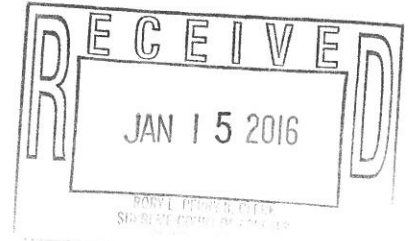


IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 16-0013



STATE OF WEST VIRGINIA ex rel. BELINDA BIAFORE,
in her capacity as Chair of the West Virginia State Democratic
Executive Committee, and STEPHEN DAVIS, LINDA KLOOP,
DAVID THOMPSON, LINDA PHILLIPS, STEPHEN EVANS,
and PATRICIA BLEVINS, each individually, and in their capacity
as the members of the West Virginia Democratic Executive
Committee for the Ninth Senatorial District,

Petitioners,

v.

EARL RAY TOMBLIN, in his capacity as Governor
of the State of West Virginia, and BEVERLY R. LUND,
JUSTIN M. ARVON, SUE "WAOMI" CLINE, TONY
PAYNTER, JOHN DOE, and JANE DOE, in their capacity as
the members of the West Virginia Republican Executive
Committee for the Ninth Senatorial District,

Respondents.

EMERGENCY MOTION FOR ORDER OF CLARIFICATION
OF THE STATE OF WEST VIRGINIA

Patrick Morrisey
Attorney General of West Virginia
Elbert Lin (WVSB 12171)
Solicitor General
Counsel of Record
J. Zak Ritchie (WVSB 11705)
Assistant Attorney General
State Capitol Building 1, Room 26-E
Tel. (304) 558-2021
Fax (304) 558-0140
Email: elbert.lin@wvago.gov
Counsel for Intervenor
State of West Virginia

EMERGENCY MOTION FOR ORDER OF CLARIFICATION

Pursuant to West Virginia Rule of Appellate Procedure 29, the Attorney General of West Virginia, on behalf of the State of West Virginia, (the "State") submits this emergency motion for an order clarifying that this Court's Rule to Show Cause, issued on January 13, 2016, operates as a stay that temporarily prohibits Respondent Governor Tomblin from taking action on the appointment that is at issue in this case. While the State believes this Court's authorities indicate that the Rule to Show Cause precludes the Governor from making the appointment, the State respectfully submits that the Governor's written response, which promises to take action absent explicit direction from this Court, creates sufficient risk of a pre-decisional appointment and ensuing confusion to warrant a clarifying order.

BACKGROUND

By letter dated January 3, 2016, Daniel J. Hall, of Wyoming County, resigned his membership in the West Virginia State Senate. At the time Hall was elected to the Senate in 2012, he was a member of the Democratic Party. Hall switched his party membership to the Republican Party soon after the election in the fall of 2014, and was a Republican when he resigned from the Senate on January 3.

West Virginia Code § 3-10-5 sets forth the procedures for the appointment of Hall's replacement. Subsection 5(a) provides:

Any vacancy in the office of State Senator . . . shall be filled by appointment by the Governor, from a list of three legally qualified persons submitted by the party executive committee of the party with which the person holding the office immediately preceding the vacancy was affiliated. The list of qualified persons to fill the vacancy shall be submitted to the Governor within fifteen days after the vacancy occurs and the Governor shall duly make his or her appointment to fill the vacancy from the list of legally qualified persons within five days after the list is received. If the list is not submitted to the Governor within the fifteen-day period, the Governor shall appoint within five days thereafter a legally qualified person of the same political party as the person vacating the office.

W. Va. Code § 3-10-5(a). Subsection 5(b) further provides, in pertinent part:

In the case of a State Senator, the list shall be submitted by the party executive committee of the state senatorial district in which the vacating senator resided at the time of his or her election or appointment.

Id. § 3-10-5(b).

On January 8, 2016, before any party executive committee submitted a list of potential replacements to the Governor, the Chair of the West Virginia State Democratic Party, Belinda Biafore, and the members of the West Virginia Democratic Executive Committee for the Ninth Senatorial District filed an emergency petition for a writ of mandamus (“Pet.”) against Governor Tomblin and the members of the West Virginia Republican Executive Committee for the Ninth Senatorial District. The Petition seeks an “election mandamus,” Pet. 31, and asks this Court to direct the Governor, pursuant to West Virginia Code § 3-10-5, to fill the current vacancy in the Senate with an individual from the Democratic Party—the party with which Hall was affiliated at the time of his election to the Senate in 2012.

On that same day, this Court issued a scheduling order, setting an expedited briefing schedule under which responses and *amicus curiae* briefs were to be filed no later than noon on January 12, 2016, less than two business days later.

On January 11, 2016, Petitioners, the Democratic Senatorial Executive Committee of the Ninth Senatorial District, submitted a list of three names to the Governor. *See* West Virginia Democratic Party, “Names Sent to Governor for Appointment” (Jan. 11, 2016), *available at* <http://www.wvdems.org/for-immediate-release-names-sent-to-governor-for-appointment/>.

That day, the Governor filed a summary response (“Gov. Resp.”) with this Court. The Governor declined to take a position on the meaning of the relevant statutory text, but proclaimed his “intention” under “sound public policy” to appoint a member of the Democratic

Party to the vacant Senate seat. Gov. Resp. 5-6. Specifically, the Governor stated that “[u]nless [he] is directed otherwise by this Court, he intends to appoint a Democrat to the vacant seat in the Ninth Senatorial District *within five days of receiving the list submitted by the Democratic Petitioners.*” *Id.* at 5 (emphasis added). At the same time, the Governor “recognize[d] [that] he is not the final arbiter of this issue, and that if he makes an appointment in advance of a ruling issued by this Court, it would be challenged by Republican Respondents and that party’s nominees.” *Id.* at 6.

On January 13, 2016, this Court issued a Rule to Show Cause, directing Respondents “to show cause, if any they can, why a writ of mandamus should not be awarded as prayed for by the petitioners in the said petition.” The Rule set the matter for oral argument on Tuesday, January 19, 2016, at 1:00 p.m.

On January 16, 2016, the day after the filing of this emergency motion, five days will have elapsed since Petitioners, the Democratic committee, submitted its list of names to the Governor.

ARGUMENT

Under this Court’s precedent, the issuance of a rule to show cause in a mandamus case, such as this one, “operates as a stay of proceedings.” Syl. Pt. 3, *State ex rel. Underwood v. Silverstein*, 167 W. Va. 121, 278 S.E.2d 886 (1981). In *Silverstein*, this Court addressed an original petition for a writ of mandamus to compel the recounting of ballots from an election. The Court expressly addressed “the procedural question of the effect of the issuance of a preliminary rule to show cause in a mandamus action.” *Id.* at 126, 278 S.E.2d at 890. Reviewing the historical origins of the “statutory rule to show cause,” this Court explained that the rule to show cause “performs the same functions formerly performed by the alternative writ of mandamus,” a legal device that had previously been “directed against . . . subordinate

tribunal[s] . . . to stay proceedings until the parties could be heard and the issues resolved.” *Id.* at 127, 278 S.E.2d at 890. On this basis, this Court concluded that “where a rule to show cause has been issued in an election mandamus action, this will operate as a stay of proceedings” that is “sufficient” to constitute a court order requiring preservation of ballots within the meaning of West Virginia Code § 3-6-9.

This automatic stay of proceedings for mandamus cases under this Court’s case law logically mirrors the automatic stay of proceedings for prohibition cases under West Virginia Rule of Appellate Procedure 16(j). Rule 16(j) provides that “[u]nless otherwise provided, the issuance of a rule to show cause in prohibition stays all further proceedings in the underlying action for which an award of prohibition is sought.” W. Va. R. App. P. 16(j). Prohibition cases and mandamus cases are essentially identical, this Court has explained, differing primarily in the types of entities against which they may be directed. Prohibition can lie against “judicial [or] quasi-judicial entities”; mandamus cannot. *State ex rel. Potter v. Office of Disciplinary Counsel of State*, 226 W. Va. 1, 2 n.1, 697 S.E.2d 37, 38 n.1 (2010). But because they are otherwise quite similar, this Court will *sua sponte* “treat[] a request for relief in prohibition as a petition for writ of mandamus if so warranted by the facts.” *Id.* Thus, it is logical that a rule to show cause in a mandamus case, like a similar rule in a prohibition case, operates as a stay of proceedings.

Under these authorities, the State believes that the Rule to Show Cause issued in this case sensibly operates as a stay that preserves the *status quo* and temporarily prohibits Respondent Governor Tomblin from making the appointment that is at issue in this case. As the Governor himself acknowledges, “an appointment in advance of a ruling issued by this Court” will only invite further complications, including a “challenge[] by Republican Respondents and that party’s nominees.” Gov. Resp. 6. Moreover, the State believes that in light of the Governor’s

stated intent to appoint a Democrat, any such pre-decisional appointment will be in violation of the clear language of the law, sow needless confusion in the Senate, and have to be undone by an order of this Court. To the extent there is any concern about delay during the stay, this Court has made clear through its efforts to expedite briefing and oral argument in this case that this Court intends to resolve this matter quickly.

Nevertheless, the Governor's response suggests that he will make the appointment no later than this Saturday, January 16, unless he receives an explicit order from this Court to stay his hand. "Unless the Governor is directed otherwise by this Court," the response states, "he intends to appoint a Democrat to the vacant seat in the Ninth Senatorial District *within five days of receiving the list submitted by the Democratic Petitioners.*" Gov. Resp. 5 (emphasis added). As the list was submitted on Monday, January 11, those five days expire this coming Saturday, January 16.

While the State believes this Court's authorities indicate that the Rule to Show Cause temporarily prohibits the Governor from making the appointment, the State respectfully submits that the Governor's response creates sufficient risk of a pre-decisional appointment and the attendant negative consequences to warrant a clarifying order.

CONCLUSION

For the foregoing reasons, the State of West Virginia by the Attorney General respectfully requests an order clarifying that this Court's Rule to Show Cause, issued on January 13, 2016, operates as a stay that temporarily prohibits Respondent Governor Tomblin from making the appointment that is at issue in this action.

Dated: January 15, 2016

Respectfully submitted,



Patrick Morrissey
Attorney General of West Virginia
Elbert Lin (WVSB 12171)
Solicitor General
Counsel of Record
J. Zak Ritchie (WVSB 11705)
Assistant Attorney General
State Capitol Building 1, Room 26-E
Tel. (304) 558-2021
Fax (304) 558-0140
Email: elbert.lin@wvago.gov
Counsel for Intervenor
State of West Virginia

CERTIFICATE OF SERVICE

I, Elbert Lin, counsel for the State of West Virginia, hereby certify that on this 15th day of January, 2016, I caused the foregoing document to be served contemporaneously with filing by electronic service, with hardcopy sent via U.S. Mail, to the following:

Anthony J. Majestro
POWELL & MAJESTRO, PLLC
405 Capitol Street, Suite P1200
Charleston, WV 25301
amajestro@powellmajestro.com
Counsel for Petitioners

Peter G. Markham
General Counsel, Office of Governor Earl Ray Tomblin
1900 Kanawha Blvd., East
State Capitol
Charleston, WV 25305
peter.g.markham@wv.gov
Counsel for Respondent Governor Tomblin

J. Mark Adkins
Patrick C. Timony
BOWLES RICE LLP
Post Office Box 1386
Charleston, WV 25325
madkins@bowlesrice.com
Counsel for Respondents Lund, Arvon, Cline, and Paynter

Mark A Carter
DINSMORE & SHOHL LLP
Post Office Box 1887
Charleston, WV 25339
mark.carter@dinsmore.com
Counsel for Respondents Lund, Arvon, Cline, and Paynter

John M. Canfield
Vice President & Counsel
West Virginia Chamber of Commerce
1624 Kanawha Boulevard East
Charleston WV 25311
jcanfield@wvchamber.com
Counsel for Amicus Curiae WV Chamber of Commerce

Parween Sultany Mascari
West Virginia Chamber of Commerce
1624 Kanawha Boulevard East
Charleston WV 253 11
pmascari@wvchamber.com
Counsel for Amicus Curiae WV Chamber of Commerce

Jeffrey M. Wakefield
Wesley P. Page
Keith R. Hoover
Flaherty Sensabaugh & Bonasso, PLLC
PO Box 3843
200 Capitol Street
Charleston, WV 25338
(304) 345-0200 phone
jwakefield@flahertylegal.com
Counsel for Amicus Curiae the Honorable William P. Cole, III

Richard R. Heath, Jr. (WV Bar #9067)
Counsel to the Senate President
State Capitol Building 1, Room M-223
Charleston, WV 25305
Richie.Heath@wvsenate.gov
Counsel for Amicus Curiae the Honorable William P. Cole, III



Elbert Lin