



State of West Virginia
Office of the Attorney General

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The Honorable Mac Warner
West Virginia Secretary of State
State Capitol Complex
1900 Kanawha Blvd. East, Bldg 1, Rm 157-K
Charleston, WV 25305

Dear Secretary Warner:

You have asked for an Opinion of the Attorney General regarding the requirements for recognizing a new political party in the State of West Virginia. This Opinion is being issued pursuant to West Virginia Code § 5-3-1, which provides that the Attorney General “shall give written opinions and advice upon questions of law . . . whenever required to do so, in writing, by . . . the secretary of state.” Where this Opinion relies on facts, it depends solely on the factual assertions in your correspondence with the Office of the Attorney General.

Your letter explains that in the 2020 General Election an individual filed as an official write-in candidate for Governor and received over 1% of the total votes cast in the gubernatorial race. The individual had first tried to have his name printed on ballots statewide by using the signature-gathering process set forth in West Virginia Code § 3-5-23, but was not able to obtain enough signatures. The write-in candidate’s voter registration lists his party designation as “Independent.” The petition forms for the failed signature-gathering process also listed his party as “Independent.” You explain that it is unclear whether these designations reflect the common understanding that an “Independent” voter or candidate has no party affiliation, or the candidate’s desire to be part of an as-yet unformed party called the “Independent Party.”

Your request raises the following legal question:

Are the requirements in West Virginia Code § 3-1-8 for recognizing a new political party satisfied where a write-in candidate registered as “Independent” receives more than 1% of the votes cast for Governor in the previous general election?

We conclude that no new political party is formed under these circumstances. West Virginia law requires recognizing a political party where a group of voters coalesces around a principle or organization and succeeds in winning more than 1% of the votes cast for governor for that group's chosen candidate. Although numerous West Virginia voters coalesced around the write-in candidate in the 2020 General Election, there is no indication those voters intended or agreed to be affiliated with any broader principle or organization.

Discussion

The West Virginia Constitution affords the State Legislature power to regulate elections, including authority to “prescribe the manner of conducting and making returns of elections.” W. Va. Const. art. IV, § 11. This constitutional provision grants “wide powers” “to make all reasonable regulations and restrictions as to preparation of ballots.” Syl. pt. 2, *Wells v. State ex rel. Miller*, 237 W. Va. 731, 791 S.E.2d 361 (2016) (quotation omitted). As most relevant here, it necessarily includes responsibility to “enact reasonable regulations of *parties*, elections, and ballots.” *State ex rel. Blankenship v. Warner*, 241 W. Va. 362, 366, 825 S.E.2d 309, 313 (2018) (emphasis added; quotation omitted).

Pursuant to this authority, the Legislature has set up a comprehensive set of election laws that applies to “every general, primary and special election in which candidates are nominated or elected or in which voters pass upon any public question submitted to them.” W. Va. Code § 3-1-2. It lays out three methods by which an individual can become a candidate for public office. The first method is through a political party's nomination process. As you explain in your request, West Virginia had four recognized political parties in the 2020 General Election: Democratic, Libertarian, Mountain, and Republican. For “[g]roups of citizens having no party organization,” the Code prescribes a signature-gathering process for nominating candidates to be placed on the ballot, rather than the “conventions or primary elections” methods for recognized political parties. *Id.* § 3-5-23. This second procedure also applies to candidates of parties that received less than 10% of the total votes cast for Governor, such as the Constitution Party. *See id.* § 3-5-22. Finally, “[a]ny eligible person who seeks to be elected by write-in votes” must file a “write-in candidate's certificate of announcement.” *Id.* § 3-6-4A.

The individual your letter describes tried to use the second method described above to collect enough signatures to be placed on the ballot, and when that effort was unsuccessful filed a write-in candidate certificate of announcement instead. The question now is whether the number of votes the write-in candidate received is sufficient to confer recognized party status. West Virginia Code § 3-1-8 provides the legal framework to resolve this issue:

Any affiliation of voters representing any principle or organization which, at the last preceding general election, polled for its candidate for Governor at least one percent of the total number of votes cast for all candidates for that office in the state, shall be a political party, within the meaning and for the purpose of this chapter

This is the only method by which a party can gain recognized status in the State. Three textual components of this statute make clear that gaining over 1% of the gubernatorial vote is not enough for a write-in candidate's “party” to gain formal recognition:

First, Section 3-1-8 refers to “[a]ny affiliation of voters.” W. Va. Code § 3-1-8. An affiliation denotes an intentional group: The Supreme Court of Appeals has explained that “the concept of an ‘affiliation of voters’ necessarily suggests consent or agreement with regard to their representation.” *Write-In Pritt Campaign v. Hechler*, 191 W. Va. 677, 681, 447 S.E.2d 612, 616 (1994). Happenstance that multiple voters cast their vote for the same individual is not evidence that those voters “wished to be affiliated” with a potential political party, much less that they wanted “to join such a party.” *Id.*

Second, the affiliation of voters must “represent[] any principle or organization.” W. Va. Code § 3-1-8. The term “any” is broad, but the representation must concern an idea or an entity—not a person. At most, the West Virginians who cast their votes for the write-in candidate displayed a “shared intention” to “cast[] a vote for a particular candidate”; our high court has already held that Section 3-1-8 requires more. *Hechler*, 191 W. Va. at 681, 447 S.E.2d at 616. Your letter acknowledges that it is unclear whether the write-in candidate thought he was representing a potential new party called the “Independent Party” or if he simply thought of himself as “independent” from all parties. Yet the candidate’s intent is irrelevant because Section 3-1-8 focuses on the voters. Given the common meaning the term “independent” plays in the context of affiliation with political parties, it is doubtful that writing “Independent” in the space an election form provides for one’s political party is enough to put anyone on notice that the write-in candidate considered himself part of a nascent “Independent Party.” Without clear evidence that a group of voters coalesced around a “principle or organization” and not simply an individual candidate, W. Va. Code § 3-1-8, there is no statutory basis to recognize a new party under these circumstances. Otherwise, we would be “limited only by our imagination as to the number of political parties that could come into existence through such mechanism.” *Hechler*, 191 W. Va. at 681, 447 S.E.2d at 616.

Third, Section 3-1-8 refers to votes cast for “its”—that is, the affiliation of voters’—“candidate for governor.” The idea that the group of voters chooses a candidate for Governor underscores the statute’s presumption that the affiliation of voters must exist *separate from* the candidate, and *before* he or she is chosen. In other words, there must actually be an organization (even if loosely defined) in order for “it” to have a candidate. The mere fact that a group of voters chooses the same write-in candidate does not mean that those voters can be deemed to have acted in agreement with the ideals and principles of a “party” that, at most, came into existence *after* Election Day. Your letter does not indicate any evidence to suggest this type of preexisting affiliation existed here.

Indeed, as described above, the statute has a separate process for “[g]roups of citizens having no party organization” to get their candidate on the ballot. W. Va. Code § 3-5-23. If an “Independent Party” had succeeded in gaining enough signatures for “its” candidate, *id.* § 3-1-8, the outcome would very well be different. Votes cast for an individual who used the statutory method for an individual “person,” however, *id.* § 3-6-4A—as opposed to the method for a *group’s* chosen candidate—cannot transform that candidate into the representative of a recognized party. At minimum, if a group of voters “wishing to form a third party” wants to invoke Section 3-1-8, they would be better positioned if they “created some organization framework, such as by-laws or specific statements of principles, in advance of an election; [and] announced their existence and solicited others to affiliate.” *Hechler*, 191 W. Va. at 681 n.7, 447 S.E.2d at 616 n.7.

Under the facts you have described, there appears to be no evidence that a group of voters affiliated with a principle or organization chose the write-in candidate as their candidate for Governor in the 2020 General Election. It is not enough that the individual in question filed a certificate of announcement as a write-in candidate and received over 1% of the votes cast for Governor. In other words, a "party" that did not exist before the election cannot be recognized after an individual candidate performs well on Election Day. Instead, Section 3-1-8 reflects the notion that a political party is bigger than any one candidate.

Sincerely,



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Solicitor General