IN THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON

THE SHEPHERDSTOWN OBSERVER, INC.,

APPELLANT, (Plaintiff below),

VS.

Docket Number: 35446
Circuit Court of Jefferson County
Civil Action No. 2009-C-169

JENNIFER MAGHAN,

APPELLEE (Defendant below),

REPLY BRIEF OF THE APPELLANT, THE SHEPHERDSTOWN OBSERVER, INC.

FILED
JUN 8 2010
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Stephen G. Skinner, WVSB 6725
SKINNER LAW FIRM
P. O. Box 487
Charles Town, West Virginia 25414
304-725-7029/Fax 304-725-4082
sskinner@skinnerfirm.com

Patrick McGinley, WVSB 5620
737 South Hills Drive
Morgantown, WV 26501
(304) 552-2631/Fax: (304) 292-9822
pmcginley@igc.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

I. COMMENT ON THE APPELLEE CLERK'S BRIEF AND EXHIBITS 4

II. DISCUSSION 5

A. THE APPELLEE CLERK DOES NOT ADEQUATELY ADDRESS THE STATUTORY DEFINITION OF "PUBLIC RECORD" OR THE REQUIREMENT THAT THE WVFOIA SHOULD BE CONSTRUED LIBERALLY. 5

B. THE APPELLEE CLERK FAILS TO ADDRESS THE REQUIREMENT OF LIBERAL CONSTRUCTION. 6

C. THE CLERK FAILS TO ADDRESS *DOE V. REED*, THE MOST RELEVANT CASE REGARDING THE CONSTITUTIONALITY OF THE WVFOIA. 11

D. THE CLERK MISREADS *GLICKMAN* AND *MCINTYRE* 14

E. THE PUBLIC HAS THE RIGHT TO REVIEW THE PETITIONS TO REVIEW THE PERFORMANCE OF THE CLERK. 14

CONCLUSION 16

CERTIFICATE OF SERVICE 19

Table of Authorities

CASES

AT & T Communications of W.Va., Inc. v. Public Service Com'n, 188 W.Va. 250, 253, 423 S.E.2d 859, 862 (1992) 7, 8
Broad. Corp. v. Cohn, 420 U.S. 469, 495 (1975) 14
Campaign for Family Farms v. Glickman, 200 F.3D 1180 (2000), 13
Child Protection Group v. Cline,. 177 W.Va. 29, 350 S.E.2d 541 (1986). 8
Daily Gazette Co. Inc. v. Withrow, 177 W.Va. at 115, 350 S.E.2d at 742 (1986). 6, 8
Doe v. Reed, 2009 WL 392155 (W.D.Wash. Jul 29, 2009) (NO. 09-5456BHS), *subsequent determination*, 661 F.Supp.2d 1194 (W.D.Wash. Sep 10, 2009), *Reversed by* 586 F.3d 671 (9th Cir.(Wash.), *certiorari granted by* 130 S.Ct. 1133 (U.S. Jan 15, 2010) (No. 09-559), --- S.Ct. ----, 2010 WL 2025133 (U.S.), 78 USLW 3687 10-16
Johnson v. Continental Casualty Company, 157 W.Va. 572, 201 S.E.2d 292 (1973) 10
Manchin v Dunfee, 174 W.Va. 532, 327 S.E.2d 710 (1984) 10
McIntyre v. Ohio Elections Com'n, 514 U.S. 334, 115 S.Ct. 1511 (U.S.Ohio, 1995) 14
O'Neal v. Peake Operating Co., 404 S.E.2d 420. 424 (W. Va. 1991) 4
Pearson v. Pearson, 488 S.E.2d 414, 420 n.4 (W. Va. 1997 4
Smith v. State Workmen's Compensation Commissioner, 159 W.Va. 108, 219 S.E.2d 361 (1975). 6, 7

State ex rel. ACF Indus., Inc. v. Vieweg, 204 W.Va. 525, 514 S.E.2d 176 (1999). 6, 7
State ex rel. City of Charleston v. Hutchinson, 154 W.Va. 585, 176 S.E.2d 691 (1970) 10
State v. Underwood, 168 W.Va. 52, 281 S.E.2d 491 (1981); 10

Thornton v. CAMC, ETC., 305 S.E.2d 316, 320 -21 (W. Va. 1983) 4

STATUTES

W. Va. Code § 3-8-5(b) 9
W. Va. Code § 8A-7-13 9
W. Va. Code §3-1-28(6)(c) 9
W.Va.Code, 29B-1-1 5

I. Comment on the Appellee Clerk's Brief and Exhibits

This case arises from a circuit court ruling on a Motion to Dismiss. It is axiomatic that appeals to this Court are to be decided on the certified record which, in the case at bar, includes the pleadings and the record before the circuit court related to the Clerk's motion to dismiss. This Court has consistently held that it will not consider evidence that was not in the record before the circuit court. *Pearson v. Pearson,* 488 S.E.2d 414, 420 n.4 (W. Va. 1997) ("This Court cannot, in the disposition of a case before it, consider anything which is not contained in the record."); *O'Neal v. Peake Operating Co.,* 404 S.E.2d 420. 424 (W. Va. 1991) (this Court may only consider matters appearing in the trial record) (citing *Thornton v. CAMC, ETC.,* 305 S.E.2d 316, 320 -21 (W. Va. 1983). Notwithstanding this fundamental rule of appellate review, in her brief and exhibits, the Appellee Clerk has improperly included a significant amount of material outside the record. In her brief, she draws conclusions from facts that were not before the circuit court. For example, the Clerk states "it can be assumed that those individuals signing the petition indicated how they would vote in an election." The record contains no evidentiary support for this statement. The Clerk makes serious accusations against the Appellant — a corporation that publishes a newspaper – based on allegations of facts not substantiated by the record. The Appellee Clerk's brief also goes outside the record by making assertions about the conduct of an officer and an employee of the Appellant corporation. All of the seven exhibits attached to Appellee Clerk's brief are documents outside the record.

Appellant will file a separate motion to strike the Clerk's brief and exhibits that include assertions of facts and/or reliance on facts outside the certified record before this Court.

II. DISCUSSION

A. The Appellee Clerk does not adequately address the statutory definition of "public record" or the requirement that the WVFOIA should be construed liberally.

The Appellee Clerk claims that this Court has interpreted the WVFOIA to mean that a "'public record' must not only relate to the public's business, but also must have been a record that was created by the public body in the first instance." (Brief, 7-8, emphasis supplied.). No decision of this Court so holds. Indeed, in no case has this Court held that information submitted to a public body and in that body's possession fails to fall within the statute's definition of public record. On the contrary, as explained below, this Court's cases have required disclosure of records under WVFOIA that were prepared by private bodies but in the possession of a public body. As set forth in Appellant's initial brief, to hold that only those documents prepared by a public body fall within the WVFOIA definition of "public record" would effectively gut the Act and lead to the exclusion of literally millions of state, county and city records that have long been considered open for public examination.

The interpretation of WVFOIA asserted by the Clerk and accepted by the circuit court ignores the overarching public interest in governmental transparency enshrined in the statute, In Syllabus point 4 of *Hechler v. Casey,* 175 W.Va. 434, 333 S.E.2d 799 (1985), this Court held that "[t]he disclosure provisions of this State's Freedom of Information Act, W.Va.Code, 29B-1-1, *et seq* . . . are to be liberally construed, citing...W.Va.Code, 29B-1-1 [1977]." That section of WVFOIA provides:

> Pursuant to the fundamental philosophy of the American constitutional form of representative government which holds to the principle that government is the servant of the people, and not the master of them, it is hereby declared to be the public policy of the state of West Virginia that all persons are, unless otherwise expressly provided by law, *entitled to full and complete information regarding the affairs of government and the of-*

> *ficial acts of those who represent them as public officials and employees.* The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments of government they have created.

W.Va. Code 29B-1-1 (emphasis added).

In any case where the analysis of a statute is an issue, "[t]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.' Syllabus point 1, *Smith v. State Workmen's Compensation Commissioner*, 159 W.Va. 108, 219 S.E.2d 361 (1975)." Syl. pt. 6, *State ex rel. ACF Indus., Inc. v. Vieweg*, 204 W.Va. 525, 514 S.E.2d 176 (1999). The extraordinarily emphatic emphasis the Legislature has placed on the public's right to be informed about the conduct of government business must be honored by this Court.

In *Daily Gazette Co. Inc. v. Withrow*, this Court emphasized that W. Va. Code §29B-1-2(4) constitutes a liberal definition of a public record in that it applies to any record which contains information "relating to the conduct of the public's business . . .." *Daily Gazette Co. Inc. v. Withrow*, 177 W.Va. at 115, 350 S.E.2d at 742 (1986). *Withrow* involved a government officer's refusal to disclose a litigation settlement agreement upon receiving a WVFOIA request from a newspaper. *Id.*[1]

B. The Appellee Clerk fails to address the requirement of liberal construction.

As stated in the Appellant's initial brief, "[t]his liberal construction of the State FOIA and

the concomitant strict construction of the exemptions thereto are of ***fundamental importance*** in deciding ***any*** case involving construction of this statute." *Hechler v. Casey,* 175 W.Va. 434, 443, 333 S.E.2d 799, 808 (1985)(emphasis added). Neither the Appellee nor the circuit court addresses the liberal construction mandate of WVFOIA, choosing instead to argue that this Court should interpret the fundamental term "public record" in a manner that would dramatically curtail the public's ability to obtain "full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees."

It is the rule of this Court that in any case where the interpretation of a statute is at issue, "[t]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. pt. 6, *State ex rel. ACF Indus., Inc. v. Vieweg*, 204 W.Va. 525, 514 S.E.2d 176 (1999) citing Syllabus point 1, *Smith v. State Workmen's Compensation Commissioner*, 159 W.Va. 108, 219 S.E.2d 361 (1975). The Legislature's explanation of the importance of public access to the workings of government is contained at W. Va. Code § 29B-1-1. The Clerk's arguments, on the other hand, ignore the explicit mandate that the disclosure provisions of the statute be liberally construed. As this Court emphasized in *AT & T Communications of W.Va., Inc. v. Public Service Com'n,* "[t]he general policy of th[e] act is to allow as many public records as possible to be made available to the public." 188 W.Va. 250, 253, 423 S.E.2d 859, 862 (1992) (footnote omitted)).

---

[1] In *Withrow*, a former deputy sheriff of Kanawha County brought a federal civil rights action against the then Sheriff of Kanawha County. The complaint in the civil rights action alleged that the Sheriff, acting "individually" and as sheriff, had wrongfully discharged the former deputy sheriff from his job. The allegation was that Withrow had discharged the deputy to prevent him "from [pursuing] his official duties in the investigation of a crime and to punish and discourage [him] in the exercise of his right of free speech." *Withrow* at 113. The civil rights action and the Sheriff's counterclaim were dismissed as the result of a settlement between the parties. In its dismissal order the United States District Court for the Southern District of West Virginia noted that the parties and their counsel had agreed not to disclose the terms of the settlement. *Id.*

The Clerk's narrow, crabbed interpretation of "public record" as used in the WVFOIA is demonstrably extreme when viewed in light of the statutory command of liberal construction and this Court's rulings in cases involving information prepared and submitted by private parties to public bodies. Thus, in *Withrow*, this Court required disclosure of a litigation settlement agreement between a former Sheriff's Department employee and the County's insurance carrier. *Withrow.* Were Appellee Clerk's interpretation of the term "public record" to prevail, the settlement of a private party's litigation with a public body would not available for public review if the settlement was prepared by the private party or her counsel. In *Hechler v. Casey*, this Court ordered disclosure of information prepared and submitted to the Secretary of State that contained information regarding a security agency's employees. *See Hechler v. Casey*, supra. The Clerk's erroneous interpretation of "public record' would make such information inaccessible to the public. In *Daily Gazette Co., Inc. v. West Virginia Development Office,* the majority of documents withheld from a newspaper had been prepared by a private entity and submitted to a public body. 198 W.Va. 563, 482 S.E.2d 180 (1996). This Court ordered that all of these privately prepared documents be disclosed pursuant to WVFOIA's liberal disclosure mandate. Similarly, in *AT & T Communications of W.Va., Inc. v. Public Service Com'n,* this Court held that certain information prepared and submitted by AT&T to the West Virginia Public Service Commission could be withheld only if it fell within WVFOIA's narrow trade secret exemption. If the Clerk's interpretation of "public record" were to prevail, such information would not be accessible to a FOIA requester because it was *prepared* by a private party. In *Child Protection Group v. Cline*, this Court even held that private medical records in the possession of a County School Board were subject to limited public access pursuant to FOIA. 177 W.Va. 29, 350 S.E.2d 541 (1986). Appellee Clerk's interpretation of "public record" would prevent any consideration of disclosure

pursuant to a WVFOIA request, contrary to the holding of *Child Protection Group.*

Notwithstanding the holdings of these cases, all of which required the disclosure of documents prepared by private parties and submitted to public bodies, the Appellee Clerk argues that documents prepared by private parties and submitted to public bodies are not public records under WVFOIA even though the documents trigger a public referendum.

Importantly, however, the Clerk concedes, that its narrow interpretation of "public record" does not apply to information prepared by private parties when a statute requires submission of the information to a public body. (App. Brief 9). This concession is fatal to Appellee's claim that the petitions at issue in the instant case are not public records because they were prepared by private parties. The Clerk ignores the fact that the statute authorizing the referendum involved herein, W. Va. Code § 8A-7-13, requires referendum petitions be filed with the Clerk. It is just like W. Va. Code § 3-8-5(b) — relied upon by Appellee Clerk—requires campaign finance reports to be filed with the County Clerk or the Secretary of State. If, as Appellee Clerk concedes, there is a statutory requirement that a document be filed with her, then that document is a public record under WVFOIA and must be disclosed pursuant to a FOIA request. Appellee's brief also fails to address how documents like applications for environmental permits or for alcohol or lottery licenses could be disclosed under her interpretation of "public record."

Appellee Clerk's interpretation of the WVFOIA term "public record" is further compromised when she uses W. Va. Code §3-1-28(6)(c) as an example to bolster her argument that privately prepared documents are not public records when held by public bodies. That provision prescribes how a public official may be suspended from office as a result of a petition. The statute provides that "the petition requesting the suspension of the election official is filed with the county commission at least ninety days prior to an election date. The names of those persons

signing the petition must be kept confidential." The fact that the provision of one statute required that a specific type of petition be withheld from public scrutiny in no way suggests that all other petitions requires under other statutes be similarly held confidential.

Indeed, this Court has long recognized the familiar rule of statutory construction "that where a statute expressly designates certain subjects, those which are not so designated are excluded by implication from the scope of the statutory designation" *State v. Underwood*, 168 W.Va. 52, 281 S.E.2d 491 (1981); *Johnson v. Continental Casualty Company*, 157 W.Va. 572, 201 S.E.2d 292 (1973); *State ex rel. City of Charleston v. Hutchinson*, 154 W.Va. 585, 176 S.E.2d 691 (1970); *see also*, Syl. Pt. 3. *Manchin v Dunfee,* 174 W.Va. 532, 327 S.E.2d 710 (1984) ("In the interpretation of statutory provisions the familiar maxim *expressio unius est exclusio alterius,* the express mention of one thing implies the exclusion of another").

Contrary to the Clerk's assertion, when the legislature specifically prohibits or excludes one thing, well-established rules of statutory construction recognize that such designation does not imply the legislature intended to prohibit or exclude other things. In the case at bar the fact that in one statute the Legislature has prohibited disclosure of names on one type of petition does not support an implication that the Legislature intended to exclude from the mandate of WVFOIA referenda or other petitions authorized by different laws. In fact, the exact opposite conclusion should be gleaned from the legislature's actions: if the legislature had intended the names of signers of a referendum petition to be held confidential, it would have explicitly stated so as it did for the nominating petition signers. Only those documents specifically exempted by the WVFOIA or other statutes may be withheld from public disclosure.[3] Appellee neither cites

nor otherwise identifies any FOIA exemption nor any other statutory requirement to support her extraordinary argument in favor of government secrecy.

C. The Clerk fails to address *Doe v. Reed*, the most relevant case regarding the constitutionality of the WVFOIA.

In her reply brief, Appellee Clerk failed to address *Doe v. Reed,* a case currently pending before the Supreme Court of the United States. *Doe v. Reed*, 2009 WL 392155 (W.D.Wash. Jul 29, 2009) (NO. 09-5456BHS), *subsequent determination*, 661 F.Supp.2d 1194 (W.D.Wash. Sep 10, 2009), *Reversed by* 586 F.3d 671 (9th Cir.(Wash.), *certiorari granted by* 130 S.Ct. 1133 (U.S. Jan 15, 2010) (No. 09-559), --- S.Ct. ----, 2010 WL 2025133 (U.S.), 78 USLW 3687.[4]

Doe v. Reed involves a challenge to the State of Washington's public records law —that State's equivalent to West Virginia's FOIA. In *Doe,* petitions were filed seeking a referendum to repeal a statutory provision enacted by the Washington State legislature in 2007 that extended to domestic partnerships rights possessed by married couples. Enough signatures were gathered to require the grant of statutory rights to domestic partners statute be placed on a statewide referendum ballot.5

An organization called Washington Families Standing Together filed a public records request with the Secretary of State of Washington, seeking disclosure of copies of the petitions. The sponsors of the referendum petition drive filed a declaratory judgment action against the

---

[3] A petition seeking the removal of a public official from office reveals a specific point of view—namely the removal of the official—while a petition for a zoning referendum only reveals that the signer of a petition desires that a vote be taken on a zoning ordinance, not that the signatory will vote against such an ordinance.

[4] Merit and amicus briefs may be found at http://www.abanet.org/publiced/preview/briefs/april2010.shtml#09559

Secretary of State requesting a declaration that the state public records law violated their First Amendment Rights. The district court entered a temporary restraining order and then granted the sponsor's motion for a preliminary injunction. *Doe v. Reed*, 2009 WL 2392155 (W.D.Wash. Jul 29, 2009) (NO. 09-5456BHS), *subsequent determination*, 661 F.Supp.2d 1194 (W.D.Wash. Sep 10, 2009), On appeal, the United States Court of Appeals for the Ninth Circuit reversed. *Doe v. Reed*, 586 F.3d 671, 677 (Wash. 2009). The Court of Appeals considered the appropriate constitutional standard and found that the public records law has only an incidental effect on speech. It held that the public records law "as applied to referendum petitions does not violate the First Amendment." (Emphasis added). The constitutional issue raised in *Doe* is analogous tothe issue before this court in the case at bar.

The Ninth Circuit held that the referendum petitions must be disclosed for four reasons:

> First, the petitions are gathered in public, and there is no showing that the signature-gathering process is performed in a manner designed to protect the confidentiality of those who sign the petition.
>
> Second, each petition sheet contains spaces for 20 signatures, exposing each signature to view by up to 19 other signers and any number of potential signers.
>
> Third, any reasonable signer knows, or should know, that the petition must be submitted to the State to determine whether the referendum qualifies for the ballot, and the State makes no promise of confidentiality, either statutorily or otherwise...
>
> Fourth, Washington law specifically provides that both proponents and opponents of a referendum petition have the right to observe the State's signature verification and canvassing process. [6]

Doe v. Reed, 586 F.3d 671, 677 (Wash. 2009). Like the Washington State petitions, those peti-

tions circulated for signatures in the instant matter were gathered in public. In each instance the petitioner's names were visible to other persons signing and, importantly, to the people gathering the signatures. Third, as with regard to the Washington referendum petitions, the referendum petitions at bar had to be submitted to County officials, and no provision of West Virginia law promises petition referendum signers confidentiality. Finally, in Washington the signature-gatherers were able to "observe" the process by which the Clerk verified the signatures, but others could not do so.

A petition for a writ of certiorari to the U. S. Supreme Court was filed by the sponsors of the Washington referendum petition; the certiorari petition was granted on January 15, 2010. The case has been fully briefed and oral argument was heard by the Court on April 28, 2010. During oral argument, Justice Scalia underscored a critical point that is also relevant to the case at bar:

> The person who requests a referendum is taking —when there's a certain number of signatures required to achieve it, is taking part in [legislating].
>
> And in light of the fact that for the first century of our existence, even voting was public -- you either did it raising your hand or by voice, or later, you had a ballot that was very visibly red or blue so that people knew which party you were voting for -- the fact is that running a democracy takes a certain amount of civic courage. And the First Amendment does not protect you from criticism or even nasty phone calls when you exercise your political rights to legislate or to take part in the legislative process.

Doe v. Reed, http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-559.pdf Transcript at 11-12 (April 28, 2010).

---

[6] As previously stated, there is no process for certifying petitions for referenda in West Virginia, despite the Clerk's assertion to the contrary. The Clerk attaches a pamphlet from the Secretary of State that appears to prescribe guidelines for nominating petitions to place a candidate on a ballot. Even a cursory review of the pamphlet shows it is not relevant to the issue pending before this Court, nor was it submitted to, or considered by the court below.

D. The Clerk misreads *Glickman* and *McIntyre*

In *Campaign for Family Farms v. Glickman,* 200 F.3D 1180 (2000), the referendum petition signers were required to state: "We support a voluntary checkoff program." *Glickman*, 200 F.3d at 1187. In other words, signing the petition disclosed how the signer would vote. The petitions at issue here contain no similar language. They simply direct the county commission to hold an election. Moreover, in *Glickman* the Court found that applied a privacy exemption of the federal Freedom of Information Act, 4 USC 552(b) (6) and involved "a petition that call[ed] for a referendum to terminate a federally-imposed assessment on pork sales." *Glickman*, 200 F.3d at 1182. The only persons able to sign "were actually pork producers or importers during the representative period." *Id* at 1183.

Appellee also relies on *McIntyre v. Ohio Elections Com'n,* 514 U.S. 334, 115 S.Ct. 1511 (U.S.Ohio, 1995) in support of her position that "anonymity is of utmost importance when controversial issues are involved." (Brief at 16-17.) Reliance on *McIntyre* is misplaced. *McIntyre* deals with a state's attempt to prohibit the anonymous distribution of pamphlets. Appellee confuses core political speech like pamphleting with signing a petition to trigger a referendum.

E. The public has the right to review the petitions to review the performance of the Clerk.

The Appellee Clerk claims that the WVFOIA should not be used by members of the public to review the legality of the verification process or, apparently, for any other legal reason. However, through the WVFOIA the legislature has specifically required public bodies to disclose records that "relate to the conduct of the public's business." Clearly the submission of a petition to a County Clerk seeking a vote on an ordinance constitutes "conduct of the public's business." See *Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975) ("The freedom of the press to

publish [information in public records] appears to us to be or crucial importance to our type of government in which the citizenry is the final judge of the proper conduct of public business.").

In the *Doe v. Reed* oral arguments Justice Sotomayor cogently observed:

> MR. BOPP: What I -- what I said is there's no role for the public in verifying signatures. You can ask for judicial review –
>
> JUSTICE SOTOMAYOR: That's assuming the answer, meaning if they don't have the right to access [the petitions], they can't [have judicial review]. But, legally, they can challenge it if they find on the petitions that things were erroneously counted by the State. They can go into court and prove that. "[I]f they don't have the right to access, they can't [challenge]. But, legally, they can challenge it if they find on the petitions that things were erroneously counted by the State. They can go into court and prove that.

Transcript of oral argument at 25.

The public has a significant public interest not only in verifying the accuracy of referendum petitions, but also in understanding the demographics of those seeking a vote on the recently enacted ordinance or for other legitimate reasons. The following interchange during oral argument in *Doe v. Reed* reveals the hollow nature of Appellee's unsubstantiated claims that disclosure of public records triggering a referendum will chill someone's First Amendment rights:

> JUSTICE STEVENS: Isn't there another possible public interest? Would it be a legitimate public interest to say I'd like to know who signed the petition because I would like to try to persuade them that their views should be modified? Is there a public interest in encouraging debate on the underlying issue?
>
> MR. BOPP: Well, it's possible, but we think this information is marginal. In other words, the --it's much more important --
>
> JUSTICE STEVENS: Well, it does identify people who have a -- a particular point of view on a public issue. And if you had the other point of view, don't you have an interest in finding out who you'd like to convince to change their minds?
>
> MR. BOPP: Well, we -- we think it's a -- a very marginal interest. The Ninth Circuit recently ruled that if you give a small contribution to an initiative, there's not -- I mean, nobody cares. So why should it be publicly disclosed when it's so marginal?
>
> (Laughter.)

MR. BOPP: Well –

JUSTICE SCALIA: Is -- is that such a bad thing in a democracy?

MR. BOPP: Well, what is bad is not the criticism; it's the public -- it's the government requiring you to disclose your identity and beliefs.

JUSTICE SCALIA: But part of the reason is so you can be out there and be responsible for the positions you've taken.

MR. BOPP: Well, then why don't they require both sides?

JUSTICE SCALIA: So that people -- people can criticize you for the position you have taken.

MR. BOPP: Then why don't they require both sides if that was the purpose?

JUSTICE SCALIA: What do you mean, "both sides"? The other side hasn't signed anything. When they sign something –

(Laughter.)

MR. BOPP: Well, but the other side --

JUSTICE SCALIA: When they sign something, they'll be out there for public criticism as well.

Doe v. Reed, transcript at 27-28.

Conclusion

Reduced to its essence, the Appellee's argument is that the WVFOIA must be construed in an extraordinarily narrow way to exclude from public disclosure literally millions of documents in State, County and municipal files that heretofore have been available to the public by virtue of WVFOIA liberal disclosure requirements. Instead of construing this law in accord with well-established principles recognized by this Court, the Clerk argues that "public records" do not include information prepared by private parties and submitted to government officials and public bodies. In making this exceptional assertion, she ignores all of this Court's cases that have held that information prepared by private parties fall within WVFOIA's definition of public re-

cords when such information has been submitted to and retained by public bodies. Appellee's argument drastically limiting the meaning of "public record" should be summarily rejected and the principles of transparency underlying WVFOIA should be embraced by this Court as mandated by our Legislature.

The Clerk's second argument, that the circuit court was right in declaring the WVFOIA unconstitutional as applied to petitions for referenda must similarly be rejected by this Court. Appellee's brief utterly fails to identify any applicable rule of constitutional law or judicial precedent supporting the circuit court's unique and unprecedented holding that, under the facts of the case at bar, WVFOIA violates the First Amendment.

Faced with no evidence in the record to support the trial court's finding that disclosure of a petition will chill the First Amendment rights of petition signers, Appellee attempts to generate and rely upon facts outside the record. She relies exclusively upon assertions of fact that were neither before the circuit court nor in the record before this Court. On the basis of a record devoid of any evidence whatsoever of threats of intimidation or of some speculative chilling effect on petition signers, the Clerk asserts that the WVFOIA violates the First Amendment and must be struck down as unconstitutional.

Absent any evidence to support the argument of the unconstitutionality of the WVFOIA as applied to referenda petitions, this Court must uphold the public's right to know guaranteed by WVFOIA and reject the Clerk's assertion of the right of a government body to conduct part of the public's business in secret. As Justice Scalia explained during the *Doe v. Reed* argument, "[Y]ou can't run a democracy this way, with everybody being afraid of having his political positions known." (Transcript at 39).

Respectfully submitted,

Stephen G Skinner WVSB 6725
SKINNER LAW FIRM
PO Box 487
Charles Town, WV 25414
304-725-7029/Fax: 304-725-4082
sskinner@skinnerfirm.com

Patrick McGinley, WVSB 5620
737 South Hills Drive
Morgantown, WV 26501
Phone: (304) 552-2631
Fax: (304) 292-9822
pmcginley@igc.org

CERTIFICATE OF SERVICE

I, Stephen G. Skinner, of SKINNER LAW FIRM, do hereby certify that that I have served a true copy of the attached **REPLY BRIEF OF THE APPELLANT, THE SHEPHERDSTOWN OBSERVER, INC.**, upon the Appellee by mailing the same to her counsel Stephanie Grove, Esq., Jefferson County Assistant Prosecuting Attorney, PO Box 729, Charles Town, WV 25414 this June 7th, 2010

Stephen G Skinner

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE