IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Upon Original Jurisdiction
No. _____

STATE OF WEST VIRGINIA, ex rel.
DONNA J. BOLEY,

Petitioner,

v.

NATALIE E. TENNANT,
SECRETARY OF STATE OF THE
STATE OF WEST VIRGINIA,
and FRANK DEEM,

Respondents.

EMERGENCY PETITION FOR WRIT OF MANDAMUS

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EMERGENCY PETITION FOR WRIT OF MANDAMUS

QUESTION PRESENTED

This petition presents the question of whether the residency dispersal provisions specified in section four, article VI of the West Virginia Constitution and W.Va. Code § 1-2-1 require the Secretary of State to exclude from the ballot a candidate whose filing for office, nomination, and election would violate those provisions.

STATEMENT OF THE CASE

Petitioner Donna Boley is an incumbent West Virginia State Senator elected to represent the Third Senatorial District serving since 1985. App. at 1 [Ex.1]. Senator Boley was last reelected in 2008. *Id.* She is currently seeking the Republican Party nomination in the May 6, 2012 primary for reelection in the November 6, 2012 general election having timely filed her certificate of candidacy on January 9, 2012. App. at 5 [Ex. 2]. Senator Boley is a resident of Pleasants County. *Id.*

Respondent Frank Deem is a former West Virginia State Senator from the Third Senatorial District. App. at 6 [Exh. 3]. Deem was defeated by David Nohe in the May 11, 2010 primary in his bid for re-election to the West Virginia State Senate, District 3. *Id.* Deem is a resident of Wood County. App. at 9 [Exh. 4]. Nohe, also a resident of

Wood County, was elected to a four-year term in the November, 2010 general election. App. at 10 [Exh. 5].

The Third Senatorial District is comprised of Wirt County, Pleasants County, portions of Roane County, and Wood County. W.Va Code § 1-2-1(d)(3). The clear residency dispersal requirements of section four, article VI of the West Virginia Constitution and W.Va. Code § 1-2-1(e) prohibit both senators in a district from being chosen from the same county when the senatorial district is composed of more than one county. In spite of this clear prohibition, on January 26, 2012, Deem filed to run as a candidate for the Third Senatorial District. App. at 9 [Exh. 4]. Respondent Secretary of State has certified Deem as a candidate. App. at 10 [Exh. 5]. Consistent with her past practice in a prior case, *see* App. at 12 [Exh. 6], the Secretary of State has refused to remove Deem from the ballot. App. at 10 [Exh. 5].

As a member of the Senate, Petitioner Boley is aware that Deem lobbied the legislature to separate Pleasants and Roane County from the Third Senatorial District. He also wrote an op-editorial criticizing the redistricting proposal ultimately adopted that combined Wirt, Wood, Pleasants, and parts of Roane to form the current Third Senatorial District. App. at 14 [Exh. 7]. When these attempts failed, he joined in a lawsuit in this Court challenging the adoption of the new

senate districts in which he argued that counties were unnecessarily split and that Pleasants County should have been placed in the Second Senatorial District. App. at 16 [Exh. 8]. That suit failed. *State ex rel. Cooper v. Tennant,* ___ W.Va. ___, No. 11-1405 (Feb. 13, 2012).

Pursuant to W.Va. Code § 3-5-9, the Secretary of State has certified the list of primary candidates to the county clerks. Petitioner understands from the Secretary of State's office that this list includes Deem. Petitioner has orally informed the Secretary of State that this action would be filed. Yesterday, the Secretary's counsel has informed Petitioner's counsel that the timely printing of the ballots requires a decision from this Court by March 2, 2012.

SUMMARY OF ARGUMENT

Article VI, section 4 of the West Virginia Constitution provides that where a senatorial district is composed of more than one county, both senators shall not be chosen from the same county. West Virginia Code § 1-2-1(e) provides that when a senatorial district is composed of one or more whole counties and one or more parts of another county or counties, no more than one senator shall be chosen from the same county or part of a county to represent such senatorial district. The Third Senatorial District is comprised of Wirt County, Pleasants County, portions of Roane County, and Wood County.

Senator David C. Nohe, a resident of Vienna, in Wood County, was elected as one of the senators from the Third Senatorial District in 2010. Deem is a resident of Wood County. As Nohe, the incumbent, is also a resident of Wood County, the constitutional and statutory residency dispersal provisions prohibit Deem from becoming his party's nominee or the district's second senator. W.Va. Code § 1-2-1(f).

Deem's argument that he believes the statutory and constitutional residency disbursal requirements violate the United States Supreme Court's one man one vote jurisprudence, s*ee, e.g., Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362 (1964), has been rejected at least three times, by the Supreme Court of the United States. *Dallas County v. Reese,* 421 U.S. 477, 95 S.Ct. 1706 (1975); *Dusch v. Davis,* 387 U.S. 112, 87 S.Ct. 1554 (1967); *Fortson v. Dorsey,* 379 U.S. 433, 85 S.Ct. 498 (1965). West Virginia state and federal decisions confirm the continued validity of these rulings. *Holloway v. Hechler,* 817 F.Supp. 617, 627 (S.D.W.Va. 1992), *aff'd* 507 U.S. 956, 113 S.Ct. 1378 (mem) (1993); G*oines v. Heiskell,* 362 F.Supp. 313, 320 (S.D.W.Va. 1973) (relying on *Fortson* and rejecting argument that delegate residency dispersal provisions were arbitrarily discriminatory); *State ex rel. Cooper v. Tennant,* ___ W.Va. ___, No. 11-1405, slip op at 34 (Feb. 13, 2012).

This Court has consistently recognized that mandamus to the Secretary of State is appropriate to strike an ineligible candidate from the ballot prior to the election. Syl. pt. 3, *State ex rel. Carenbauer v. Hechler*, 208 W.Va. 584, 585, 542 S.E.2d 405, 406 (2000); *State ex rel. Maloney v. McCartney,* 159 W.Va. 513, 527, 223 S.E.2d 607, 616 (1976); *White v. Manchin*, 173 W.Va. 526, 532-534, 318 S.E.2d 470, 476-478 (1984).

For these reasons, this Court should grant the writ and order the Secretary of State to withdraw her certification of Deem's candidacy for the West Virginia Senate, and further order that the Secretary to direct the ballot commissioners for Wood, Wirt, Pleasants, and Roane counties to not include Deem on the primary election ballots, and further order the Secretary of State to direct all election officials, county commissioners, clerks of county commissioners, clerks of circuit courts, boards of ballot commissioners, election commissioners, and poll clerks associated with the administration of the primary elections to disregard and refrain from tallying, tabulating, certifying, or returning any vote cast, absentee, write-in, or otherwise, for Deem.

STATEMENT REGARDING BRIEFING, ORAL ARGUMENT AND DECISION

Petitioner Boley requests that this Court forthwith enter an expedited briefing schedule sufficient to permit the court to reach a decision prior to March 2, 2012.

Petitioner Boley believes that the dispositive issues raised by this case have been authoritatively decided by the United States Supreme Court and this Court and that the facts and legal arguments can be adequately presented in the briefs. Consequently, especially given the short time available, oral argument is not necessary. Rev. Rule of App. Pro. 18(a). While Petitioner does not believe oral argument is necessary, Petitioner's counsel will make himself available for a Rule 19 or Rule 20 argument at any time between now and March 1, 2012.

Petitioner Boley believes that a published opinion would be appropriate as the issue here, while subject to clear precedent, has not been decided by this Court in the context of a West Virginia Senate election. A signed decision on the power of the Secretary of State to reject a candidate filing, an issue upon which the Petitioner has no opinion, may also be useful in future cases. Given the timeframe involved, however, Petitioner Boley respectfully suggests that it may be

appropriate for the Court to enter a summary order and follow in due course with the opinion explaining the decision.

ARGUMENT

I. DEEM IS NOT ELIGIBLE FOR ELECTION AS A SENATOR IN 2012.

Article VI, section 4 of the West Virginia Constitution provides:

> For the election of senators, the state shall be divided into twelve senatorial districts, which number shall not be diminished, but may be increased as hereinafter provided. Every ***district shall elect two senators, but, where the district is composed of more than one county, both shall not be chosen from the same county***. The districts shall be compact, formed of contiguous territory, bounded by county lines, and, as nearly as practicable, equal in population, to be ascertained by the census of the United States. After every such census, the Legislature shall alter the senatorial districts, so far as may be necessary to make them conform to the foregoing provision.

The Legislature implemented section 4 by enacting W.Va. Code § 1-2-1(e), which provides in relevant part:

> The West Virginia Constitution further provides, in section four, article VI thereof, that where a senatorial district is composed of more than one county, both senators for such district shall not be chosen from the same county, a residency dispersal provision which is clear with respect to senatorial districts which follow county lines, as required by such Constitution, but which is not clear in application with respect to senatorial districts which cross county lines. However, in an effort to adhere as closely as possible to the West Virginia Constitution in this regard, the following additional provisions, in furtherance of the rationale of such residency dispersal provision and to give meaning and effect thereto, are hereby established:

> (1) With respect to a senatorial district which is composed of one or more whole counties and one or more parts of another county or counties, no more than one senator shall be chosen from the same county or part of a county to represent such senatorial district . . . .

Under the provisions of W.Va. Code § 1-2-1(d)(3), the Third Senatorial District is comprised of Wirt County, Pleasants County, portions of Roane County, and Wood County. Thus, pursuant to subsection (e)(1), no more than one senator shall be chosen from the same county or part of a county to represent such senatorial district.

Senator David C. Nohe, a resident of Vienna, in Wood County, was elected as one of the Senators from the Third Senatorial District in 2010. Despite redistricting, Nohe continues to hold his seat as an incumbent Senator from the Third Senatorial District until his four-year term concludes in 2014. W.Va. Code § 1-2-3(g). ("all senators elected. . . at the general election held in the year 2010 shall continue to hold their seats as members of the Senate for the term, and as representatives of the senatorial district, for which each thereof, respectively, was elected.").

Deem is a resident of Wood County. As Nohe, the incumbent, is also a resident of Wood County, the constitutional and statutory residency dispersal provisions prohibit Deem from becoming his party's nominee

or the second senator as the district is comprised of more than one county. *See* W.Va. Code § 1-2-1(f) ("Candidates for the Senate shall be nominated as provided in section four, article five, chapter three of this code, except that such candidates shall be nominated in accordance with the residency dispersal provisions specified in section four, article VI of the West Virginia Constitution and the additional residency dispersal provisions specified in subsection (e) of this section. Candidates for the Senate shall also be elected in accordance with the residency dispersal provisions specified in said section and the additional residency dispersal provisions specified in subsection (e) of this section."). Indeed, Nohe's election as a Wood County resident in 2010 prohibits Deem from even filing for the seat:

> In furtherance of the foregoing provisions of this subsection, no person may file a certificate of candidacy for election from a senatorial district described and constituted in subsection (d) of this section if he or she resides in the same county and the same such senatorial district wherein also resides an incumbent senator, whether the senatorial district wherein such incumbent senator resides was described and constituted by chapter ten, Acts of the Legislature, Fifth Extraordinary Session 2001, or was described and constituted in subsection (d) of this section or its immediately prior enactment.

W.Va. Code § 1-2-1(f).

Thus, Deem is ineligible to file a certificate of candidacy, to be his party's nominee, to be elected in the general election in November, 2012

or to be seated as a Senator following that election. As such, he should not appear on the ballot in the May 8, 2012 primary.

II. THE RESIDENCY DISPERSAL REQUIREMENTS SPECIFIED IN SECTION FOUR, ARTICLE VI OF THE WEST VIRGINIA CONSTITUTION AND IN W.VA. CODE § 1-2-1(E) ARE CONSTITUTIONAL.

As noted above, Deem has publicly stated that he believes the statutory and constitutional residency disbursal requirements violate the United States Supreme Court's one man one vote jurisprudence. *See, e.g., Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362 (1964). At least three times, the Supreme Court of the United States has rejected similar claims. *Dallas County v. Reese,* 421 U.S. 477, 95 S.Ct. 1706 (1975); *Dusch v. Davis,* 387 U.S. 112, 87 S.Ct. 1554 (1967); *Fortson v. Dorsey,* 379 U.S. 433, 85 S.Ct. 498 (1965).

Fortson v. Dorsey, involved a Georgia statute which apportioned the state's senatorial seats among senatorial districts drawn along existing county lines. There was no population disparity among the districts; however, where there was more than one district in a county, all of the county's senators would be elected by a countywide vote. In approving of this arrangement, the United States Supreme Court held that countywide voting in the multi-district counties did not result in denying voters a vote approximately equal in weight to that of voters in

the single-member districts. The Court explicitly rejected the claim that the scheme was unconstitutional because countywide voting in multi-district counties could result in the nullification of the majority of the voters of a district. In doing so, the Court rejected the central premise of Deem's argument:

> It is not accurate to treat a senator from a multi-district county as the representative of only that district within the county wherein he resides. The statute uses districts in multi-district counties merely as the basis of residence for candidates, not for voting or representation. Each district's senator must be a resident of that district, but since his tenure depends upon the county-wide electorate he must be vigilant to serve the interests of all the people in the county, and not merely those of people in his home district; thus in fact he is the county's and not merely the district's senator.

379 U.S. at 438, 85 S.Ct. at 501.

Two years later in *Dusch v. Davis,* the Supreme Court approved a residency requirement functionally identical to the one at issue here. In *Dusch,* the City of Virginia Beach, Virginia, was governed under a charter providing for an elected council composed of 11 members. Of the 11, four of were elected at large, without regard to residence, but the remaining seven were elected by the entire city, with each one of those seven required to reside in a different borough:

> The Seven–Four Plan makes no distinction on the basis of race, creed or economic status or location. Each of the 11 councilmen is elected by a vote of all the electors in the city.

> The fact that each of the seven councilmen must be a resident of the borough from which he is elected, is not fatal.

387 U.S. at 115, 87 S.Ct. at 1555. After repeating the above quote from *Fortson v. Dorsey*, the Court concluded:

> By analogy the present consolidation plan uses boroughs in the city "merely as the basis of residence for candidates, not for voting or representation." He is nonetheless the city's, not the borough's, councilman. In *Fortson* there was substantial equality of population in the senatorial districts, while here the population of the boroughs varies widely. If a borough's resident on the council represented in fact only the borough, residence being only a front, different conclusions might follow. But on the assumption that *Reynolds v. Sims* controls, the constitutional test under the Equal Protection Clause is whether there is an "invidious" discrimination. 377 U.S., at 561, [84 S.Ct. at 1381], 12 L.Ed.2d at 527.

387 U.S., at 115–16, 87 S.Ct. at 1555–56. Finding no "invidious discrimination", the Court rejected the constitutional challenge.

Finally, in 1975, the Supreme Court reaffirmed *Fortson* and *Dusch* in *Dallas County v. Reese*. There, residents of Selma, Alabama, sued challenging the system by which members of the Dallas County Commission were elected. That system, provided for countywide balloting for each of the four county commissioners, but required that one of them be elected from each of four residency districts. The constitutional claim was premised on the fact that the populations of the four districts varied widely. Moreover, only one member of the City

of Selma could be a member of the commission notwithstanding the fact that the City contained about one-half of the county's population. In upholding the residency requirements, the Supreme Court noted:

> *Dusch* reaffirmed the principle enunciated in *Fortson v. Dorsey,* 379 U.S. 433, 438, 13 L.Ed.2d 401, 85 S.Ct. 498 [501] (1965), that when an official's "tenure depends upon the county-wide electorate he must be vigilant to serve the interests of all the people of the county, and not merely those of people in his home district." Because the districts in the present plan are used "merely as the basis of residence for candidates, not for voting or representation," *ibid.; Dusch v. Davis,* supra [387 U.S.], at 115, [87 S.Ct., at 1556], each commissioner represents the citizens of the entire county and not merely those of the district in which he resides.

421 U.S. at 479–80, 95 S.Ct. at 1707.

The holdings in *Reese, Dusch,* and *Fortson* are indistinguishable from the claims Deem seems to be making here. Furthermore, the principle of these cases has been repeatedly reaffirmed. *See La Porte County Republican Cent. Committee v. Board of Com'rs of County of La Porte,* 43 F.3d 1126, 1128 (7th Cir. 1994) ("The legislature of La Porte County, Indiana, is a three-member Board of Commissioners. Although the County has three districts, all elections are held at large, for staggered four-year terms. The districts therefore affect only the residence of the Commissioners (each of whom must live in a different district); all residents of the County may vote for each of the three

positions. Because voters may cast ballots for each position, the residence districts need not have identical (or even similar) populations." citing *Reese, Dusch,* and *Fortson*); *Palmer v. Board of Educ. of Community Unit School Dist. 201-U, Will County, Ill.* 46 F.3d 682, 688 (7th Cir. 1995) ("Plaintiffs depict the three seats reserved until 1989 for residents of Monee Township as the "representatives" of Monee Township; the other four members "represented" Crete Township. Yet elections were held at large, and it is a premise of at-large systems that every person elected represents the entire district. That is why, the Supreme Court has held, residence districts need not have equal or even comparable populations."); *Walsh v. Katz,* 17 N.Y.3d 336, 345, 953 N.E.2d 753, 760, 929 N.Y.S.2d 515, 522 (N.Y.,2011) ("Applying this principle here, since the Fishers Island seat is subject to a town-wide vote, the individual elected to fill the seat represents the entire town, not just the residents of Fishers Island. Thus, Ross's contention that the residency requirement gives the people of Fishers Island a permanent advantage of greater representation is unavailing.").

Most notable of the cases approving similar residency requirements is *Holloway v. Hechler*, 817 F.Supp. 617 (S.D.W.Va. 1992) which upheld

the constitutionality of delegate residency dispersal requirements for West Virginia's House of Delegates:

> This court perceives that the issue raised by plaintiffs' claim that the two proviso districts created by H.B. 4043 are unconstitutional, is in substance not essentially different from the issues raised by similar claims made in *Fortson, Dusch* and *Dallas County,* and that the Court's decisions in those cases are controlling authority on that issue. The court accordingly holds those two proviso districts created by H.B. 4043 are not unconstitutional under the provisions of the Equal Protection Clause of the Fourteenth Amendment and that H.B. 4043 is not rendered unconstitutional in virtue of its providing for those proviso districts.

817 F.Supp. at 627; *see also Goines v. Heiskell*, 362 F.Supp. 313, 320 (S.D.W.Va. 1973) (relying on *Fortson* and rejecting argument that delegate residency dispersal provisions were arbitrarily discriminatory). Notably, on a direct appeal, *Holloway* was summarily affirmed by the Supreme Court of the United States. *Holloway v. Hechler*, 507 U.S. 956, 113 S.Ct. 1378 (mem) (1993).

Finally, just this week, this Court reaffirmed the continuing validity of the holdings of *Reese, Dusch,* and *Fortson* as set forth in *Holloway* and *Heiskell*:

> Petitioner Cooper also asserts that the delegate residency dispersal requirement included in the House of Delegates redistricting plan for District 28, including parts of Monroe, Summers, and Raleigh Counties, is constitutionally impermissible. As noted above, delegate residency dispersal requirements have been a consistent

> feature of legislative redistricting in West Virginia, have been upheld and have withstood equal protection challenges in numerous cases, and satisfy valid and legitimate constitutional and public policy interests. *See Holloway,* 817 F. Supp. at 627 (holding that delegate residency dispersal requirements do not violate Equal Protection Clause or any other constitutional provision); *Heiskell,* 362 F. Supp. at 320 (rejecting argument that delegate residency dispersal provisions were arbitrarily discriminatory and finding that "[t]he Court cannot say that the Legislature lacked rational reasons and bases for the delegate residency dispersal provisions. . . .").

State ex rel. Cooper v. Tennant, ___ W.Va. ___, No. 11-1405, slip op at 34 (Feb. 13, 2012). The only fact distinguishing this case from *Holloway, Heiskell,* and *Cooper* is that, unlike House of Delegate districts, section 4 of article VI explicitly *requires* the dispersal proposal adopted by the Legislature.

Petitioner's counsel is unaware of any cases finding similar residency dispersal arrangements unconstitutional.

III. IT IS APPROPRIATE TO CHALLENGE DEEM'S CANDIDACY VIA A WRIT OF MANDAMUS.

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) (citation omitted). 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, in part, *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 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).

Pursuant to *White v. Manchin, supra,* Petitioner Boley has joined the Secretary of State and, Deem as original party respondents to avoid any delay to receive a motion to intervene.

In the end it is clear, that Petitioner is entitled to the writ. When a candidate for elected office is ineligible, a writ of mandamus lies against the Secretary of State.[1] *White v. Manchin,* 173 W.Va. at 547, 318 S.E.2d at 491 (granting writ of mandamus commanding Secretary of State to withdraw his certification of candidacy of respondents deemed ineligible to run for the West Virginia Senate and further

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[1]Petitioner Boley has not joined the county ballot commissioners as parties. This decision was made in order to expedite this case and save the commissioners the cost and expense of filing a response to this Petition where they are nominal parties. Petitioner Boley believes that W. Va. Code, § 3-1A-6(a) authorizes the Secretary of State, as chief election official, to issue orders to all election officials, county commissions, clerks of county commissions, clerks of circuit courts, boards of ballot commissioners, election commissioners and poll clerks who are required to abided by any orders that may be issued. As such, a writ directed at the Secretary of State is sufficient to provide the relief required by this Petition.

directing Secretary of State to direct all election officials, county commissioners, clerks of county commissioners, clerks of circuit courts, boards of ballot commissioners, election commissioners, and poll clerks associated with the administration of the primary elections to disregard and refrain from tallying, tabulating, certifying, or returning any vote cast, absentee, write-in, or otherwise, for senate candidates deemed ineligible); *State ex rel. Maloney v. McCartney,* 159 W.Va. at 527, 223 S.E.2d at 616 (granting writ against respondent Secretary of State); *see also State ex rel. Carenbauer v. Hechler*, 208 W.Va. at 600, 542 S.E.2d at 421 (applying election mandamus standards and granting writ of prohibition prohibiting Justice serving after election to an unexpired term to run for a full twelve year term).

CONCLUSION

For the reasons noted herein, Petitioner Boley prays that this Court grant a rule to show cause, enter an expedited briefing schedule, and after due consideration, grant Petitioner a writ of mandamus. Petitioner believes that the writ should (1) direct the Respondent Secretary of State to withdraw her certification of candidacy of Respondent Deem declaring him ineligible to run for the West Virginia Senate in 2012; (2) further direct the Secretary of State to, pursuant to her authority granted by W. Va. Code, § 3-1A-6(a), herself direct the

ballot commissioners for Wirt, Wood, Pleasants, and Roane Counties to strike, omit, or otherwise remove the name of Respondent Deem from the official ballots to be used in the primary election to be conducted on May 8, 2012, as candidate for the Republican Party nomination to the office of state senator from the Third Senatorial District; and (3) further direct Secretary of State, pursuant to W. Va. Code, § 3-1A-6(a), to herself direct all election officials, county commissioners, clerks of county commissioners, clerks of circuit courts, boards of ballot commissioners, election commissioners, and poll clerks associated with the administration of the primary elections to disregard and refrain from tallying, tabulating, certifying, or returning any vote cast, absentee, write-in, or otherwise, for Respondent Deem.

DONNA J. BOLEY,

By counsel,

Anthony J. Majestro (WVSB 5165)
POWELL & MAJESTRO, PLLC
405 Capitol Street, Suite P-1200
Charleston, WV 25301
Ph: 304-346-2889 ; Fax: 304-346-2895

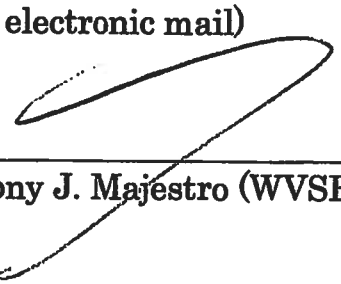
CERTIFICATE OF SERVICE AND MEMORANDUM OF PERSONS TO BE SERVED

I, Anthony J. Majestro, counsel for State of West Virginia ex rel. Donna J. Boley, do certify that on this 15th day of February, I have served the Emergency Petition for Writ of Mandamus and Petitioners' Appendix to Emergency Petition for Writ of Mandamus as set forth below. The Court's Rule to Show Cause should be served on these same parties at the addresses set forth below.

The Honorable Natalie E. Tennant
West Virginia Secretary of State
Room 157-K, Building 1
State Capitol Building
1900 Kanawha Boulevard, East
Charleston, WV 25305
(via Hand Delivery)

The Honorable Darrell V. McGraw
West Virginia Attorney General
Room E-26, Building 1
State Capitol Building
1900 Kanawha Boulevard, East
Charleston, WV 25305
(via Hand Delivery)

Frank Deem
5518 2nd Avenue
Vienna, WV 26105
fdeem@frontier.com
(via Hand Delivery and electronic mail)



Anthony J. Majestro (WVSB 5165)

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Upon Original Jurisdiction
No. _____

STATE OF WEST VIRGINIA
ex rel. DONNA J. BOLEY,

Petitioner,

v.

NATALIE E. TENNANT,
SECRETARY OF STATE OF THE
STATE OF WEST VIRGINIA, et al.,

Respondents.

VERIFICATION

STATE OF WEST VIRGINIA
STATE AT LARGE *to wit:*

Donna J. Boley, being first duly sworn upon oath, states that she is the Petitioner in the above styled case, that she has read the Emergency Petition for Writ of Mandamus and that the facts and allegations contained therein are true except insofar as therein stated to be upon information and belief and insofar as therein stated upon information and belief she believes them to be true.

Donna J. Boley

Taken, subscribed and sworn to before me this the 15th day of February, 2012.

My commission expires 2-13-16.

Notary Public

Official Seal
Notary Public
State of West Virginia
Ann [illegible]
1540 [illegible] Road
Charleston, WV 25314
My commission expires February 13, 2016