IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON

THE SHEPHERDSTOWN OBSERVER, INC.,
APPELLANT

V.

CASE NO.: 35446

JENNIFER MAGHAN,
APPELLEE

BRIEF AMICUS CURIAE OF JOSEPH G. THOMPSON IN SUPPORT OF APPELLANT

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I. INTRODUCTION

Comes now, Joseph G. Thompson, *pro se*, and respectfully submits a brief as *amicus curiae* in the above captioned matter.

The *amicus curiae*, Mr. Thompson, is a citizen of the state of West Virginia, and a resident of and taxpayer in Jefferson County, with a responsible citizen's interest in the government of that county.

On October 2, 2008, the Jefferson County Commission adopted a new Zoning Ordinance for the county. A petition drive to place the ordinance on the ballot for referendum in accordance with W.Va. Code §8A-7-13 ensued, leading to the suspension of the ordinance until the holding of an election. The *Shepherdstown Observer* requested the names of the signers, along with other records pertaining to the petition, from Jefferson County Clerk Jennifer Maghan. Clerk Maghan made a partial disclosure but refused to provide the signers' names, claiming they were not public records subject to disclosure.

The *Observer* filed a complaint in the Jefferson County Circuit Court, citing the West Virginia Freedom of Information Act as a basis for disclosure. On August 21, 2009, Judge David Sanders dismissed the complaint, finding that the documents requested were not public records under the West Virginia Freedom of Information Act, and that even if they were, they would be protected from release by the privacy exemption of that Act. The *Observer* appealed the ruling to this Court.

This issue has important consequences for the transparency and accountability of local government, in which every citizen has a compelling interest, and Mr. Thompson

respectfully submits this brief as an *amicus curiae* in support of the position held by the Observer.

The clear intent of the West Virginia Freedom of Information Act is that information relating to a government body should be available to the public unless a compelling reason for non-disclosure congruent with one of the narrow statutory exemptions is present. The appellee has not shown in arguments to date, nor does the Circuit Court's order of dismissal bring to light, sufficient basis for exempting the names of petition signers from disclosure under the West Virginia Freedom of Information Act. Consequently, this *amicus* respectfully requests that this Honorable Court find in favor of the *Observer*, that the petition sheets are public records subject to the West Virginia FOIA, and that the Jefferson County Clerk must now disclose them.

II. ARGUMENT

A. The reasoning by which the Circuit Court finds the petition signatures not to be public records is contradictory to the plain meaning of the statute in question

The Circuit Court ruled that the petition forms are not public records subject to the West Virginia FOIA because they were not prepared, owned, and retained by the Clerk. In this portion of its ruling it partially quoted W.Va. Code §29B-1-2(4). Further, it cited this partial quote as the exclusive definition of a public record, but its quote omitted the critical word "includes". The plain meaning of "includes", and the preceding text of §29B-1-1 ("...the

provisions of this article shall be liberally construed..."), require this clause to be interpreted broadly and non-exclusively: the word "includes" means the text of the Act does not define public records as exclusively those meeting the conditions of W.Va. Code §29B-1-2(4), but states that those records are non-exclusively part of the set of all public records subject to the West Virginia FOIA.

It is clear that the "and" in "prepared, owned and retained" should and must be interpreted disjunctively (as including records for which *any* of the conditions is true) rather than conjunctively (including only records for which *all* the conditions are true). While this may seem like a subtle issue of grammar, the relevant case law reinforces this point.

B. The cases relied upon by the Circuit Court in its finding that the signatures are covered by the privacy exemption to the West Virginia FOIA are inapplicable to the instant case or misinterpreted by the Circuit Court

The form of the petition at issue embodied six facts regarding each signer: name, address, signature, date signed, the presumed agreement of each signer with the statement at the head of the signature form, and the statement implicit in the act of signing that each signer is a registered voter residing in an unincorporated area of the county. Neither name, address, registration status, nor any combination of the three, can be considered privacy-protected information, since these data are available as public records for a modest fee from the County Clerk's office and from the West Virginia Secretary of State. The signature itself is less relevant for purposes of public verification of the petition and need not be

disclosed to or examined by third parties unless a controversy arises on other grounds. It is also difficult to imagine a case in which the date of signature might be considered private information when the fact of signature itself is known; accordingly we do not attempt to do so here.

This leaves only the agreement with the petition statement, attested by the signature of the petitioner, as information that might conceivably be private to each signer. However, this assertion cannot stand up to scrutiny when we consider the circumstances of the cases cited by the Circuit Court in its ruling. This *amicus* will not belabor all the arguments already made by the appellant in its petition regarding certain cases, but notes a few points of particular interest:

In *Daily Gazette v. Bailey,* 164 S.E.2d (1968), this Court ruled that signatures on a nominating certificate were protected from disclosure. However, *Bailey* is easily distinguishable from the instant case:

- The ruling of this Court turned upon the fact that signers of a candidate's nominating certificate were affirming that they desired to vote for the candidate, and were barred by law from voting in the subsequent primary, effectively casting a ballot with the act of signing the certificate. In contrast the statement of the petition in the case at bar did not indicate an intent to vote (or an intent to act equivalently to voting) in a particular way.
- The US Supreme Court later (*Socialist Workers Party v. Hechler,* F.2d (1989)) ruled unconstitutional the provision of West Virginia law which specified the signer must express a desire to vote for a specific candidate.

- The ruling in *Bailey* predates the 1977 passage of the West Virginia Freedom of Information Act, which significantly changed the statutory landscape surrounding disclosure of public records.

Bailey therefore should not be considered dispositive on its face.

Moreover, the Circuit Court cites the statement in *Daily Gazette v. Withrow,* 350 S.E.2d 738 (1986) that "a writing must have been 'prepared, owned and maintained by a public body' in order to be a public record" [under the West Virginia FOIA], in support of its narrow interpretation of that statute. In reality, this Court ruled in *Withrow* ruled that records prepared by private attorneys were not exempt from disclosure. This Court has ruled similarly in a variety of other cases, but perhaps most tellingly in *Child Protection Group v. Cline,* 350 S.E. 2d, 545 (1986), when it ruled in favor of disclosure of psychiatric evaluations prepared completely independently of the direction or request of any public body:

> "An individual's medical records are classically a private interest. Further, it is difficult to imagine an item more potentially embarrassing than individual psychiatric reports.... No individual would want these matters to be considered a public record. These reports were surrendered to the school board under a justifiable expectation of confidentiality. Further, the trial court, in its discretion, ruled for Mr. Roberts. Certainly only a most compelling interest could justify the release of the records under the Freedom of Information Act. Nevertheless, we believe that the parents of the children assigned to Mr. Roberts' bus have such a compelling interest in his mental condition."

In circumstances which would make signing a document equivalent to casting a ballot, that signature is entitled to the same privacy protection as a ballot. However, the

situation at hand is different: signing this petition did not demonstrate a voting preference. At most it demonstrated an intent to cast a ballot, in which respect it is most like *registering* to vote; as previously noted, voter registrations are public records and are routinely disclosed to the public. The same should therefore be true here as well.

C. The Circuit Court's decision is on its face contradictory to the clear directive of the statute and would abrogate the rights and abridge the powers of all citizens.

The ruling by the Circuit Court, if allowed to stand, would create a situation completely contradictory to the intent of the West Virginia FOIA. That statute recognizes the people as having a natural power over their elected servants. However, if petitions are not public records and the names on them cannot be released to the public, then the Clerk has the nearly-unchecked power to certify or deny any petition regardless of its sufficiency. The only recourse to the public would be to undertake the expensive and time-consuming process of litigation and discovery whenever it wished to verify the validity of the Clerk's ruling. Even if a court ruled the Clerk acted properly, such litigation would still not be sufficient to directly satisfy the litigants or the public at large, since the actual list of names presumably still could not be released to them.

Moreover, the Circuit Court assumes in its ruling that those in the Clerk's office, with some unstated degree of training and skill in signature verification, are the best parties to verify each signature to guard against petition fraud. However, there is one party superior to all others in verifying a person's signature on a document: the person

himself, who knows without any doubt whether he signed it or not. If the names of those listed as signing a petition are not publicly disclosed, the putative signers cannot self-verify; that power is taken away from them and held by a single office which cannot know with the same certainty whether its judgment is correct.

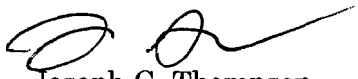
Even if there is a privacy interest in the fact of a person's signature, that interest can be overridden by a sufficient public right to know, as held by this Court in *Cline*, *supra*. This *amicus* believes the foregoing demonstrate both the lack of compelling privacy interest, and the overwhelming sufficiency of the public interest regardless.

The Circuit Court's ruling demands that the people trust, without evidence, that their elected officials have acted properly, while the entire point of the West Virginia Freedom of Information Act is that such trust ought not be (and since the passage of the Act, is not) required.

III. CONCLUSION

For the above-stated reasons, this *amicus curiae*, Joseph G. Thompson, respectfully requests that this Honorable Court find that the petition sheets are public records subject to the West Virginia FOIA, and that the Jefferson County Clerk must now disclose them.

Respectfully submitted,



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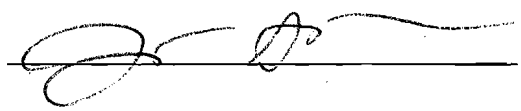
CERTIFICATE REGARDING SERVICE

I, Joseph G. Thompson, do hereby certify that I have served a true copy of the attached Brief *Amicus Curiae* upon the Appellant and the Appellee by mailing the same to their respective counsels this day of April 15, 2010:

Counsel for Appellant, Stephen G. Skinner, Skinner Law Firm, P.O. Box 487, Charles Town, WV, 25414

Counsel for Appellant, Patrick McGinley, 737 South Hills Dr., Morgantown, WV, 26501

Counsel for Appellee, Stephanie Grove, Esq., Jefferson County Assistant Prosecuting Attorney, P.O. Box 729, Charles Town, WV, 25414



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