

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. _____

**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.

PETITION FOR WRIT OF MANDAMUS

I.

*TO THE HONORABLE JUSTICES OF THE
WEST VIRGINIA SUPREME COURT OF APPEALS:*

Petitioners hereby respectfully petition this Court issue a rule to show cause¹ against

¹An important preliminary matter should be resolved prior to addressing the constitutional disqualification of Respondent Kiss. On September 22, 1999, a “friendly” petition for writ of mandamus was filed with this Court by a lawyer named John Rist. From the public accounts in the media, although Mr. Rist has challenged the qualifications of Respondent Kiss, he has made it clear that he believes Respondent Kiss should not be disqualified. This Court has held that such “friendly” actions will be viewed with caution and will require the friendly petitioner to pursue the case with greater than average diligence and in the utmost good faith. *Alsop v. McCartney*, 159 W. Va. 829, 834-35, 228 S.E.2d 278, 281 (1979). Thus, before issuing a rule to show cause in connection with the *Rist* petition, the Court will need to decide whether it is appropriate, in light of this Court’s precedents demonstrating a reluctance to grant nonadversarial petitions, to issue a rule to show

cause based upon the *Rist* petition. Petitioners are willing to take discovery of the Respondents and Mr. Rist to determine whether that lawsuit was filed collusively if the Court so desires.

More importantly, Respondent Kiss neither has resigned formally from the House of Delegates nor accepted formally the appointment to this Court. By taking neither action, Respondent Kiss, through the *Rist* petition, seeks to obtain an advisory opinion from this Court prior to deciding whether or not to accept Respondent Underwood's appointment to this Court. Thus, prior to issuing a rule to show cause in connection with the *Rist* petition or this case, the Court must decide whether a ripe justiciable controversy has been presented or whether Respondent Kiss merely is seeking an advisory opinion from this Court. Historically, this Court has refused to give advisory legal opinions. *Syllabus* Point 2 of *Harshbarger v. Gainer*, 184 W. Va. 656, 403 S.E.2d 399 (1991). *But cf.*, *State ex rel. Maloney v. McCartney*, 159 W.Va. 513, 223 S.E.2d 607 (1976) (election case).

The Court should note that in the cases cited where a challenge has been made to the appointment of a person, who was disqualified under that state's emoluments clause, the appointed person either had resigned his former position or had accepted the appointment in some formal way, such as the approval of a legislative body. *See, e.g.*, *Vreeland v. Byrne*, 72 N.J. 292, 370 A.2d 825 (1977)(State senator appointed to New Jersey Supreme Court had his nomination approved by the Senate at the time of the constitutional challenge); *Warwick v. State ex rel. Chance*, 548 P.2d 384, 387-88 (Alaska, 1976)(Legislator had resigned and had been appointed to Commissioner of Administration at the time of the constitutional challenge); *State ex rel. Fraser v. Gay*, 158 Fla. 465, 28 So.2d 901 (1947)(State senator resigned his position and was elected as Comptroller at the time of the constitutional challenge); *State ex rel. Hawthorne v. Marshall*, 158 Fla. 267, 28 So.2d 589 (1946)(A member of the house of representatives had resigned that office and had been appointed as a judge at the time of the constitutional challenge); *Anderson v. Chapman*, 86 Wash.2d 189, 543 P.2d 229 (1975)(Two legislators had resigned their positions and filed to run for secretary of state at the time of the constitutional challenge).

The failure of Respondent Kiss to resign from the House of Delegates is no mere technicality. Article VI, Section 13 of the *West Virginia Constitution* provides that no person "holding any other lucrative office" is eligible to a seat in the Legislature. Article VIII, Section 7 of the *West Virginia Constitution* prohibits justices, judges, and magistrates from either accepting an appointment or even filing to become a candidate for any elective office other than a judicial office. If a judge accepts an appointment or files for nomination for an elective nonjudicial office, this constitutional provisions mandates such a violation "shall vacate his judicial office." *See also* Art. V, § 1.

In light of these mandatory constitutional provisions, Petitioners respectfully submit that the question of whether Respondent Kiss is constitutionally disqualified from serving on this Court cannot be addressed until after Respondent Kiss clarifies this critical fact. If Respondent Kiss insists he is still a member of the House of Delegates, then not only is he disqualified from this Court pursuant to Art. VI, § 15, but he also is ineligible under Art. VIII, § 7 and Art. V, § 1. By not resigning from the House of Delegates, Respondent Kiss necessarily has not accepted the appointment to this Court, meaning that the issue presented is not ripe for adjudication. However, if Respondent Kiss notifies this Court that he has resigned formally from the House of Delegates, or if this Court concludes the appointment letter dated September 22, 1999 effected a *de facto* resignation, then the issue presented in this case is ripe for decision.

Respondents Cecil H. Underwood, Governor of the State of West Virginia, and Robert S. Kiss,² the person announced by Governor Underwood as his appointee to fill the unexpired term of Justice Margaret Workman. This **PETITION** asks each Respondent to show cause why a writ of mandamus should not be granted against them, based upon the fact that Respondent Kiss is constitutionally disqualified from serving as a Justice on this Court, as mandated by Article VI, §15 of the *West Virginia Constitution*. Petitioners seek the issuance of a writ acknowledging that Art. VI, §15 disqualifies Respondent Kiss from serving on this Court and mandating that Respondent Underwood appoint a constitutionally qualified person to fill the unexpired term of Justice Workman. Petitioners expect that Respondent Kiss will attempt to take the oath of office in the very near future.

II.

STATEMENT OF FACTS

The facts are undisputed. During the 1999 session of the Legislature, Respondent Kiss served as a member of the House of Delegates. At the time this **PETITION** was filed, Respondent Kiss had not resigned from that position. The two-year term presently being served by Respondent Kiss as a member of the House of Delegates will expire some time in December, 2000.

For purposes of this **PETITION**, the act creating the constitutional disqualification of Respondent Kiss from serving on this Court was the salary increase the Legislature mandated to be given to the Justices of this Court. Specifically, in this past session, the Legislature amended W.Va.Code §51-1-10a, which increased the salary of the Justices of this Court from \$85,000 to

²Robert S. Kiss is named as a Respondent not because he has to carry out any nondiscretionary constitutional duties, but rather, he is included because, as the person appointed by Respondent Underwood to fill Justice Workman's unexpired term, he is a real party in interest.

\$95,000, effective July 1, 1999.

Effective August 31, 1999, the Honorable Margaret Workman resigned as a Justice of this Court. Justice Workman's resignation created a vacancy on this Court that may be filled only by gubernatorial appointment. Justice Workman's unexpired term ends in December, 2000. Pursuant to Article VIII, Section 7 of the *West Virginia Constitution*, Respondent Underwood, the Governor, had a duty to "fill such vacancy by appointment for the unexpired term." On September 9, 1999, Respondent Underwood announced his decision to appoint Respondent Kiss to fill Justice Workman's unexpired term. On September 22, 1999, Respondent Underwood notified the Secretary of State that the appointment would be effective and Respondent Kiss would begin to serve at 12:00 a.m. on September 23, 1999.

Respondent Kiss was scheduled to be sworn in as a Justice of this Court on September 20, 1999. After the issues raised in this **PETITION** were stated publically, Respondent Kiss canceled his previously scheduled oath-taking ceremony. A "friendly" Petition for Writ of Mandamus was filed by John F. Rist, III on September 23, 1999 (No. 99-2497). Although this Court has not issued a rule to show cause in the *Rist* case, the respondents nevertheless filed a response to the "friendly" Petition on September 27, 1999.³ The instant Petitioners are not associated with Mr. Rist.

³Although styled as the response of Respondent Underwood only, the cover page contains the name of counsel for Respondent Kiss and Respondent Rist as well. The response to the "friendly" *Rist* Petition mentions several of the instant Petitioners, suggesting Petitioners are "a few malcontents," and "petty partisans" who are engaged in an "effort to subvert the West Virginia Constitution and the will of the people." Brief at 2, 20. The response also inexplicably alleges the instant Petitioners were somehow holding the constitutional process "hostage." Brief at 2. These *ad hominem* attacks notwithstanding (one would expect the Governor to, at the very least, wait to see Petitioners' arguments before engaging in such hyperbole), Petitioners are a truly bipartisan mix of citizen taxpayers, respected lawyers and community leaders who have a very diverse range of political perspectives; they have joined together not to subvert the *West Virginia Constitution*, but to protect it. Hyperbolic accusations of constitutional subversion are especially unwarranted. In its

III.

STANDARD OF REVIEW

This Court's standard of review in awarding relief through the extraordinary writ of mandamus or prohibition is *de novo*. Syllabus Point 1, *Staten v. Dean*, 195 W.Va. 57, 464 S.E.2d 576 (1995); Syllabus Point 1, *O'Daniels v. City of Charleston*, 200 W.Va. 711, 490 S.E.2d 800 (1997).

IV.

ARGUMENT

A.

MANDAMUS

The general standard applied by this Court in determining whether to issue a writ of mandamus is summarized in Syllabus Point 2 of *Staten*:

“A writ of mandamus will not issue unless three elements coexist--(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.’ Syllabus Point 1, *State ex rel. Billy Ray C. v. Skaff*, 190 W.Va. 504, 438 S.E.2d 847 (1993); Syllabus Point 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969).”

If the Court is satisfied that the concerns expressed in footnote 1, *supra*, are no bar to mandamus, the instant Petitioners are entitled to a rule to show cause.

experience, the Court can take note that *ad hominem* attacks often are made as a last resort when legal or factual arguments are exceedingly weak.

B.

**RESPONDENT KISS IS CONSTITUTIONALLY
DISQUALIFIED FROM SERVING AS AN APPOINTED JUSTICE
ON THIS COURT, UNDER ARTICLE VI, SECTION 15 OF THE
WEST VIRGINIA CONSTITUTION**

1.

*THE CONSTITUTIONAL DISQUALIFICATION OF RESPONDENT
KISS UNDER THESE FACTS CANNOT BE DISPUTED*

Subject to one narrow exception, no State senator or State delegate may be appointed to any civil office for which the salary or benefits have been increased during the term for which the legislator was elected. The *West Virginia Constitution* provides, in pertinent part:

§ 15. Senators and Delegates Not to Hold Civil Office for Profit

No senator or delegate, during the term for which he shall have been elected, shall be elected or appointed to any civil office of profit under this State, which has been created, or the emoluments of which have been increased during such term, except offices to be filled by election by the people.

West Virginia Constitution Art. VI, § 15.

Most other states, as well as the federal government, have similar constitutional provisions. In a thorough discussion of the rationale for such constitutional provisions, the Supreme Court of Alaska stated the following:

“There is little disagreement as to the purpose of the type of constitutional provision under consideration here. [*Alaska Constitution* Art. II, § 5].⁴

⁴Article 2, § 5 of the *Alaska Constitution* states:

“During the term for which elected and for one year thereafter, no legislator may be nominated, elected, or appointed to any other office or position of profit which has been created, or the salary or emoluments of which have been increased, while he was a member.”

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. In one often-cited quotation, Justice Story, commenting upon a like provision in the Constitution of the United States, said: 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 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.”

Warwick v. State ex rel. Chance, 548 P.2d 384, 387-88 (Alaska, 1976) (footnotes omitted).

The *Warwick* court also stated that the purpose of the constitutional disqualification provision is to prevent all legislators voting to increase emoluments for state offices from being influenced by either conscious or unconscious selfish motives. *Id.*, 548 P.2d at 391, holding that

“[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.”

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

impropriety.” *Id.*

In the instant case, the 1999 West Virginia Legislature enacted legislation raising the salaries for the office of Justice of this Court. *W.Va. Code* § 51-1-10a. Respondent Kiss was elected to the House of Delegates in 1998, and his term in office does not expire until the year 2000. Respondent Kiss was a member and Speaker of the House of Delegates when the salary increase was enacted. Respondent Underwood’s desired appointment of Respondent Kiss to that office constitutes an appointment to a “civil office of profit under this State . . . the emoluments of which have been increased during [Respondent Kiss’s] term” in the Legislature. Thus, Respondent Kiss is constitutionally disqualified from being appointed to the office, and the purported appointment is barred by Art. VI, § 15 of the *West Virginia Constitution*.

Although this Court has never had occasion to pass upon the construction of Art. VI, § 15,⁵ the interpretations of other state appeals courts is consistent with the foregoing analysis.⁶ For

⁵In *Campbell v. Kelly*, 157 W.Va. 453, 202 S.E.2d 369 (1974), this Court examined the last sentence in Art. V, §15, prohibiting legislators from having an interest in any contract with the State or county thereof.

⁶Many other courts have disqualified state legislators from appointment, and even election, to government office under similar provisions. See *Kederick v. Heintzleman*, 132 F.Supp. 582, 15 Alaska 582 (1955); *State v. Erickson*, 180 Minn. 246, 230 N.W. 637 (1930); *Miller v. Holm*, 217 Minn. 166, 14 N.W.2d 99 (1944); *Hall v. Baum*, 452 S.W.2d 699 (Tex. 1970); *Anderson v. Chapman*, 86 Wash.2d 189, 543 P.2d 229 (1975); *Opinion of the Justices*, 244 Ala. 386, 13 So.2d 674 (1943); *Montgomery v. State*, 107 Ala. 372, 18 So. 157 (1895); *State v. Porter*, 1 Ala. 688; *Taylor v. Commonwealth*, 305 Ky. 75, 202 S.W.2d 992 (1947); *Kimble v. Bender*, 173 Md. 608, 196 A. 409 (1938); *Opinion of the Justices*, 348 Mass. 803, 202 N.E.2d 234 (1964); *In re Opinion of the Justices*, 303 Mass. 615, 21 N.E.2d 551 (1939); *Fyfe v. Mosher*, 149 Mich. 349, 112 N.W. 725 (1907); *State v. Sutton*, 63 Minn. 147, 65 N.W. 262 (1895); *Shelby v. Alcorn*, 36 Miss. 273, 72 Am.Dec. 169 (1858); *Baskin v. State*, 107 Okla. 272, 232 P.388 (1925); *Fair v. State Election Bd. of Oklahoma*, 879 P.2d 1223 (Ok. 1994); *Gibson v. Kay*, 68 Or. 589, 137 P. 864 (1914); *Palmer v. State*, 11 S.D. 78, 75 N.W. 818 (1898); *Romney v. Barlow*, 24 Utah2d. 226, 469 P.2d 497 (1970); *State v. Grover*, 102 Utah 41, 125 P.2d 807 (1942); *State v. Clausen*, 107 Wash. 667, 182 P. 610 (1919); *Oceanographic Commission v. O'Brien*, 74 Wash2d. 904, 447 P.2d 707 (1968).

example, in *Vreeland v. Byrne*, 72 N.J. 292, 370 A.2d 825 (1977), the Supreme Court of New Jersey prohibited a member of the New Jersey legislature from taking the office of Associate Justice of the New Jersey Supreme Court, during the legislator’s same term in office where the emoluments of that office had been increased. New Jersey has a constitutional provision similar to Art. VI, § 15 of the *West Virginia Constitution*, namely *N.J.Const.* Art. IV, § 5, 1.⁷ The *Vreeland* court also addressed whether a legislator could skirt the constitutional disqualification by not accepting the pay increase. Despite the pay raise increase, the New Jersey Legislature attempted to carve out an exception to the constitutional prohibition by passing legislation stating that the pay increase for the Associate Justice position would not apply to any member of the Legislature who was appointed to the position. Nevertheless, the New Jersey Supreme Court invalidated the appointment of the legislator as violative of the constitutional disqualification provision. *Id.*⁸

⁷Art. IV, § 5, 1 of the *N.J.Const.* states:

“No member of the Senate of General Assembly, during the term for which he shall have been elected, shall be nominated, elected or appointed to any State civil office or position, of profit, which shall have been created by law, or the emoluments whereof shall have been increased by law, during such term. The provisions of this paragraph shall not prohibit the election of any person as Governor or as a member of the Senate or General Assembly.”

⁸The *Vreeland* court held that the legislature’s attempt to skirt the constitutional disqualification provision was unconstitutional “special legislation.” *Id.*, 72 N.J. at 297, 370 A.2d at 827. Justice Mountain also discussed the fact that all other state courts addressing whether such an exception may be read into the disqualification provision have agreed that the legislator-appointee was barred from taking office:

“There appear to be only three out-of-state cases in which the issue of eligibility has been raised under circumstances substantially similar to those before us. In each case a statute providing for a salary increase stipulated that it should not apply to a legislator-appointee during the balance of the legislative term. That is, of course, the same situation we have here. In each case the court found the appointment to be in violation of the state

Similarly, in *State ex rel. Fraser v. Gay*, 158 Fla. 465, 28 So.2d 901 (1947), the Florida Supreme Court held that a Florida state legislator, during whose term of office the Florida Legislature raised the salary for the office of State comptroller, could not be appointed to that office even if he remitted the portion of salary raised. The *Fraser* court held

“certainly it cannot avoid the constitutional prohibition by remitting the raise in salary for the period of this election to the legislature.”⁹

Id., 158 Fla. at 470, 28 So.2d at 903. The *Fraser* court held that, to hold otherwise, would allow the Constitution to be “circumvented and its practical purpose nullified.” *Id.* In the case at bar, Respondent Kiss has not been provided a special exemption by the West Virginia Legislature (and even had such an exemption been provided, such exemption would be invalid under the *Vreeland/Fraser* analysis), rather, he has merely stated publically that he will either refuse the portion of his Supreme Court salary that was raised by the Legislature, or he will give it away.¹⁰ The State

constitution. *Anderson v. Chapman*, 86 Wash.2d 184, 543 P.2d 229 (1975); *State ex rel Fraser v. Gay*, 158 Fla. 465, 28 So.2d 901 (1947); *State ex rel. Hawthorne v. Wiseheart*, 158 Fla. 267, 28 So.2d 589 (1946).”

Vreeland, supra, 72 N.J. at 307, 370 A.2d at 833 (Mountain, J.).

⁹The constitutional disqualification provision addressed in *Fraser, supra*, was Section 5, Article III of the *Florida Constitution*, which states:

“No Senator or member of the House of Representatives shall during the time for which he was elected, be appointed, or elected to any civil office under the Constitution of this State that has been created, or the emoluments, whereof shall have been increased during such time.”

¹⁰In his response to the *Rist* Petition, Respondent Underwood suggests that if the Court concludes Respondent Kiss is disqualified, a potential option open to him would be to request the Legislature roll back the judicial pay raise, thereby reducing the salary of all Supreme Court Justices. Brief at 17, n.11. This appears to be a forthright threat to the Justices who will called to pass upon the issues raised in this case. It also should be noted that Respondent Underwood’s proffered option

Constitution does not provide such an exception to the clear prohibition of his appointment, and his public renouncement of the salary increase cannot shield him from its application.¹¹

2.

A VACANCY OF THE OFFICE OF JUSTICE OF THE SUPREME COURT OF APPEALS, WITH LESS THAN TWO YEARS REMAINING TO AN UNEXPIRED TERM, IS AN APPOINTED OFFICE UNDER ART. VIII, § 7 OF THE WEST VIRGINIA CONSTITUTION

Under Article VIII, § 7 of the *West Virginia Constitution*, the unexpired term of a Justice on

presumably would require Respondent Kiss to lead the House in rolling back the pay raise, so that he could then ascend to the judiciary. This is the type of conduct the disqualification clause was designed to prevent.

¹¹To allow an exception to the constitutional disqualification found in Art. VI, § 15 for a legislator-appointee who claims to renounce the pay increase, one would have to create an exception where none exists. Such an interpretation is prohibited, however, because the provision is plain and unambiguous and therefore not a proper subject for judicial interpretation. As stated in *State ex rel. Brotherton v. Blankenship*, 157 W.Va. 100, 207 S.E.2d 421, 427 (W.Va. 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.”

Because the disqualification provision is plain and unambiguous, an interpretation that grafts an exception onto the plain language of the provision is unwarranted. Other courts assessing almost identical language have held such provisions to be plain and unambiguous. For example, assessing the almost identical language in the New Jersey disqualification provision, the *Vreeland* court held that the provision was “not . . . in any sense ambiguous” and was “devoid of any trace of uncertainty.” *Id.*, 72 N.J. at 302, 370 A.2d at 830. *See also Fraser, supra*, 158 Fla. at 468, 28 So.2d at 902 (“The terms of Section 5, Article III are so clear and direct that they defy misinterpretation. . . . To offer an interpretation other than their clear meaning imports would be a distortion of the English sentence.”)

this Court is an *appointed* office, not an office “filled by election by the people[.]” as that provision is stated in Art. VI, § 15. This is clear because Article VIII, § 7 distinguishes between Supreme Court vacancies filled by election, and unexpired terms filled only by appointment:

If from any cause a vacancy shall occur in the office of a justice of the supreme court of appeals or a judge of a circuit court, the governor shall issue a directive of election to fill such vacancy in the manner prescribed by law for electing a justice or judge of the court in which the vacancy exists, and the justice or judge shall be elected for the unexpired term; and in the meantime, the governor shall fill such vacancy by appointment until a justice or judge shall be elected and qualified. *If the unexpired term be less than two years, or such additional period, not exceeding a total of three years, as may be prescribed by law, **the governor shall fill such vacancy by appointment for the unexpired term.***

West Virginia Constitution, Art. VIII, § 7. (emphasis added).

As the above portions of Art. VIII, § 7 highlighted in bold show, when there is a vacancy in an unexpired term of a Justice of this Court, the unexpired term being less than two years, “the office of a justice of the supreme court of appeals” is not an elected office filled by the people. Rather, as stated in the last sentence of Art. VIII, § 7, it is an office that may be filled only by appointment by the Governor:

“the governor *shall* fill such vacancy **by appointment** for the unexpired term.”

*Id.*¹² (emphasis added). Therefore, when a Justice vacates his/her office, leaving an unexpired term

¹²“The word ‘shall’ in the absence of language in the statute showing a contrary intent on the part of the legislature, should be afforded a mandatory connotation.” Syl. pt. 2, *Terry v. Sencindiver*, 153 W.Va. 651, 171 S.E.2d 480 (1969); see also *United Mine Workers of America v. Scott*, 315 S.E.2d 614, 621 (W.Va.1984), and cases cited therein; *In re Mann*, 151 W.Va. 644, 652, 154 S.E.2d 860, 864 (1967); *State ex rel. Staley v. County Court*, 137 W.Va. 431, 440, 73 S.E.2d 827, 832 (1953); *State ex rel. Boone County Coal Corp. v. Davis*, 133 W.Va. 540, 549, 56 S.E.2d 907, 913 (1950); Syl. pt. 8, *Baer v. Gore*, 79 W.Va. 50, 90 S.E. 530 (1916).

of less than two years, that office cannot be filled “by election by the people”, and the exception in Art. VI, § 15 does not apply.¹³

¹³Petitioners have found only one other state court addressing the disqualification of a legislator under an emoluments clause that is similar, but not identical, to Art. VI, §15 (the Alabama provision bars legislators only from appointment, not appointment and election like Art. VI, § 15). In *Opinion of the Justices*, 279 Ala. 38, 181 So.2d 105 (1965), the Alabama Supreme Court issued an advisory opinion (there were no parties, only questions propounded by the Governor) suggesting the Alabama Constitution allowed a state legislator to take an office he had voted to create. Nonetheless, the Court also held that where the people did not have the ability to vote on the appointment of that person to office, the legislator-appointee was disqualified: “[I]f the people are not permitted to vote on the occupant of the office, the prohibition in Section 59 applies.” *Id.*, 279 Ala. at 40, 181 So.2d at 108 (emphasis added). The Alabama court thus recognized the electorate’s ability to vote on the appointee is the paramount concern. Thus, this holding is consistent with the argument presented by Petitioners in this case because the public will never be given any opportunity to elect a person to fill the unexpired term of Justice Workman, and will not be permitted to vote on the putative “occupant of the office,” Respondent Kiss. Only the Governor, Respondent Underwood, can make that appointment under our Constitution. Obviously, if Respondent Kiss, after Justice Workman’s term has expired, decides to run for one of the two vacancies on this Court and is then elected by the people, the constitutional disqualification mandated by Art. VI, §15 would no longer bar him from serving on this Court.

In *Carter v. Commission on Qualifications of Judicial Appointments*, 14 Cal.2d 179, 93 P.2d 140 (1939), the California Supreme Court did not interpret an emoluments clause, but rather interpreted a provision in California’s constitution on the eligibility of persons to be elected as members of the state senate or assembly. The state constitutional provision addressed in *Carter* is the equivalent of Article VI, §13 of the *West Virginia Constitution*. California’s legislative eligibility provision includes an exception that is similar, but not identical, to the exception in Art. VI, §15. While the California Supreme Court found the appointment of a legislator to a newly created judgeship to fall within this exception, the Court further explained that such appointment would be subject to a retention election (*i.e.*, the appointee would be compelled to stand unopposed for election to retain the position). Again, this holding is of no benefit to Respondent Kiss because he will never be subject to an election of any kind in connection with the unexpired term of Justice Workman. Without the involvement of the electorate, the exception in Art. VI, §15 simply is not triggered. Furthermore, the Supreme Court of California in *Miller v. Greiner*, 60 Cal.2d 827, 36 Cal.Rptr. 737, 389 P.2d 129 (1964), distinguished *Carter*. Although the procedure for filling the office at issue in *Greiner* was identical as the procedure in *Carter*, and both were to stand for an unopposed election, the office at issue in *Greiner* was deemed appointive because the 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, California law supports Petitioners’ argument.

Although it is unnecessary to the Court’s decision in the case at bar, it should be noted that it is far from a foregone conclusion that Respondent Kiss will ever face the voters if this appointment

The exception to the general disqualification rule is directed at allowing legislators to take office when they are “elected by the people.” Article VI, § 15. If a Legislator votes for a pay increase for a particular government office, or to create a specific governmental office, and then assumes that office without being elected “by the people,” citizens do not have an opportunity to pass upon “the appearance of impropriety” attendant to a Legislator’s assuming such an office.¹⁴ *Warwick v. State ex rel. Chance, supra*, 548 P.2d at 388. It is the ability of the electorate to pass upon a putative officeholder’s actions that drives the exception to the general disqualification rule in Article VI, § 15.¹⁵ Because Respondent Kiss would fill the office of Supreme Court Justice by appointment

is permitted. There is no requirement that the appointee stand for the next election. In fact, Respondent Kiss 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*. Moreover, 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, Art. VI, § 15 only makes sense 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.

¹⁴In the instant case, although no testimony has been taken, it has been reported by state news media that Respondent Kiss was interested in the position of Justice of this Court both before and after the vote was taken by the Legislature to increase the salary for Supreme Court Justices. If this Court believes the motives and circumstances surrounding the appointment, or who initiated discussions regarding the instant appointment, are important to a resolution of this matter, Petitioners request the right to take discovery on these issues.

¹⁵It is truly ironic that Respondent Underwood, in his response to the “friendly” *Rist* Petition, suggests that the instant Petitioners desire to “subvert . . . the will of the people.” Brief at 2. Directly to the contrary, it is Respondents who seek to avoid subjecting the appointee to a vote of the electorate, and the Petitioners who seek adherence to the *Constitution*.

Similarly, Respondent Underwood’s suggestion that scholarly research supports his position reflects a misreading of the work. Brief at 17, n.10. The passage Respondent Underwood quotes from Robert M. Bastress, *The West Virginia Constitution* at 140, supports Petitioners position, *i.e.*, that the exception requires “popular election” in order to ensure “full public scrutiny and, ultimately, approval.” *Id.*

rather than “by election by the people”, he does not fall within the Art. VI, § 15 exception and is constitutionally disqualified from holding such office.¹⁶

V.

CONCLUSION

Wherefore, Petitioners hereby respectfully request this Court, after considering the matters raised in footnote 1 of this **PETITION**, to issue a rule to show cause against Respondents Cecil H. Underwood, Governor of West Virginia, and Robert S. Kiss, the person announced by Governor Underwood as his appointment to fill the unexpired term of Justice Margaret Workman, asking them to show cause why a writ of mandamus should not be granted against them, based upon the fact that Respondent Kiss is constitutionally disqualified from serving as a Justice on this Court, as mandated by Article VI, §15 of the *West Virginia Constitution*. Petitioners ask this Court to issue a writ acknowledging that Respondent Kiss is constitutionally disqualified, under Art. VI, §15, from serving as a Justice on this Court and mandating that Respondent Underwood appoint a constitutionally qualified person to fill the unexpired term of Justice Workman. In the event the Court determines that a rule to show cause should be issued, Petitioners respectfully ask, pursuant to Rule 14(b) of the Rules of Appellate Procedure, that the rule specifically state that any actions scheduled to occur in connection with the swearing in of Respondent Kiss as a Justice of this Court, are stayed until this Court has resolved the issues raised in this **PETITION**. Further, Petitioners seek such other relief

¹⁶In his Response to the *Rist* Petition, Respondent Underwood suggests reading into the exception proviso in the Art. VI, § 15 the following bracketed language: “except offices to be filled by election by the people [and also offices to be filled by appointment, that, after the expiration of the term to which the appointee was appointed, will be subject to an election for the next term].” It should go without saying that such a contorted interpretation would defy all known rules of constitutional construction.

as this Court deems appropriate.

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-----by counsel-----

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