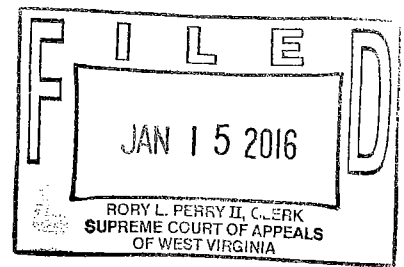


**IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
No. 16-0013**



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

Petitioners,

v.

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

Respondents.

**GOVERNOR EARL RAY TOMBLIN'S
SUPPLEMENTAL BRIEF**

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SUPPLEMENTAL BRIEF

COMES NOW his Excellency, West Virginia Governor Earl Ray Tomblin, by counsel, and submits this Supplemental Brief in response to this Court's Rule to Show Cause Order.

Unless directed otherwise by this Court, Governor Tomblin will appoint a Democrat to the vacant Senate Seat in the Ninth Senatorial District at 4:00 p.m. on Saturday, January 16, 2016, in compliance with his statutory duties. He had intended—for the sake of ensuring an orderly process—to honor and apply a ruling of this Court in making this appointment. However, with oral argument now scheduled for next Tuesday, January 19, 2016, it appears unlikely a ruling will issue in advance of Governor Tomblin's statutory deadline. *See* W. Va. Code § 3-10-5(a) (providing five day deadline for governor to appoint following receipt of list).

The record in this matter should reflect that the Democratic Executive Committee for the Ninth Senatorial District submitted its list of replacement candidates on January 11, 2016, after normal business hours. Governor Tomblin received the list on January 12, 2016. *See* Tomblin Appendix (Democratic Ltr). Accordingly, he is dutybound to appoint a replacement State Senator on or before January 17, 2016, to comply with W. Va. Code § 3-10-5(a). With the sixty day 2016 Regular Session of the Legislature now underway, Governor Tomblin deems

it important and necessary to appoint a replacement Senator to give the citizens of the Ninth Senatorial District a voice in the Senate immediately.

A Saturday afternoon appointment will comply with this Court's Scheduling Order, which explicitly states that nothing therein is "intended to prevent or delay public officials from exercising any duties under the West Virginia Code." See Scheduling Or. at p. 2. Further, the Republican Respondents failed to seek a stay or injunction to prevent Governor Tomblin from making the appointment – even though they had notice of his intent to appoint a Democrat a day prior to filing their January 12, 2016, Response in Opposition to the Emergency Petition. The Attorney General, arguing on behalf of the "State," likewise failed to seek a stay or injunction in the Intervenor's Response Brief, also filed on January 12, 2016. The Intervenors did, however, seek clarity this morning on whether this Court's Rule to Show cause operates as a stay.¹ At this time, no stay or injunction has been imposed by this Court.

From a merits standpoint, Governor Tomblin believes he is wholly and legally justified in appointing on Saturday a replacement State Senator to represent

¹ The Attorney General cites Syllabus Point 3 in *State ex rel. Underwood v. Silverstein*, 167 W. Va. 121, 122, 278 S.E.2d 886, 888, (W. Va. 1981) to argue that the issuance of a rule to show cause in a mandamus action "operates as a stay of proceedings." Em. Mot. p. 3. This syllabus point is presented to the Court out of context. The syllabus point in full reads, "Where a rule to show cause has been issued in an election mandamus action, this will operate as a stay of proceedings sufficient to preclude the destruction of ballots under W. Va. Code 3-6-9." The Court in its syllabus point merely prohibited the destruction of ballots. The issue in this matter does not relate to ballots in an election, but to an appointment required by law.

the citizens of the Ninth Senatorial District from the Democratic list. His position is supported on multiple fronts, including the following:

- West Virginia Code § 3-10-5 is unclear; specifically, it is ambiguous as applied to party-swap circumstances because the phrase “was affiliated” can be reasonably read to refer to the political party of the vacating legislator at the time of election *or* at the time of vacancy;
- No West Virginia authorities interpret § 3-10-5 to require Governor Tomblin to apply Daniel Hall’s party affiliation at the time he vacated his Senate seat in making the appointment, but two strikingly similar out of state cases instruct that Governor Tomblin instead should apply Hall’s party affiliation at the time he was elected to honor the mandate of the voters. *See Wilson v. Sebelius*, 72 P.3d 553, 276 Kan. 87 (Sup. Ct. Kan. 2003); *see also Richards v. Board of Co. Comm’rs of Sweetwater Co., Wyo.*, 6 P.3d 1251, 2000 Wyo. LEXIS 132 (Sup. Ct. Wyo. 2000);
- The voters of the Ninth Senatorial District elected a Democrat, who ran as a Democrat, who was supported by the Democratic Party, and who served the majority of his term of office as a Democrat;

- This Court has recognized that, although candidates and legislators have the constitutional right to freely associate, the State of West Virginia has a legitimate and compelling interest in “preserving the integrity of the political process and in preventing party raiding and voter confusion.” *See State ex rel. Billings v. City of Pt. Pleasant*, 460 S.E.2d 436, 443 194 W. Va. 301, 308 (1995); and
- The Republican Respondents—in submitting their list of candidates to Governor Tomblin—nominated, among others, the very individual the voters of the Ninth Senatorial District rejected in favor of then-Democrat Daniel Hall, giving rise to the absurd result that Governor Tomblin, if forced to pick from the Republican list, would directly undermine the will of the voters. *See Tomblin Appendix (Republican List)* (nominating Epp Cline, who was defeated in the 2012 general election by then-Democrat Daniel Hall).

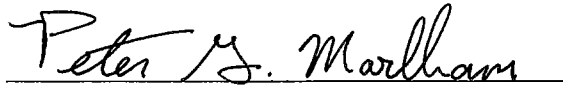
CONCLUSION

Governor Tomblin will perform his statutory duty of appointment on Saturday at 4:00 p.m. absent a contrary directive from this Court. In applying an ambiguous statute under the unique circumstances at issue, he will choose to err on the side of the people—the voters of the Ninth Senatorial District—who elected a

Democrat. This makes sense practically and squares with sound public policy. Following the appointment, the Emergency Petition will be technically moot insofar as Governor Tomblin is implicated in this matter. At that time, he respectfully requests this Court to enter an order ruling that he has no further duties to discharge with respect to the Emergency Petition for a Writ of Mandamus.

Respectfully submitted by,

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



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By Special Appointment of the Attorney General

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the attached “**Governor Earl Ray Tomblin’s Supplemental Brief**” was served upon the persons listed below as required by Rule 37, Revised Rules of Appellate Procedure, on this 15th day of January, 2016:

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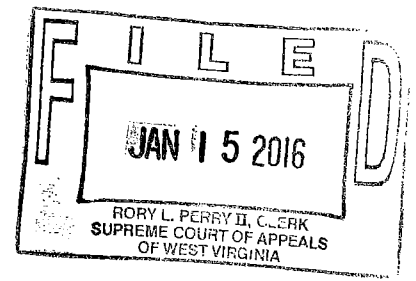
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**APPENDIX TO GOVERNOR EARL RAY TOMBLIN'S
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CERTIFICATE OF ACCURACY OF APPENDIX CONTENTS

I, Peter G. Markham, Counsel for Respondent Governor Tomblin, do this 15th day of January, 2016, hereby certify, pursuant to the provisions of Rule 7(c)(2) and Rule 16(e) of the Revised Rules of Appellate Procedure, that the contents of this Appendix are, to the best of my knowledge and belief, accurate copies of the items that I have described in the TABLE OF CONTENTS OF THIS APPENDIX and GOVERNOR EARL RAY TOMBLIN'S SUPPLEMENTAL BRIEF to which this Appendix is appended.



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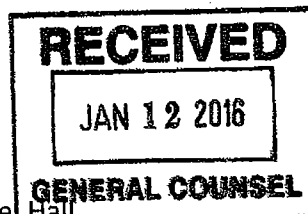
Counsel for Respondent Governor Tomblin

TABLE OF CONTENTS

Exhibit 1: Democratic Executive Committee for the Ninth Senatorial District
List of Candidates for Appointment

Exhibit 2: Republican Executive Committee for the Ninth Senatorial District List
of Candidates for Appointment

January 11, 2016



Nominations to Governor to fill vacancy in the 9th Senatorial District of Daniel Hall

- 1 D. Michael Goode
- 2 Timmy Ellison
- 3 David G. Thompson

Respectfully:

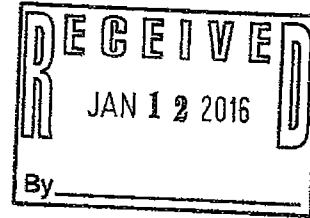
David Thompson	Wyoming County	<u>David G. Thompson</u>
Linda Goode Phillips	Wyoming County	<u>Linda Goode Phillips</u>
Stephen Davis	Raleigh County	<u>R. Stephen Davis</u>
Linda Klopp	Raleigh County	<u>Linda L. Klopp</u>
Patricia Blevins	McDowell County	<u>Patricia Blevins</u>
Steven Evans	McDowell County	_____



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Interested Parties;

Due to the vacancy in State Senate District 9, created by the resignation of Republican Senator Daniel Hall, the West Virginia Republican Party's 9th Senatorial District Committee submit the following names for your consideration:

First Name - Last Name - Address - City - Zip - Phone

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Epp Cline P.O. Box 201 Oceana, WV 24870 304-682-6596

Jack Finchem P.O. Box 436 Brenton, WV 24818 304-923-3113

Sincerely,

Conrad Lucas
Chairman
West Virginia Republican Party

Chairman
West Virginia Republican Party 9th Senatorial District

Secretary
West Virginia Republican Party 9th Senatorial District