E.2d 470, 476-478 (1984).

A writ of prohibition is proper where a judge is improperly appointed. *State ex rel. Hash v. McGraw*, 180 W. Va. 428, 429, 376 S.E.2d 634, 635, (1988). Cognizant of the need for alacrity in matters affecting the right to political office, this Court has recognized that "[i]n West

Virginia a special form of mandamus exists to test the eligibility to office of a candidate in either a primary or general election." *State ex rel. Maloney v. McCartney*, 159 W.Va. 513, 223 S.E.2d 607 (1976). In special mandamus election cases, "[b]ecause there is an important public policy interest in determining the qualifications of candidates in advance of an election, this Court does not hold an election mandamus proceeding to the same degree of procedural rigor as an ordinary mandamus case." Syl. Pt. 2 *State ex rel. Bromelow v. Daniel*, 163 W.Va. 532, 258 S.E.2d 119 (1979). In that same vein, we have explained that "when a writ of mandamus has been invoked to preserve the right to vote or to run for political office . . . this Court has eased the requirements for strict compliance for the writ's preconditions, especially those relating to the availability of another remedy." Syl. Pt. 3 *State ex rel. Sowards v. Cty. Comm'n of Lincoln Co.*, 196 W.Va. 739, 474 S.E.2d 919 (1996).

B. **The constitutional requirement that a candidate can only be elected when he or she "has been admitted to practice law for at least ten years prior to his election", by its plain language and also as a matter of constitutional intent means that a candidate must have current experience practicing law by, being admitted to practice law in the decade prior to the election; and not merely at any time ever in the life of the candidate, as any other reading would render the words "prior to his election" superfluous.**

1. The policy basis in ensuring West Virginia has a competent and qualified judiciary who understands the law of the jurisdiction is what is behind the framers' intent in the ten year admission to bar requirement

The West Virginia Constitution states "[n]o person may hereafter be elected as a justice of the Supreme Court of Appeals unless he has been admitted to practice law for at least ten years prior to his election" W. Va. Const. Art. VIII, § 7. "The phrase 'admitted to practice law for at least five years,' contained in West Virginia Constitution Art. VIII, § 7 imposes licensing and experimental requirements for persons elected to the office of circuit judge which may only be satisfied by unqualified admission to the practice of law in this State for the requisite period.

'Admitted to practice' means permitted to practice before the official body empowered to regulate the practice of law in this State." *State ex rel. Haught v. Donnahoe*, 174 W. Va. 27, 28, 321 S.E.2d 677, 678, (1984). So important is regulation of the entire judiciary, and so important is that lawyers, who become judges, are regulated by the highest tribunal in the state, as found by the *Haught* Court, the constitutional provision mandating the five-year requirement means five years of licensing is required to be in the same jurisdiction where the potential judge would preside, that is, the State of West Virginia. The need to fulfill the qualification requirement is even higher here because the seat sought is on the highest Court in our State. Certainly, if a circuit judge is required to have five years of unqualified admission in this State, a Supreme Court Justice's requirement of ten years admission likewise is unqualified and in this State.

"The starting point in every case involving construction of our Constitution is the language of the constitutional provision at issue". *State ex rel. W. Va. Citizen Action Group v. Tomblin*, 227 W. Va. 687, 690, 715 S.E.2d 36, (2011). This Court previously has recognized that "[t]he provisions of the Constitution, the organic and fundamental law of the land, stand upon a higher plane than statutes, and they will as a rule be held mandatory in prescribing the exact and exclusive methods of performing the acts permitted or required."Syl pt. 2 *Id.* citing *Simms v. Sawyer*, 85 W. Va. 245, 101 S.E. 467 (1919). This Court also has stated:

> "The Constitution of this State is the supreme law of West Virginia; it is subject only to the Constitution of the United States and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States, all of which constitute the supreme law of the land. United States Constitution, Article VI, Clause 2. The Constitution of West Virginia is binding upon all the departments of government of this State, all its officers, all its agencies, all its citizens, and all persons whomsoever within its jurisdiction. The three branches of our government, the legislative, the executive, and the judiciary, alike derive their existence from it; and all of them must exercise their power and authority under the Constitution solely and strictly in accordance with the will of the sovereign, the people of West Virginia, as expressed in that basic law. It is the solemn duty of this Court, its creature, to obey and give full force and effect to all its terms and provisions."

Harper v. County Court, 129 W. Va. 54, 61-62, 39 S.E.2d 177, 184 (1946).

The qualifications requirement for justices of the Supreme Court stated in the West Virginia Constitution are mandatory. Their goal is to "advance the State's compelling interest in securing and maintaining a judiciary qualified in the law of the jurisdiction". *Haught* at 22. Further the *Haught* Court discussed the importance of the licensing prerequisite for a Circuit Judge:

> "As previously noted, similar experiential requirements for judges are common. The purpose for such requirements is unquestionably clear. They are intended to insure not only that judges are competent in the law, but that they are reasonably familiar with the law of the jurisdiction to which they are elected. While it may be axiomatic that judges are elected to interpret and uphold the law, due process demands a high level of jurisdictional competence and integrity in that endeavor. Requirements or restrictions affecting eligibility for judicial office that reasonably strive to meet such valid public purposes do not impose impermissible barriers to such offices. Furthermore, a state's particular interest in maintaining the integrity of its judicial system can support restrictions which could not survive constitutional scrutiny if applied to other types of offices.

Id. at 22 citing *Clements v. Fashing,* 457 U.S. 957, 968, 102 S. Ct. 2836, 2846, 73 L. Ed. 2d 508, 519 (1982).

2. <u>The plain language of the constitutional provision demonstrates that continuous, uninterrupted admission to practice law during the ten years prior to his election is a constitutional prerequisite to run for election or hold the office of justice of the Supreme Court of West Virginia.</u>

The plain meaning of the words of the constitutional provision at issue here requires that a justice of the Supreme Court of Appeals be admitted to practice law for the decade prior to his ascension to the bench. The verb tense "has been" coupled with the phrase "prior to his election" indicates continuous, uninterrupted admission for the decade prior to the election is required. Indeed, had the framers intended only that one merely be admitted to practice law for any ten year period, the words "prior to his election" would be rendered superfluous and meaningless.

This Court also previously had held that state constitutional provisions must be read using the plain meaning of their words. "[I]n discerning the meaning of constitutional language, words used in a state constitution, as distinguished from any other written law, should be taken in their general and ordinary sense." *State ex rel. W. Va. Citizen Action Group* at 690.

Here, an analysis of the Constitution's use of "has been" is necessary to determine the remoteness of the ten-year license requirement. "Has been" is used for the present perfect continuous tense. This form is used to refer to something which had started in the past and is still continued in the present tense. EF Education First, Ltd, https://www.ef.edu/english-resources/english-grammar/present-perfect-continuous. Here, as used in Art. VIII, § 7, "has been admitted to the practice of law for at least ten years prior to his election" means the candidate must have been licensed for the ten years preceding and continuously running up to the appointment or election. "Has been" is clear and unambiguous to a reasonable person. "Where a provision of a constitution is clear in its terms and of plain interpretation to any ordinary and reasonable mind, it should be applied and not construed." *State ex rel. W. Va. Citizen Action Group* at 690 citing *State ex rel. Smith v. Gore*, 150 W. Va. 71, 143 S.E.2d 791 (1965). By using "has been" and not some other verb or verb tense qualifying the time period of the active license, the authors of the requirement intended for the candidate to have had an active law license for at least a continuous ten years up to the present. Mr. Jenkins' law license lapsed for four years, from 2014 to when he just recently applied to have it reinstated. This clearly violates the active license requirement mandated in the West Virginia Constitution and renders Mr. Jenkins unqualified for the vacated Supreme Court seat.

The facts here present the situation of a person who was a West Virginia licensed lawyer who voluntarily placed that license in inactive status and did not practice law in West Virginia

and in fact had not acted as a lawyer for more than twenty years. The former licensee then reactivated his license solely for the purpose of qualifying for the appointment and subsequent run for a vacant seat on the West Virginia Supreme Court. The four year gap in the law licensure of the appointee/candidate for a seat on the Supreme Court violates the West Virginia Constitutional requirement to be a licensed lawyer for the requisite time period "prior to his [taking office]."

If the ten year "prior to" licensure requirement were anything but immediate and recent as to the decade, someone could accumulate the ten years and not practice for decades and then immediately ascend to the bench, with no limits on how long it has been since once was a practicing attorney. The constitutional words "prior to his election" would be superfluous and meaningless, as they would add nothing to a ten year licensure requirement The way the requirement is written must give a meaning to those words separate and apart from what would be meant if the provision had ended with a period after the word "years." The only common sense interpretation of the plain constitutional language that gives meaning to the words "prior to his election" is that a justice must be fully admitted and licensed to practice law in West Virginia in the decade prior to taking office. To that end, this Court has long recognized that a "cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute." Syl. Pt. 3, *Meadows v. Wal-Mart Stores, Inc.*, 207 W.Va. 203, 530 S.E.2d 676 (1999); *see also State ex rel. Johnson v. Robinson*, 162 W.Va. 579, 582, 251 S.E.2d 505, 508 (1979) ("It is a well-known rule of statutory construction that the Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning."); *Davis Mem'l Hosp. v. W. Va. State Tax Comm'r*, 222 W.Va. 677, 686, 671 S.E.2d 682, 691 (2008) (same). "Courts should favor the plain and obvious meaning of a statute as

opposed to a narrow or strained construction." *T. Weston, Inc. v. Mineral Cnty.*, 219 W.Va. 564, 568, 638 S.E.2d 167, 171 (2006) (citing *Thompson v. Chesapeake & O. Ry. Co.*, 76 F. Supp. 304, 307-08 (S.D. W. Va. 1948)). *Young v. Apogee Coal Co., LLC*, 232 W. Va. 554, 561 (2013) Indeed, it is apparent this constitutional provision was intended to prohibit the very type of appointment or possible election of an inexperienced, unqualified person like Jenkins to the Supreme Court of Appeals of West Virginia.

Additionally, "inactive" status carries with it specific limitations within the Rules governing the members of the West Virginia State Bar. An inactive member shall not practice law, vote in any meeting, election or referendum of the state bar, or hold office in the state bar. W. Va. State Bar Bylaws Art. II, § 6. An inactive member must also pay the annual inactive member dues. As an inactive member of the West Virginia State Bar, Mr. Jenkins was prohibited from advising any one regarding the law, from drafting legal documents for another, or from representing another in front of a tribunal. In short, Mr. Jenkins has been prohibited from doing any act that is the essence of what lawyers do for four (4) years prior to the appointment. Further, for four (4) years, Mr. Jenkins had no legal malpractice insurance requirement and no continuing legal education requirement. He was devoid of everything that makes a West Virginia lawyer a West Virginia lawyer.

In his/her service as a United States House of Representatives member, a Representative is not practicing law and is not required to have a law license. Attorneys General, Supreme Court Justices, lower court judges, and prosecuting attorneys are the only politicians that are practicing law, and are required to be admitted to the practice of law, by nature of the position. Representative Jenkins (and Speaker Armstead) were not practicing law in their respective political positions.

State ex rel. Haught, as previously discussed, was a case regarding a California lawyer who left that state after purchasing a farm in West Virginia. After moving to West Virginia with no intention to practice law here, Mr. Donnahoe decided to run for a Circuit Court seat in the Third Judicial Circuit. While he had been a licensed lawyer in California for five years prior to seeking the seat, Mr. Donnahoe was not ever licensed in West Virginia. A challenge to his qualifications to be a West Virginia judge was brought asserting the West Virginia Constitution, even though it did not specifically state it, required the candidate to have been licensed in West Virginia, not any other state, for five years. The *Haught* Court reached the analysis by reasoning the following:

> "...the phrase 'admitted to practice law for at least five years,' contained in West Virginia Constitution art. VIII, § 7 imposes licensing and experiential requirements for persons elected to the office of circuit judge which may only be satisfied by unqualified admission to the practice of law in this State for the requisite period. 'Admitted to practice' means permitted to practice before the official body empowered to regulate the practice of law in this State for the minimum five-year period provided in article VIII, § 7. **This requires uninterrupted permission to practice in the State for such period.**"

Id. at 683-684. (Emphasis Added).

Similarly here, the phrase in the qualification of justices section of the W.Va. Constitution "unless he has been admitted to practice law for at least ten years prior to his election" is not satisfied unless the candidate has unqualified admission to the practice of law in this state uninterrupted for the decade prior to the election. *Haught*, supra, Mr. Jenkins' admission to practice law in West Virginia is not for the requisite period: his ten years prior to his appointment was interrupted by the four most recent years of not being permitted to practice law in West Virginia. Evan Jenkins is constitutionally unqualified to be a West Virginia Supreme Court Justice and therefore the instant writ should be granted.

C. When voters elect two supreme court justices and a governor all as Democrats, and the Governor flips party loyalty to Republican after winning the election as a Democrat, and subsequently appoints two supreme court vacancies with "conservative" Republicans, has art. II, § 2 and art. VII, §7, been violated to deny the will of the people and to deny equal protection to those who elected three Democrats and instead got three Republicans, by means other than election.

"Liberty is always at stake when one or more of the branches seeks to transgress the separation of powers."[1]

"The powers of government reside in all the citizens of the State, and can be rightfully exercised only in accordance with their will and appointment." W. Va. Const. art. II, §2. A rticle II, §4 states that "[e]very citizen shall be entitled to equal representation in the government, and, in all apportionments of representation, equality of numbers of those entitled thereto, shall as far as practicable, be preserved." This Court previously has determined this language to be plain: "[w]e believe that Article II, §4 of our Constitution is clear in its terms and that the intention thereof is manifest from the language used. It provides for equal representation in government and, additionally, in all apportionments of representation." *State ex rel. Smith v. Gore*, 150 W. Va. at 76, 143 S.E.2d at 794. "Thus, it is clear that the voters of this State have the right, guaranteed by this State's Constitution, to elect the individuals who will represent them, and their interests, in this State's Legislature." *State ex rel. Biafore v. Tomblin*, 236 W. Va. 528, 532, 782 S.E.2d 223, 227, (2016) (Davis, R, dissenting). "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S. Ct. 526, 535, 11 L. Ed. 2d 481 (1964).

An elected official also has a right to choose her own political party. Syl. pt. 3, *State ex rel. Billings v. City of Point Pleasant*, 194 W. Va. 301, 460 S.E.2d 436 (1995) ("Restrictions that

[1] *Clinton v. City of N.Y.*, 524 U.S. 417, 450, 118 S. Ct. 2091, 141 L. Ed. 2d 393 (1998) (Kennedy, J., concurring).

limit an individual's ability to select and change his or her party affiliation implicate the speech and associational freedoms guaranteed by the First Amendment to the United States Constitution and by Sections 7 and 16 of Article III of the West Virginia Constitution. Such restrictions cannot be imposed on these rights unless the restrictions are necessary to accomplish a legitimate and compelling governmental interest and there is no less restrictive means of satisfying such interest."). In her dissent in *Biafore*, Justice Davis stated:

> "That is not to say, however, that the whim of the one may trump the will of the many. While the express language of W. Va. Code § 3-10-5 may require replacing a vacating legislator with an individual of the last political party of which the vacating legislator was a member, where, as here, that legislator has changed parties such that the person replacing him/her is a member of a different political party than the one that sponsored the legislator as a candidate for political office at the time he/she was elected, such a replacement procedure effectively frustrates the voters' right to elect the candidate of their choice. 'Political candidacies are essentially a coming together of voters to support a particular platform, cause, or leader. Political parties, which are—for better or worse—an integral part of our democratic system, measure their success through their candidates.' *Billings*, 194 W. Va. at 305, 460 S.E.2d at 440".

Biafore at 547[2]. But "candidates' rights are necessarily tied to voters' rights. Clearly, '[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on the right strike at the heart of representative democracy.'" *Reynolds v. Sims*, 377 U.S. 533, 555, 84 S. Ct. 1362, 1378, 12 L. Ed. 2d 506, 523 (1964). A citizen's right to vote is not worth much if the law denies his or her candidate of choice the opportunity to run. "The rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlating effect on voters." *Bullock v. Carter*, 405 U.S. 134, 143, 92 S. Ct. 849, 856, 31 L. Ed. 2d 92, 99 (1972). As the United States Supreme

[2] While her position was not that of the majority decision on the Court, those arguments were also not developed throughout the briefing process or oral argument. "While it was considerate for the parties to evade the pivotal question of this statute's constitutionality to facilitate the Court's decision of this case, such niceties were neither necessary nor prudent. This Court regularly considers and decides issues involving this State's Constitution, and, while addressing the constitutionality of a statutory provision is not always a routine part of this Court's statutory construction, sometimes the constitutional implications of a statute's construction require venturing into that realm." *Biafore* at 542.

Court observed in *Powell v. McCormack*, 395 U.S. 486, 548, 89 S. Ct. 1944, 1977, 23 L. Ed. 2d 491, 531 (1969): "A fundamental principle of our representative democracy is, in Hamilton's words, 'that the people should choose whom they please to govern them.' 2 *Elliot's Debates*, 257. . . ." *Billings*, 194 W. Va. at 305, 460 S.E.2d at 440.

It is not necessary for the Relator herein to argue or this Court to find these political occurrences discussed here were strategically planned to intentionally create vacancies to allow the GOP to appoint a conservative court. All that is necessary is that through the totality of the facts the Court recognize the conditions exist in our government for this unacceptable abrogation of the will of the voters to occur. In other words, it does not matter if a coup was actually intended – only that it could have been – and the law should not allow conditions to exist that permit political strategy to prevail over the will of the voters. Frankly, it does not matter which political side one is on, the situation exists now where the will of the voter is poised to be ignored and the separation of powers effectively dissolved.

The citizens of the State elected Robin Davis and Menis Ketchum as Democrats at a time when the citizens were directed to choose between candidates that had a known party affiliation. Democrat Davis was elected to the West Virginia Supreme Court first in 1996, and re-elected her in 2000 and 2012, firmly indicating a Democrat in the seat was desired. Democrat Ketchum was elected to the West Virginia Supreme Court on November 4, 2008. In April of 2015, before Davis' term ended and before Ketchum's term ended, the then Governor signed a bill into law that made subsequent elections for all judges, including Supreme Court justices, non-partisan. Had Davis stayed on the bench, her next re-election, should she have chosen to run, would have been in 2024. If Ketchum had decided to stay, his re-election would have been in 2020. The non-

partisan rule, W. Va. Code § 3-5-6a[3], would apply to both re-elections. But the non-partisan rule did not apply and was not in effect when Davis and Ketchum were most recently elected. The will of the people in electing Democrats to the Supreme Court was thwarted by subsequent Republican vacancy appointments.

If these political developments come to fruition, the voters will have had three major public elected officials swing from Democrat to Republican when the will of the people was the exact opposite. The transgression of the separation of powers is exhibited in Governor Justice's comments on August 25, 2018, the day he appointed Evan Jenkins and Tim Armstead:

- "What we need to do more than anything is repair, move on and show the nation how committed we are as West Virginians to have a solid court and, in my opinion, without any question, a conservative court." Erin Beck, *Justice: Supreme Court appointees selected for their conservatism*, Register-Herald reporter, August 26, 2018.
- "Both of these appointees are true conservatives, and both have the honor and integrity we need to restore trust to our highest court." Justice, James (@WVGovernor), August 25, 2018, 1:37 PM, Tweet.

In this case, a unique set of facts has unfolded; they are so unique that this is a case of first impression for this Court and perhaps for all courts nationwide. The people elected two Democrat Supreme Court Justices and later elected a Democrat for Governor. The people had spoken by casting their votes that they wanted Democrats in those positions. A complete disenfranchisement of the voters will occur if all three of those highest positions in government are switched to Republican in direct contravention to their vote. Reasonable people can evaluate

[3] "(a) An election for the purpose of electing a justice or justices of the Supreme Court of Appeals shall be held on the same date as the primary election, as provided by law, upon a nonpartisan ballot by division printed for this purpose."

the actions of this Governor and know that they have been deceived and their will is being denied. Governor Justice "must exercise their power and authority under the Constitution solely and strictly in accordance with the will of the sovereign". *Harbert v. County Court*, 129 W. Va. 54, 61-62, 39 S.E.2d 177, 184 (1946).

Further, in this case, the voters of the entire State separately chose the persons who they wanted to be on the Supreme Court: Democrats Robin Davis and Menis Ketchum. As was their prerogative, both justices resigned their positions. Upon their departure from office, however, application of the express language of W. Va. Code § 3-10-3(b) without regard to political party affiliation of the replacement operates to disenfranchise the voters of the entire State, who, at the time of each previous election, (2012 and 2008) elected Robin Davis and Menis Ketchum as their Supreme Court Justices. This construction, dictated by the statute's plain language, effectively silences the voters' voice and cannot be reconciled with the voters' constitutional right to select their representatives of their choosing guaranteed by Article II §4 of the West Virginia Constitution which plainly states "[e]very citizen shall be entitled to equal representation in the government, and, in all apportionments of representation, equality of numbers of those entitled thereto, shall as far as practicable, be preserved." (The second clause of this section, "and, in all apportionments of representation," refers to something other than the legislature) *State ex rel. Smith v. Gore,* 150 W. Va. 71, 143 S.E.2d 791 (W. Va. 1965).

"The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. *And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.*" (Italics supplied.) Syl. Pt. 1 *Lance v. Board of Educ. of Cnty. of Roane*, 153 W. Va. at 569, 170

S.E.2d at 789 (quoting *Reynolds v. Sims*, 377 U.S. at 555, 84 S. Ct. at 1378, 12 L. Ed. 2d 506 (footnote omitted)). *See also Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 665, 86 S. Ct. 1079, 1081, 16 L. Ed. 2d 169 (1966) ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."). Application of W. Va. Code § 3-10-3(b) without regard to political party affiliation of the replacement as the Governor has done deprives the voters of their right to elect a candidate of their choosing, and, thus, is unconstitutional by violating Article II, §4 of the West Virginia Constitution.

Certainly Governor Justice has drawn his authority to appoint these replacements without adhering to the vacating justice's political affiliation from the recently passed statute that provides that justices shall be elected through nonpartisan ballots. W.Va. Code § 3-5-6a stating "[a]n election for the purpose of electing a justice or justices of the Supreme Court of Appeals shall be held on the same date as the primary election, as provided by law, upon a nonpartisan ballot by division printed for this purpose." This statute is a part of a larger chapter of laws collectively referred to as "West Virginia Election Code", W.Va. Code § 3-1-1 *et seq.*, and took effect June 8, 2015 *after* both Robin Davis and Menis Ketchum were elected in their respective partisan elections. A complete reading of the statute, and the entire Election Code, reveals no provision for retroactivity of the statute or that the statute would specifically apply to appointments of vacated partisan justices, as has happened here. "A statute will be construed to operate in future only, and will not be given a retroactive effect unless the legislature has expressed its intention to make it retrospective. *Jenkins v. Heaberlin*, 107 W. Va. 287, 148 S.E. 117, (1929). The Legislature could have indicated in the new statute that it was to be considered retroactively, yet such language is absent from the text of W.Va. Code § 3-5-6a. The result of the

absence of the language is that the statute making the election of Supreme Court Justices nonpartisan is not applied only to the seats that were elected in a partisan election and vacated prior to their next naturally occurring election. Governor Justice misused the nonpartisan provision in the statute by not appointing Democrats to fill the unexpired seats on the Court of Democrats elected by the People as justices.

D. Article VI, §15, The Emoluments Clause, is violated by the gubernatorial appointment of a legislator to a vacant supreme court of appeals seat, who voted affirmatively by official house resolution, to investigate and impeach the entire Supreme Court, and who then resigned to run for one of the two seats vacated, where the vacancies of the two seats at issue were "created" due to the House impeachment proceedings.

When the House of Delegates passed HR201, Armstead, while recusing himself from presiding as Speaker over the special session, nevertheless did not recuse himself from voting on the House Resolution to investigate and impeach the entire Supreme Court of Appeals. To be clear, Armstead thereby "created" an office, by voting in a way that a vacancy was created on the Supreme Court through resignations directly related to impeachment resolution Armstead knew at the time of the vote that he would be filing to run for a vacant Supreme Court position. See Exhibit C, Speaker Armstead Statement on Special Impeachment Session. Notwithstanding his self-serving subjective belief that he had "no conflict" such a position is directly opposite to the West Virginia Constitution that states in pertinent part: "No senator or delegate, during the term for which he shall have been elected, shall be elected or appointed to any civil office of profit under this State, which has been created, or the emoluments of which have been increased during such term…" W. Va. Const. Art. VI, § 15. This is a "straightforward and absolute bar against a member of the legislature obtaining any public office that was created, or the emoluments of which were increased, during the legislator's term of office." Syl pt. 6 *State ex rel. Rist v.*

Underwood, 206 W. Va. 258, 524 S.E.2d 179, (1999). Here, Armstead was in his term of office, and was the highest ranking member of the House of Delegates on June 26, 2018. By voting "yea" on the impeachment resolution he helped create a vacancy in the office of the Supreme Court of Appeals that he himself wanted to take. This is a transparent and straightforward violation of the constitutional emoluments clause.

The fact that Mr. Armstead may have requested a ruling from sympathetic House leaders on whether or not he should vote on the resolution is of no moment. The fact remains that he did vote, he voted "yea", and that vote ultimately created an office for an unexpired term of justice on the Supreme Court of Appeals that he wanted to fill, all in direct violation of the constitutional emoluments clause. The emoluments clause allows for only one exception: if that ineligible legislator gains the office through popular election. W. Va. Const. Art. VI, § 15. It is conceded here that should he be otherwise qualified to be on the ballot on November 6, 2018 and the citizens of West Virginia should elect him by popular vote, his actions in creating the office he was interested in are swept away. In other words, this constitutional restriction is limited to appointment to the office created; Armstead can run and be elected to the position. But his appointment to a seat he helped create by his vote in favor of the impeachment resolution is precisely the kind of unconstitutional appointment the emoluments clause was intended to prohibit.

Creating a vacancy by impeachment proceedings is "creating an office" as contemplated by the West Virginia Constitution. The Emoluments Clause prohibits Armstead, who voted "yea" on the impeachment resolution, from the appointment to this created office which would raise his personal income by four or five times. Based upon the foregoing, the requested Writ should be granted.

VI. CONCLUSION

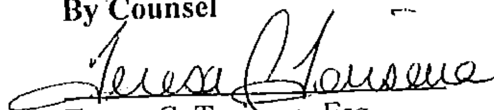
Evan Jenkins is disqualified from election because he has not been admitted to the practice of law for the decade prior to his appointment or election. Evan Jenkins' and Tim Armstead's appointments both violate the Constitution as to abrogating the will of voters in electing a Democratic governor and two Democratic Supreme Court justices and having all three changed to "conservative" Republicans through means other than election. The West Virginia Supreme Court of Appeals should never be a consolation prize for a career politician like Evan Jenkins who lacks even a decade of relevant legal experience and who has been prohibited from practicing law in this State for the last four years.

Tim Armstead cannot be appointed because his vote on the impeachment resolution helped create the vacancies on the Court, one of which he immediately sought. The Emoluments Clause of the Constitution does not permit him to vote in favor of a resolution to create a vacancy in an office and then be the one to fill that office.

PRAYER FOR RELIEF

For the foregoing reasons, the Writs requested should be granted.

WILLIAM K. SCHWARTZ
By Counsel



Teresa C. Toriseva, Esq.
W.Va. Bar No. # 6947
Joshua D. Miller, Esq.
W.Va. Bar No. # 12439
TORISEVA LAW
1446 National Road
Wheeling, WV 26003
Telephone: (304) 238-0066
E-mail: justice@torisevalaw.com

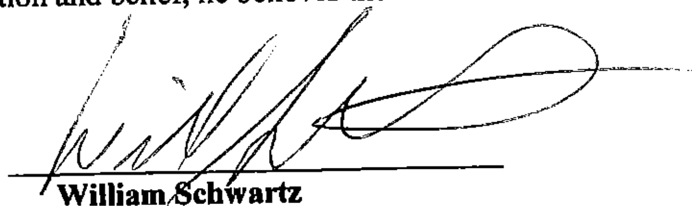
S. Paige Flanigan, Esq.
WV Bar ID# 6015
Flanigan Law Office
1407 E Main Street
Princeton, WV 24740
Phone Number: (304) 487-2338
paige.flaniganlaw@gmail.com

VERIFICATION

STATE OF WEST VIRGINIA,

COUNTY OF OHIO; TO-WIT:

WILLIAM SCHWARTZ, the Petitioner named in the foregoing **Relator William Schwartz's Combined Writ of Mandamus and Writ of Prohibition Directing the Secretary of State to Remove Evan Jenkins' Name from the Election Ballot on November 6, 2018, and to Prohibit Governor Justice's Appointments of Jenkins and Armstead to the Vacant Supreme Court Seats** after being duly sworn, says that the facts and allegations therein contained are true, except so far as they are therein stated to be on information and belief, and that so far as they are therein stated to be on information and belief, he believes them to be true.



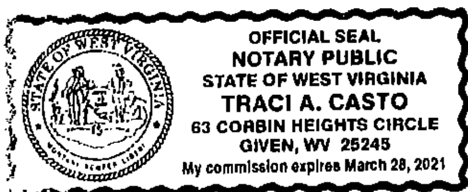
William Schwartz

Taken, sworn to and subscriber before me this the 13th day of September, 2018, by William Schwartz, Petitioner.

My Commission Expires: March 28, 2021

Traci A. Casto

Notary Public



IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

AT CHARLESTON

State of West Virginia, ex rel
William K. Schwartz, a registered
voter in Kanawha County, West Virginia
Relator

V.

The Honorable James Justice,
Governor of the State of West
Virginia, and The Honorable Mac Warner,
Secretary of State of the State of
West Virginia, and Evan Jenkins, a real party in
interest, and Tim Armstead, a real party in
interest,
Respondents.

CERTIFICATE OF SERVICE

I, Teresa C. Toriseva, the undersigned counsel, do hereby certify that true copies of the foregoing **Relator William Schwartz's Combined Writ of Mandamus and Writ of Prohibition Directing the Secretary of State to Remove Evan Jenkins' Name from the Election Ballot on November 6, 2018, and to Prohibit Governor Justice's Appointments of Jenkins and Armstead to the Vacant Supreme Court Seats** were deposited in the United States Mail via certified mail to the following:

Governor James C Justice
Office of the Governor
State Capitol, 1900 Kanawha Blvd. E
Charleston, WV 25305

Mac Warner
Secretary of State
State Capitol, 1900 Kanawha Blvd. E.
Charleston, WV 25305

Evan Jenkins
121 Oak Lane
Huntington, WV 25701

Tim Armstead
State Capitol, 1900 Kanawha Blvd E.
Charleston, WV 25305

Teresa C. Toriseva, Esq.
Counsel for Relator William K. Schwartz, Esquire
Bar ID 6947
1446 National Road
Wheeling, WV 26003
(304) 238-0066