

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 992562

**STATE EX REL. RICHARD A. ROBB,
W. KENT CARPER, RUDOLPH L. DITRAPANO,
ROGER D. FORMAN, MARVIN W. MASTERS,
ANTHONY J. MAJESTRO, AMERICAN CIVIL
LIBERTIES UNION OF WEST VIRGINIA,
THOMAS W. PETTIT, MARK E. GAYDOS,
CARL N. FRANKOVITCH, MICHAEL G. SIMON,
JAMES C. PETERSON, R. EDISON HILL,
HARRY G. DEITZLER, MICHAEL C. BEE,
NORMAN STEENSTRA, JR.,**

Petitioners,

v.

CECIL H. UNDERWOOD,
Governor of the State of West Virginia, and
ROBERT S. KISS,

Respondents.

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF, AND REPLY TO
RESPONDENTS' RESPONSES TO, PETITION FOR WRIT OF MANDAMUS**

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*TO THE HONORABLE JUSTICES OF THE
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I INTRODUCTION

A fundamental maxim of American democracy, recited frequently in school civics lessons, is that our federal and state constitutions impose a number of “checks and balances” upon the Government. Indeed, Art. I, § 3 of the *West Virginia Constitution* mandates that its provisions, as well as those of the federal Constitution, may not be departed from or violated, be it under a plea of necessity or otherwise, because any such departure “is subversive to good government, and tends to anarchy and despotism.”

Out the outset, Petitioners note that the case at bar concerns a matter of constitutional construction, the prime goal of which is to give effect to the intent of the Framers of the “organic law.” Where, as here, the language of a constitutional provision is plain and unambiguous, it should not be subject to judicial interpretation, because the intent of the framers and the people can be readily ascertainable therefrom. As stated by this Court in *State ex rel. Brotherton v. Blankenship*, 157 W.Va. 100, 108, 207 S.E.2d 421, 427 (1973):

The fundamental principle in constitutional construction is that effect must be given to the intent of the framers of such organic law and of the people who ratified and adopted it. *Flesher v. Board of Review, West Virginia Department of Veterans' Affairs*, 138 W.Va. 765, 77 S.E.2d 890; *Morgan v. O'Brien*, 134 W.Va. 1, 60 S.E.2d 722; 16 Am.Jur.2d, Constitutional Law, Section 64. If the language of a constitutional provision is plain and unambiguous it is not subject to judicial interpretation, the intent of the framers and the people being readily ascertainable therefrom.

(emphasis added).¹

The issue in the case at bar is not complicated. Like Article I, § 6 of the *United States Constitution*, Art. VI, § 15 of the *West Virginia Constitution* imposes a very minor constitutional “check.” This “check” prohibits a very small portion of the State’s citizenry, namely members of the House of Delegates or Senate (of whom there are 134), for a very limited period of time (the term to which legislators have been elected to the Legislature), from being appointed to a very limited

¹See generally, *State ex rel. Maloney v. McCartney*, 159 W. Va. 513, 520, 223 S.E.2d 607, 612, *appeal dismissed*, *Moore v. McCartney*, 425 U.S. 946, 96 S.Ct. 1689, 48 L.Ed.2d 190 (1976):

“Absent clear and compelling authority this Court is bound by oath to support every provision of the Constitution of the State of West Virginia. See dissenting opinion of Judge Haymond, *Lance v. Board of Education*, 153 W.Va. 559, 574, 170 S.E.2d 783, 791 (1969), *Rev'd sub nom. Gordon v. Lance*, 403 U.S. 1, 91 S.Ct. 1889, 29 L.Ed.2d 273 (1971).”

number of government positions (offices created or emoluments increased during the legislator's term). The purpose of this "check" is obvious and beyond dispute—the Framers of the *West Virginia Constitution*, like the Framers of the federal *Constitution*, intended to avoid any appearances of impropriety and to ensure integrity.²

This narrow constitutional "check" is subject to an exception—"offices to be filled by election by the people." The purpose of this exception also is clear: the Framers intended that where state citizens have the opportunity to vote on the Legislator's actions in voting to create the office sought, or to increase the emoluments of the office sought, the right of the citizenry will predominate because the vote of the people takes the place of the absolute prohibition that otherwise applies. In other

²In their proposed Brief *amicus curiae*, the West Virginia Legislature states:

"the question raised is fundamentally a separation of powers issue. Section 15 is a check on the Legislature . . . Of course, the concept of separation of powers and the implementation of checks and balances is central to our form of government."

Amicus Brief at 2. The constitutionally mandated separation of powers "must be strictly enforced":

"In *State ex rel. State Building Commission of West Virginia v. Bailey*, W.Va., 150 S.E.2d 449, with reference to the language of Article V of the Constitution of this State, this Court said 'That language is clear and free from ambiguity and **its requirement of the separation of the powers of government must be strictly enforced.**' In the earlier case of *State ex rel. Miller v. Buchanan*, 24 W.Va. 362, this Court declared that the legislative, executive and judicial departments of government must be kept separate and distinct and that each must be protected in its legitimate sphere of action."

State ex rel. Sahley v. Thompson, 151 W.Va. 336, 151 S.E.2d 870, 875 (1966), *overruled, in part, on other grounds, State ex rel Hill v. Smith*, 172 W.Va. 413, 305 S.E.2d 771 (1983) (emphasis added). Art. VI, § 15 is a constitutional "check" that implements the "separation of powers", and, as such, "must be strictly enforced."

words, the vote of the people acts as the “check” in place of the otherwise absolute disqualification. The importance of the will of the people is reflected no more clearly than in Art. II, § 2 of the State *Constitution* itself:

“The powers of government reside in all citizens of the State, and can be rightfully exercised only in accordance with their will and appointment.”

Clearly, an expression of the will of all the citizens of the State was deemed especially important to the Framers of the State *Constitution*.

It is logical to compare the constitutional provision at issue herein, Article VI, § 15 of the *West Virginia Constitution*, with its federal counterpart, Art. I, § 6 of the *United States Constitution*.

Art. VI, § 15 mandates, in relevant part:

“No member of the legislature may **be elected or appointed** during the term for which he has been elected . . . to any civil office of profit . . . the emoluments of which have been increased during such term, **except offices to be filled by election by the people.**”³ (emphasis added).

Art. I, § 6 of the *United States Constitution* mandates, in pertinent part:

“No Senator or Representative shall, during the Time for which he was elected, **be appointed** to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time[.]” (emphasis added).

An examination of the two provisions’ differences does not reveal any intent on the part of the West Virginia Framers to, as suggested by respondents, to weaken the application of the state emoluments clause. To the contrary, because of differences in the powers of the two legislatures, the West Virginia Framers clearly intended Art. VI, § 15 of the *West Virginia Constitution* to apply more

³Art. VI, § 15 was not part of the first *West Virginia Constitution* enacted in 1863. Rather, it appeared first in the *Constitution* of 1872. Petitioners have been unable to locate any contemporaneous documentation confirming or clarifying the Framers’ intent regarding this provision.

broadly than the Framers of Art. I, § 6 of the *United States Constitution*.

Like Art. I, § 6 of the *U.S. Constitution*, Article VI, § 15 of the *W.Va. Constitution* absolutely prohibits the *appointment* of any member of the Legislature to any civil office of profit when the salary (emoluments) has been increased during the term of a senator or delegate. The Framers of the *West Virginia Constitution*, unlike their federal counterparts, contemplated that the Legislature itself would have the power to “elect” individuals to civil offices for profit. In West Virginia, then, senators and delegates were also *absolutely prohibited* from *election* to a civil office of profit where the election is by a means otherwise than by direct popular vote (“election by the people”). The *W.Va. Constitution* itself reveals that there was a time when under West Virginia law that the Legislature and other public bodies were empowered to “elect” persons to certain “civil offices of profit.”⁴ Apparently, this was common in other states as well. Thus when the salary (emoluments) of a

⁴See, e.g., *W.Va. Constitution*, Art. VI, § 44:

“*In all elections to office which may hereafter take place in the legislature, or in any county, or municipal body, the vote shall be viva voce, and be entered on its journals.*”

(emphasis added) (The title or “catch line of Art. VI, § 44, “Election of Legislative, County and Municipal Officers” may suggest, at first glance, that Art. VI, § 44 was only to apply to officers of the respective bodies listed; Petitioners note, however, that the catch lines were not part of the Constitution as ratified in 1872. As stated in the Editor’s notes to the *Constitution of West Virginia*: “The section catch lines in this constitution first appeared in the official Code of 1931 and were not part of the constitution as ratified in 1872.” Volume 1, *Michies West Virginia Code Annotated* at 33).

In any event, emoluments clauses found in other states’ constitutions specifically juxtapose elections by the Legislature with elections by the people, prohibiting the former and allowing the latter. See *Indiana Constitution*, Art. IV, § 30; *Oregon Constitution*, Art. IV, § 30. Cf., *Maine Constitution*, Art. IV, § 10.

(emphasis added).

government position has been increased during the term of a senator or delegate, the prohibition of Article VI, § 15, absolutely prohibits the Legislature electing one of its own members to such a civil office during that legislative term --- because the legislator would not have been elected by the people.

The Framers' intent was to prevent the Legislature from electing one of its own, not to all civil offices of profit, but only to those offices where the emoluments were increased, or the office itself was created, during the term of the legislator-appointee. Obviously, where the legislator sought election by the people, rather than by the Legislature itself, no similar concerns are evident. Thus, the Framers allowed an exception to Article VI, § 15's narrow, but absolute prohibition by allowing a senator or delegate to assume a civil office of profit during his/her term — if, and only if — he or she fills such office “by election by the people.” The meaning of the exception is clear and unequivocal.

Thus, the State Framers intended to incorporate an emoluments clause essentially the same in effect as Art. I, § 6 of the *U.S. Constitution*. Appointments are absolutely prohibited, as are elections by the Legislature itself. The only way a legislator who participates in votes to create an office or increase its emoluments can hold such an office during his/her elected term is “by election by the people.”

Under respondent Underwood's interpretation of Art. VI § 15, a senator or delegate appointed to fill a Supreme Court vacancy pursuant to Art. VIII, § 7, could assume and hold the office without the people having had an opportunity to determine whether the appearance of

impropriety should disqualify him or her from the position.⁵ There is no rational explanation for construing the exception so broadly, and no such explanation has been proffered by respondents.

In his response to the instant Petition, respondent Underwood stridently accuses petitioners of attempting to confuse and obfuscate the issue in this case. Underwood Response to *Robb* Petition at 3. To the contrary, it is the respondents who have taken a narrow, but clear constitutional mandate and attempted to obscure its straightforward intent and meaning with creative semantics. Respondent Underwood's rhetoric is used to disguise his attempt to evade the clear intent of Article VI § 15. Because respondent Kiss would assume an office he would fill by *appointment* and not "by election by the people[.]" he is absolutely disqualified from holding such office. There is no ambiguity in Article VI § 15 except that which respondents attempt to create.

Indeed, should Respondent Kiss be permitted to fill the vacancy left by Justice Workman's retirement, he could choose not to seek "election [to the office of Justice] by the people."⁶ Certainly, in that event, respondent Kiss would have evaded the Framers' intent that the only exception to the absolute prohibitions contained in Article VI § 15 are those situations when the office is filled by popular election.

Respondents' arguments trivialize the import of the absolute prohibitions contained in Article VI § 15. They do so because distorting the clear meaning of the constitutional provision suits their immediate political purpose. The *Constitution* is not, however, an instrument of governance to be manipulated to meet the short term political goals of contemporary politicians. Art. II, § 2, *W.Va.*

⁵The delegate or senator could later choose to stand for election as an incumbent Justice, enjoying all of the well recognized and documented political advantages of incumbency. The appearance of impropriety is obvious in such a situation.

⁶See September 9, 1999 *Charleston Daily Mail*.

Constitution. Rather, when the language of a constitutional provision is clear on its face, the intention of the Framers must be followed.

Although respondents list a parade of horrors they envisage if this Court applies Art. VI, § 15 to disqualify the Kiss appointment, it is noteworthy that under the Constitution of the United States and the majority of the States there is no exception to the constitutional ban on legislators being appointed to an office whose salary has been increased during the legislators' term of office. The ban is absolute. Apparently, during the more than two centuries of governance under the federal and these state constitutions, democracy has prospered though legislators have been absolutely banned from holding office in such circumstances.

Contrary to respondents' arguments, should the Court hold that respondent Kiss is disqualified to hold office pursuant to Article VI § 15, no harm will come to the State or to our system of democratic governance. The Governor will simply appoint a non-legislator to fill Justice Workman's unexpired term. Respondent Kiss apparently will serve out his term as delegate in accord with the desire he expressed to the people of his constituency when he sought their vote. Respondent Kiss may then choose to run in the primary election⁷, a mere seven months from now, untainted by any appearance of impropriety. If he prevails there, he will have the opportunity to face the two individuals who will be nominated by respondent Underwood's own party in the general election, and, as intended by the Framers, the people will be permitted to decide whom should be given the privilege of serving the State as a member of this honorable Court.

II THE EXCEPTION TO THE GENERAL RULE OF THE EMOLUMENTS CLAUSE IS DIRECTED AT THE METHOD OF FILLING THE OFFICE

⁷Albeit he would stand for election without the advantages of incumbency which Respondent Underwood attempts to bestow upon him.

1 THE INTENT OF THE FRAMERS

The root of respondents' argument appears to be that an ambiguity underlies the emoluments clause exception *provisio*. Respondents argue that the focus of the Court's inquiry should be directed in the first instance not at the intent of the emoluments clause, but at a semantic dissection of the difference between adjectives "appointive" and "elective" when those words modify the word "office." The thrust of their argument ignores the fundamental principle in constitutional construction that effect must be given to the intent of the framers of such organic law and of the people who ratified and adopted it. *State ex rel. Brotherton v. Blankenship*, 157 W.Va. 100, 108, 207 S.E.2d 421, 427 (1973).

In *Syllabus* Points 4 and 5 of *Randolph County Board of Education v. Adams*, 196 W. Va. 9; 467 S.E.2d 150 (1995), this Court summarized two additional rules of construction that must be followed in interpreting and applying constitutional provisions:

4. "'Where a provision of a constitution is clear in its terms and of plain interpretation to any ordinary and reasonable mind, it should be applied and not construed.' Syl. Pt. 3, *State ex rel. Smith v. Gore*, 150 W. Va. 71, 143 S.E.2d 791 (1965)." *Syllabus* [**2] Point 1, *Jarrett Printing Co. v. Riley*, 188 W. Va. 393, 424 S.E.2d 738 (1992).

5. "'Courts are not concerned with the wisdom or expediences of constitutional provisions, and the duty of the judiciary is merely to carry out the provisions of the plain language stated in the constitution.' Syl. Pt. 3, *State ex rel. Casey v. Pauley*, 158 W. Va. 298, 210 S.E.2d 649 (1975)." *Syllabus* Point 2, *Jarrett Printing Co. v. Riley*, 188 W. Va. 393, 424 S.E.2d 738 (1992).

As stated above, Petitioners reject respondents apparent thesis that Art. VI, § 15 is ambiguous.⁸ The clear and unambiguous meaning of the exception is to remove from the general

⁸The respondents do suggest, although only through self-serving answers to rhetorical questions, that the interpretation proffered by them "is plain and unambiguous." Kiss Response to

application of the emoluments clause offices **filled by election** by the people, and not, as suggested by respondents, offices **filled by appointment** but thereafter subject to election. Nevertheless, even if the Court accepts respondents' initial thesis and deems the exception *provisio* ambiguous, proper rules of constitutional construction require more than the semantic gymnastics offered by respondents—such an ambiguity may be resolved only after “consideration of the general scope and meaning of the Constitution when all of its provisions are examined”:

“Whether an ambiguity exists in a provision of the Constitution, justifying interpretation thereof, is determined not only from the meaning of particular words but may arise from a consideration of the general scope and meaning of the Constitution when all of its provisions are examined.”

Syllabus Point 2, State ex rel. Brotherton v. Blankenship, supra. Curiously, respondents' briefs fail to consider the exception in light of the general scope, meaning and purpose of the emoluments clause itself.

Using the indisputable purpose of the emoluments clause as a starting point, it becomes clear that in drafting the exception the Framers' did not intend to make the semantic distinction proffered by respondents. As admitted by Respondent Underwood in his response to the *Rist* Petition:

“One reason for the inclusion of this provision in Federal Constitution was ‘to take away, *as far as possible*, any improper bias in the vote of the Representative, and *to secure to the constituents* some solemn pledge of his disinterestedness.’ J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 864 (1833). Another reason, according to Alexander Hamilton, was *to prevent legislative bartering with the executive branch for appointments.* THE FEDERALIST NO. 76, at 483, 484 (A.Hamilton)(B.Fletcher ed. 1972)(“The Constitution has provided some important guards against the danger of executive influence upon the legislative body.”). Undoubtedly, the same motivations influenced the framers of state

Rist Petition at 3. Nevertheless, they also rely heavily upon the case of *Carter v. Commission on Qualifications of Judicial Appointments*, 14 Cal.2d 179, 183, 93 P.3d 140, 142 (1939), where the California court deemed the exception *provisio* therein: “admittedly uncertain.”

constitutions.”

(emphasis added) Underwood Response to *Rist* Petition at 7, n.2.⁹

The instant Petitioners also addressed the purpose of an emoluments clause in their Petition. The undisputed intent and purpose of the emoluments clause should be the most important than any other factor in determining the Framers’ intent. That purpose is worth restating here:

“Although the exact language varies from state to state, all such provisions are aimed at a common goal: to remove improper motives from considerations of legislators in voting for increased salaries or the creation of new offices. . . . The reasons for excluding persons from offices who have been concerned with creating them, or in increasing their salary emoluments, are to take away, as far as possible, any improper bias in the vote of the representative, and secure to the constituents some solemn pledge of his disinterestedness.

This type of constitutional provision is designed not only to stop overt

⁹As admitted by respondent Underwood, one of the purposes of the emoluments clause is to deter legislative bartering with the executive branch. Respondent Underwood later proffer that “The absence of any improper motivation on the part of Speaker Kiss . . . is indisputable,” Underwood Response to *Rist* Petition at 17. Petitioners note, however, that during the 1999 Legislative session, respondent Kiss was quoted in the media as follows: “Kiss said the House will initiate either one or two omnibus pay raise bills . . . Kiss said the House may put raises for statewide elected officials, justices, judges and magistrates in one bill[.]” February 24, 1999 *Charleston Gazette*, p. 2A. The House, with respondent Kiss as Speaker, passed the pay raise bill shortly thereafter.

The following circumstances also are known from media reports: (1) Justice Workman’s retirement at the end of the May, 1999 term of Court was speculated upon in the media and elsewhere as early as the past Legislative session and before (see June 29, 1997 *Charleston Gazette*, p. 8B; October 5, 1997 *Sunday Gazette-Mail* at p. 8B; March 12, 1999 *Charleston Gazette*, p. 2A); (2) respondent Kiss has been quoted as to his interest in a Supreme Court position, and that interest has been speculated upon in the media and elsewhere well before the past legislative session (see December 17, 1997 *Charleston Gazette*, p. 1C; December 18, 1997 *Charleston Gazette*, p. 1C; December 21, 1997 *Sunday Gazette-Mail*, p. 4C; December 21, 1997 *Sunday Gazette-Mail*, p. 8B; December 24, 1997 *Charleston Gazette*, p. 1A; December 28, 1997 *Sunday Gazette-Mail*, p. 8B; December 31, 1997 *Charleston Daily Mail*, p. 1A) (3) respondent Kiss, as Speaker, has worked closely with the Governor (see September 28, 1999 *Charleston Daily Mail* at p. 1A); (4) respondent Underwood thereafter appointed respondent Kiss to fill the remainder of Justice Workman’s term.

trafficking in offices, but also to prevent less obvious influences on a legislator's actions:

(T)his constitutional provision was enacted through fear that a legislator might be, either consciously or unconsciously, influenced by selfish motives when voting for or against a bill. . . .

Another purpose has been said to be the elimination of even the suspicion that legislators were acting with improper motives. As in the case of the judiciary, it is important that the legislature not only avoid impropriety, but also the appearance of impropriety.”¹⁰

Warwick v. State ex rel. Chance, 548 P.2d 384, 387-88 (Alaska, 1976) (footnotes omitted).¹¹ The constitutional disqualification provision addressed in the *Warwick* case serves the same purpose as Art. VI, § 15, that is, “to prevent all legislators from being influenced by either conscious or

¹⁰The *Warwick* court continued:

“[t]he purpose sought to be accomplished by that section is not merely to prevent an individual legislator from profiting by an action taken by him with bad motives, but to prevent all legislators from being influenced by either conscious or unconscious selfish motives. There is nothing in the provision making its restriction dependent on the intent of an individual legislator voting for the bill in question.”

Id., 548 P.2d at 391.

¹¹Respondent Kiss erroneously argues that the *Warwick* court “specifically notes” that the West Virginia emoluments clause “contains an exception for elective offices.” Respondent Kiss then misquotes the *Warwick* opinion, suggesting the Alaska court had concluded that West Virginia was among states that specifically exempt “elective offices”:

“Some states specifically exempt elective offices. See, for example . . . West Virginia Constitution art. VI, § 15 . . .”

The ellipsis placed within the foregoing quotation is extremely misleading. Contrary to respondent Kiss' assertion, the *Warwick* court clearly did not list West Virginia as among those states that exempt elective offices from their emoluments clause (only Alabama, California, Indiana, Iowa, Kentucky, Maine, Mississippi, Nevada and Oregon are named as support for that proposition). Rather, the *Warwick* court, in the same paragraph went on to note simply that “many states limit the prohibition to ‘civil offices’”, and cite Art. VI, § 15 for support of that proposition.

unconscious selfish motives” and to “not only avoid impropriety, but also the appearance of impropriety.” *Id.*

Therefore, it is beyond cavil that one purpose of the emoluments clause is to avoid even the appearance of impropriety, and, as admitted by respondent Underwood, another purpose was “to take away, *as far as possible*, any improper bias in the vote of the Representative,” (Response to *Rist* Petition at 7, n.2). Under proper rules of constitutional construction, the exception must be viewed in light of those clear aims of the Framers.

If the Framers’ purpose was to avoid the appearance of impropriety, and take away **as far as possible** any improper bias in the vote of the legislator, the construction of the *proviso* proffered by respondents lacks any conceivable logic. The purpose of the exception appears self-evident—where the people are the judge of the legislator’s action, and express their approval, the legislator may stand for election to an office he otherwise would be prohibited from accepting. This rationale for the exception would be rendered meaningless if it allowed a legislator to take office, through appointment, prior to a vote by the people.¹² Simply put, the semantic construction proffered by

¹²Respondent Kiss recognizes the nexus between the people’s vote and the purpose of the exception:

“Elective offices are excepted. Why? **Because the ultimate safeguard against potential nest feathering—the vote of the people—serves as a check**, a check not present with respect to an office that it is not subject to the vote of the people on a periodic basis.”

Kiss Response to *Rist* Petition at 4. (emphasis added).

Petitioner agrees that the Framers’ intent is clear and discernible and must be given effect. The intent clearly was to provide the “ultimate safeguard,” the “vote of the people,” to provide a “check” against “potential” improper motivations. *Id.* What respondent Kiss declines to address is that the “ultimate safeguard” is rendered a nullity if a legislator with potential improper motivations could fill an office by appointment just because, at some time in the future, the office

respondents ignores the intent of the emoluments clause, and its exception. Because respondents' proffered construction fails to account for the fact that "effect must be given to the intent of the framers of such organic law", and further fails to give "consideration of the general scope and meaning of the Constitution when all of its provisions are examined", this Court should reject that construction, and accept the clear and plain meaning intended by the Framers. *Quoting State ex rel. Brotherton v. Blankenship*, 157 W.Va. at 108, 207 S.E.2d at 427.

2 THE REASONING OF THE CALIFORNIA SUPREME COURT IN CARTER V. CALIFORNIA COMMISSION ON QUALIFICATIONS FOR JUDICIAL APPOINTMENTS IS INAPPLICABLE TO ART. VI, § 15 OF THE WEST VIRGINIA CONSTITUTION

Both respondents rely heavily on the decision of the California Supreme Court of Appeals in *Carter v. California Commission on Judicial Appointments*, 14 Cal.2d 179, 93 P.2d 140 (1939). Curiously, a most important element of the California constitutional provision is not revealed by respondents: the California provision at issue in *Carter* **was not an emoluments clause**.¹³ Petitioners acknowledge the California court did address the meaning of an exception *provisio* similar (but not

will be subject to an election. Indeed, a legislator who is permitted to accept such an appointment not only defeats the intent of the emoluments clause, but gains the substantial benefit of making the decision of whether to stand for election to that office thereafter *as an incumbent*. Respondent Kiss has expressed publically his reservations about standing for election. He has been quoted in the media as saying that it would be "kind of crazy" for him to commit to running for election after the appointed term expires, and suggesting he may not run if he finds the job unappealing, if he doesn't "mesh with the rest of the justices" or if he simply decides he "hates being a Justice." *See* September 9, 1999, *Charleston Daily Mail*. And even if he decides to run for an elected term, he would still have to survive a primary election before he would be subject to "election by the people." Consistent with the foregoing, the purpose of Art. VI, § 15 would be defeated if respondent Kiss is permitted to take office without facing an election by the people. The provision only serves its purpose if it requires a legislator to stand for election by the people before he can hold an office for which he voted to increase the salary.

¹³In his Response to the *Rist* Petition, respondent Underwood suggests that the *Carter* case addressed an emoluments clause. Brief at 9, 11. That suggestion is not correct.

identical) to the *proviso* to Art. VI, § 15. But any discussion of the *proviso* must begin with the intent of the constitutional provision as a whole.

Whereas the emoluments clause in the *West Virginia Constitution* is directed at proscribing the appearance of impropriety and at stemming, as far as possible, any improper motivations on the part of legislators, the California provision was much broader in application—applying not only to legislators who voted to increase emoluments or to create offices they could later seek to fill, but applied to **any and all** offices of trust or employment under the state:

“No senator or member of the Assembly shall, during the term for which he shall have been elected, hold or accept any office, trust, or employment under this State; provided, that this provision shall not apply to any office filled by election by the people.”

Article IV, § 19 of the 1916 *California Constitution*.¹⁴

It should be noted that among the respondents in *Carter* was Earl Warren, then California Attorney General and future Chief Justice of the Supreme Court of the United States. As a member of the Commission on Qualifications for Judicial Appointments, Attorney General Warren rejected the California Governor’s nominee for a judicial appointment on the basis that the Governor’s nomination amounted to an appointment, even though the nominee necessarily would have had to stand for a retention election to keep the position.¹⁵

¹⁴The California provision at issue in *Carter* more closely resembles Art. VI, § 13 of the *West Virginia Constitution*, than Art. VI, § 15. Article VI, § 13 states:

“No person holding any other lucrative office or employment under this State, the United States, or any foreign government; no member of Congress; and no person who is sheriff, constable, or clerk of any court of record, shall be eligible to a seat in the legislature.”

¹⁵It should be borne in mind that the mechanics of filling the office at issue in *Carter* were significantly different than the method of filling a Supreme Court vacancy in West Virginia. In

The *Carter* court disagreed with the interpretation favored by the future Chief Justice of the United States, on the basis that: (1) resort to “contemporaneous interpretation,” suggested a contrary meaning, *id.*, 93 P.2d at 143-44, (2) a statement on the “ballot pamphlet” sent to electors who voted for the 1916 constitutional amendment at issue, *id.*, 93 P.2d at 144, (3) California intermediate court decisions interpreting portions of the provision in question; *id.*, (4) and the somewhat obtuse conclusion that, “[s]ome meaning must be ascribed to the excepting clause[.]” *id.* Unlike California, West Virginia does not have any published “contemporaneous interpretation” of the 1872 Constitution. Nor is there any “ballot pamphlet” from which to refer to ascertain the intent of the Framers. And there are no intermediate or other court pronouncements interpreting Art. VI, § 15.¹⁶

Significantly, it also should be noted that the *Carter* court described how the 1916 amendment of the constitutional provision at issue therein changed the wording of that exception *proviso*:

California, only *incumbent* judicial officers could choose to stand for election, *i.e.*, commonly referred to as a “retention” election. If an incumbent chose not to stand for a retention election, or otherwise vacated the office, the only way the office could be filled was by gubernatorial nomination—there were no primaries, and no adversary or partisan general elections. Thus, unlike the situation in West Virginia, *a member of the California Legislature could not stand for election to the California Supreme Court unless he was first appointed to the Court by the Governor*. As stated by the court in *Carter*: “the candidacies for the office have been restricted to persons who occupy the offices or to persons who have theretofore been nominated by the governor.” *Id.*, 14 Cal.2d at 188, 93 P.2d at 145.

¹⁶The only arguably applicable opinion open for exposition is the *Carter* court’s arbitrary conclusion that:

“the reasonable, if not the only logical conclusion is that the exception had the effect of describing the kind or character of the offices thereby removed from the operation of the prohibitory clause and not the method by which the offices were to be filled.”

Id., 93 P.2d at 186. This arbitrary interpretation of California law hardly can be relied upon to discern the West Virginia Framers’ intent seventy years before.

“the language of the exception or proviso was changed from ‘except such office as may be filled by elections by the people’, to ‘provided, that this provision shall not apply to any office filled by election by the people’.”

Although the *Carter* court did not examine why the exception *proviso* therein was amended and changed in 1916, the amendment must have meant something. The likely explanation is that the California Framers-electors wanted to change the meaning of the *proviso* so that the broadening of the disqualification clause’s application would have a concomitant broadening of the positions excepted. If that was indeed the reason, the Framers who amended the California constitution must have understood the pre-1916 language—language much closer to the *proviso* of Art. VI, § 15 at issue herein—as being more restrictive or limited in application than the amended language interpreted by the *Carter* court.

Moreover, an examination of the briefs of both respondents show that they appear to concede, on some level, that unlike the *proviso* at issue in *Carter*, the exception in Art. VI, § 15 is directed at describing the “method” by which the office is filled, not the “character” of the office. For example, both respondents cite with approval to Professor Bastress’ treatise on the *West Virginia Constitution*, and quote with approval the following interpretation:

“The exception, for ‘offices to be filled by election by the people,’ recognizes that **popular election to the office would ensure full public scrutiny and, ultimately, approval.**”

(emphasis added); *quoted with approval* by respondent Underwood in his Response to the *Rist* Petition at 17, n.10; *quoted with approval* by respondent Kiss in his Response to the *Rist* Petition at 4. Petitioners agree with respondents’ citation to Professor Bastress’ analysis—it is indeed the “popular election to the office”, *i.e.*, the method of filling the office and not its ultimate character, that ensures full public scrutiny and approval. Because it is clear that the exception *proviso* to Art. VI,

§ 15 can only achieve the intent of the Framers to provide a “check” on legislative power, by requiring an election, by the people, to fill any office for which the emoluments have been increased or which has been created during the legislator’s term. Because the semantic construction offered by respondents would defeat the Framers’ intent, this Court should not countenance it.

Finally, in the subsequent case of *Miller v. Greiner*, 60 Cal.2d 827, 36 Cal.Rptr. 737, 389 P.2d 129 (1964), the Supreme Court of California distinguished *Carter*. Although the procedure for filling the office at issue in *Greiner* was identical to the procedure in *Carter*, *i.e.*, a retention election, and both individuals were to stand for an unopposed election, the office at issue in *Greiner* was deemed appointive because the city charter at issue (comparable to the state constitution in effect) specifically deemed the office appointive. This is consistent with the Art. VIII, § 7 designation of the vacancy for the unexpired term as a purely appointed position. Therefore, contrary to respondents assertions, California law ultimately supports Petitioners’ argument.¹⁷

3 IN ALABAMA, AN ADVISORY “OPINION OF THE JUSTICES” IS NOT PRECEDENT, AND, THEREFORE, THIS COURT SHOULD NOT RELY UPON IT

In support of their position, respondents also rely heavily upon an “advisory opinion” of the Supreme Court of Alabama. *Opinion of the Justices No. 186*, 279 Ala. 38, 181 So.2d 105 (1965).

¹⁷In his Response to the *Rist* petition, respondent Kiss misapprehends Petitioners’ position concerning Art. VIII, § 7 of the *West Virginia Constitution*. Even if one agrees with respondents that the exception was intended by the Framers to parse between “elective” and “appointive” offices, and not to utilize elections by the people to act as a “check” in place of the otherwise absolute prohibition, Art. VIII, § 7 simply shows that (1) respondent Kiss will be appointed, not elected; and (2) there will be no election for that seat until the term expires; and (3) therefore, there is no guarantee respondent Kiss will (a) choose to stand for election for a new term; (b) be nominated by his party to stand for election by all the people. Therefore, Art. VIII, § 7 conclusively shows respondent Underwood is attempting to **appoint** respondent Kiss to an office where there is no guarantee he will stand for election. The Court should deem, as a matter of logic, that any such office is “appointive.”

Before discussing the merits of that case, it must be observed that in Alabama, “advisory opinions”, such as the one relied upon by respondents, are not precedent. As stated by the Supreme Court of Alabama:

“It is also instructive to note that *advisory opinions are not binding precedents* as are decisions on appeal to this Court.”¹⁸

(emphasis added). *Opinion of the Justices No. 289*, 410 So.2d 388, 392 (1982).

Indeed, the Supreme Court of Alabama candidly, if somewhat bizarrely, has recognized that, because its advisory opinions are not precedent, it could render an advisory opinion to the effect that an act is constitutional, and, when confronted with an adversary proceeding or appeal, declare the very same act unconstitutional:

“it is possible that this Court could render an advisory opinion offering its belief that a bill does not violate the Alabama Constitution but later declare the same act unconstitutional if a case presented on appeal so warranted.”

The point to be taken from the foregoing discussion is that, pursuant to Alabama law, “advisory opinions” of the Supreme Court of Alabama can not be relied upon to accurately state even a proper interpretation of Alabama law. Certainly, such opinions can not be relied upon to accurately discern the true intent of the Framers of the *West Virginia Constitution*.

In West Virginia, citation to non-precedential opinions is disfavored. For example, in *Pugh v. Worker’s Comp. Comm’r*, 188 W.Va. 414, 424 S.E.2d 759 (1982), this Court forbid the citation to unpublished opinions of this Court because such opinions are not precedent:

“henceforth, *unpublished opinions of this Court are of no precedential value and for this reason may not be cited in any court of this state as precedent*”

¹⁸The Alabama Supreme Court’s own interpretation of its advisory opinions stands in stark contrast to Respondent Kiss’ suggestion that the advisory opinion at issue, “provides uniform, clear and compelling precedent[.]” Kiss Response to *Rist* Petition at 6.

or authority, except to support a claim of *res judicata*, collateral estoppel, or law of the case.”

(emphasis added). *Id.* at *Syllabus* Point 3. Because the *Opinion of the Justices* case cited by the respondents is not precedent, employing the logic of *Pugh*, “for this reason may not be cited in any court of this state as precedent or authority.”¹⁹ Similarly, although published, this Court previously has disfavored the citation its *per curium* opinions because they have been deemed to lack precedential weight.

As in Alabama, in West Virginia, both the executive and legislative branches of government may request advisory opinions. However, such opinions are not to be requested from this Court, but from the Attorney General. *W.Va. Code* § 5-3-1.²⁰ Significantly, even the advisory opinions of our own Attorney general are not considered precedential. As stated by this Court in *Syllabus* Point 2 of *Hoover v. Blankenship*, 199 W.Va. 670, 487 S.E.2d 328 (1997):

“Opinions of the attorney general are not precedential or binding upon this Court. *Matter of Vandelinde*, 179 W.Va. 183, 189, 366 S.E.2d 631, 637 (1988).”

See also State v. Wassick, 156 W.Va. 128, 133, 191 S.E.2d 283, 287 (1972); *State v. Conley*, 118 W.Va. 508, 190 S.E. 908 (1937). Considering that advisory opinions rendered in this State are deemed to lack precedential value, and considering that Alabama itself deems its own Supreme

¹⁹ Petitioners do not believe respondents were attempting to mislead the Court, and do not believe they should suffer any sanction. Most likely, respondents were simply unaware that the case they cited lacked precedential value.

²⁰Both respondents have suggested through the media that they were aware of the issue of the disqualification clause prior to respondent Underwood’s announcement of his appointment of respondent Kiss. Curiously, however, although both respondent Underwood, as Governor, and respondent Kiss, as Speaker of the House of Delegates, have the authority to request the opinion of the Attorney General on this issue, neither availed themselves this fundamental service of his office.

Court's advisory opinions to lack precedential value, respondents' reliance upon the Alabama opinion appears tenuous at best.

Petitioners acknowledge advisory opinions issued by the Attorney General of West Virginia sometimes are considered "persuasive", but that such consideration is given only where the Attorney General's advisory opinion is rendered contemporaneously with the passage of the provision in question. As stated by this Court in *Walter v. Ritchie*, 156 W.Va. 98, 191 S.E.2d 275 (1972):

"Although an opinion of the attorney general is not binding upon this Court it is persuasive when it is issued rather contemporaneous with the adoption of the statute in question. See *State ex rel. Battle v. Baltimore and Ohio Railroad Company*, 149 W.Va. 810, 837, 838, 143 S.E.2d 331 (1965)."

(emphasis added). Indisputably, the Alabama advisory opinion relied upon by respondents was not issued contemporaneously with the adoption of the constitutional provision at issue therein. Even if it was precedent in Alabama, which it is not, and somehow relevant to this Court's review of the *West Virginia Constitution*, it could not be deemed even "persuasive" authority pursuant to *Walter, supra*. Therefore, respondents' reliance on the Alabama advisory opinion, an opinion construing Alabama law, and not even entitled to precedential weight in Alabama itself²¹, is highly questionable

²¹In *Opinion of the Justices No. 289, supra*, 410 So.2d at 391-92 (1982), the Supreme Court of Alabama explained some of the reasons why its advisory opinions lacked the weight of precedent:

"as has been pointed out many times, the procedure, as well as the advisability, of rendering advisory opinions is not without difficulty, particularly in view of the fact that the questions are presented outside the normal adversary system wherein pertinent facts from the record of a trial court would be presented, and the issues would be briefed by attorneys and most times orally argued before the Court."

(emphasis added). Indeed, the advisory opinion relied upon by the respondents concerned only questions posed by the Governor, questions wholly removed from the normal adversary system. Moreover, the issues in that case were not briefed by any attorneys, and the case was not orally

and unpersuasive.²²

III PUBLIC POLICY CONCERNS THAT APPLY TO ELIGIBILITY FOR ELECTION DO NOT APPLY TO ELIGIBILITY TO BE APPOINTED TO OFFICE

Both respondents suggest that, if ambiguous²³, the disqualification clause should be construed to allow respondent Underwood to appoint respondent Kiss because, they assert, there is a public

argued before the Court. This may account for that court's cursory approach to the interrogatory presented.

²²A review of the *Opinion of the Justices No. 186, supra*, shows the Supreme Court of Alabama did not resort to traditional rules of constitutional construction in reaching its arbitrary, non-precedential advisory opinion. That court was silent as to the intent of the Alabama Framers in enacting to the exception *provisio* to the emoluments clause at issue therein. Even so, the advisory opinion is somewhat ambiguous in its arbitrary conclusion:

“We think the exception in Section 59 makes the test whether or not the office can be filled by a vote of the people. If it is such an office, the exception in Section 59 permits a member of the legislature to be appointed;”

id., 279 Ala. at 40, 181 So.2d at 108. However, the court goes on to hold, in line with the position of the instant Petitioners, that the deciding factor is whether the people will be permitted to vote *on the occupant of the office*:

“but if the people are not permitted to vote on the occupant of the office, the prohibition in Section 59 applies.”

Id. Contrary to respondents' position, the foregoing suggests that the Alabama court was directing its opinion on the exception *provisio* to apply to the “occupant” of the office, and not to the general character of the office. In the case at bar, pursuant to Art. VIII, § 7, there is no guarantee the people will be “permitted to vote on the occupant of the office”, and in such circumstances the prohibition applies.

²³As stated above, *supra*, Petitioners do not believe the emoluments clause is ambiguous. As the following discussion makes clear, however, even if the Court determines the clause is ambiguous, the public policy concerns relating to eligibility to run for election to an office are not applicable when an individual only seeks appointment to an office.

policy that “favors” “eligibility for public office.”²⁴ Petitioners do not quarrel with the respondents argument insofar as it pertains to an individual’s eligibility to stand for election. But the same public policy considerations simply do not apply to an individual’s eligibility to be *appointed* to office.

A review of all of the cases in the string citations in both respondents’ briefs shows that all but one of the cases cited by them to support their argument concerned the right of an individual to stand for election—and that the public policy they assert has not been applied to appointments: in *State ex rel. Maloney v. McCartney*, 159 W. Va. 513, 223 S.E.2d 607 (1976) this Court addressed whether the governor could stand for election for a third consecutive term; in *State of Nevada Employees Ass’n, Inc. v. Lau*, 110 Nev. 715, 720, 877 P.2d 531, 535 (1994) the Supreme Court of Nevada discussed a governor’s right to stand for reelection; in *Sears v. Bayoud*, 786 S.W.2d 248 (Tex. 1990) the Supreme Court of Texas discussed an individual’s qualifications to stand for election to the Texas Supreme Court, and determined the candidate was ineligible; in *Cannon v. Gardner*, 611 P.2d 1207, 1211 (Utah 1980) the Supreme Court of Utah addressed a candidate’s qualifications to be elected county surveyor; in *Viera v. Slaughter*, 318 So.2d 490, 492 (Fla. Dist. Ct. App. 1975), the District Court of Appeal for Florida addressed whether a mayor was eligible to stand for reelection; in *Scharn v. Ecker*, 88 S.D. 255, 218 N.W.2d 478 (1974) the Supreme Court of South Dakota addressed whether an individual elected to state public utility commission was eligible to stay in office in light of the fact that he was receiving pension from a company regulated by that commission; in *Oliver v. City of Shreveport*, 169 So.2d 1 (La. Ct. App. 1964) the Court of Appeals of Louisiana addressed

²⁴As a general matter, respondents’ position also conflicts sharply with the rule that constitutional provisions delineating “separation of powers,” such as Art. VI, § 15, must be “strictly construed.” *State ex rel. Sahley v. Thompson*, 151 W.Va. 336, 151 S.E.2d 870, 875 (1966). See footnote 1, *supra*.

whether a city could refuse to accept the results of an election for a position on the Municipal Fire and Police Civil Service Board of the City of Shreveport; and in *Gilbert v. Breithaupt*, 60 Nev. 162, 165, 104 P.2d 183, 184 (1940), the Supreme Court of Nevada addressed whether an individual elected to the City Commission of the City of Las Vegas had been a qualified voter for two years prior to his election.²⁵

The lone West Virginia case cited by respondents clearly concerns only eligibility to stand for

²⁵The only case cited by respondents arguably supporting an extension of the public policy concerning eligibility to stand for election to appointments is *Oceanographic Comm. of Washington v. O'Brien*, 74 Wash. 2d 904, 914, 447 P.2d 707, 712 (1968). That case is clearly distinguishable. Therein, the Supreme Court of Washington addressed the contention that Washington's emoluments clause prohibited six (6) legislators from serving on that state's Oceanographic Commission. Washington statutory law mandated that the Speaker of the Washington House of Representatives and the President of the Washington Senate each appoint three (3) members of their respective bodies to the Commission. The court held that the emoluments clause clearly and unambiguously barred the appointments. Nevertheless, although it was not necessary to the decision, the court observed, without elaboration or analysis, that, "a strong public policy exists in favor of eligibility for public office[.]" The Court never addressed whether this proposition actually applies to both eligibility to stand for election and eligibility to be appointed to an office. Significantly, the only case cited by the *O'Brien* court for the foregoing proposition was *State ex rel O'Connell v. Dubuque*, 68 Wash.2d 553, 567, 413 P.2d 972, 981 (1966), wherein the Supreme Court of Washington explained the basis of the public policy concerns in terms of eligibility to stand for election (never mentioning eligibility to appointment to office):

"A strong public policy exists in favor of eligibility for public office, and the constitution, where the language and context allows, should be construed so as to preserve this eligibility. . . . [previous caselaw supports this] strong policy favoring eligibility for public office and **fosters the idea of reserving for the people a greater freedom of choice in elections.**"

(emphasis added). The court went on, "**We favor an interpretation tending to unfetter the process of election as more in keeping with democratic ideals than a construction which inclines to curtail the freedom to stand for office.**" *Id.*, *State ex rel O'Connell v. Dubuque*, 68 Wash.2d at 568, 413 P.2d at 982 (emphasis added). The foregoing makes clear, once again, that the public policy involved concerns the right of an individual to stand for election and the concomitant ability of the public to choose who will fill a public office—a policy that is not present when an individual seeks appointment.

election. In *State ex rel. Maloney v. McCartney*, *supra*, this Court addressed whether Governor Moore could stand for election to a third consecutive term as Governor, and addressed why restrictions on eligibility to stand for election could be deemed unconstitutional:

“This Court agrees that *any restriction upon eligibility for office which exists for the purpose of limiting the franchise* of any substantial group of citizens is inherently unconstitutional. However, we also recognize a distinction between incidental *limitations on the franchise* attendant upon the accomplishment of a valid public purpose and limitations which have no effect other than simple restrictions of the franchise. Incidental *limitations on the franchise* are those which restrict its exercise only with regard to office seekers who fail to meet objective qualifications, established on a rational basis, in a valid attempt to insure wisdom, dignity, responsiveness, and competence in public officials. Examples of this type of limitation include requirements that candidates be of a certain age, not be under conviction for a felony, or be members of the bar.”

Id., 159 W.Va. at 517, 223 S.E.2d at 611 (emphasis added). Lest there be any doubt that this Court was addressing nothing more than the “franchise”, or election rights, the *Maloney* Court acknowledged therein that, “[t]he cases cited by the Governor in support of his position all involve restrictions on the franchise[.]” *Id.*, 159 W.Va. 518, 223 S.E.2d at 612.

Again, Petitioners have no quarrel with the proposition that public policy mandates statutes be construed favorably to allow individuals to stand for election. As this Court has stated many times, “the right to become a candidate for public office is a fundamental right, and that any restriction on the exercise of this right must serve a compelling state interest.” *White v. Manchin*, 173 W.Va. 526, 543, 318 S.E.2d 470, 488 (1984); see also *Marra v. Zink*, 163 W.Va. 400, 404, 256 S.E.2d 581, 584 (1979); syl. pt. 1, *State ex rel. Piccirillo v. City of Follansbee*, 160 W.Va. 329, 233 S.E.2d 419 (1977); *State ex rel. Maloney v. McCartney*, 159 W.Va. 513, 517, 223 S.E.2d 607, 611 (1976). The right to stand for election is favored, requiring a compelling state interest to restrict it.

No similar “fundamental right” attaches to appointments to public office, and no similar public policy concerns are evident when an individual seeks an appointment. Therefore, the public policy concerns extant when individuals seek to stand for election should not be extended to individuals who seek to fill an office by appointment.

Indeed, the fundamental right to stand for election goes hand-in-glove with the Art. VI, § 15 exception *proviso* at issue herein. It appears the Framers’ valued the voice of the people as expressed through the election process so much that they excepted from the applicability of the otherwise absolute disqualification clause the filling of an office by election by the people. The purpose of the exception *proviso* and of the rule of construction allowing ambiguities to be construed favoring eligibility both are derived from the same seed—that the ability of the electorate to vote will cure any perceived impropriety because the people, through their vote, are the ultimate arbiter and paramount judge, and their vote is entitled to great deference. Because no such public policy considerations flow to appointments, they are not entitled to the same public policy considerations.

IV THE CONSTITUTIONAL IMPROPRIETY OF RESPONDENT UNDERWOOD’S APPOINTMENT IS ONLY RIPE FOR DECISION IF RESPONDENT KISS ACCEPTS THE APPOINTMENT BY TAKING THE OATH AND RESIGNS FROM THE LEGISLATURE

In the initial petition filed, the instant petitioners asked the Court to consider whether the serious constitutional issue raised is ripe for decision. Although this Court issued a rule to show cause in these consolidated cases, the orders did not indicate whether the ripeness issue had been resolved. The petitioners respectfully submit that the opinion issued by the Court should address the ripeness issue specifically so that other voters, citizens, and taxpayers who may choose to challenge a gubernatorial appointment in the future will know when such a challenge can be filed.

This Court does not issue advisory opinions:

“As we frequently have said before, this Court cannot issue an advisory opinion with respect to a hypothetical controversy.

‘Courts are not constituted for the purpose of making advisory decrees or resolving academic disputes. The pleadings and evidence must present a claim of legal right asserted by one party and denied by the other before jurisdiction of a suit may be taken.’ *Mainella v. Board of Trustees of Policemen's Pension or Relief Fund of City of Fairmont*, 126 W. Va. 183, 185-86, 27 S.E.2d 486, 487-88 (1943).”

State ex rel. ACF Industries, Inc. v. Vieweg, ___ W.Va. ___, n.13, ___ S.E.2d ___, n.13(1999).

Indeed, even when the Legislature directs the Court to answer a question presented by a “test case”, this Court has held recently that such directions are disfavored:

“First, we face a procedural question: how should this Court respond to a ‘friendly lawsuit’ or ‘test case’ that essentially seeks an advisory opinion by this Court, and that is brought as a result of a statutory directive that such a case be brought?

To this first question, our answer (in summary) is that we will respond cautiously and with an explicit caveat that *in the future such statutory directives are legally questionable and disfavored.*”

State ex rel. West Virginia Deputy Sheriff's Ass'n, Inc. v. Sims, ___ W.Va. ___, ___ S.E.2d ___ (1998) (emphasis added).²⁶

²⁶ It is well-established in West Virginia that this Court is not a body that gives advisory legal opinions: “Courts are not constituted for the purpose of making advisory decrees or resolving academic disputes.” *Syllabus Point 2*, in part, *Harshbarger v. Gainer*, 184 W.Va. 656, 403 S.E.2d 399 (1991).

Nevertheless, Petitioners are constrained to acknowledge that this general principle of not issuing advisory opinions is subject to limited exceptions, as was recognized in *Alsop v. McCartney*, 159 W.Va. 829, 834-35, 228 S.E.2d 278, 281 (1979):

“Experience dictates that there are occasions on which courts must undertake something in the nature of advisory opinions. We have done this in cases involving elections because of the expense attendant upon

It stands to reason that if the filing of a lawsuit directed by the Legislature, essentially seeking advisory opinion, are legally questionable and disfavored, that such a lawsuit brought by individuals may not be ripe until a true controversy is presented. The initial question for this Court is whether its participation in the instant matters is premature, given that respondent Kiss is still a member of the Legislature, and that he has not formally accepted the position by taking the oath of office of Justice of the Supreme Court of Appeals.

This Court has long held that courts only have jurisdiction over cases or controversies that have adversarial character. In *Harshbarger v. Gainer*, 184 W. Va. 656, 659, 403 S.E.2d 399, 402 (1991), this Court held, "The actual dispute or controversy rule applies to all West Virginia judicial proceedings." See also *Mainella v. Bd. of Trustees of Policemen's Pension or Relief Fund*, 126 W. Va. 183, 185-186, 27 S.E.2d 486, 487-488 (1943)("The pleadings and evidence must present a claim

campaigns and the deleterious effect on representative government which uncertainty in elections causes. *State ex rel. Maloney v. McCartney*, 159 W.Va. 513, 223 S.E.2d 607 (1976). Similarly we have rendered essentially advisory opinions when it was necessary to permit bond counsel to authorize the marketing of bonds for public authorities. *State ex rel. City of Charleston v. Coghil*, 156 W.Va. 87, 207 S.E.2d 113 (1973).

Importantly, the rationale for assuming jurisdiction over essentially advisory disputes is limited to cases where either "the investment of enormous amounts of human effort" or "the investment of vast sums of money" may cause the Court to intervene to establish the legality of whatever act or action is being contemplated:

"The need for certainty before the investment of enormous amounts of human effort and before the investment of vast sums of money has led us to an ad hoc reappraisal of the common law requirement of a true adversary 'case or controversy' as a condition precedent to court review."

Id. The instant Petitioners believe it is highly questionable whether a failure to assume jurisdiction over this issue, at this point in time, necessarily will result in either "the investment of enormous amounts of human effort" or "the investment of vast sums of money".

of legal right asserted by one party and denied by the other before jurisdiction of a suit may be taken."). Stated another way, the case must present an "actual and existing controversy of such a character as to be justiciable ." *Arthur v. County Court of Cabell County*, 153 W. Va. 60, 61, 167 S.E.2d 558, 559 (1969). *See also Farley v. Graney*, 146 W. Va. 22, 119 S.E.2d 833 (1960).

Respondent Underwood seeks to avoid the ripeness issue by relying on cases where the eligibility of a candidate for elective office was challenged prior to the election. The petitioners agree with the cases relied upon by respondent Underwood, but fail to see how they apply to a gubernatorially appointed position. As a matter of public policy, it makes sense for courts to address the eligibility of a candidate for an elective office because elections require that ballots be printed well in advance of the election. If courts were unable to determine candidate eligibility early in the process, an entire election may be rendered meaningless if ineligible candidates are permitted to remain on the ballot. Therefore, for reasons of efficiency and for the preservation of our democratic ideals, such candidate challenges need to be heard by the courts prior to any election.

These considerations are not present here where a Governor appoints a person to fill a vacancy in public office. In these circumstances, there are no ballots to print and there is no election scheduled that requires an early resolution of the candidate's eligibility. In the present case, respondent Kiss either is qualified or disqualified under the *West Virginia Constitution*. If he is disqualified, the solution is simply for respondent Underwood to appoint a qualified person to fill the vacancy.

In applying these general principles to the present case, the petitioners respectfully submit that this case presents an actual case or controversy that is ripe for decision **only if** this Court concludes that respondent Kiss has accepted the appointment by taking the oath, and that respondent Kiss has

resigned his position in the Legislature. To understand why this result is mandated by the facts, a review of the history of this appointment will be helpful.

On or about September 9, 1999, respondent Underwood announced publicly that he had decided to appoint respondent Kiss to fill Justice Workman's unexpired term. Clearly, no justiciable issue existed at that time because respondent Underwood had not taken any official action to carry out the appointment. Therefore, there was no factual basis for a justiciable controversy.

On September 22, 1999, while respondent Underwood was on a trade mission in Germany, he issued a letter to Secretary of State Ken Hechler appointing respondent Kiss to this Court, with the appointment effective "from 12:00 a.m., September 23, 1999." Similar appointment letters were issued by respondent Underwood on October 1 and 8, 1999. Even though by September 22, 1999, respondent Underwood had taken official action, no justiciable issue existed at that time because respondent Kiss could have rejected the offer made by the Governor or respondent Underwood could have withdrawn the appointment and appointed another person who was not constitutionally disqualified. Fundamentally, an appointment is not completed until the person so appointed officially accepts the position.

West Virginia law defines how a person appointed to fill a vacancy demonstrates his acceptance of the position. As noted by respondent Underwood brief in response to the *Rist* petition, under W.Va.Code §6-1-5, a person appointed or elected to fill a vacancy must file his oath of office "within ten days from the date of the election or appointment, and in any event before entering into or discharging any of the duties of the office." Clearly, this statute is designed to ensure that there is a smooth transition in public offices when officials are appointed or elected to fill vacancies. Therefore, respondent Kiss could have eliminated any confusion over whether or not he accepted the

appointment by taking the oath no later than October 4, 1999.

To date, respondent Kiss has never taken the oath to become a member of this Court. Although he was scheduled to take the oath prior to the filing of any petitions in this Court, that ceremony was canceled at the last moment and never rescheduled. Prior to taking the oath to become a member of this Court, respondent Kiss also would be required to resign from the Legislature, under Art. VIII, §7 of the *West Virginia Constitution*. To date, respondent Kiss has not resigned officially from the Legislature.

The fact that respondent Kiss had scheduled an oath-taking ceremony is an indication that he accepted the appointment. However, respondent Kiss's refusal to take the oath within the time period prescribed by W.Va.Code §6-1-5, could be interpreted as a rejection of the appointment. The fact that respondent Kiss has failed to resign from the Legislature is another indication that he has rejected the appointment. Thus, at the time this Court issued the rule to show cause in these consolidated cases, respondent Kiss had failed to take the oath within ten days of the appointment and had failed to resign from the Legislature.

At this time, respondent Underwood is free to appoint a constitutionally qualified person or he may continue issuing letters reappointing respondent Kiss. Respondent Kiss is free to take the oath or he may choose, once again, to let these multiple letters of appointment expire. In light of the fluidity of these facts and the Court's policy of avoiding constitutional issues where the facts are not ripe for decision, the petitioners respectfully submit that during oral argument, respondents should be required to stipulate to the following:

1. No later than October 21, 1999, respondent Kiss will accept the appointment to fill the unexpired term of Justice Workman; and

2. No later than October 21, 1999, respondent Kiss will resign his position in the Legislature, and will take the oath required of Justices of this Court.

Without these critical factual stipulations, the Court will be deciding a constitutional issue never before addressed by this Court in a case where the appointed person has not accepted the position formally, and the matter could be mooted by respondent Underwood appointing a constitutionally qualified person. If this case is allowed to proceed in its present form, without these factual stipulations, then respondents Underwood and Kiss will have achieved their goal of obtaining an advisory opinion from this Court.

V CONCLUSION

Based upon the foregoing, Petitioners request this Court, after resolving the ripeness issue, to grant the Petition for Writ of Mandamus and to order respondent Underwood to appoint to the Supreme Court of Appeals an individual who was not a member of the State Legislature in 1999, and who is therefore not barred from filling the office vacated by Justice Workman, and who meets all other constitutional and statutory qualifications and requirements.

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