Chase Tower, Eighth Floor
P.O. Box 1588
Charleston, WV 25326-1588
(304) 353-8000 (304) 353-8180 Fax
www.steptoelaw.com

FACSIMILE TRANSMISSION

TO: John Curry, Esquire

COMPANY:

FAX NO: ~~(304) 353-0340~~ (304) 342-6007

FROM: Robert E. Ryan, Esq.

DATE: 9/23/10

NUMBER OF PAGES (including this coversheet): 12

If you do not receive all the pages, please call back as soon as possible.
The facsimile operator's number is (304) 556-8221.

COMMENTS:

NOTICE - CONTENTS ARE PRIVILEGED AND CONFIDENTIAL. This communication is intended for the sole use of the above-named addressee. It is covered by the attorney-client and/or work product privileges. Please deliver this communication to the addressee and protect it from inadvertent disclosure or dissemination. If this communication has been improperly directed or the addressee is not located at the receiving location, please notify the sender and return the communication to address shown above. Thank you.

JOB CODE NO.:

NO.

Member of the Worldwide Network of Independent Law Firms
TERRALEX

Robert. E. Ryan, Esquire
Setliff, Turner & Holland
517 9th Street
Huntington, WV 25701

Via Facsimile Only (304) 357-0473
The Honorable Cathy S. Gatson
Clerk
Kanawha County Circuit Court
111 Court Street
Charleston, WV 25301

Re: The Republican State Executive Committee of West Virginia v. Natalie E. Tennant
Civil Action No.: 10-C-1676

Dear Ms. Gatson:

Please find enclosed for filing **Plaintiff's Brief in Support of Its Request for Injunction and Declaratory Judgment** relative to the above-referenced case. Counsel of record have been served as evidenced by the **Certificate of Service.**

Very truly yours,

Robert E. Ryan, Esquire

RER/drt

Attachment

cc: The Honorable Jennifer Bailey (via facsimile only) – 304-357-0463
John Curry, Esquire (via facsimile only) – 304-353-0340

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

THE REPUBLICAN STATE EXECUTIVE
COMMITTEE OF WEST VIRGINIA,

Plaintiff,

v.

CIVIL ACTION NO: 10-C-1676
Judge Bailey

NATALIE E. TENNANT,
Secretary of State of West Virginia,

Defendant.

PLAINTIFF'S BRIEF IN SUPPORT OF ITS REQUEST FOR INJUCITON AND DECLARATORY JUDGMENT

Comes Now, the Plaintiff, The Republican Executive Committee of West Virginia (hereinafter "Plaintiff"), by counsel, Robert Edward Ryan, and hereby submits its Brief in Support of issuing a temporary and permanent injunction against the Secretary of State (hereinafter "the Secretary") from employing a single ballot in the general election regularly scheduled to occur on November 2, 2010 and the special election mandated by W.V. Code 3-10-4a. Further, the Committee seeks a judgment from this Court declaring that the law of West Virginia requires that the general election and the special election to be separate elections and such legislative mandate precludes the Secretary from employing any method of voting that would combine the elections in any manner contrary to the legislative edicts contained in W.V. Code 3-10-4a. As the plain language of the law passed by the West Virginia Legislature (hereinafter "the legislature") demands separate elections and the Secretary has evidenced her intent to intentionally fail to heed the mandates of the legislature, the relief requested is appropriate and necessary.

I. STATEMENT OF FACTS

In the wake of the death of the late Sen. Robert C. Byrd, the legislature took measures, in its second Extraordinary Session of 2010, to delineate and define how the election of a candidate to fill the unexpired term left by his passing shall operate. The power to "prescribe the manner of conducting and making returns of elections" is squarely vested in the legislature Article IV, Section 11 of the West Virginia Constitution. W.V. Con. Art. 4, §11. The legislature exercised its power to direct the manner and mode of elections in this state by the passing of H.B. 201 on July 19, 2010 which is codified in West Virginia Code § 3-10-4a. At some point in time following enactment of this law, the Secretary appears to have employed discretion not vested in her to conduct the general and special elections on the same ballot even though the law clearly mandates that the general and special elections are to be "separate" and conducted "concurrently" and, additionally, even though H.B. 201 stated that its enactment that one of the purposes was to clarify "that the special general election held on November 2, 2010, for the United States Senate vacancy is a separate election from the general election held on the same date." H.B. 201. In employing discretion not vested in her by law, the ballot proposed to be used by the Secretary includes only a single "straight ticket" option for both elections. The law of the State of West Virginia specifically and expressly mandates that the general election and the special election be separate elections conducted concurrently. As the Committee has no other remedy, it initiated this action to prevent the Secretary from combining the general and special elections contrary to legislative mandate.

II. STANDARD OF LAW

A. Injunctions

The decision to grant an injunction rests within the sound discretion of the trial court. A.P. v. Canterbury, 224 W.Va. 708 (2009). "The granting or refusal of an injunction, whether mandatory or preventive, calls for the exercise of sound judicial discretion in view of all the circumstances of the particular case; regard being had to the nature of the controversy, the object for which the injunction is being sought, and the comparative hardship or convenience to the respective parties involved in the award or denial of the writ." Syl. pt. 4, State ex rel. Donley v. Baker, 112 W.Va. 263 (1932). In so making this balancing inquiry, this Court "must consider, in 'flexible interplay,' the following four factors in determining whether to issue a preliminary injunction: (1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest." Camden-Clark Memorial Hospital Corp. v. Turner, 212 W.Va. 752, 756 (2002). As each factor weighs in favor of granting the injunction requested, the writ should be issued restraining the Secretary from employing the legally flawed ballot.

B. Declaratory Judgment

The authority of this Court to enter a judgment is found in the Uniform Declaratory Judgment Act. W.V. Code 55-13-1, *et seq.* That act authorizes this Court to issue declarations of "rights, status and other legal relations whether or not further relief is or could be claimed." Christian v. Sizemore, 181 W.Va. 628, 630 (1989). As the legal interests of the Plaintiff are affected by Secretary's incorrect application W.V. Code 3-10-4a, it has standing to seek a declaration that the Secretary's actions are invalid and *ultra vires* under the statute.

III. ARGUMENT

A. The Secretary's Proposed Ballot Creates a Single Election

It is beyond argument that the Secretary's action in combining the two elections on one ballot creates a single, conjunctive election, not separate and concurrent elections. She has chosen a single ballot over two separate ballots. That in and of itself denies the Plaintiff and its chosen candidates the protection provided by statute that the elections be separate. But, moreover and far more indicative of the Secretary's desire and intent to combine the elections into a single election, she has only provided one straight ticket option for both elections. If a voter can answer a single question that applies to both elections, the elections by definition are not separate and concurrent, but, rather, are being conducted simultaneously and conjunctively. Furthermore, W.V. Code 3-6-2(c)(1) requires that heading on a ballot for a general election be "Official Ballot, General Election." In placing the special election on a ballot that declares, by statute, that it is the official ballot of the general election, the Secretary has illegally combined in the elections into a single election. By employing a single ballot for two elections, allowing the answering of a single question to carry into the general and special elections and by placing the special election on a ballot entitled "Official Ballot, General Election", the Secretary has clearly combined the elections into a single, conjunctive election.

B. The West Virginia Legislature Mandated that the General Election and Special Election are to be Separate Elections

One neither has to search for nor attempt to infer what the legislature intended when it passed H.B. 201 relating to the special election. In numerous locations in H.B. 201 the legislature clearly and indisputably made known its intention that the general election and the special election are to be separate and distinct elections that take place on the same day. In the

preamble to H.B. 201, the legislature stated, in no uncertain terms, that part of the reason for passage of the legislation was to clarify "that the special general election held on November 2, 2010, for the United States Senate vacancy is a separate election from the general election held on the same date." H.B. 201. Furthermore, the legislature stated the "special election shall be held to fill the unexpired term concurrent with the general election of November 2, 2010." W.V. Code 3-10-4a(a). Finally, the law states, "Any special election, which is held under the provisions of this section and occurs concurrently with a general election, shall be a separate election from the general election." W.V. Code 3-10-4a(d).

One need not attempt to exercise any construction or interpretation when reading the law which mandated the special election. The legislature clearly, repeatedly and unequivocally evidenced its intent that the general and special elections be conducted separately and concurrently, not conjunctively. Our Supreme Court has repeatedly stated "When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." Syl. pt. 5, State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars, 144 W. Va. 137 (1959). "The moment a court ventures to substitute its own judgment for that of the legislature in any case where the Constitution has vested the legislature with power of the subject, that moment it enters a field where it is impossible to set limits to its authority and where its discretion alone will measure the extent of its inference. *The judiciary cannot run a race of opinion to the point of reason and expediency with the law making power. And where a statute limits a thing to be done in a particular form, it includes in itself a negative, viz: that it shall not be done otherwise. Affirmatives in statutes that introduce new laws imply a negative of all that is not in the purview. So that a law directing a think to be done in a certain manner implies that it*

shall not be done in any other manner." Morris v. Board of Canvassers, 49 W.Va. 251, 255-256 (1901) (emphasis added) (citations omitted). Simply put, as the legislature has mandated that the elections be conducted separately and concurrently, it necessarily follows that it shall not be done in any other manner.

The Secretary cannot be permitted to employ interpretation, construction and discretion where the courts cannot. The Secretary must not be permitted to substitute her own judgment and will for that of the legislature. In the instant case, that is exactly what the Secretary has done. She made a decision that she would place both elections on the same ballot regardless of legislative mandate and intent. As the power to prescribe the parameters of elections is squarely vested in the legislature, the Secretary's actions should be declared invalid by this Court as her actions by nature employ discretion where she has none: when a statute is clear and unambiguous and the legislative intent is plain.

C. Even if Interpretation of the Statute is Necessary, Rules of Construction Require that the Elections be Conducted Separately and Concurrently

If a statute is declared ambiguous and the ambiguous terms are not defined in that statute, the undefined words are to be assigned their ordinary and familiar meaning. Canterbury, *supra*. Merriam Webster defines "separate" as 1a) set or kept apart: detached; 1b) archaic: solitary, secluded; 1c) immaterial, disembodied; 2a) Not shared with another: individual; 2b) often capitalized: estranged from a parent body; 3a) existing by itself: autonomous; 3b) dissimilar in nature or identity. It further defines "concurrent" as 1) operating or occurring at the same time 2a) running parallel; 2*b)* convergent; specifically : meeting or intersecting in a point; 3) acting in conjunction; 4) exercised over the same matter or area by two different authorities <concurrent jurisdiction>. Assuming *arguendo*, that the Secretary needed to interpret the statute in order to

prepare the ballots for these elections, the principles of statutory construction in West Virginia dictated that the elections, assigning the ordinary and everyday meaning to the words contained in the statute, must be conducted as separate elections on the same day. The Secretary's interpretation violates the letter of the law and the rules of construction.

D. The Plaintiff is Entitled to Injunctive Relief and Declaratory Relief

All of the elements necessary for this Court to issue an injunction and a declaratory judgment as requested are satisfied. The first prong is irreparable harm. The legislature mandated that these elections be conducted separately. In doing so, it afforded protection to the Plaintiff and its chosen candidates that voters be required to make their choices in the general and special election separately. In employing a single ballot with only one straight ticket option, the legislative intent that separate decisions be made in separate elections is rendered useless. If the Secretary is permitted to employ the illegal ballots she proposes, the Plaintiff and its chosen candidates will suffer harm that will be permanent.

The likelihood of harm to the Defendant is legally non-existent. It is anticipated that the Secretary will make excuses like it would cost more to have two separate elections of voters may be confused by having to execute two ballots. None of these arguments hold merit. It is not within the purview of the Secretary to make these judgments when the legislature has clearly directed her to act otherwise. It is not sufficient for an executive officer to claim economics in not abiding by the directives of the legislature. The only harm that can be claimed by the Secretary is that she will have to comply with the law as written in the printing of ballots, the re-sending of absentee ballots and reprogramming of election machines. None of these claimed harms are sufficient to allow the Secretary to ignore the law.

There is also a strong likelihood that the Plaintiff will succeed upon the merits. The Secretary has clearly twisted, contorted and volitionally ignored the law passed by the legislature. When there is clear legislative directive, the Secretary has no discretion. As she has clearly acted beyond her discretion, the Plaintiff should be granted a declaratory judgment would also satisfy the third prong for an injunction.

Lastly, the public interest in issuing this injunction cannot be understated. At a crucial point in our nation's history, the citizens of West Virginia deserve to have their elected Senator seated as quickly as allowed by law. By not enjoining the Secretary from using the illegal, single ballot, the likelihood that a legal challenge to the ballot would be brought post election is an almost certainty. Such a challenge could delay the seating of West Virginia's elected Senator and deprive the citizens of this West Virginia the benefit of having its elected representative acting on their behalf. As a fair and legal election is in the utmost interest of the citizens of West Virginia, the last prong required for the issuance of an injunction is satisfied.

WHEREFORE, because the West Virginia Legislature clearly and unambiguously directed the general and special elections to be conducted separately and concurrently, the Plaintiff is entitled to a declaratory judgment stating that the elections must be separate in every manner, including separate ballots and separate straight ticket voting options. Furthermore, because the Plaintiff will suffer irreparable harm without an injunction, the Defendant will suffer no legitimate harm, the Plaintiff is entitled to judgment on the merits and the issue is of the utmost public interest, it is entitled to and prays this Court for an injunction preventing the Secretary from employing a single ballot for the general and special elections scheduled to take place on November 2, 2010.

THE REPUBLICAN STATE EXECUTIVE COMMITTEE OF WEST VIRGINIA

By:_____
Of Counsel

Robert Edward Ryan, Esquire (WVBN 8596)
SETLIFF, TURNER & HOLLAND
517 9th St, Second Floor
Huntington, WV 25701
(304) 525-0550

Counsel for Plaintiff,
THE REPUBLICAN EXECUTIVE COMMITTEE OF WEST VIRGINIA

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

THE REPUBLICAN STATE EXECUTIVE COMMITTEE OF WEST VIRGINIA

Plaintiff,

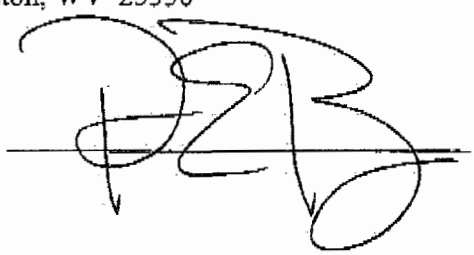
v.

Civil Action No. 10-C-1676
Honorable Jennifer Bailey

NATALIE E. TENNANT, SECRETARY OF STATE OF WEST VIRGINIA,

Defendant.

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2010, I filed the foregoing **Plaintiff's Brief in Support of Its Request for Injunction and Declaratory Judgment** via facsimile only to counsel of record as follows:

Facsimile No.: (304) 353-0340
John Curry, Esquire
P. O. Box 2786
Charleston, WV 25330