

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**No. \_\_\_\_\_**

**State of West Virginia *ex rel.*  
DONALD L. BLANKENSHIP, candidate for U.S. Senate in West Virginia; and  
CONSTITUTION PARTY OF WEST VIRGINIA,**

**Petitioners,**

**v.**

**MAC WARNER, in his official capacity as West Virginia Secretary of State,**

**Respondent.**

---

**PETITION FOR WRIT OF MANDAMUS AND  
INCORPORATED MEMORANDUM OF LAW IN SUPPORT**

---

Robert M. Bastress, Jr. (WVBN 263)  
P.O. Box 1295  
Morgantown, West Virginia 26507  
304-319-0860  
[rmbastress@gmail.com](mailto:rmbastress@gmail.com)

**COUNSEL FOR PETITIONERS**

**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES.....	iii
QUESTIONS PRESENTED.....	1
STATEMENT OF THE CASE.....	2
STATEMENT REGARDING BRIEFING, ORAL ARGUMENT, AND DECISION.....	6
SUMMARY OF ARGUMENT.....	6
ARGUMENT.....	10
I. According to Applicable State Law, Petitioner Blankenship Is Entitled to Have His Name Appear on the November General Election Ballot as the U.S. Senate Nominee of the Constitution Party.....	11
A. The Secretary of State’s Reliance Upon Its 2018 <i>Guidebook</i> Entitled “Running for Office in West Virginia” Is Misplaced. ....	11
B. Section 3-5-23(a) Fails to Provide Any Support for a “Sore Loser” Law. ....	12
C. Petitioner Blankenship’s Right to Appear on the General Election Ballot Is Governed by the 2009 Cross-Filing Law, not the 2018 Sore Loser Law.....	15
II. H.B. 2981’s 2009 Amendment to W.Va. Code § 3-5-23(a) Violated Article VI, Section 30 of the West Virginia Constitution. ....	18
A. The Title to H.B. 2981 Is Insufficient, as It Contains No “Index” of or “Pointer” to the Alleged Sore Loser Addition to § 3-5-23(a). ....	18
B. The Reasoning Behind This Court’s <i>Wheeling</i> Decision Is Inapplicable Here. ....	20
C. <i>Copley Garage</i> Governs This Case. ....	21
III. The Application of H.B. 4434 to the 2018 Election Cycle to Bar the Candidacy of Petitioner Blankenship Violates Due Process. ....	23
IV. W.Va. Code § 3-5-23(g) Violates the Equal Protection Guarantee.....	26

A.	Petitioners Are Similarly Situated to Other Parties and Candidates, but West Virginia Treats Them Disparately. ....	27
B.	The Restriction Imposed by H.B. 4434 Denies Blankenship His Fundamental Right of Access to the Ballot. ....	30
C.	The State of West Virginia Has No Valid Justification for the Discrimination in H.B. 4434. ....	31
V.	The West Virginia Sore Loser Law Abridges the Free Associational Rights of Petitioners Blankenship and the Constitution Party.....	31
A.	The West Virginia Constitution Provides Robust Protection for Associational Freedom.....	32
B.	The West Virginia Sore Loser Law Does Not Prevent All Losing Candidates from Seeking a Nomination to the Same Office a Second Time. ...	33
C.	The West Virginia Legislature Has No Credible Interest in Its Sore Loser Law.....	34
D.	Petitioners Are Severely Burdened by the Secretary of State’s Application of § 3-5-23(g).....	36
	CONCLUSION. ....	36

## VERIFICATION

## CERTIFICATE OF SERVICE

## APPENDICES

- A. Constitution Party letter to Secretary of State, July 17, 2018
- B. Candidate’s Certificate of Announcement for 2018 Elections, July 24, 2018
- C. Secretary of State Denial Letter, July 26, 2018
- D. Declaration of Donald L. Blankenship
- E. Declaration of Phil Hudok, Vice Chairman, Constitution Party of West Virginia

## TABLE OF AUTHORITIES

### UNITED STATES CONSTITUTION

Art. I, Section 3. ....	5
Amendment I. ....	33
Amendment XIV. ....	25

### WEST VIRGINIA CONSTITUTION

Art. III, Section 4. ....	17
Art. III, Section 7. ....	32
Art. III, Section 10. ....	25, 27
Art. III, Section 11. ....	17
Art. III, Section 16. ....	32
Art. III, Section 17. ....	30
Art. VI, Section 30. ....	7, 18, 22

### WEST VIRGINIA STATUTES

W.Va. Code § 2-2-10. ....	16
W.Va. Code § 3-1-8. ....	27
W.Va. Code § 3-5-7. ....	5, <i>passim</i>
W.Va. Code § 3-5-22. ....	9, <i>passim</i>
W.Va. Code § 3-5-23. ....	4, <i>passim</i>
W.Va. Code § 3-5-24. ....	20
W.Va. Code §§ 29A-2-1, <i>et seq.</i> . ....	12

### OTHER STATUTES

52 U.S.C. § 30101. ....	25
S.C. Code § 7-11-10. ....	33

### CASES

<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983). ....	27, 31
<i>Antion v. Bd. of Law Exam'rs</i> , 2017 W.Va. LEXIS 223 (Apr. 7, 2017). ....	27
<i>Bedford Corp. v. Price</i> , 112 W.Va. 674, 166 S.E. 380 (1932). ....	21, 22
<i>Bent v. Weaver</i> , 108 W.Va. 299, 150 S.E. 738 (1929). ....	18
<i>Bowen v. Georgetown Univ. Hospital</i> , 488 U.S. 204 (1988). ....	25
<i>Burdick v. Takushi</i> , 504 U.S. 428 (1992). ....	27
<i>C.C. "Spike" Copley Garage v. Public Serv. Comm'n</i> , 171 W.Va. 489, 300 S.E.2d 485 (1983). ....	21, 22
<i>Cromer v. South Carolina</i> , 917 F.2d 819 (4 <sup>th</sup> Cir. 1990). ....	33
<i>Cutlip v. Sheriff of Calhoun County</i> , 3 W.Va. 588 (1869). ....	23
<i>Dash v. Van Kleeck</i> , 7 Johns. 477 (N.Y. 1811). ....	25
<i>Garcelon v. Rutledge</i> , 173 W.Va. 572, 318 S.E.2d 622 (1984). ....	10
<i>General Motors Corp. v. Romein</i> , 503 U.S. 181 (1992). ....	25

<i>Libertarian Party of Ohio v. Husted</i> , 2014 U.S. District LEXIS 187771 (S.D. Ohio: 2014).	17, 26
<i>Marra v. Zink</i> , 163 W.Va. 400, 256 S.E.2d 581 (1979).	10
<i>Powell v. McCormack</i> , 395 U.S. 486 (1969).	10
<i>Potomac Hosp. Corp. v. Dillon</i> , 229 Va. 355, 329 S.E.2d 41 (1985).	25
<i>Piccirillo v. Follansbee</i> , 160 W.Va. 329, 233 S.E.2d 419 (1977).	10
<i>Pnakovich v. SWCC</i> , 163 W.Va. 583, 259 S.E.2d 127 (1979).	25
<i>Pushinsky v. West Virginia Board of Law Examiners</i> , 164 W.Va. 736, 266 S.E.2d 444 (1980).	32
<i>South Carolina Green Party v. S.C. State Election Commission</i> , 612 F.3d 752 (4th Cir. 2010).	32, 34
<i>State ex rel. Billings v. City of Point Pleasant</i> , 194 W.Va. 301, 460 S.E.2d 436 (1995).	10
<i>State ex rel. Brewer v. Wilson</i> , 151 W.Va. 113, 150 S.E.2d 592 (1966).	10
<i>State ex rel. Carenbauer v. Hechler</i> , 208 W.Va. 584, 542 S.E.2d 405 (2000).	2
<i>State ex rel. Maloney v. McCartney</i> , 159 W.Va. 513, 223 S.E.2d 607 (1976).	10
<i>State ex rel. Myers v. Wood</i> , 154 W.Va. 431, 175 S.E.2d 637 (1970).	23
<i>State ex rel. Walton v. Casey</i> , 179 W.Va. 485, 370 S.E.2d 141 (1988).	19
<i>State ex rel. West Virginia Highlands Conservancy, Inc. v. West Virginia Division of Environmental Protection</i> , 193 W.Va. 650, 458 S.E.2d 88 (1995).	37
<i>State v. Bannister</i> , 162 W.Va. 447, 250 S.E.2d 53 (1978).	8, 16
<i>State v. Voiers</i> , 134 W.Va. 690, 61 S.E.2d 521 (1950).	18
<i>Sturm v. Henderson</i> , 176 W.Va. 319, 342 S.E.2d 287 (1986).	10
<i>United States v. Robel</i> , 389 U.S. 258 (1968).	32
<i>Wells v. Miller</i> , 237 W.Va. 731, 791 S.E.2d 36 (2016).	5, <i>passim</i>
<i>West Virginia Citizens Action Group v. Daley</i> , 174 W.Va. 299, 324 S.E.2d 713 (1984).	32
<i>Wheeling v. American Casualty Co.</i> , 131 W.Va. 584, 48 S.E.2d 404 (1948).	20
<i>Woodruff v. Board of Trustees</i> , 173 W.Va. 604, 319 S.E.2d 372 (1984).	32
<i>W.V. Libertarian Party v. Manchin</i> , 165 W.Va. 206, 270 S.E.2d 634 (1980).	28, 30, 31

## MISCELLANEOUS

R.M. Bastress, Jr., <i>The West Virginia State Constitution</i> , 2 <sup>nd</sup> Edt. (Oxford: 2016).	10, 19
H. Broom, <i>Legal Maxims</i> (8th ed. 1911).	26
11 C.F.R. § 100.3.	25
H.B. 2981 (2009).	7, <i>passim</i>
H.B. 4434 (2018).	4, <i>passim</i>
A. Scalia & B. Garner, <i>Reading Law</i> (West: 2014).	16, 17
2 J. Story, <i>Commentaries on the Constitution</i> (5th ed. 1891).	26
WV Mountain Party Press Release, “Mountain Party Tops Ticket with Congressional Nominee,” (June 11, 2018).	29
W.Va. Secretary of State, <i>Running for Office in West Virginia, 2018</i> .	3, <i>passim</i>

### **QUESTIONS PRESENTED**

1. Does W.Va. Code § 3-5-23(a) (H.B. 2981, 2009) authorize the Secretary of State to deny Petitioner Blankenship a position on the official ballot as the nominee of the Petitioner Constitution Party of West Virginia in the November 2018 general election?

2. Was the 2009 amendment to W.Va. Code § 3-5-23(a) (H.B. 2981, 2009) enacted by the legislature in violation of Article VI, section 30 of the West Virginia Constitution because its title did not in any way describe the amendment being made, and is therefore void, providing no lawful basis for the Secretary of State's decision to deny Petitioner a position on the general election ballot?

3. Does W.Va. Code § 3-5-23(g) (H.B. 4434, 2018), which was enacted in the middle of the 2018 election cycle, apply to the 2018 election cycle?

4. Does the retroactive application of W.Va. Code § 3-5-23(g) (H.B. 4434, 2018) to deny Petitioner Blankenship a position on the official ballot based on decisions made and actions taken by him before enactment of the law violate due process of law?

5. Does the application of W.Va. Code § 3-5-23(g) (H.B. 4434, 2018), which disadvantages unrecognized parties and their candidates, but not similarly situated small recognized parties and their candidates, violate the equal protection of the law?

6. Does the application of W.Va. Code § 3-5-23(g) (H.B. 4434, 2018), or any other provision of state law, to bar Petitioner Blankenship from the official ballot for the general election as the nominee of Petitioner Constitution Party of West Virginia, violate the freedom of association of both Petitioners as well as the voters of West Virginia?

**STATEMENT OF THE CASE**

This Petition for Writ of Mandamus is filed pursuant to Rule 16 of the Rules of Appellate Procedure of the Supreme Court of Appeals of West Virginia. *See State ex rel. Carenbauer v. Hechler*, 208 W.Va. 584, 587, 542 S.E.2d 405, 408 (2000).

This case involves the right of Petitioner Don Blankenship, who is affiliated with an unrecognized minor party, the Constitution Party of West Virginia, to become a candidate for election to the U.S. Senate and have his name placed on the official November 2018 general election ballot as the nominee of that party.

On July 17, 2018, the Constitution Party of West Virginia notified the Secretary of State that Donald L. Blankenship would be that party's nominee for U.S. Senate. *See* Appendix "A." On July 24, 2018, Donald L. Blankenship filed his "Candidate's Certificate of Announcement for 2018 Elections," seeking to be listed as a candidate for the U.S. Senate on the official ballot for the November 6, 2018 general election, as the designated nominee of the Constitution Party of West Virginia. *See* Appendix "B." This application was timely filed, and was accompanied by the required filing fee and supported by petitions signed by the required number of West Virginia voters in accordance with West Virginia Code § 3-5-23.

On July 26, 2018, the Secretary of State issued an official letter making what he termed a "final determination" denying Mr. Blankenship certification for the upcoming November ballot. *See* Appendix "C." That letter reported that the Secretary of State conducted a "preliminary review" of the petition signatures submitted, and "presume[d] approximately 7,100 to be valid," thereby meeting the "threshold requisite number of qualified signatures required by the code." *Id.*

Having found that Mr. Blankenship met the West Virginia Code’s petition requirement, the Secretary of State proceeded to set forth the basis for his denial. As authority for his decision, he initially cited not from any provision of the West Virginia Code, but from page 4 of his own campaign guidebook, *Running for Office in West Virginia, 2018* (“2018 Guidebook”) which reads as follows:

THE “SORE LOSER” or “SOUR GRAPES” LAW (W.Va. Code §§ 3-5-7(d)(6) and 3-5-23)

Candidates affiliated with a recognized political party who run for election in a primary election and who lose the nomination **cannot** change her or his voter registration to a minor party organization/unaffiliated candidate to take advantage of the later filing deadlines and have their name on the subsequent general election ballot. [Emphasis original.]

In a paragraph immediately following this quotation, the Secretary’s letter added:

This interpretation of election law relates to then existing W.Va. Code 3-5-23(a), which provided:

Groups of citizens having no party organization may nominate candidates who are not already candidates in the primary election for public office otherwise than by conventions or primary elections. In that case, the candidate or candidates, jointly or severally, shall file a nomination certificate in accordance with the provisions of this section and the provisions of section twenty-four of this article. [Underlining in letter but not in statute.]

Having asserted the legal basis upon which the certification of the Constitution Party’s nominee was denied, the Secretary set out the facts that he believed bring Petitioner Blankenship under West Virginia’s alleged “sore loser” statutory scheme:

- On January 24, 2018, Blankenship filed a Certificate of Announcement seeking the Office of U.S. Senator as a member of the Republican Party — a recognized political party;
- On March 12, 2018, the Secretary certified Blankenship’s candidacy for the Republican Party nomination for U.S. Senate;



- On May 8, 2018, Blankenship was unsuccessful in seeking the Republican Party nomination for U.S. Senate in the party's primary;
- On May 19, 2018, the Constitution Party (an unrecognized party in West Virginia) chose Blankenship to be its nominee for the U.S. Senate; and
- On May 21, 2018, Blankenship changed his political affiliation from Republican to the Constitution Party.

Folded into the middle of this recitation of facts, the Secretary's letter noted that "two new subsections" had been added to § 3-5-23 by H.B. 4434, which he claimed "provides further clarity to the issue at hand." Without further explanation, the Secretary's letter reported that, on March 10, 2018,<sup>1</sup> while Blankenship was campaigning "as a Republican," the State Legislature passed H.B. 4434, and that bill was signed by the Governor on March 22, 2018, with an effective date of June 5, 2018. The Secretary of State recited verbatim the "two new subsections" added to § 3-5-23:

(f) For the purposes of this section, any person who, at the time of the filing of the nomination certificate or certificates, is registered and affiliated with a recognized political party as defined in §3-1-8 of this code may not become a candidate for political office by virtue of the nomination-certificate process as set forth in this section.

(g) For the purposes of this section, any person who was a candidate for nomination by a recognized political party as defined in §3-1-8 of this code may not, after failing to win the nomination of his or her political party, become a candidate for the same political office by virtue of the nomination-certificate process as set forth in this section.

However, the Secretary's letter does not mention that July 19, 2018 (seven days before the Secretary's July 26, 2018 denial letter) marked the end of the 60-day period required to effectuate Petitioner Blankenship's announcement that he had changed his voter registration and

---

<sup>1</sup> The State Legislature passed H.B. 4434 on March 7, 2018.

affiliation from the Republican Party (a recognized party) to the Constitution Party (an unrecognized party), meeting the requirements of § 3-5-23(f),<sup>2</sup> cited here by the Secretary of State, as well as another statute cited in the Secretary of State 2018 *Guidebook*, § 3-5-7(d)(6).

That section states in relevant part:

For partisan elections, the name of the candidate's political party [is required along with] a statement that the candidate: (A) Is a member of and affiliated with that political party as evidenced by the candidate's current registration as a voter affiliated with that party; and (B) has not been registered as a voter affiliated with any other political party for a period of **sixty days** before the date of filing the announcement. [Emphasis added.]

In addition to meeting the qualifications of Article I, Section 3 of the United States Constitution, and filing the requisite number of petition signatures and the application fee, Mr. Blankenship's Certificate of Announcement filed July 24, 2018 demonstrates that he meets the only other applicable requirement, as he affirms that he is not a member of a recognized political party thereby allowing use of the nomination-certificate process. The Secretary of State's letter appears to confirm that Mr. Blankenship has met all the applicable statutory conditions to be listed on the ballot, but for what the Secretary of State understands to be the State's "sore loser" law. Thus, the only basis for denial of Petitioner Blankenship's request is that he is disqualified by the alleged "sore loser" provision of West Virginia law.

---

<sup>2</sup> Subsection (f) provides that a member of a recognized political party (of which there currently are four: Republican, Democrat, Mountain, and Libertarian) may not avail himself or herself of the nomination-certificate process involved here, which was designed for minor party and unaffiliated candidates. This subsection appears to conform West Virginia law to this Court's holding in *Wells v. Miller*, 237 W.Va. 731, 791 S.E.2d 36 (2016).

**STATEMENT REGARDING BRIEFING, ORAL ARGUMENT, AND DECISION**

This petition for mandamus is being filed expeditiously, so that the Court will have sufficient time to reach a decision before the printing of the ballots for the November general election. The current vacancy in the membership of the Court, which will be filled in the November 6, 2018 general election, will require that ballots not be printed until late August 2018 at the earliest.

Petitioners respectfully request that this Court enter an expedited briefing schedule, so that a decision regarding this petition can be reached as soon as possible, because of the need of the Secretary of State for an expeditious decision in order to have time to print the ballots for the November general election.<sup>3</sup> A Motion for Expedited Relief is being filed by separate filing pursuant to West Virginia Supreme Court Rule 29(c).

Petitioners request oral argument due to the importance of the constitutional and statutory questions involved.

**SUMMARY OF ARGUMENT**

The Secretary of State's letter of July 26, 2018, denying Petitioners' access to the general election ballot for the U.S. Senate election, rests on several West Virginia State law grounds, each of which is mistaken.

Insofar as the Secretary purports to rest his denial decision upon the "sore loser" barrier as articulated in the 2018 *Guidebook* for candidates issued by his office, the Secretary's denial lacks legal justification. The 2018 *Guidebook* is not law, the Secretary having no legislative power;

---

<sup>3</sup> The filing period for candidates seeking election to the Court is from August 6, 2018 through midnight August 21, 2018. West Virginia Secretary of State Press Release, "[Warner Announces Candidate Filing Period for Supreme Court Special Election](#)" (July 30, 2018).

nor does it constitute a rule with the force of law, as it was not adopted in compliance with the West Virginia Administrative Procedures Act. Moreover, the *Guidebook*'s layman's summary of West Virginia Code §§ 3-5-7(d)(6) and 3-5-23 as a "sore loser" law miscomprehends those two statutes, as the plain language of each, or of both when read together, reveals that they have nothing to do with the subject matter of a "sore loser" law.

The Secretary's denial letter underlined a single phrase in § 3-5-23(a) — "who are not already candidates in the primary election for public office" — mischaracterizing that statutory phrase as a "sore loser" law when it is not. It does not even refer to candidates who lost in an election context. Rather, it refers to candidates who "are" already candidates — not those who "were" candidates, but lost. Inserted into the code in 2009, the phrase added in § 3-5-23(a) prevents what is commonly understood as a prohibition of the practice of "cross filing" — or being listed on multiple ballot lines in the same election. By way of illustration, under that provision as properly understood, a candidate seeking a place on the general election ballot as a major party candidate could not also use the nomination-certificate route to gain an additional line as an independent candidate on that November ballot for that same office. By contrast, a "sore loser" law provide that candidates who have lost their party's nomination from later getting on the general election ballot in another way for the same office. Had the language inserted into § 3-5-23(a) in 2009 by H.B. 2981 truly been designed to be a "sore loser" statute, then the highly detailed title of that bill would have been required to reflect that significant change in law, which it did not. Thus, if § 3-5-23(a) is construed to be a sore loser law, then it was adopted in violation of Article VI, Section 30 of the West Virginia Constitution.

Finally, as a last resort, the Secretary refers to H.B. 4434, seeking to bootstrap support for his decision that Petitioner Blankenship is not permitted to be on the ballot as the candidate of the Constitution Party to run for the U.S. Senate in the upcoming general election because he lost the Republican Party's nomination in the May 2018 primary. If applicable to this election cycle, the "new" § 3-5-23(g) would altogether disallow Petitioners' third-party candidacy. But the Secretary has mistakenly assumed that H.B. 4434 — which was passed on March 7, 2018, and did not become effective until June 5, 2018, well into the current election cycle — operates retroactively. This assumption conflicts with the established presumption in West Virginia, articulated in *State v. Bannister*, "that a statute is intended to operate prospectively, unless it appears, by clear, strong and imperative words." *State v. Bannister*, 162 W.Va. 447, 453; 250 S.E.2d 53, 56 (1978). The Secretary asserted in his denial letter that H.B. 4434 did not change the law, but only "clarified" it. To the contrary, the legislature did not even amend § 3-5-23(a), but rather added a new section — § 3-5-23(g) — by which the legislature left standing the no "cross filing" provision, and added a separate no "sore loser" provision. According to the canon of construction that a statute should be construed to avoid constitutional doubt, H.B. 4434 should be construed to operate prospectively, not retroactively, as the Secretary has erroneously presumed.

If the applicable canons of statutory construction are not sufficient to demonstrate that § 3-5-23(g) should operate only prospectively, beginning with the next election cycle, then the due process principles of the West Virginia Constitution require this result. Should the June 2018 statute be applied to deny ballot access to Petitioner Blankenship, that denial would be

based on Blankenship's January 2018 filing to run for the Republican Party nomination, long before the law was changed, violating Petitioners' due process rights.

Additionally, Petitioner Constitution Party would be denied equal protection of the laws because, although similarly situated to the Mountain and Libertarian Parties, by § 3-5-23(g) Petitioner is barred from nominating a primary-losing candidate to access the ballot for the same office in the general election, whereas § 3-5-22 provides an alternative way for these other small parties (by virtue of having received less than 10 percent, but more than 1 percent, of the vote in the last election for Governor) to use a convention to place that same losing candidate on the official ballot for the general election. Such disparate treatment unfairly disadvantages newer and smaller parties and their candidates and violates their right to equal protection of the laws as protected under the West Virginia Constitution.

Finally, denying Petitioner Blankenship access to the ballot violates Petitioners' free association rights, as well as those of the West Virginia voters. The West Virginia "sore loser" policy does not evenhandedly prevent all losing candidates from ballot access, but only those who seek to gain access to the general ballot via the nomination-certificate process. By leaving the door open for other, small parties to bypass the sore loser barrier, and exempting recognized parties entirely, the Secretary cannot possibly justify the state's sore loser law as one designed to protect against factionalism, splintering, or ballot confusion. Instead, Petitioners are being severely injured in the exercise of their Freedom of Association rights for no good reason.

### ARGUMENT

It is well established that “the West Virginia Constitution confers a fundamental right to run for public office” and that right is sourced in the right of political expression, the right of free speech, the right of voters to support a candidate and the freedom of association. *See State ex rel. Billings v. City of Point Pleasant*, 194 W.Va. 301, 305; 460 S.E.2d 436, 440 (1995). To further demonstrate the significance of this fundamental right, this Court cited two of the nation’s founders:

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. As Madison pointed out at the convention, this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself. [*Id.* at 305, 440 (emphasis added) (citing *Powell v. McCormack*, 395 U.S. 486 (1969).]

*Accord: State ex rel. Brewer v. Wilson*, 151 W.Va. 113, 121, 150 S.E.2d 592, 597 (1966); *State ex rel. Maloney v. McCartney*, 159 W.Va. 513, 530-31, 223 S.E.2d 607, 618 (1976); *Marra v. Zink*, 163 W.Va. 400, 403-04, 256 S.E.2d 581, 584 (1979); *Garcelon v. Rutledge*, 173 W.Va. 572, 574-75, 318 S.E.2d 622, 625 (1984); and *Sturm v. Henderson*, 176 W.Va. 319, 321-22, 342 S.E.2d 287, 290 (1986).

Where, as here, that right has been denied, “the State ... must demonstrate that a compelling state interest is served by such restriction.” (*Billings* at 306, 441 (citing *Piccirillo v. Follansbee*, 160 W.Va. 329, 233 S.E.2d 419 (1977)))<sup>4</sup> but no such interest has been identified here.

---

<sup>4</sup> *See also* Robert M. Bastress, Jr., The West Virginia State Constitution, 2<sup>nd</sup> Edt. (Oxford: 2016) at 113, 140.

**I. ACCORDING TO APPLICABLE STATE LAW, PETITIONER BLANKENSHIP IS ENTITLED TO HAVE HIS NAME APPEAR ON THE NOVEMBER GENERAL ELECTION BALLOT AS THE U.S. SENATE NOMINEE OF THE CONSTITUTION PARTY.**

Pursuant to and in compliance with West Virginia Code § 3-5-23, Petitioner Donald L. Blankenship is entitled by statute to appear on the general election ballot as the nominee of the Constitution Party for the U.S. Senate. According to this Court’s ruling on September 7, 2016 in *Wells v. Miller*, 237 W.Va. 731, 791 S.E.2d 361 (2016), “the nomination certificate process outlined in West Virginia Code §3-5-23” is the only process available to a “minor party candidate[.]” to get on the general ballot. *Id.* at 744. As conceded by the Secretary of State in his July 26, 2018 letter, Petitioner Blankenship qualifies as a member of and candidate for the Constitution Party, which is a minor party, having met all of the petition requirements meriting certification of his candidacy. *See* Appendix C. Nevertheless, the Secretary of State has ruled that Petitioner Blankenship is disqualified by state law from exercising his right to be on the general election ballot on the sole ground that, prior to becoming a member of the Constitution Party and its U.S. Senate nominee, Petitioner — then a member of the Republican Party — sought and lost that party’s nomination in a primary election. The Secretary of State is mistaken.

**A. The Secretary of State’s Reliance Upon His 2018 *Guidebook* Entitled “Running for Office in West Virginia” Is Misplaced.**

The Secretary of State purports initially to base Petitioner’s disqualifications on the State’s alleged “sore loser” law based on his December 17, 2017 publication of a “guidebook for candidates seeking office in this State.” Appendix C at 1. Citing to page 4 of that *Guidebook*, the Secretary explained his view that those “[c]andidates affiliated with a recognized political party who run for election in a primary election and who lose the nomination **cannot** change her



or his voter registration to a minor party organization/unaffiliated candidate to take advantage of the later filing deadlines and have their name on the subsequent general election ballot.” *Id.* Yet, the 2018 *Guidebook* contains an express disclaimer that that publication does not constitute “settled law” or “legal advice”:

**References to state and federal laws and regulations are current as of the time of publication. All other information represents the interpretation of the Office of the Secretary of State and should not be regarded as settled law or legal advice. It is a candidate’s responsibility to know and comply with the law. Please consult an attorney for legal advice.** [2018 *Guidebook* at 2 (bolding original).]

Moreover, that publication was not adopted pursuant to the West Virginia Administrative Procedures Act, W.Va. Code, 29A-2-1, *et seq.*, and thus does not have the force of law.

To bolster his presumed authority, the Secretary cited two statutory provisions: §§ 3-5-7(d)(6) and 3-5-23(a), yet neither contain any such express mandate. Indeed, the language in the two code sections does not even “remotely suggest[]” a rule that would disqualify a minor party candidate from being placed on the ballot because of his having previously sought the nomination of a recognized party and lost. *See Wells* at 742. Section 3-5-7(d)(6) is concerned solely with the requirements for someone to get on the primary ballot of the “candidate’s political party,” affirming his party membership and registration in that party. And § 3-5-23(a) is concerned solely with the general rule governing persons who are seeking the nomination of a group of citizens unaffiliated with a state-recognized party. Neither statute relates in any way to the Secretary of State’s assertion that, in West Virginia, a candidate unsuccessful in the primary election of a recognized party is ineligible to run for the same office in the general election.

**B. Section 3-5-23(a) Fails to Provide Any Support for a “Sore Loser” Law.**

In recognition that § 3-5-23 as a whole does not constitute a “sore loser” rule, the Secretary pinpoints subsection (a), hoping to add the necessary statutory support for his claim that, prior to the 2018 election cycle, West Virginia had a robust “sore loser” law. The Secretary’s 2018 characterization of § 3-5-23(a) as a “SORE LOSER” or “SOUR GRAPES” law did not appear in the [2016 edition](#) of *Running for Office in West Virginia*, or in the [2014 edition](#) of that publication, and thus it seems likely<sup>5</sup> that 2018 was the first time that such language was used in the Secretary’s official election guide, even though § 3-5-23(a) in its current form was enacted in 2009. 2009 W.Va. Acts 92, H.B. 2981. The 2009 amendment (H.B. 2981) to West Virginia Code § 3-5-23(a) added nine words to the first subsection of that statute: “who are not already candidates in the primary election.”

The Secretary of State’s characterization of § 3-5-23(a) in his guidebook as a “SORE LOSER” or “SOUR GRAPES” law is his alone, without support from the text of the statute, or any legislative history of this provision which is available to Petitioners. There was no such description of this provision in either the informal Explanatory Note or the constitutionally required title of the bill, both as introduced and as finally passed. *See* H.B. 2981. *See* discussion in Argument Section II, *infra*. Moreover, this Court in *Wells v. Miller* never used the term “sore loser” or “sour grapes” to describe that law. Rather, in *Wells*, this Court explained its understanding of § 3-5-23(a) as being designed to provide persons who were not members of recognized political parties with access to the ballot through the petition process.

The statutory language cuts in favor of Blankenship’s right to place his name on the general ballot as the Constitution Party’s U.S. Senate nominee. First, § 3-5-23(a) does not

---

<sup>5</sup> Petitioner has been unable to locate any other prior versions of this guidebook.

disqualify Blankenship, because he is **not now** a candidate in any primary election for public office. To be sure, Blankenship once **was** a candidate in a primary election vying for the same office as he now seeks, but with a different party. Second, subsection (a) is not aimed at “sore losers” but targets the practice of “cross filing,” whereby a person may appear on the general ballot not only as the nominee of a recognized party but also as an independent candidate or as a candidate of an unrecognized party. Indeed, as this Court ruled in September of 2016, it was the “Legislature’s intention that West Virginia Code § 3-5-23 was for use exclusively by unaffiliated or minor party candidates.” *See Wells* at 743. More particularly, this Court ruled that § 3-5-23’s original design was to benefit “individuals who do not belong to” a state-recognized party who would otherwise “have no means of entering the election process in absence of the provisions of West Virginia Code § 3-5-23.” *Id.* The rationale for the section, then, was **not** to protect the recognized party nomination process from sore losers, as the Secretary claimed in his July 2018 letter, but to “‘maintain[] the integrity of different routes to the ballot and [] stabiliz[e] the political system.’” *Wells* at 744. Thus, this Court held “that a candidate who is registered and affiliated with a recognized ‘political party’ ... may not become a candidate for political office by virtue of the nomination certificate process,” **not** because he lost in the party primary but because he is a member of a recognized political party. *Wells* at 744.

In *Wells*, the person seeking to get on the ballot as an independent using the nomination-certificate process, “failed to change his registration to unaffiliated at least sixty-one days before filing his certificate of candidacy” pursuant to § 3-5-7(d)(6). Mr. Blankenship, however, did exactly that, announcing his affiliation with the Constitution Party and its program and ideals,

leaving the Republican Party and the safety net of a recognized party and, in doing so, became eligible for the nomination-certificate process. *See Wells* at 745.

**C. Petitioner Blankenship’s Right to Appear on the General Election Ballot Is Governed by the 2009 Cross-Filing Law, not the 2018 Sore Loser Law.**

As the Secretary correctly stated in his July 26, 2018 letter, it was not until June 5, 2018, almost 6 months after the publication of his 2018 *Guidebook*, that the legislature, in H.B. 4434, added to § 3-5-23 a “new subsection ... (g)” which reads as follows:

For the purposes of this section, any person who was a candidate for nomination by a recognized political party as defined in §3-1-8 of this code may not, after failing to win the nomination of his or her political party, become a candidate for the same political office by virtue of the nomination-certificate process as set forth in this section.

According to the Secretary, this brand new subsection was designed by the legislature only to “provide[] further clarity to the issue at hand.” The Secretary of State’s description of the purpose of the 2018 law being to clarify existing law reveals his view that existing law was ambiguous and in need of clarity. By this view, an ambiguous law should not be allowed to trump a fundamental right to seek public office. However, the Secretary of State misreads the statute. Subsection (g) was not designed to clarify the existing law governing candidates who have lost an election in a state-recognized political party, but to change the law, removing completely the current option that enables a candidate defeated in a recognized party primary election to obtain nomination by certificate.

The Secretary of State’s view violates a basic rule of construction. Had the legislature amended the 2009 statute that the Secretary of State describes as a sore loser law codified at § 3-5-23(a), it might be possible to argue that the purpose was to provide “further clarity to the issue

at hand.” However, the legislature did not amend § 3-5-23(a) in 2018, but rather added a new subsection, § 3-5-23(g), and reading a different subsection as merely providing clarity would cause the two subsections to be duplicative and violate the canon against surplusage. *See* A. Scalia & B. Garner, Reading Law at 174, *et seq.* (West: 2014). To avoid such an interpretation, subsection 3-5-23(a) should not be read as a sore loser statute.

The question before this Court, then, is whether the recent addition to the law (subsection (g)) applies to Blankenship. The Secretary assumes that it does, H.B. 4434 having been “approved by the Governor on March 22, 2018 with an effective date of June 5, 2018.” But this does not mean that the new “sore loser” section must be retrospectively applied to the prejudice of Petitioner Blankenship. To the contrary, “there is a presumption that a statute is intended to operate prospectively, unless it appears, by clear, strong and imperative words or by necessary implication that the Legislature intended to give the statute retroactive force and effect.” *State v. Bannister*, 162 W.Va. 447, 453, 250 S.E.2d 53, 56 (1978). Indeed, the presumption is highlighted in the West Virginia Code, having been included in the statutory list of canons of statutory construction. *See* W.Va. Code § 2-2-10(bb). The Secretary of State’s letter is void of any acknowledgment of this interpretive principle, having made absolutely no effort to rebut the presumption, much less to rebut it with “clear, strong and imperative words.” To be sure, the Secretary of State does assert that the “effective date” of the statute is June 5, 2018, but this assertion means nothing more than that the statute became law on this day as enacted by both houses of the state legislature and signed by the Governor as provided by the West Virginia Constitution. *See* Enrolled H.B. 4434 Statutory Note — History: Passed March 7, 2018; in effect ninety days from passage.

The State’s rule of statutory construction is reinforced by the due process principle that “[r]etroactivity is generally disfavored in the law.” *See Libertarian Party of Ohio v. Husted*, 2014 U.S. Dist. LEXIS 187771, \*17 (S.D. Ohio: 2014). ““Retrospective laws,”” an Ohio federal trial judge recently observed, ““are, as a rule, of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law.”” *Id.* at \*18. Antonin Scalia and Bryan Garner have succinctly put it: “As a general, almost invariable rule, a legislature makes law for the future, not for the past.” Scalia & Garner at 261. *See also* Section III, *infra*.

Such a prospective construction of the new § 3-5-23 is favored by yet another canon of interpretation — that a statute should be construed, if reasonable, to avoid constitutional doubt. Article III, Section 11 of the West Virginia Constitution prohibits the State from “depriv[ing] by law, of any right, or privilege, because of any act done prior to the passage of such law.” According to the Secretary’s letter, the newly enacted § 3-5-23(g) went into effect on June 5, 2018. Prior to that date, on May 21, 2018, Petitioner changed his Republican Party membership to membership in the Constitution Party, having secured its nomination for the same U.S. Senate seat on May 18, 2018. The canon that a statute should be interpreted in a way that avoids placing its constitutionality in doubt “represents judicial ... judgment that statutes *ought not* to tread on questionable constitutional grounds unless they do so clearly....” Scalia & Garner at 249. If the new sore loser is construed to be operational with the next election cycle, this constitutional doubt evaporates. *See* Art. III, Section 4, West Virginia Constitution.

**II. H.B. 2981's 2009 AMENDMENT TO W.Va. CODE § 3-5-23(a) VIOLATED ARTICLE VI, SECTION 30 OF THE WEST VIRGINIA CONSTITUTION.**

The Secretary of State's denial of ballot access to Petitioner purportedly was based on an amendment to § 3-5-23(a) that occurred in 2009, in H.B. 2981. However, the addition to that subsection clearly violates Article VI, Section 30 of the West Virginia Constitution, and therefore is void.

**A. The Title to H.B. 2981 Is Insufficient, as It Contains No "Index" of or "Pointer" to the Alleged Sore Loser Addition to § 3-5-23(a).**

In 2009, H.B. 2981 amended W.Va. Code § 3-5-23(a) to add the following underscored language: "Groups of citizens having no party organization may nominate candidates who are not already candidates in the primary election for public office otherwise than by conventions or primary elections." Prior to that amendment, § 3-5-23(a) did not contain the underscored provision. *See* 2008 W.Va. Code § 3-5-23, Michie's West Virginia Code Annotated (Matthew Bender & Company, Inc.).

Article VI, Section 30 of the West Virginia Constitution first states that "[n]o act hereafter passed shall embrace more than one object, and that shall be expressed in the title." Section 30 further provides that, if a bill does not provide sufficient description of its contents, then "the act shall be void only as to so much thereof, as shall not be so expressed...."

Nearly 70 years ago, this Court explained that "[t]he purpose of [Section 30] was to require the title of an Act to contain a statement of the objects and purposes of a proposed enactment, so that there could not be incorporated in the body of the Act legislation to which there was no index in the title." *State v. Voiers*, 134 W.Va. 690, 693-94, 61 S.E.2d 521, 523 (1950); *see also Bent v. Weaver*, 108 W.Va. 299, 301, 150 S.E. 738, 739 (1929) (upholding a

statute whose title “serves as a fair and reasonable index to the purposes of the legislation”).

This Court has explained further that “the requirement of expressiveness contemplated by our Constitution necessarily implies explicitness. A title must, at a minimum, furnish a ‘pointer’ to the challenged provision in the act. The test to be applied is whether the title imparts enough information to one interested in the subject matter to **provoke a reading of the act.**” *State ex rel. Walton v. Casey*, 179 W.Va. 485, 488, 370 S.E.2d 141, 144 (1988). This language in § 30 is intended to protect both the legislature and the public from hidden provisions. *See* *Bastress* at 181; *Michie’s* at 2. H.B. 2981 failed to meet the title requirements of Section 30 with respect to its amendment of § 3-5-23(a) and, thus, this Court should find that provision to be void.

The title to the enrolled version of H.B. 2981 provided as follows (with bullets added):<sup>6</sup>

- “AN ACT to amend and reenact §3-5-7, §3-5-23 and §3-5-24 of the Code of West Virginia, 1931, as amended, all relating to elections generally
- requiring candidates for the Senate and House of Delegates to file announcement of candidacy with the Secretary fo [sic] State [3-5-7(a)];
- reducing number of signatures needed for nomination of third-party candidates [3-5-23(c)];
- making filing deadline for the nomination of candidates August 1 [3-5-24(a)];
- eliminating requirement that persons signing nomination certificate state a desire to vote for nominated candidate [3-5-23(d)];
- permitting duly registered voters who sign nomination certificates to vote in the corresponding primary election [3-5-23(d)];
- establishing the date by which the filing fee must be paid [3-5-24(b)]; and
- making technical corrections.”<sup>7</sup>

The title of enrolled H.B. 2981 contains no reference whatsoever to the change in law contained in the amendment to § 3-5-23(a). Although it provides an “index” with “pointers” to every other

---

<sup>6</sup> Bracketed code sections identify the amended code sections referred to by each part of H.B. 2981’s title.

<sup>7</sup> [http://www.wvlegislature.gov/Bill\\_Status/bills\\_text.cfm?billdoc=hb2981%20ENR.htm&yr=2009&sesstype=RS&i=2981](http://www.wvlegislature.gov/Bill_Status/bills_text.cfm?billdoc=hb2981%20ENR.htm&yr=2009&sesstype=RS&i=2981).



substantive change, the title of H.B. 2981 contains no mention of the entirely new disqualification for certificate nominees. Simply put, H.B. 2981 failed to adequately inform that there were changes being made to the eligibility requirements for certificate nominees. Its title appears to describe all other changes made by the Act to §§ 3-5-7, 3-5-23, and 3-5-24 — except for the added eligibility requirement for those seeking certificate nomination.

**B. The Reasoning Behind this Court’s *Wheeling* Decision Is Inapplicable Here.**

To be sure, in one of its earliest and most often cited cases interpreting Section 30, this Court held that “[w]hen an act amends a designated chapter and section of the Code and in its title it refers specifically to the amended chapter and section, it sufficiently complies with the constitutional requirement that the object must be expressed in the title.” *Wheeling v. American Casualty Co.*, 131 W.Va. 584, 593, 48 S.E.2d 404, 410 (1948). On its face, the title to H.B. 2981 might appear to fall under this protection, as it designates the chapter and section that it amends. However, H.B. 2981 goes much further, delving into specifics — yet leaving off any reference to the purported enactment of what the Secretary of State now calls West Virginia’s “sore loser” law.

Due to its specificity, H.B. 2981 thus loses *Wheeling*’s protection. In *Wheeling*, the act’s title straightforwardly referred only to the section to be amended by the legislation: “AN ACT to amend and reenact section eight, article seven, chapter fifty-five of the code of West Virginia, one thousand nine hundred thirty-one, relating to the termination or abatement of action for injury upon the death of either party and providing for the survival of action against the personal representative of the wrongdoer.” *Id.* at 593. The Court merely held that a general title is sufficient, and declined to impose a requirement to go into specifics.

**C. Copley Garage Governs This Case.**

Very different facts obtain here. H.B. 2981 did go further and did get into specifics. The title of H.B. 2981 provided an index of every specific change to the state’s election law — except for the one at issue here. As this Court explained in a nearly identical case, *C.C. “Spike” Copley Garage v. Public Serv. Comm’n*, 171 W.Va. 489, 300 S.E.2d 485 (1983), “[i]n the case before us the title to the bill was not a general title ... where lack of specificity itself would have warned of impending danger. To the contrary, the title ... was enormously specific; it set forth a brief description of every major change that the act made *except* [the challenged provision].” *Id.* at 491. While detailing fairly minor changes (such as extensions to filing deadlines), the title to H.B. 2981 omits any reference to the elephant in the room — what the Secretary of State believes to be the authority to bar Petitioner Blankenship from the ballot. This is not permissible. Indeed, this Court has noted that:

Though it is settled law that a title to an act ... is sufficient if it enumerates and identifies the sections proposed to be amended, it is equally well settled that if the amendment goes beyond the subject matter of the sections proposed to be amended, the title of the amendatory act is not sufficient if it merely enumerates the old sections. It must go further and indicate the new matter proposed to be inserted. [*Bedford Corp. v. Price*, 112 W.Va. 674, 677-678, 166 S.E. 380, 381 (1932).]

That is exactly what occurred here. The Secretary of State’s 2018 *Guidebook* has characterized H.B. 2981 as having created the state’s “SORE LOSER” or “SOUR GRAPES” provision. H.B. 2981’s amendment was “foreign to” and went far “beyond the subject matter” of the prior contents of § 3-5-23(a) — creating an entirely new and unrelated eligibility requirement for third-party candidacy. Thus, “[n]o person, whether public official or private citizen, upon reading the said title would have received the slightest intimation that the pending bill proposed

to make [such] drastic changes....” *Bedford Corp.* at 677. Likewise, in *Copley Garage*, “[a] person ... would reasonably conclude that the act did not touch that subject because all the other concerns are set forth with specificity.” *Copley Garage* at 491. Likewise, a reader of H.B. 2981’s title would never conceive of the possibility that the Act created a “sore loser” law, since the title detailed far less significant changes with far more specificity. Thus, it is no defense to say that H.B. 2981 referred to § 3-5-23(a). If the bill’s authors wished to add a sore loser law into § 3-5-23(a), the Act’s title should have provided notice of that significant change.

Yet the problem with H.B. 2981’s title extends beyond failure to provide adequate notice of its contents. H.B. 2981’s title actually gives a false impression that its index of specifics is exhaustive, but instead it is selective, failing to disclose the most important part of the Act. As it was in *Copley Garage*, the title of H.B. 2981 “is not infirm because it is vague and unspecific, but rather because it is positively misleading....” *Id.* at 491.

Indeed, this Court has held that “a surreptitious provision, undisclosed in the title, which extended substantial benefits ... is assuredly the very practice that our constitutional provision was designed to prevent.” *Walton* at 488; *see also Copley Garage* at 489 (noting that the challenged provision “radically changed” the current law). Likewise, the “sore loser” provision supposedly added in § 3-5-23(a) by H.B. 2981 is “undisclosed in the title,” it “extend[s] substantial benefits” to the major parties which control the legislature at the expense of minor party and independent candidates such as Petitioner, and thus is precisely what Article VII, Section 30 is “designed to prevent.”

An additional purpose undergirding Section 30 was to prevent bills which were “rushed through on the last day of the session of the legislature.” W.Va. Const. Art. VI, Section 30,

Annotations by Michie’s, West Virginia Code Annotated (2018), at 2 (emphasis added); *see also* *Cutlip v. Sheriff of Calhoun County*, 3 W.Va. 588, 590 (1869). Interestingly enough, H.B. 2981 was passed on April 11, 2009 — the very last day of the 2009 legislative session.<sup>8</sup> The title of H.B. 2981 not only failed to provide fair notice that an extremely significant “sore loser” provision was in the bill, but also it misled legislators and the public by its great detail in describing every other small change in the bill, in violation of this constitutional requirement, rendering the amendment void.

Additionally, should H.B. 2981’s amendment to § 3-5-23(a) be viewed as creating a new “sore loser” prohibition, violation of that prohibition, under subsection (h), constitutes a criminal act subjecting candidates to a criminal penalty of up to one year in jail and a \$1,000 fine. In *State ex rel. Myers v. Wood*, 154 W.Va. 431, 175 S.E.2d 637 (1970), the Court struck from the law a provision in a bill creating a new crime because the bill’s title contained “no reference or indication whatsoever that the Act purported or intended to establish any criminal offense, or to provide a penalty for any criminal offense in connection with the provisions of the Act, all of which, from the contents of the title, dealt only with civil matters.” *Id.* at 437. Likewise here, the title of H.B. 2981 dealt only with civil matters, giving no indication whatsoever that the bill contained a provision which created a new crime. For this additional reason, the contention of the Secretary of State should be rejected.

### **III. THE APPLICATION OF H.B. 4434 TO THE 2018 ELECTION CYCLE TO BAR THE CANDIDACY OF PETITIONER BLANKENSHIP VIOLATES DUE PROCESS.**

---

<sup>8</sup> <http://www.wvlegislature.gov/nowcalendar legis3.cfm>.

The Secretary of State’s July 26, 2018 letter refusing to allow Petitioner Blankenship a position on the November 2018 general election ballot references and could be read to rely in part on the recently passed 2018 bill, H.B. 4434. *See* Secretary of State’s July 26, 2018 Letter at 2 (stating, “on March 10, 2018, the State Legislature passed H.B. 4434 which provides further clarity to the issue at hand”). Without further discussion, the letter simply quotes the bill’s two subsections added to W.Va. Code § 3-5-23, including subsection (g) which prohibits a person “who was a candidate for nomination by a recognized political party ... after failing to win the nomination of his or her political party, [from] becom[ing] a candidate for the same political office” as the ballot-listed nominee of a minor political party. To whatever extent the Secretary of State relied on that 2018 amendment, it was misplaced.

Contrary to the characterization by the Secretary of State, H.B. 4434 was not enacted as a “clarification” of existing law. Prior to this new law, there was no prohibition on a recognized political party candidate who lost a primary election from affiliating with, seeking the nomination of, and running as the nominee of a minor political party for that same office in the general election. *See* Argument Section I, *supra*. H.B. 4434 radically extinguishes the rights of minor political parties to nominate unsuccessful recognized party candidates as their general election candidates. Moreover, the prohibition is not limited to the same election cycle, as the new law literally prohibits such individuals from ever again seeking ballot access as a minor political party’s general election candidate.

Allowing H.B. 4434 to govern the 2018 election constitutes changing the rules in the middle of the game — a practice to which fair-minded people object, even in sports. Elections do not occur in one day, but in cycles. The Secretary of State’s own publication identifies U.S.

Senate candidates as among those who “will be nominated and elected in the 2018 election cycle.”<sup>9</sup> 2018 *Guidelines* at 5. By any definition, July 2018 was well into the 2018 election cycle. For this reason, as a general principle, laws enacted during an election cycle should apply in the next cycle.

The retroactivity and retrospective provisions<sup>10</sup> of H.B. 4434 violate the due process guarantees of Article III, Section 10 of the West Virginia Constitution, which states, “[n]o person shall be deprived of life, liberty, or property, without due process of law...,”<sup>11</sup> as well as the due process guarantees of the Fourteenth Amendment of the U.S. Constitution.

Because of such due process protections, retroactivity is generally disfavored in the law. *See Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988); *see also Potomac Hosp. Corp. v. Dillon*, 229 Va. 355, 360, 329 S.E.2d 41, 45 (1985) (retroactive application of a statute impairing a “substantive” right violates due process). Retroactivity “presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions.” *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992); *see also Pnakovich v. SWCC*, 163 W.Va. 583, 590, 259

---

<sup>9</sup> This “election cycle” terminology is consistent with the Federal Election Commission rules. *See* 52 U.S.C. § 30101(2); 11 C.F.R. § 100.3(b).

<sup>10</sup> The term “retroactive” describing a law generally refers to the passage of a law with an effective date predating its passage. The term “retrospective” describes a law that operates based on actions that predate the law. As applied by the Secretary of State, H.B. 4434 could be viewed as both retrospective and retroactive: retroactive in that it was adopted during and affecting the current election cycle that started prior to the effective date, and retrospective in that certain prior actions (*e.g.*, filing for and losing a recognized party primary) trigger provisions of the new law (*e.g.*, prohibition of ballot access).

<sup>11</sup> This anathema to retroactivity is not just a matter of a violation of state and federal constitutional due process guarantees, but also a matter of common law. *See Dash v. Van Kleeck*, 7 Johns. 477, 503 (N.Y. 1811) (“[i]t is a principle in the English common law, as ancient as the law itself, that a statute, even of its omnipotent Parliament, is not to have a retrospective effect.”).

S.E.2d 127 (1979) (fundamental principle controlling retroactive application of statute is “whether the individual has changed his position in reliance upon existing law, or whether the retrospective act defeats the reasonable expectations of the parties it affects”); H. Broom, Legal Maxims 24 (8th ed. 1911) (“[r]etroactive laws are, as a rule, of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law”); 2 J. Story, Commentaries on the Constitution § 1398 (5th ed. 1891) (“[r]etroactive laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact”).

H.B. 4434 “moved the proverbial goalpost in the midst of the game,”<sup>12</sup> prohibiting certain candidates from ever running for office as a candidate for a minor political party, causing other candidates to lose the benefit of substantial efforts applied during primary campaigns, and depriving minor political parties of the opportunity to nominate certain candidates. This abrupt loss of important rights occurred with a total absence of safeguards and was patently unfair. Consequently, the new law — at least with respect to its retroactive and retrospective application to the 2018 election cycle — violates the due process clauses of both the state and federal Constitutions.

#### **IV. W. VA. CODE § 3-5-23(g) VIOLATES THE EQUAL PROTECTION GUARANTEE.**

---

<sup>12</sup> *Libertarian Party of Ohio v. Husted*, 2014 U.S. Dist. LEXIS 187771, \*22 (S.D. Ohio, Jan. 7, 2014).

Just last year, this Court reaffirmed the state’s Equal Protection standard, primarily based on the Due Process guarantee of the West Virginia Constitution, Article III, § 10:

Under the law as set forth by both the Constitutions of the United States and West Virginia, “[e]qual protection of the law is implicated when a classification treats similarly situated persons in a disadvantageous manner.” Syl. Pt. 2, in part, *Israel v. W.Va. Secondary Sch. Activities Comm’n.*, 182 W.Va. 454, 388 S.E.2d 480 (1989); U.S. Const. Amend. IV; W.Va. Const. art. III, § 10. [*Antion v. Bd. of Law Exam’rs*, No. 16-1002, 2017 W.Va. LEXIS 223, at \*9 (Apr. 7, 2017).]

In cases involving equal protection challenges to state ballot access requirements, this Court has applied the U.S. Supreme Court’s balancing test established in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992). *See Wells*, 237 W.Va. at 745. The *Wells* Court quoted *Burdick*’s description of the test as follows:

A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff’s rights. [*Id.* (quoting *Burdick* at 434).]

**A. Petitioners Are Similarly Situated to Other Parties and Candidates, but West Virginia Treats Them Disparately.**

According to § 3-5-22, three categories of candidates have access to the nomination-certificate process: (i) independent candidates; (ii) candidates of minor unrecognized parties; and (iii) candidates of certain smaller recognized parties. If a recognized party polled less than 10 percent in the most recent election for governor, then that party may nominate candidates either (i) by party convention, or (ii) by the nomination-certificate process of § 3-5-23. *See* § 3-5-22. Currently, § 3-5-22 only applies to the Mountain Party and the Libertarian Party. *See* § 3-1-8. Thus, § 3-5-22 provides that the Mountain and Libertarian Parties have access to use the same



nomination-certificate process that is provided for unrecognized party and independent candidates.<sup>13</sup> Accordingly, the Constitution Party as an unrecognized party is not significantly different from the Mountain Party and the Libertarian Party even though the latter are recognized parties because they polled more than 1 percent at the most recent governor election. All three parties can nominate candidates by the nomination-certificate process of § 3-5-23, but unlike the Libertarian and Mountain Parties, only the Constitution Party is denied the convention process.

According to the newly enacted § 3-5-23(g), use of the nomination-certificate process is denied to any individual who previously lost his bid to be a recognized party's nominee, but nevertheless seeks to be on the general election ballot as an independent candidate or unrecognized party nominee. The two smaller recognized parties, however, can circumvent this prohibition of § 3-5-23(g) by choosing the losing candidate by a nominating convention. *See also W.V. Libertarian Party v. Manchin*, 165 W.Va. 206, 222 n.16, 270 S.E.2d 634, 644 n.16 (1980). Thus, § 3-5-23(g) operates to deny the Constitution Party the right of nominating a candidate for an office when the candidate lost another party's nomination, but allows the Libertarian Party and the Mountain Party — as well as the Democratic and Republican Parties — to do just that. The two kinds of minor parties, both recognized and unrecognized, are similarly situated with respect to the State's sore loser policy: both pose the same threats of factionalism, party-splintering, and ballot confusion. *See* Argument, Section V, *infra*. Yet they are treated differently for no apparent reason.

---

<sup>13</sup> H.B. 4434 created an apparent inconsistency in that § 3-5-22 allows certain recognized parties to use the nomination-certificate process of § 3-5-23, but § 3-5-23(f) prohibits recognized parties from that process.

The disparate treatment is not just theoretically possible. In 2018, two candidacies demonstrate the unfairness and unequal application of the law to Petitioners Blankenship and the Constitution Party. Two county commissioner candidates sought nomination in recognized party primaries and lost, yet now have been selected by the Mountain Party as their candidates in the general election. *See* WV Mountain Party Press Release, “[Mountain Party Tops Ticket with Congressional Nominee](#),” (June 11, 2018). In Fayette County, Susie Worley Jenkins ran unsuccessfully in the Democratic primary for county commissioner,<sup>14</sup> yet was nominated on June 9 by the Mountain Party. In Jefferson County, David Tabb ran unsuccessfully for county commissioner in the Republican primary, yet was nominated for the same office in the general election as the Mountain Party candidate.<sup>15</sup> Both of these candidates, as the Mountain Party described it, “took advantage of current state elections regulations which, under certain conditions, grants those defeated in the Primary a second chance to run in the subsequent General Election if nominated by the Mountain Party.” WV Mountain Party Press Release, *supra*.

Not only are the Constitution Party and the Mountain Party similarly situated as minor parties, Blankenship is similarly situated to Jenkins and Tabb in that he also lost a major party primary. Jenkins and Tabb were allowed to be nominated by another party, but Blankenship cannot be, because his new party’s candidate for governor in 2016 received only 0.57 percent of the votes cast, rather than 1.0 percent, and the “sore loser” law applies only to candidates who are seeking to get on the ballot by the nomination-certificate process. This difference is in no way relevant to the State’s purposes in enacting a sore loser law. Thus, the law unfairly disadvantages

---

<sup>14</sup> <http://results.enr.clarityelections.com/WV/Fayette/74497/Web02.203317/#/cid/0328>.

<sup>15</sup> <http://results.enr.clarityelections.com/WV/Jefferson/74506/Web02.207763/#/cid/0310>.

smaller or newer parties who are attempting to legitimately gain support by associating with a candidate who may have better name recognition than they otherwise may be able to attract.

**B. The Restriction Imposed by H.B. 4434 Denies Blankenship His Fundamental Right of Access to the Ballot.**

This Court has recognized repeatedly that the right to ballot access in West Virginia is a fundamental right under the Equal Protection Clause of W. Va. Constitution Art. III, Section 17. In *W.V. Libertarian Party v. Manchin*, this Court held that the state must allow independent candidates, *i.e.*, a candidate not affiliated with any political party, to seek ballot access through petition signatures. *W.V. Libertarian Party* at 214. Resisting the petition process required by *W.V. Libertarian Party*, the West Virginia Legislature has now sought to restrict the availability of that same process to some candidates through enactment of H.B. 4434's sore loser law.

As explained, the Respondent has denied Petitioner Constitution Party of West Virginia the ability to have Petitioner Blankenship's name placed on the ballot for the general election — despite the fact that the nominee met all the qualifications set forth in federal and state law — and did so solely because the Constitution Party is an unrecognized minor party. In other words, a sore loser is denied a second chance only if he seeks the nomination via the nomination-certificate process required of all unrecognized minor party candidates. On the other hand, as recognized minor parties, the Mountain and Libertarian Parties are authorized to avoid the “sore loser” law by using the convention process to select candidates for the general election, even where that candidate lost a major party primary election earlier this year.

H.B. 4434 bars Petitioners from gaining access to the general election ballot. It thus imposes a severe burden on Mr. Blankenship's right to run for office, and on the Constitution

Party's right to nominate the candidate of its choice. As the Supreme Court held in *Anderson*: "A burden that falls unequally on new or small political parties or on independent candidates ... discriminates against those candidates and — of particular importance — against those voters whose political preferences lie outside the existing political parties." *Anderson* at 793-94. *See also* Argument Section III.

**C. The State of West Virginia Has No Valid Justification for the Discrimination in H.B. 4434.**

The principal beneficiaries of a sore loser law are the major parties. H.B. 4434 was passed with the unanimous support of a Republican-led legislature, and was supported by all Democratic members of the legislature.<sup>16</sup> (There are no third-party members serving in the legislature.) It almost goes without saying that major parties seek to consolidate power and minimize pressure from outside interests. To do that, they endeavor to implement barriers to ballot access from independent and minor third parties. Yet some barriers have been found to violate constitutional rights by various courts. *See, e.g., W.V. Libertarian Party.*

To be sure, the state has an interest in providing a reasonable set of election rules to promote the orderly administration of elections. Not all restrictions on ballot access are impermissible. Here, however, the State of West Virginia has neither a compelling nor even a credible reason for the discriminatory treatment caused by § 3-5-23(g).

**V. THE WEST VIRGINIA SORE LOSER LAW ABRIDGES THE FREE ASSOCIATIONAL RIGHTS OF PETITIONERS BLANKENSHIP AND THE CONSTITUTION PARTY.**

---

<sup>16</sup> One Democratic Delegate voted against initial passage of H.B. 4434, but he then voted to concur in the Senate's amendments in the House's final vote. [http://www.wvlegislature.gov/Bill\\_Status/bills\\_history.cfm?INPUT=4434&year=2018&sessiontype=RS](http://www.wvlegislature.gov/Bill_Status/bills_history.cfm?INPUT=4434&year=2018&sessiontype=RS).

**A. The West Virginia Constitution Provides Robust Protection for Associational Freedom.**

Article III, Section 16 of the West Virginia Constitution expressly states that the freedom to consult for the common good shall be held inviolate. United States and West Virginia Supreme Court decisions have also held that the right to associate with others to advance particular causes is necessarily embedded in the freedoms of speech and press (West Virginia Constitution, Art. III, Sections 7 & 16), and is accorded fundamental status protected by the strictest of judicial scrutiny. *See, e.g., United States v. Robel*, 389 U.S. 258 (1967); *Pushinsky v. West Virginia Board of Law Examiners*, 164 W.Va. 736, 266 S.E.2d 444 (1980). These federal precedents provide a floor for interpretation of the Article III protections in Sections 7 and 16, and this Court has stated that “the West Virginia Constitution offers limitations on the power of the state” to curtail the rights of association and speech “more stringent than those imposed on the states by the Constitution of the United States.” *Pushinsky, supra*, 164 W.Va. at 745, 266 S.E.2d at 449; *accord, West Virginia Citizens Action Group v. Daley*, 174 W.Va. 299, 311, 324 S.E.2d 713, 725 (1984); *see also Woodruff v. Board of Trustees*, 173 W.Va. 604, 319 S.E.2d 372 (1984).

Similarly, the U.S. Court of Appeals for the Fourth Circuit has observed, “[t]he First Amendment, as incorporated against the states by the Fourteenth Amendment, protects the rights of individuals to associate for the advancement of political beliefs and ideas.” *South Carolina Green Party v. S.C. State Election Commission*, 612 F.3d 752, 755-56 (4th Cir. 2010). Continuing, the court of appeals stated that “[t]hese rights include the freedom for individuals to ‘band together’ in political parties to promote electoral candidates who support their political

views.” *Id.* at 756. Concluding, the Court affirmed that “[s]uch political parties have a right to choose their ‘standard bearer’ in the form of a nominee.” *Id.* Yet, that is precisely what the West Virginia sore loser statute does — deny to the Constitution Party the ability to choose Petitioner as its nominee for the United States Senate.

According to the Fourth Circuit, the state may override the Petitioners’ First Amendment rights if the sore loser law “**prevent[s]** a candidate who has lost a party primary ... nomination from effecting a ‘splinter’ of a major political party, by joining a minor party while retaining the support of the major party’s voters, thereby undermining the major party in the general election.” *Id.* (emphasis added). Thus, the Fourth Circuit found the South Carolina “sore loser” rule to be a “justifiable measure[] for preventing splintering and factionalism within the major parties....” *Cromer v. South Carolina*, 917 F.2d 819, 825 (4<sup>th</sup> Cir. 1990). But, as shown below, the South Carolina sore loser law is very different from West Virginia’s. Consequently, neither of the Fourth Circuit precedents can be relied upon to undermine the free association rights of either Petitioner in this case.

**B. The West Virginia Sore Loser Law Does Not Prevent All Losing Candidates from Seeking a Nomination to the Same Office a Second Time.**

In pertinent part, § 7-11-10 of the South Carolina Code straight-forwardly reads as follows:

a person who was defeated as a candidate for nomination to an office in a party primary or party convention shall not have his name placed on the ballot for the ensuing general ... election, except that this section does not prevent a defeated candidate from later becoming his party’s nominee for that office in that election if the candidate first selected as the party’s nominee dies, resigns, is disqualified, or otherwise ceases to become the party’s nominee for that office before the election is held.

By contrast, the West Virginia sore loser statute, § 3-5-23(g), reads very differently:

For the purposes of this section, any ... candidate for nomination by a recognized political party as defined in §3-1-8 of this code may not, after failing to win the nomination of his or her political party, become a candidate for the same political office by virtue of the nomination-certificate process as set forth in this section.

The South Carolina statute absolutely forbids losing primary candidates from seeking the same office. The West Virginia statute, however, forecloses only one way whereby a losing candidate may still seek that office — by use of the nomination-certificate process set forth in § 3-5-23. It leaves open the “party convention” process described in § 3-5-22, to any of the four recognized political parties if one “polled less than ten percent of the total vote cast only for Governor at the general election immediately preceding...” Thus, the Mountain Party has nominated two candidates even though both had lost the nominations in this year’s primary election. *See* Argument Section IV, *supra*.

### **C. The West Virginia Legislature Has No Credible Interest in Its Sore Loser Law.**

Having left the convention process option open to a losing candidate, the West Virginia legislature cannot now contend that its sore loser statute is designed to prevent a losing candidate from “effecting a ‘splinter’ of a major political party, by joining a minor party ... thereby undermining the major party” — the common rationale given to justify sore loser laws. *See S.C. Green Party* at 756. Indeed, if the West Virginia legislature intended by its sore loser law to “discourag[e] intra-party feuding ... reserving ‘major struggles’ for general election ballots,” it would not have left the “convention process” alone in light of the fact that it was available to slightly larger recognized parties, such as the Libertarian Party, but not to slightly smaller, yet-to-be-recognized parties such as the Constitution Party. *Id.* Although the South Carolina

preventive ban “minimize[es] excessive factionalism and party splintering,” the West Virginia statute allows it by enabling a small minority party to be a launch pad for a disappointed major party candidate. *See id.* at 759. By failing to prevent a losing major party candidate from gaining access to the ballot, the West Virginia sore loser law, unlike the South Carolina bar, does little to “reduce the possibility of voter confusion that could occur when a candidate’s name appears on the ballot after losing a primary race.” *Id.* As for the state’s interests in “orderly, fair, and efficient procedures for the election of public officials,” (*id.*) the South Carolina sore loser law is just that — one strike and you’re out: if you lost the first time, don’t try again until the next election cycle. In West Virginia, it’s a different story. There are no fewer than 11 scenarios for losing candidates to become nominated candidates, but only three would be prohibited by § 3-5-23(g).<sup>17</sup>

---

<sup>17</sup> In the following chart: R-Republican Party; D-Democratic Party; M-Mountain Party; L-Libertarian Party; CP-Constitution Party.)

1. Candidate unsuccessfully seeks nomination of R or D parties in primary or convention,
  - a. Then seeks nomination of the R or D party to fill a vacancy — No bar.
  - b. Then seeks nomination of M or L party to fill a vacancy — No bar.
  - c. Then seeks nomination of M or L party by nomination-certificate — Bar.
  - d. Then seeks nomination of M or L party by convention — No bar.
  - e. Then seeks nomination of minor party (*e.g.*, CP) by nomination-certificate — Bar.  
(This is the situation faced by Petitioner Blankenship.)
2. Candidate unsuccessfully seeks nomination of M or L parties in primary/convention,
  - a. Then seeks nomination of R or D parties (if vacancy) — No bar.
  - b. Then seeks nomination of the other M or L party by convention — No bar.
  - c. Then seeks nomination of a minor party by nomination-certificate — Bar.
3. Candidate unsuccessfully seeks nomination of minor/unrecognized party (*e.g.*, CP) at a convention through nomination-certificate process,
  - a. Then seeks nomination of R or D party to fill a vacancy — No Bar.
  - b. Then seeks nomination of M or L party at a convention — No Bar.
  - c. Then seeks nomination of another minor party using nomination-certificate process — No Bar.



In short, the Secretary has no cohesive rationale that would justify the preventive restrictions on an unrecognized party without any evidence that allowing a candidacy through such unrecognized party is a greater threat to the cohesion of its two-party system than the two existing minor parties and the two major parties who remain free to nominate a person who lost the nomination of one of the two major parties.

**D. Petitioners Are Severely Burdened by the Secretary of State's Application of § 3-5-23(g).**

Unlike the chimerical interests of the State, Petitioners are severely burdened. Petitioner Blankenship would lose the momentum that has propelled him — a newcomer to politics — to a respectable third-place finish against two experienced politicians. If this momentum is stopped by taking him out of the Senate race, the opportunity may never come again for him or the Constitution Party. Not only would he be denied a run for the office of U.S. Senator in 2018, but the denial could also effect a premature closing of the door to a future run for office. The Constitution Party needs a boost from a candidate with broad name identification and other strengths, in its effort to become a state-recognized party, as further detailed in the Affidavit of Phil Hudok, Exhibit E. *See also* Affidavit of Donald L. Blankenship, Exhibit D.

**CONCLUSION**

Petitioners have a fundamental right to have Mr. Blankenship's name on the November 2018 ballot as the nominee of the Constitution Party, unless West Virginia demonstrates a compelling state interest, which it cannot do. For this reason and the other reasons stated above, Petitioners respectfully request that this Court issue a writ of mandamus; award Petitioners such

attorney's fees as this Court finds appropriate; and grant such other relief as may be just and equitable.<sup>18</sup>

---

Robert M. Bastress, Jr. (WVBN 263)  
P.O. Box 1295  
Morgantown, West Virginia 26507  
304-319-0860  
[rmbastress@gmail.com](mailto:rmbastress@gmail.com)

**COUNSEL FOR PETITIONERS**

---

<sup>18</sup> “[C]osts and attorney’s fees will be awarded in mandamus proceedings involving public officials ... because ‘citizens should not have to resort to lawsuits to force government officials to perform their legally prescribed non-discretionary duties.’” Syl. Pt. 1, *State ex rel. West Virginia Highlands Conservancy, Inc. v. West Virginia Division of Environmental Protection*, 193 W.Va. 650, 653, 458 S.E.2d 88, 91 (1995).

**VERIFICATION**

STATE OF WEST VIRGINIA

COUNTY OF \_\_\_\_\_, to-wit:

I, Donald L. Blankenship, being first duly sworn upon oath, state that I have read the foregoing “**Petition for Writ of Mandamus And Incorporated Memorandum of Law in Support,**” along with the attached “**Appendix To Petition For Writ of Mandamus And Incorporated Memorandum of Law in Support,**” and that the facts and allegations therein contained are true and correct to the best of my belief and knowledge.

\_\_\_\_\_  
DONALD L. BLANKENSHIP

Taken, sworn to, and subscribed before me this \_\_\_\_ day of August, 2018.

My commission expires: \_\_\_\_\_.

\_\_\_\_\_  
NOTARY PUBLIC

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. \_\_\_\_\_

*West Virginia ex rel.*  
**DONALD L. BLANKENSHIP**, candidate for U.S. Senate in West Virginia; and  
**CONSTITUTION PARTY OF WEST VIRGINIA**,

**Petitioners,**

**v.**

**MAC WARNER**, in his official capacity as West Virginia Secretary of State,

**Respondent.**

---

**CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that he served the foregoing **Petition for Writ of Mandamus and Incorporated Memorandum of Law in Support and Appendix to Petition for Writ of Mandamus and Incorporated Memorandum of Law in Support** upon the following individuals via hand delivery, on the \_\_\_\_ day of August, 2018 to:

The Honorable Mac Warner  
Secretary of State  
State Capitol, Bldg. 1, Suite 157-K  
1900 Kanawha Boulevard East  
Charleston, WV 25305

Marc E. Williams (WVBN 4062)  
Nelson Mullins Riley & Scarborough LLP  
949 Third Avenue, Suite 200  
Huntington, WV 25701

---

Robert M. Bastress, Jr.