

IN THE  
CIRCUIT COURT OF KANAWHA COUNTY  
STATE OF WEST VIRGINIA

THE COMMITTEE TO REFORM HAMPSHIRE  
COUNTY GOVERNMENT, MICHAEL HASTY,  
VERA ANDERSON, ROBERT SHILLING,  
FRANK WHITACRE, KAY DAVIS, ROBERT  
WALKER, SHIRLEY CARNAHAN, and  
MARVIN HOTT,

Plaintiffs,

VS.

CIVIL ACTION NO. 05-C-1910

The HONORABLE ROBERT KISS, Speaker of the  
West Virginia House of Delegates, and the  
HONORABLE EARL RAY TOMBLIN, President  
of the West Virginia Senate,

Defendants.

PLAINTIFFS' MEMORANDUM IN  
OPPOSITION TO DEFENDANTS' MOTION  
FOR RELIEF FROM JUDGMENT

While defendants' memorandum is accurate when it states (at page 2) that Rule 60(b) is a remedial provision that is designed to assure that justice is done, the rule also assures that the finality of a judgment must not be undermined except in cases of mistake, fraud or other extraordinary circumstances. "The purpose of Rule 60(b) is to define the circumstances under which a party may obtain relief from a final judgment. The provisions of this rule must be carefully interpreted to preserve the delicate balance between the sanctity of final judgments, expressed in the doctrine of *res judicata*, and the incessant command of the court's conscience that justice be done in light of *all* the facts." *N. C. v. W.R.C.*, 173 W.Va. 434, 437, 317 S.E.2d 793, 796 (1984), *quoting Bankers Mortgage Co. v. United States*, 423 F.2d 73, 77 5thCir. 1970 (emphasis in original). "Accordingly, rarely is relief granted under [Rule 60(b)] because it provides a remedy that is extraordinary and is only invoked upon a showing of exceptional circumstances. Because of the judiciary's adherence to the finality doctrine, relief under this provision is not to be liberally granted. *Powderidge Unit Owners Ass'n v. Highland Props., Ltd.*, 196 W. Va. 692, 704 n.21, 474 S.E.2d 872, 884 n.21 (1996) (quoting *Cox v. State*, 194 W. Va. 210, 219 n.5, 460 S.E.2d 25, 34 n.5 (1995) (per curiam) (Cleckley, J., concurring) (citations omitted))." *Coffman v. West Virginia Division of Motor Vehicles*, 209 W.Va. 736, 740, 551 S.E.2d 658, 662 (2001) (internal quotation marks omitted.)

The Court must summarily deny defendants' Rule 60 motion to set aside the previously entered judgment awarding plaintiffs' their requested declaratory relief. There are no extraordinary or changed circumstances, revelations, or throes of injustice that in any way undermine the validity of this Court's judgment.

To support their motion, defendants have cited to a resolution passed by the Hampshire County Commission this past April that the petition for an alternative form of county government submitted by the plaintiffs and others "no longer represents the will of ten percent of the registered voters of Hampshire County." The resolution has no legal effect. Nothing in Article IX,

§ 13 confers the authority on a county commission to retain jurisdiction over a petition, once it is submitted to the Legislature. What § 13 does require is that the will of the voters of Hampshire County must be determined by a county wide referendum and not by either the county commission or the Legislature. Sound reasoning also dictates that county commissions should not have the discretion or power to nullify or withdraw previously submitted, valid petitions. By definition, a § 13 proposal to alter county government necessarily seeks to change the form of the county commission, thus threatening the nature and perhaps even the existence of commissioners' positions. The commissioners voting on the resolution in this had surely well aware that their jobs will be at stake when the required referendum to reform county government occurs.

Similarly irrelevant are the data adduced by the defendants, which also underlay the county commission's action, that show that the number of signatures on the petition has, because of increased population, dropped below ten percent of the total of registered voters. The critical moment for making the determination on the sufficiency of the number of signatures has to be the point at which the county commission makes the initial determination as to the petition's validity. Otherwise, there would be no finality to a petition because the ten percent would always be a moving target that could leave a petition open to challenge right up to the day of the referendum.<sup>1</sup> Undoubtedly, such common sense rationales explain why the defendants can cite to no authority for the proposition that a petition's validity can lapse because of developments that occur after its proper validation and that are not expressly delineated by the underlying constitutional or statutory provision.<sup>2</sup>

This case brings to mind the Supreme Court's response to the City of Huntington when it argued that it had the discretion to submit to the voters a question raised by a valid petition at any election in the future, rather than the next election. The Court held the city's "position is not well taken because under this interpretation an election could be postponed by the council for a period of many years." *State ex rel. Plymale v. Garner*, 147 W.Va. 293, 299, 128 S.E.2d 185,189 (1962). The Court proceeded to conclude that the city had a mandatory duty to submit the question raised by a valid petition to the voters. *Accord, Bachmann v. Goodwin*, 121 W.Va. 303, 3 S.E.2d 532 (1939) (under city charter provision and upon receipt of a petition with a sufficient number of valid signatures, city council must either adopt the proposal or submit it to the voters); *Doolittle v. County Court of Cabell County*, 28 W.Va. 158, Syl. Pts. 5 & 6 (1886) (after determining that a petition was supported by a sufficient number of signatures, county court's duties were ministerial and nondiscretionary); *see also State ex rel Peterkin v. City Council of City of Parkersburg*, 95 W.Va. 502, 121 S.E. 489 (1924) (upon receipt of a petition stating proper grounds, city would have to hold an election even if it would have to spend money not available from current funds).

The defendants have yet to put forth in this litigation any reason why they cannot or should not meet their constitutional and ethical duty to submit the reforms proposed by the plaintiffs petition to the voters of Hampshire County.<sup>3</sup> Plaintiffs merely seek that the "will of the people" of their county regarding the proposed reforms be accurately captured through a referendum, as guaranteed to those people by Article IX, § 13. This Court should forthwith deny defendants' Rule 60 motion and dissolve the stay.

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<sup>1</sup>For that matter, under defendants' argument, an approved referendum could be challenged after the fact on the ground that, at the time of voting, the originating petition's signature numbers had fallen below the ten percent line.

<sup>2</sup>Petitioner's research has also failed to find any case on point. But *see State ex rel. Plymale v. Garner*, 147 W.Va. 293,128 S.E.2d 185 (1962) (city had nondiscretionary duty to submit question raised by valid petition to voters at the next election).

<sup>3</sup>The House of Delegates did pass a bill this past session (H.B. 3036) that would have authorized a vote on the plaintiffs' petition. The Senate inexplicably failed to act on the measure. *See* <http://www.legis.state.wv.us/Bill-Status/Bills-history.cfm?input=3036&year--2007&session type=RS&btype=bill>.

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#### CERTIFICATE OF SERVICE

I have on this the 13<sup>th</sup> day of July, 2007, mailed a copy of the foregoing memorandum to the following counsel for the defendants:

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