

DOCKET NO. 16-0228

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

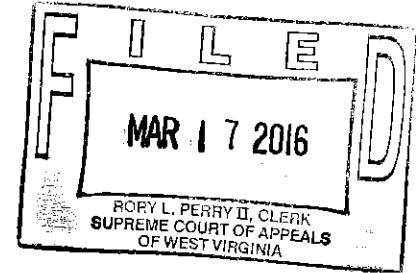
BRENT D. BENJAMIN, candidate for the  
Supreme Court of Appeals of West Virginia

Petitioner,

v.

ELIZABETH D. WALKER, candidate for the  
Supreme Court of Appeals of West Virginia;  
WEST VIRGINIA SECRETARY OF STATE  
NATALIE TENNANT; West Virginia State  
Election Commission members, GARY A.  
COLLIAS and VINCENT P. CARDI,

Respondents.



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**BRIEF OF RESPONDENTS, NATALIE TENNANT, GARY A. COLLIAS  
AND VINCENT P. CARDI, MEMBERS OF THE  
WEST VIRGINIA STATE ELECTION COMMISSION**

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## **ASSIGNMENTS OF ERROR**

1. The Circuit Court clearly erred and abused its discretion in overturning the State Election Commission's determination that Justice Benjamin met all requirements of the Public Campaign Financing Program.

2. The Circuit Court clearly erred and abused its discretion in holding that disqualification is the automatic remedy for a late financial report under the Public Campaign Financing statute.

3. The Circuit Court clearly erred and abused its discretion in holding that the State Election Commission's decision certifying Justice Benjamin for public financing violated Beth Walker's federal Constitutional rights.

## **STATEMENT OF THE CASE**

In the interest of brevity, the Respondents, Natalie Tennant, Gary A. Collias And Vincent P. Cardi, Members Of The West Virginia State Election Commission (hereinafter "WVSEC"), accept and adopt, as if set forth fully herein, the Statement of the Case as set forth in the Brief of Petitioner, Brent D. Benjamin.

In addition, because proceedings before the WVSEC that took place simultaneously in a certification proceeding involving William Wooton are relevant to place the matters in the instant proceeding in context, the WVSEC would include the following facts:

William Wooton ("Wooton") is running for a seat on the Supreme Court of Appeals of West Virginia and declared his intent to seek public financing under The Judicial Campaign Finance Act (W. Va. Code §3-12-1, *et seq.*) (the "Act"), and subsequently became a participating candidate on December 28, 2015. (JA at 753.)

Wooton timely submitted records to the West Virginia Secretary of State that demonstrated he had gathered the required number and amount of contributions to qualify for the

Act on February 2, 2016, the second business day following the close of the filing period of January 30<sup>th</sup> (the last Saturday in January) as required by W. Va. Code § 3-12-3 (15). (JA at 753-755.)

Wooton's campaign filed its application for certification for public financing (the "Application") with the State Elections Commission on February 3, 2016.<sup>1</sup> (JA at 263.) That same day, Walker's campaign lodged an objection on the grounds that the Application was one day late. (JA at 755-756.)

The WVSEC conducted a hearing on February 5, 2016 wherein Commission determined to exercise discretion to relieve Wooton from strict compliance with a deadline in order to be fair and consistent in relieving Walker from strict construction of a deadline for lodging objections to qualifying contributions in the Benjamin certification proceeding:

MR. COLLIAS<sup>2</sup>: Yeah, I have a question. This is Gary Collias. Tim, isn't this the same issue that we had talked about where the regulations provided a time limit but the statute didn't, and we were basically giving people the benefit of the doubt and liberally interpreting the regulation because it conflicted with the statute?

MR. LEACH<sup>3</sup>: Yes. It's the same argument I made in regard to the Walker campaign being denied the right to file challenges because they missed the two-day deadline, but there is no two-day deadline for the filing of challenges or for the filing of the request for certification in the statute. They were added by regulation and further restricted the rights of the individuals.

MR. COLLIAS: Right. So I mean if we're going to be consistent, let's just say we're being consistent with our earlier decision, then we would have to let the Wooton campaign file this one day late.

(JA at 756-757.)

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<sup>1</sup> W. Va. Code 3-12-10(a) does not mandate a deadline for filing of applications, however, W. Va. CSR § 146-5-6.1 does provide that applications be filed within two business days after the close of the qualifying period, in this case, February 2, 2016.

<sup>2</sup> Member of WVSEC.

<sup>3</sup> Assistant Counsel for the West Virginia Secretary of State.

The WVSEC denied Walker's objection in the Wooton matter, finding that there was no prejudice in permitting the Application be admitted one day beyond the deadline set forth in W. Va. CSR § 146-5-6.1. (JA at 756-758.)

### **SUMMARY OF ARGUMENT**

The Judicial Campaign Finance Act (W. Va. Code §3-12-1, *et seq.*) (the "Act") is reform legislation that should be liberally construed under a substantial compliance standard in accordance with the Legislature's stated intent to ensure the fairness of democratic elections in this state, protect the Constitutional rights of voters and candidates from the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of elections, protect the impartiality and integrity of the judiciary, and strengthen public confidence in the judiciary.

The record before the WVSEC in this proceeding, and in the sister-proceeding before this Court on certified question involving Mr. Wooton, establish that the WVSEC attempted to exercise its' discretion in a manner that was fair and equitable to both the petitioning candidates and to Walker, the challenger in both matters. The WVSEC asserts that the record before the WVSEC in the Benjamin matter shows that there was substantial evidence to support the WVSEC findings that Benjamin had met the criteria for certification for public financing under the Act. The Circuit Court erred and abused its discretion in failing to give deference to the WVSEC's findings and in substituting its judgment for that of the WVSEC.

The Circuit Court further erred in adopting a strict construction interpretation that is inconsistent not only with the stated intent of the Act and the express discretion granted to the WVSEC, but which is also inconsistent with the sole reported opinion issued by this Court in *Loughry v. Tennant*, 229 W. Va. 630, 732 S.E.2d 507 (2012), in which this Court overlooked a



technical, strict construction application of a provision under the Act in order to accomplish a fair and just result.

## **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Court has already has scheduled oral argument for March 23, 2016 and Justice Benjamin believes such argument will be helpful to the Court and this Court should issue a formal opinion pursuant to Rule 20(g)(2) of the West Virginia Rules of Appellate Procedure.

## **ARGUMENT**

### **Introduction**

First and foremost, an understanding of the context of the proceedings before the West Virginia State Election Commission (“WVSEC”) involving both the Justice Benjamin and Wooton matters currently under review is necessary for a reasoned review by this Court of the merits.<sup>4</sup> All proceedings involving both the Brent Benjamin (“Benjamin”) and William Wooton (“Wooton”) campaigns before the WVSEC were conducted on an expedited, emergency basis while being presented with facts and circumstances never before presented to the WVSEC under the recently enacted statutory and regulatory scheme for public financing of judicial campaigns.

As is evidenced from the lengthy transcripts of the hearings below involving both the Benjamin and Wooton campaigns, the WVSEC undertook not only an effort to fulfill the spirit, intent and substance of the Act designed to reduce the overarching presence of large private donations from the judicial election process, but also attempted to exercise discretion to be fair to the candidates seeking public financing *and* the challenging candidate.

As for the expedited nature of the proceedings, the WVSEC spent considerable time and effort in reacting to all requests and challenges, most of which were brought and required to be

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<sup>4</sup> This Court is simultaneously addressing matters in a related proceeding, *William R. Wooton, Petitioner v. Elizabeth D. Walker, Respondent*. Docket No. 16-0226.

considered by the WVSEC within a span of two days, inclusive of internal analysis and public hearing. As is established below, the WVSEC was faced with arguments that (i) there was a late filing by the Wooton campaign, (ii) a late filing by the Benjamin campaign, and (iii) 365 late challenges the Walker campaign asserted against Benjamin. The WVSEC exercised discretion that is implied from the statute (*See* W. Va. Code §3-12-10(d); 3-12-16(h)) in granting both petitioning applicants and the challenger relief from arbitrary deadlines. Accordingly, the WVSEC attempted to balance any potential prejudice that could result from strict compliance with criteria under the statutory and regulatory scheme, with the express language of the statute that appears to create a substantial compliance standard.

The Act expressly gives the WVSEC discretion to determine whether a violation of the technical requirements for certification for public financing warrants imposition of a penalty or complete decertification. (*See* W. Va. Code §3-12-10(d); 3-12-16(h)). This discretion logically creates a substantial compliance standard to be exclusively administered by the WVSEC. Otherwise, the discretion expressly granted in the statute is illusory and any technical mis-step would result in immediate disqualification for public financing – a result belied by the statute itself.

Case law cited below has been offered to support the proposition that certain political deadlines, such as placing a name on a ballot, must adhere to strict deadlines.<sup>5</sup> The prejudice resulting from the missing of a deadline such as announcing an intention to seek election is concrete. Here, both applicants declared their intention to seek election for a seat on the West Virginia Supreme Court of Appeals and further declared their intentions to seek public funds

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<sup>5</sup> *See e.g. Brady v. Hechler*, 176 W. Va. 570, 571-72, 346 S.E.2d 546, 547-48 (1986)(granting mandamus relief directing the Secretary of State to strike a candidate from the ballot whose certificate of candidacy for nomination was one day late and explaining that “[i]t is generally and almost universally held that statutory provisions in election statutes, requiring a certificate or application of nomination to be filed with a specified officer within a specified period of time, are mandatory”).

under the Act, all well in advance of the proceedings here. The WVSEC asserts that the deadlines regarding the filing of a contribution report or an application for certification under the Act constitute ministerial deadlines and that the *contents* of such reports/applications are subject to review and scrutiny as part of the ultimate certification process.

The WVSEC asserts that it properly determined, under a substantial compliance standard, Mr. Benjamin had satisfied all criteria required for public financing under the Act, notwithstanding several discrete categories of challenges raised by the Walker campaign. Accordingly, the WVSEC respectfully urges the Court to uphold the WVSEC decision to allow Wooton to receive public financing in order to foster a liberal construction of a statute intended to protect the integrity of the judiciary.

Alternatively, in the event this Court determines that a strict compliance standard applies, thus making one or more of the matters that were the subject of a Walker campaign objection a violation under the Act, the WVSEC respectfully requests (i) consistency in any ruling as to timeliness matters in both proceedings currently before the Court on this matter, and (ii) remand of this matter to the WVSEC to permit the WVSEC to exercise the statutory discretion exclusively granted to the WVSEC to assess the gravity of such violation(s) and to determine whether any such violation warrants a \$100 fine under W. Va. Code §3-12-16(d) or full decertification under W. Va. Code 3-12-10(h).

### **Pertinent Statutory Provisions and Regulations Under The Act**

In 2009, then-Governor Joe Manchin created an Independent Commission on Judicial Reform to “evaluate and recommend proposals for judicial reform in West Virginia.” *State ex rel. Loughry v. Tennant*, 229 W. Va. 630, 732 S.E.2d 507 (2012). Additionally:

The Commission identified three “troubling trends” that led to its creation and which it sought to address: (1) the erosion of the public’s confidence in the

State's judicial system; (2) the voluminous caseload before the West Virginia Supreme Court of Appeals; and (3) the surge in judicial campaign expenditures. The Commission noted that "[a]s campaign spending has increased, so too has the perception that interested third parties can sway the court system in their favor through monetary participation in the election process.

*Id.*

The West Virginia Legislature passed the Judicial Campaign Finance Act (W. Va. Code §3-12-1 *et seq.*) and set forth the intent in §3-12-2(10):

As demonstrated by the 2012 West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program, an alternative public campaign financing option for candidates running for a seat on the Supreme Court of Appeals will ensure the fairness of democratic elections in this state, protect the Constitutional rights of voters and candidates from the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of elections, protect the impartiality and integrity of the judiciary, and strengthen public confidence in the judiciary.

W. Va. Code § 3-12-10(b) contains the criteria for certification of a participating candidate:

(b) Upon receipt of a notice from the Secretary of State that a participating candidate has received the required number and amount of qualifying contributions, the State Election Commission shall determine whether the candidate or candidate's committee:

(1) Has signed and filed a declaration of intent as required by section seven [§ 3-12-7] of this article;

(2) Has obtained the required number and amount of qualifying contributions as required by section nine [§ 3-12-9] of this article;

(3) Has complied with the contribution restrictions of this article;

(4) Is eligible, as provided in section nine [§ 3-5-9], article five of this chapter, to appear on the nonpartisan judicial election ballot; and

(5) Has met all other requirements of this article.

W. Va. Code § 3-12-8(d) addresses the filing of monthly reports for exploratory contributions:

(d) At the beginning of each month a participating or certified candidate or his or her financial agent shall report all exploratory contributions, expenditures and obligations along with all receipts for contributions received during the prior month to the Secretary of State. Such reports shall be filed electronically:

Provided, That a committee may apply for an exemption in case of hardship pursuant to subsection (c) of section five-b [§ 3-8-5b], article eight of this chapter.

W. Va. Code § 3-8-5b(c) allows for a hardship exemption from electronic filing and gives the WVSEC discretion: "Committees required to report electronically may apply to the State Election Commission for an exemption from mandatory electronic filing in the case of hardship. An exemption may be granted at the discretion of the State Election Commission."

W. Va. Code § 3-12-10(h) states that: "A candidate's certification and receipt of public campaign financing may be revoked by the State Election Commission, if the candidate violates this article. A certified candidate who violates this article shall repay all moneys received from the fund to the State Election Commission."

Correspondingly, § 3-12-16(d) authorizes the imposition of a civil penalty in the event of a violation of the Act: "In addition to any other penalties imposed by law, the State Election Commission may impose a civil penalty for a violation by or on behalf of any candidate of any reporting requirement imposed by this article in the amount of \$ 100 a day."

W. Va. CSR § 146-5-7.3 outlines the timing and procedure for challenges to qualifying contributions:

7.3. The challenger should attach any relevant evidence, affidavits, or notarized statements to the form. Challenge forms must be filed with, and received by, the Secretary within two business days after the close of the qualifying period or the filing of a candidate's Application For Certification, whichever is earlier.

W. Va. CSR § 146-5-7.5 requires the WVSEC to resolve all challenges within one day: “The WVSEC must determine by the end of next business day whether the challenge is sustained and notify the candidate and challenger.”

### **Standard of Review**

Findings of fact by an administrative agency are afforded great deference on review, while conclusions of law are reviewed *de novo*. *Maikotter v. University of W. Va. Bd. of Trustees/West Va. Univ.*, 206 W. Va. 691, 527 S.E.2d 802 (1999). Moreover, “The ‘clearly wrong’ and the ‘arbitrary and capricious’ standards of review are deferential ones which presume an agency’s actions are valid as long as the decision is supported by substantial evidence or by a rational basis.” Syl. Pt. 3, *Curry v. W. Va. Consol. Pub. Ret. Bd.*, 236 W. Va. 188, 778 S.E.2d 637 (2015).

Additionally, “A reviewing court must evaluate the record of an administrative agency’s proceeding to determine whether there is evidence on the record as a whole to support the agency’s decision. The evaluation is conducted pursuant to the administrative body’s findings of fact, regardless of whether the court would have reached a different conclusion on the same set of facts.” Syl. Pt. 1, *Walker v. W. Va. Ethics Comm’n*, 201 W. Va. 108, 109, 492 S.E.2d 167, 168-69 (1997).

As also stated by this Court:

The scope of judicial review of administrative adjudications in contested cases is controlled by W. Va. Code § 29A-5-4, which provides, in pertinent part:(g)

The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or

- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

This provision clearly predicates the circuit court's authority to reverse an administrative order upon a showing, by the party seeking review, of prejudice to his substantial rights as a result of one or more of the statutorily enumerated grounds. Absent such a showing, the reviewing court has no statutory authority to reverse an order or decision of an administrative agency in a contested case. *Shepherdstown Volunteer Fire Dept. v. West Virginia Human Rights Comm'n*, 172 W. Va. 627, 309 S.E.2d 342 (1983).

*Johnson v. State Dep't of Motor Vehicles*, 173 W. Va. 565, 569, 318 S.E. 2d 616, 619-620 (W. Va. 1984).

Finally:

[o]n appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W.Va.Code § 29A-5-4(a) and reviews questions of law presented de novo; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong." This deference extends to evidentiary findings made at administrative hearings. Syl. Pt. 1, *Francis O. Day Co., Inc. v. Director, Div. Of Env'tl. Protec.*, 191 W. Va. 134, 443 S.E.2d 602 (1994) ("Evidentiary findings made at an administrative hearing should not be reversed unless they are clearly wrong.").

*Groves v. Cicchirillo*, 225 W. Va. 474, 478, 694 S.E.2d 639, 643 (W. Va. 2010).

### Argument

The Circuit Court's order reversed the WVSEC decision on several grounds, including (i) that certain exploratory reports were late as they should have been filed monthly since October, 2015 (JA at 2084, ¶ 20.), (ii) that the hardship exemption was improper both as to form of filing and as to an extension of time (JA at 2086, ¶ 34.), and (iii) that electronic signatures could not qualify as signatures, and therefore, 192 receipts, receipts that were not individually analyzed by the WVSEC, failed to include a signature. (JA at 2089-2090, ¶¶ 52-56.)

As discussed below, the WVSEC's factual determinations are to be afforded great deference and there was substantial evidence to support the WVSEC's decision. The WVSEC's decision was not arbitrary, capricious or an abuse of discretion. The Circuit Court's reversal of the WVSEC's certification of Brent Benjamin was clearly erroneous and an abuse of discretion as set forth below. All arguments set forth below agree with and are made in support of Assignments of Error 1 and 2 set forth above. The WVSEC takes no position on Assignment of Error 3.

**A. The Circuit Court Erred In Holding That The Act Is To be Strictly Construed.**

The Circuit Court's Order determined that the Act is to be strictly construed: "This Court must strictly enforce the reporting deadlines set forth in W. Va. Code §§ 3-12-3(5), 3-12-8(d) and W. Va. CSR § 146-5-11.3. (JA at 2083, ¶ 16) "Strict adherence to deadlines relating to political campaigning activity is paramount..." *Id.* at ¶ 17.

However, the Act is reform legislation designed to allow public financing of judicial elections to curb the harmful effects of large private donations and to protect the impartiality and integrity of the judiciary, and as a result, should be liberally construed to that end. *See e.g. Repass v. Workers' Comp. Div.*, 212 W. Va. 86, 92, 569 S.E.2d 162, 168 (W. Va. 2002) ("The Workmen's Compensation Law is remedial in its nature, and must be given a liberal construction to accomplish the purpose intended." Citing Syl. pt. 3, *McVey v. Chesapeake & Potomac Telephone Co.*, 103 W. Va. 519, 138 S.E. 97 (1927) .

Furthermore, support for a substantial compliance standard is reflected in the two corresponding provisions referenced above regarding the WVSEC's discretion to address violations through a penalty (W. Va. Code § 3-12-16(d)) or through complete decertification (W. Va. Code § 3-12-10(h)). Importantly, Subsection 3-12-10(h) states that certification "may" be



revoked for a violation. *Id.* By necessity, this means that a candidate could nominally violate the Act and still be certified. The Act cannot require strict compliance if the discretion afforded the WVSEC to weigh the impact of a violation is to be given any meaning. As set forth below, the WVSEC found that Benjamin otherwise met all criteria for certification and that the Benjamin Campaign was in substantial compliance with the Act notwithstanding the Walker campaign objections raised and considered by the WVSEC.

Moreover, in the sole reported decision issued by this Court regarding the Act, *State ex rel. Loughry v. Tennant*, 229 W. Va. 630, 732 S.E.2d 507 (2012), this Court overlooked a technical, strict compliance requirement under the Act in order to accomplish a fair and just result. There, Allen Loughry (now Justice Loughry), petitioned the WVSEC for matching funds under the Pilot Program, the first version of the Act.<sup>6</sup> Under that scheme, a petitioning creditor could receive \$350,000 in initial public funding and, if a competing candidate spent beyond a specified threshold, the petitioning candidate could receive additional “matching funds.” This Court determined that such a scheme was unconstitutional. *Id.*

However, this Court also acknowledged that W. Va. Code §3-12-12 “prohibits a participating candidate from raising private contributions.” *Id.* at 520. This Court determined to overlook the technical application of this prohibition under the circumstances because it would have worked an unwarranted and unnecessary injustice: “Considering these unique circumstances and as a matter of fundamental fairness to Petitioner Loughry, who relied in good faith on the terms of the Pilot Program, we find that Petitioner Loughry may now seek campaign contributions in support of his candidacy.” *Id.*

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<sup>6</sup> The matching funds concept under the Pilot Program was amended to create the current version of the Act.

Consistent with this Court's prior treatment and liberal interpretation of the Act, this Court should repeat the framework and analysis of the Act, as in *Loughry, supra*, by beginning with the proposition that it calls for liberal interpretation and carries a substantial compliance standard.

**B. The Circuit Court erred in holding that exploratory reports were required in months where the statute does not require them to be filed.**

The Circuit Court's Order states that "The Justice was obligated to file an exploratory period report no later than October 1, 2015, the beginning of the month following his September 11, 2015 Declaration of Intent to Participate, an unequivocal statement of his intent to receive public campaign financing." (JA at 2080, ¶ 15.) Accordingly, the Circuit Court reversed certification for failure to meet reporting requirements. This was clear error.

Under the Act, no reporting requirements arise until a candidate declares intent to seek public financing and becomes a "participating candidate." See W. Va. Code § 3-12-3(11). As a result, a candidate who is not yet "participating," has no obligation to report exploratory contributions, at least until after declaring an intent to participate. Once intent is declared, the candidate no longer receives exploratory contributions – they become qualifying contributions. W. Va. Code § 3-12-7. No one disputes that Benjamin timely filed all reports for qualifying contributions in each monthly period after becoming a "participating" candidate.

However, the question has arisen whether an exploratory report was due in October, 2015, the month after Benjamin became a qualifying candidate. The express language of the controlling statute states:

(d) At the beginning of each month a participating or certified candidate or his or her financial agent shall report all exploratory contributions, expenditures and obligations along with all receipts for contributions **received during the prior month** to the Secretary of State.

W. Va. Code § 3-12-8(d) (emphasis supplied). Although the Benjamin Campaign received

exploratory contributions in months prior to September, 2015, it did not **receive** any contributions in September. As such, a requirement to report exploratory contributions “received in the prior month” had no application to the Benjamin campaign.

W. Va. Code § 3-12-13(c)(1) specifically permits a participating candidate to file a report of all exploratory contributions not previously submitted:

No later than two business days after the close of the qualifying period, a participating candidate or his or her financial agent shall report . . . (1) All exploratory contributions received and funds expended or obligated during the exploratory period together with copies of any receipts not previously submitted for exploratory contributions.

*Id.*

The Circuit Court’s order states that “Justice Benjamin did in fact receive exploratory contributions during the exploratory period on March 3, April 20, 27, 29, May 20, June 22, July 21 and July 22, 2015, but failed to file any exploratory period monthly reports at the beginning of the month following receipt of such contribution.” (JA at 2082, ¶ 13.) The Circuit Court fails to acknowledge that reports are not required until a candidate becomes a participating candidate. Because Benjamin did not declare intent until September of 2015, **no reports** were due at all prior to October, 2015.

The Circuit Court’s Order also expressly acknowledges, more than once, that exploratory reports are required for exploratory contributions received **during the prior month**. (JA at 2081, ¶ 8; 2082, ¶ 13.) Yet, the Benjamin Campaign received no exploratory contributions that would have triggered that reporting obligation. As a result, no report of exploratory contributions was necessary for October, the month after Benjamin filed his declaration of intent and became a participating candidate, because no qualifying contributions were “received during the prior month.”

The WVSEC properly determined that Benjamin's exploratory contributions could be reported in the final reporting referenced in W. Va. Code § 3-12-13(c)(1) and the Circuit Court erred in holding that exploratory reports were required in months where the statute does not require them to be filed. This comes from an "ordinary" reading of the statutory language. The WVSEC's decision is further justified under a liberal interpretation and a substantial compliance standard as addressed above.

**C. The Circuit Court Erred In Holding That Benjamin Could Not Receive A Hardship Exemption.**

The Circuit Court's Order held that "the hardship exemption did not apply and the WVSEC was clearly erroneous in granting Justice Benjamin a hardship exemption extending the deadline for Benjamin to file his statutorily-required exploratory reports, with no precedent, regulations or statute allowing the same." (JA at 2086, ¶ 34.)

The WVSEC made factual findings regarding a problem with the software used to accept electronic filings. (JA at 709-717.) Additionally, as discussed above, the WVSEC made findings that exploratory reports were not due prior to the final report because no exploratory reports were received in any month that was previous to the declaration of intent. As established above, those findings are entitled to great deference and the Circuit Court should not have substituted its judgment for that of the WVSEC. "The 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis." Syl. Pt. 3, *Curry v. W. Va. Consol. Pub. Ret. Bd.*, 236 W. Va. 188, 778 S.E.2d 637 (2015). The Circuit Court's Order regarding the hardship exemption was also based in part on the erroneous interpretation that exploratory reports were, in fact, due for those preceding months. The WVSEC's decision to grant a hardship exemption both as to electronic filing and as to a brief extension for a final

report was supported by substantial evidence, and was not clearly erroneous or an abuse of discretion.

W. Va. Code § 3-12-13(c)(1) states that the final report is to be filed within two business days of the close of the qualifying period (February 2, 2016) and must be filed electronically. *Id.* The statute further authorizes the grant of a hardship exemption under W. Va. Code § 3-8-5b(c). *Id.*

W. Va. Code § 3-8-5b(c) allows for a hardship exemption from electronic filing and gives the WVSEC discretion: "Committees required to report electronically may apply to the State Election Commission for an exemption from mandatory electronic filing in the case of hardship. An exemption may be granted at the discretion of the State Election Commission." This is another example of discretion granted to the WVSEC and further supports a liberal interpretation of the Act and a substantial compliance standard.

The transcript from the February 5, 2016 hearing before the WVSEC contains the following discussion of the software problem that prevented electronic filing of the final report:

MR. LEACH:<sup>7</sup> . . . So the campaign has advised us, me and the Secretary, we confirmed that our electronic reporting software system is not set, doesn't recognize the animal of public campaign financing pre-candidate filings. The law tends to treat them much as an exploratory committee and they are or I mean as a pre-candidate committee, but in fact they're a different animal. They're exploratory public finance rollover reports. So in any event there's no way to get those into our system because it's not designed for that peculiar animal. So they've asked for a waiver of the electronic filing requirement.

MR. CARDI:<sup>8</sup> Thank you.

WVSEC. TENNANT:<sup>9</sup> Any questions or comments?

MR. LEACH: And I would add for the benefit of the Commission that this is in many places in campaign financing reports besides just public financing. And the

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<sup>7</sup> Assistant Counsel for the Secretary of State.

<sup>8</sup> A Member of the WVSEC.

<sup>9</sup> A Member of the WVSEC.

waiver exists in all those places, and there's no definition in the statute of what constitutes a hardship. So it's pretty much at your discretion.

MR. CARDI: This is Vince Cardi. Do the facts support the contention that there was no way really to file these electronically because the Secretary of State's software wasn't set up to receive it?

MR. LEACH: Well, it has to be -- the program has to be written to acknowledge that report which it didn't recognize. It's a different animal than what our programming is set up to receive from the general pre-candidacy reports. It's exploratory report for public financing. Pre-candidacy reports are not due until April of the following year. And they're trying to shove a report into our electronic system in November, December, January, whenever, and it's not April of the following year and the system just says can't do that.

(JA at 710-712.) In finding that the electronic filing problem was not within the Benjamin Campaign's control, the WVSEC exercised its discretion and granted the hardship extension:

MR. CARDI: Okay. Do the facts show that this information could not be responded to or received, whatever the problem is, because the software or what was done in the Secretary of State's office was unable to do it?

MR. LEACH: Yes, the facts support that.

MR. CARDI: Then is there any reason for the Commission not to grant this request?

MR. LEACH: I can't cite the instances, but I would remind the State Election Commission that we have granted similar hardship requests in the past.

WVSEC. TENNANT: And one of them was --

MR. CARDI: This is Vince Cardi. I move that we grant this hardship request.

MR. COLLIAS:<sup>10</sup> I second the motion. This is Gary Collias.

WVSEC. TENNANT: It's been moved and seconded. All in favor say aye.

MR. COLLIAS: Aye.

MR. CARDI: Aye.

WVSEC. TENNANT: Aye. Motion carries. And if I may address a question that came up. So the waiver has been granted to the Benjamin campaign.

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<sup>10</sup> A Member of the WVSEC.

(JA at 716-717.)

The WVSEC correspondingly found that it made no sense to grant the hardship extension without giving the Benjamin Campaign additional time to file the final report. (JA at 747-752.) Accordingly, the WVSEC granted an extension through February 10, 2016 to file the final report as a predicate to considering all criteria for certification. *Id.*

The hardship exemption is yet another example of “discretion” expressly afforded to the WVSEC. W. Va. Code § 3-8-5b(c). It bears repeating that the WVSEC likewise exercised discretion to allow presentation of 365 “late” challenges brought by the Walker Campaign on February 3, 2016. As such, substantial compliance/liberal interpretation of the Act was not exercised solely for the benefit of any one party. It was exercised for Benjamin, Walker and Wooton.<sup>11</sup>

If the WVSEC has discretion to grant the hardship exemption, it stands to reason that such discretion also carries the ability to briefly extend the deadline – so long as any report necessary for consideration for certification is filed in advance of the certification process. *See Walker v. W. Va. Ethics Comm’n*, 201 W. Va. 108, 121, 492 S.E.2d 167, 180 (1991) (noting that there are “certain circumstances in which an agency may perform a function that is implied, but not specifically permitted, by statute”; an agency’s authority includes “such other powers as are necessary or reasonably incident to the powers granted.”) (quoting *Walter v. Ritchie*, 156 W. Va. 98, 108, 191 S.E.2d 275, 281 (1972)).

Moreover, as stated by this Court: it is “the duty of a court to disregard a statutory construction, though apparently warranted by the literal sense of the words in a statute, when

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<sup>11</sup> As previously noted, the WVSEC permitted Walker to lodge 365 challenges to Benjamin qualifying contributions on February 3, 2016, one day beyond the regulation requiring they be lodged no later than February 2, 2016. Additionally, the WVSEC granted William Wooton relief from enforcement of a deadline for the filing of the application for certification in Docket No. 16-0028.

such construction would lead to injustice and absurdity.” *Chevy Chase Bank v. McCamant*, 204 W. Va. 295, 512 S.E.2d 217 (1998)).

The WVSEC’s liberal interpretation and use of a substantial compliance standard, particularly in light of the decision to consider 365 late challenges brought by the Walker Campaign, provides adequate grounds for this Court to affirm the WVSEC’s decision to permit the Benjamin campaign a hardship exemption, both as to form and time, under the circumstance. Moreover, because the final report was submitted prior to consideration of certification, there was no prejudice in the brief delay. Alternatively, in the event the Court finds that either the submission of prior exploratory contributions in the final report or the filing of the paper final report on February 10, 2016, to be a violation of the Act, the Court should remand the issue to the WVSEC in order for the WVSEC to exercise its statutory discretion to weigh such violation and determine whether to impose a fine or to decertify Benjamin, all as discussed more fully below.

**D. The Circuit Court Erred In Removing Walker’s Burden of Proof Below On The 365 Late Challenges.**

The Circuit Court’s Order reversed the WVSEC’s certification of Benjamin on the additional ground that “the WVSEC unilaterally decided that Walker was also required to provide evidence which was a copy of the actual receipt for each challenged contribution.” (JA at 2090, ¶ 60.)

W. Va. CSR § 146-5-7.3 outlines the timing and procedure for challenges to qualifying contributions:

7.3. The challenger should attach any relevant evidence, affidavits, or notarized statements to the form. Challenge forms must be filed with, and received by, the Secretary within two business days after the close of the qualifying period or the filing of a candidate’s Application For Certification, whichever is earlier.



As set forth above, the WVSEC received 155 challenges to Benjamin qualifying contributions that were submitted by the Walker campaign on February 2, 2016.<sup>12</sup> Under W. Va. CSR § 146-5-7.5, “The WVSEC must determine by the end of next business day whether the challenge is sustained and notify the candidate and challenger.” *Id.* Additionally, subsection 7.3 of the WVCSR states that “the challenger should attach any relevant evidence, affidavits, or notarized statements to the form.” *Id.*

The Secretary of State’s staff undertook the task, until 10 p.m. the evening of February 2, 2016, to review the initial 155 Walker objections and would have taken roughly 3 times that to review the 365 late challenges that were brought on February 3, 2016. (JA at 567<sup>13</sup>.)

There was a discussion on the record about the 365 additional challenges being late and also about the need for the Walker campaign to come forward with specifics and not blanketly challenge a massive group of receipts:

MR. LEACH: we need you -- I mean you can’t, in my belief, you can’t just say I want you to investigate all eight hundred of these and make sure they are registered voters. That is not what the challenge -- the challenge is I know this guy. He lives in Arizona. He doesn’t live in West Virginia. He’s registered in Arizona. He cannot make a contribution. That’s what the challenge is, and then we rule on them one at a time. You don’t turn over your responsibility to the State Election Commission and say investigate the whole package.

(JA at 566.)

WVSEC. TENNANT: Oh, this is the rule. It says the challenger shall cast any relevant evidence, affidavits, or notarized statements to form. Challenge forms must be filed with a receipt by the Secretary of State within two business after the close of the --

MR. LEACH: That might be the basis for an objection.

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<sup>12</sup> The Circuit Court’s Order indicates that there were 154 challenges brought on February 2, 2016. (JA at 2074, ¶ 40.) Given the WVSEC’s analysis of those challenges on the merits and the corresponding denial of the majority of such challenges (discussed in detail below), the difference is immaterial to any ultimate ruling on certification.

<sup>13</sup> Again, a hearing on challenges must be conducted under WVCSR 146-7-7.5 by the next business day.

WVSEC. TENNANT: With the close of the qualifying period for the filing of candidates' application, whichever is earlier. So we don't have to accept any of these.

(JA at 566-567.) Notwithstanding the fact that the 365 challenges were technically late, the WVSEC nevertheless permitted the Walker Campaign to advance the evidence to support the challenges.

At the hearing on February 4, 2016, Joe Reidy, a representative of the Walker Campaign, acknowledged that he was advised to bring evidence to the February 4, 2016 hearing:

MR. REIDY:<sup>14</sup> I was told yesterday that I had to bring evidence --

WVSEC. TENNANT: Hang on. Please state your name. Go ahead, Joe.

MR. REIDY: I was told yesterday that I had to bring evidence to back up my challenges today.

(JA at 596.)

Commissioner Collias displayed additional discretion and fairness in acknowledging that the WVSEC would consider the 365 challenges even though they were technically late:

MR. COLLIAS: No, I'm prepared to go forward and consider these all on their merit in the groups that they're broken down on, down in. I'm satisfied that I think it wouldn't be right to strike all of these challenges based on the timeliness issue. I don't think that would be right, and so I'm ready to go forward.

(JA at 596-597.)

Additionally, as stated on the record before the WVSEC on February 4, 2016:

MR. CARDI:<sup>15</sup> That you made it clear to them that they actually had to bring in the receipts if their objection was based upon the content of the receipt, they had to bring in the receipt?

MR. NICHOLS:<sup>16</sup> I'm sorry. I didn't mean to interrupt. My comment to them was any evidence they needed to present, they would need to provide because the

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<sup>14</sup> A non-attorney representative of the Walker campaign.

<sup>15</sup> A Commissioner with the WVSEC.

<sup>16</sup> Legislative Liaison and Legal Assistant to the W. Va. Secretary of State.

Secretary of State's office staff would not be going through and looking up each one of those as we did with the ones from the meeting yesterday.

MR. CARDI: So I mean the point here, if in fact they were justifiably led to believe that we would have these in front of us, that we would have them present at the hearing so they could say, hey, look at Burgess', and here's the problem with Burgess, and we could pick up the Burgess and look at it, then Gary's may be right. But if they were clearly led to believe that we may have possession of it, but it's not our job to produce it, you've got to bring what we already, you've got to bring another copy of what we already have in our possession.

MR. NICHOLS: That was the intent of what I was conveying in the phone call last night, yes.

MR. COLLIAS: Vince, I agree with exactly the way you put it there. That's exactly what I think the distinction is.

MR. CARDI: Yeah.

WVSEC. TENNANT: And it -- I mean I can't speak for Joe. Was it clear to you?

MR. REIDY: Yes, ma'am.

WVSEC. TENNANT: He said it was clear to him.

MR. CARDI: Joe is who?

WVSEC. TENNANT: Joe, Joe is Joe. Joe is Joe Reidy from the Walker campaign. He's the one who's been with us the last two days.

MR. NICHOLS: Okay. And the one I spoke with on the phone.

WVSEC. TENNANT: And the one that Dave spoke with.

MR. CARDI: Okay. And does Joe agree with David that it was made clear to him last night that if they wanted to base their objection on the content of the receipt, they had to bring the receipt and not depend upon the Commission staff to produce that?

MR. REIDY: Yes, sir.

MR. NICHOLS: Did you hear that, Professor?

MR. COLLIAS: Yeah, I heard it. That seems to resolve the issue.

MR. CARDI: Yeah, yeah, it does.

MR. COLLIAS: I mean my concern was -- I don't care, you know, which way these challenges go as between the Benjamin and the Walker campaign, but it's important that, you know, I want to be fair, too, you know, to both parties in this.

(JA at 651-653.)

The Commissioners further addressed not only the distinction between permitting the 365 late challenges to come in, and the evidentiary obligation they placed on the challenger, but the fact that the Secretary of State was the entity with copies of the subject receipts, not the WVSEC and also that the WVSEC has no staff:

WVSEC. TENNANT: I would say that the Secretary of State-- now, remember we're separate. The WVSEC doesn't have a staff.

MR. REIDY: Okay.

WVSEC. TENNANT: The State Election Commission does not have a staff. The Secretary of State's office has a staff, and we can assist when we can. And I would say that we offered extra information. Just as we printed out all of these, there was extra information. So it's not that we brought any evidence in. And it goes back to this. So ignoring is a strong word.

MR. COLLIAS: Well, what we've done is give the Walker campaign the benefit on the two-day business rule.

WVSEC. TENNANT: Correct.

MR. COLLIAS: But that doesn't mean that that invalidates the rest of that regulation. The rest of the regulation doesn't have the problem. I mean there's a severe problem with that applying the two-day limit to the Walker campaign. I thought it was unfair and unjust, and there's questions that Tim Leach described with regard to adopting regulations that might be inconsistent with the statute. But the language with regard to the challenge should attach relevant evidence, affidavits, or notarized statements to the form, that doesn't seem to me to have any problem, any legal problem at all. That's exactly the sort of regulation that the legislature expects us to adopt.

(JA at 655-656.)

When the additional 365 “late” challenges came in, the WVSEC attempted to be fair in relieving Walker from the lateness but also reasonably required Walker to bring evidence of the 365 receipts as contemplated by W. Va. CSR 146-5-7.3. Obviously, the Walker campaign had a copy of each receipt and additional documentation or other evidence in order to assert the objections. Yet, the Walker Campaign effectively said, “yes, we identified and reviewed each underlying document in making our objections, now you go find them.” As a result, the WVSEC acted fairly and within its discretion to allow the Walker campaign the opportunity to present the 365 objections notwithstanding that they were late, but also acted fairly and within its discretion to also require the Walker campaign to support and substantiate the late objections with evidence. When the Walker campaign failed to bring evidence, the WVSEC properly refused to consider the additional objections. This was either a failure to carry the burden of persuasion/production or a waiver of the challenges, or both.<sup>17</sup>

As stated by this Court “Requiring the party bringing a claim for relief to bear the burden of persuasion, however, is consistent with our jurisprudence. ‘It is a well-established rule of law that in civil actions the party seeking relief must prove his right thereto[.]’” *In re Tax Assessment of Foster Foundation's Woodlands Ret. Cmty.*, 223 W. Va. 14, 29, 672 S.E.2d 150, 165 (2008) (citing *Boury v. Hamm*, 156 W. Va. 44, 52, 190 S.E.2d 13, 18 (1972)). The regulation clearly contemplates that the challenger should come forward with evidence. W. Va. CSR § 146-5-7.3.

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<sup>17</sup> The WVSEC inquired whether, in the absence of any evidence offered in support of the 365 otherwise late challenges, the Walker campaign could shed any light on the substance of the electronic signature objection:

MR. CARDI: Okay. And what about this document, what about it that showed no signature? Why was the electronic signature on that not a signature or was it just not a signature at all? I mean what was defective about it?

MR. REIDY: I don't have a comment on that.

(JA at 643.)

The WVSEC's actions in requiring the Walker Campaign to carry the burden of persuasion/production for an enormous number of otherwise late challenges to be reviewed within 24 hours was not only proper, but was consistent with the contents of the applicable regulation and West Virginia jurisprudence regarding claimants carrying such burden. As a result, the Court should affirm the decision of the WVSEC in refusing to consider the late challenges for which no evidence was provided.

It cannot reasonably be contemplated that the West Virginia Legislature intended that a challenger could lodge a blanket objection to several hundred qualifying contributions and expect the WVSEC to co-opt the Secretary of State's busy staff and to carry the objecting party's evidentiary burden to substantiate all such objections within 24 hours of such challenges. This is particularly acute when the challenger, in order to assert a good faith basis to challenge, must have necessarily possessed and reviewed documentation that could easily be presented as evidence in support of such challenges. Such a standard, if adopted, would create a "how to" guide for any future competitor candidate, that would permit a challenger to object to every contribution on every conceivable ground in a situation where all the challenger has to do is raise the substance of the objection, thereby forcing the WVSEC (on its own or through use of the Secretary of State's staff) to engage in an unenviable task of reviewing all challenged contributions and preparing the objecting candidate's evidence for them for a hearing to be held within 24 hours.<sup>18</sup>

**E. The Circuit Court Erred In Reversing the WVSEC's Certification of Benjamin.**

On February 10, 2016, the WVSEC conducted an additional proceeding to consider

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<sup>18</sup> W. Va. CSR 146-7-7.5 states "The WVSEC must determine by the end of next business day whether the challenge is sustained and notify the candidate and challenger."

Benjamin's certification under the Act. (*See generally*, JA at 210-253.) In reviewing the criteria for certification on February 10, 2016 the WVSEC found that Benjamin complied (or substantially complied as discussed herein) with all certification requirements.<sup>19</sup> Specifically, with respect to qualifying contributions, the WVSEC confirmed that, without consideration of the 365 February 3, 2016 challenges, Benjamin's total qualifying contributions comprised of (i) statutory verification and sampling techniques used by the Secretary of State under W. Va. Code § 3-12-10(b) and (c), and (ii) the valid contributions remaining after full consideration by the WVSEC of the 155 challenges lodged on February 2, 2016, that the Benjamin campaign had 512 qualifying contributions. (JA at 726-727; JA at 214.) Accordingly, the WVSEC certified Benjamin under the Act. (JA at 249.)

There was substantial evidence to support the WVSEC factual findings, particularly in the absence of consideration of the 365 challenges lodged by the Walker Campaign on February 3, 2016. As established above, those findings are entitled to great deference and the Circuit Court should not have substituted its judgment for that of the WVSEC. "The 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis." Syl. Pt. 3, *Curry v. W. Va. Consol. Pub. Ret. Bd.*, 236 W. Va. 188, 778 S.E.2d 637, 638 (2015).

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<sup>19</sup> As discussed above, the WVSEC determined that a final exploratory report could properly include exploratory contributions previously unreported, particularly where none of the exploratory contributions were received in any immediately preceding month during which the candidate was a "participating candidate." Additionally, the WVSEC granted a hardship exemption for the filing of that final report such that it could be filed on February 10, 2016 by paper, given the inability to file it electronically.

**F. The Circuit Court Erred In Considering The 365 February 3, 2016 Challenges that were late by the Circuit Court's Own Strict Compliance Standard, and Where Those Challenges Were Either Waived Or Where No Record Was Made Preserving Those Challenges**

The Circuit Court's Order embraces a strict construction of the Act: "This Court must strictly enforce the reporting deadlines set forth in W. Va. Code §§ 3-12-3(5), 3-12-8(d) and W. Va. CSR 146-5-11.3. (JA at 2083, ¶ 16.) "Strict adherence to deadlines relating to political campaigning activity is paramount . . . ." *Id.* at ¶ 17. This creates an inconsistency. The Circuit Court ruled that Benjamin could obtain no relief from a deadline either under a liberal interpretation, or through a substantial compliance standard. However, the Circuit Court Order also fails to acknowledge that the 365 challenges brought by Walker on February 3, 2016 are equally late under the same strict construction approach.

If this Court is inclined to accept the Circuit Court's "late is late" approach, then the 365 challenges presented by the Walker campaign on February 3, 2016 were equally late, and should not have been entertained by the WVSEC or the Circuit Court. The significance of this "late is late" approach is that the WVSEC can determine that a late filing by a "participating candidate" is a violation and exercise statutory discretion to determine whether the late filing is a nominal violation, warranting a fine, or whether the late filing is a significant violation, warranting full decertification. However, if the rule from this proceeding is to be "late is late" then Walker's "late" challenges were, frankly, late, and cannot be entertained and the WVSEC has no discretion or recourse to permit a late challenge.

Alternatively, if the WVSEC acted properly in exercising discretion to entertain the late Walker challenges, such a finding necessarily establishes a substantial compliance standard and further acknowledges deference given to the WVSEC to exercise discretion with a view toward fairness in the spirit of the Act, rather than wield arbitrary authority. This appears to be the



reasoned rule, particularly where the WVSEC can assess whether a failure to meet a deadline is substantial or whether is merely ministerial and causes no prejudice.

Either the WVSEC can excuse a violation or it cannot. If it can, then it was appropriate for the WVSEC, in its discretion, to find substantial compliance and grant certification. If the WVSEC cannot excuse a violation, then the question becomes (for a “participating candidate’s” violation), whether the violation warrants a penalty and/or whether the candidate can be certified notwithstanding the violation.

Thus, The Circuit Court erred in two distinct ways in reviewing the 365 late challenges raised by the Walker Campaign. First, the Circuit Court’s Order, in order to be internally consistent, would have to have found the Walker challenges late: “This Court must strictly enforce the reporting deadlines set forth in W. Va. Code §§ 3-12-3(5), 3-12-8(d) and W. Va. CSR § 146-5-11.3. (JA at 2083, ¶ 16.) “Strict adherence to deadlines relating to political campaigning activity is paramount . . . .” *Id.* at ¶ 17.

Second, the evidence of the challenges was not properly before the Circuit Court. *See* W. Va. Code § 29A-5-4(e) (“Appeals taken on questions of law, fact or both, shall be heard upon assignments of error filed in the cause or set out in the brief of the appellant. ***Errors not argued by brief may be disregarded . . . .***”) (emphasis added). Additionally, this Court addressed the fact that is improper for a trial court to consider a matter not raised during administrative review below:

[The] Trial court erred in reversing a hearing officer's revocation of a licensee's driver's license based on a finding that the police officer did not introduce a copy of the municipal ordinance which was the basis of the licensee's DUI arrest into the record before the hearing examiner because the licensee failed to raise, before the hearing examiner, a question as to if the municipal DUI ordinance differed substantively from state law found at W. Va. Code § 17C-5-2; because the issue was raised for the first time on appeal to the trial court, the question should not have been considered by the trial court.

*Noble v. W. Va. DMV*, 223 W. Va. 818, 679 S.E.2d 650 (2009).

**G. The Circuit Court Erred In Making A Blanket Ruling On Electronic Signatures.**

The Circuit Court's Order expressly found that the 192 contributions for which an electronic signature was alleged to fall short of the signature requirement in the Act, warranted a reversal of certification on the grounds that the Benjamin failed to produce the requisite 500 qualifying contributions under the Act. (JA at 2090, ¶¶ 54-56.)

First, this is contrary to the WVSEC finding, referenced above, that the Benjamin Campaign had 512 qualifying contributions (after consideration of all appropriate objections). Second, the 365 "late" challenges raised by the Walker Campaign should not have been reviewed by the Circuit Court as addressed in the preceding argument. However, to the extent this Court permits that review to stand, the WVSEC asserts that it was error for the Circuit Court to make a blanket rule about electronic signatures and further to bypass the WVSEC's discretion to analyze the receipts one at a time and make a determination as to whether there were violations, and if, so whether there was any curative or corrective evidence that could have cured any such violation. Additionally, if there was a violation, such violation would not necessarily have resulted in immediate decertification.

Had the Walker Campaign presented evidence (or had the challenged receipts otherwise been reviewed on the merits), and had the WVSEC reviewed the challenged receipts one at a time, as was the case during the preceding day's hearing, the WVSEC could have (i) determined if a violation occurred, (ii) determined if the Benjamin campaign had any curative evidence (i.e. an original signature to accompany an electronic signature), (iii) permitted the Benjamin the balance of its 5-day period to "replace" a challenged receipt, and (iv) ultimately make a determination as to whether any uncured violation warranted a fine or decertification.

The Act does not state that an original signature is required, only a signature: “For qualifying contributions of \$25 or more, the contributor's signature, printed name, street address, zip code, telephone number, occupation and name of employer; and for qualifying contributions of less than \$25, the contributor's signature, printed name, street address and zip code.” W. Va. Code § 3-12-9(b)(2). Moreover, during the hearing on February 3, 2016, the WVSEC undertook an analysis of the electronic signature issue one receipt at a time. (*See generally* JA at 447-550.) The 192 electronic signatures at issue were part of the 365 challenges that the WVSEC ultimately refused to consider on the grounds that the Walker Campaign failed to present evidence. There was no analysis by the WVSEC of the 192 electronic signatures and no inquiry as to whether there were original signatures to accompany the receipts or any consideration of whether the Benjamin Campaign should be given the balance of time to replace any contributions.<sup>20</sup>

Accordingly, the Circuit Court's Order went straight to decertification, without any consideration of the matters that the WVSEC would have considered as a matter of course and as would have been consistent with the previous day's hearing.

If the Court will forgive the analogy, the review of this issue is a bit like the layers of an onion:

Layer One - If this Court determines that the 365 challenges were not late, that necessarily means that the WVSEC had discretion to adopt a liberal interpretation of the

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<sup>20</sup> The Act gives a participating candidate 5 days from the date of a challenge to replace a contribution for one that was challenged. W. Va. CSR § 146-5-7.6. The challenges mounted on February 3, 2016 were denied on February 4, 2016. (JA at 657.) Had any of those challenges been sustained, the Benjamin Campaign would have had the opportunity (for 4 additional days) to replace any contributions that were successfully challenged. Because the challenges were denied, there was no need for the Benjamin Campaign to replace any of those challenged contributions. If this Court's ruling revives those challenges and the Benjamin Campaign is not afforded an opportunity to replace contributions, this would appear to eliminate the Benjamin Campaign's right to replace contributions – another reason to remand as discussed below.

challenge deadline and to grant the Walker campaign relief from an arbitrary deadline. If however, the 365 challenges were, in fact late, then the issue of the 192 electronic signatures is moot and of no consequence.

Layer Two – If this Court determines under Layer One, that the 365 challenges were not late (which tacitly acknowledges the WVSEC’s discretion), then under Layer Two, it must determine whether the WVSEC properly exercised discretion to require the Walker Campaign to present the evidence of the 365 otherwise late challenges and if so, whether the Walker Campaign either failed to meet its burden of production or otherwise waived the 365 challenges in failing to bring evidence. If so, the 365 challenges were not properly before the Circuit Court on appeal and the issue of the 192 electronic signatures is again moot and of no consequence.

Layer Three – If the Court finds that the 365 challenges were not late, but that it was proper nevertheless for the Circuit Court to review those 365 challenges notwithstanding the Walker Campaign’s failure to present evidence in support of those challenges, only then must the Court consider whether it was proper for the Circuit Court to (i) make a blanket rule that the “signature” requirement in W. Va. Code §3-12-9(b)(2) requires an “original” handwritten signature, and (ii) make a blanket ruling that all electronic signature receipts fail as a matter of law, without conducting a receipt-by-receipt analysis of all 192 receipts, and affording the Benjamin campaign an opportunity to either cure (as was the case with several electronic signature receipts from the February 3, 2016 hearing) (JA at 678-692), or replace the receipts, as contemplated under W. Va. CSR § 146-5-7.6.

As evidenced by the February 3 and 4 hearing transcripts, the WVSEC conducted a receipt-by-receipt analysis of challenges (among the initial and timely 155 challenges) asserting that an electronic signature failed to qualify. (*See generally* JA 447-550.) In several instances,

the Benjamin Campaign ultimately produced an original signature to eliminate the need to further consider the electronic signature question. (JA at 678-692.) Additionally as set forth above, had the WVSEC considered the 365 one-by-one on the merits and ruled against some or all of the 192 receipts asserted to have electronic signatures, the Benjamin Campaign would have had the balance of the 5-day period from the date of the late-but-nevertheless-permitted challenges to replace such receipts as set forth in W. Va. CSR § 146-5-7.6. If this Court has interpreted the Act liberally enough to permit the late challenges to be permissible for review, it stands to reason, particularly under *Loughry, supra*, that a petitioner that has relied upon the absence of a need to replace a challenged receipt, should, in fairness, receive the balance of that 5 day period in order to replace such receipt if it is found to violate the criteria for certification.

Ultimately, if this Court finds any of the foregoing matters involving the electronic signatures on receipts to be violations of the Act, including any violations set forth in the Circuit Court's Order, then the Court should remand this matter to the WVSEC for further proceedings in order to substantively review the challenged receipts on the merits, and in order to determine the consequences of any such violation, all as set forth in the remand discussion below.

**H. In The Event The Court Determines That The Benjamin Campaign Violated The Provisions of The Act, Then The Consequences of Such Violation Should Be Remanded To The WVSEC For Exercise of The WVSEC's Discretion To Determine Whether Such Violation Warrants a Fine Or Decertification.**

If the Court finds there was, in fact, a violation of the Act, this matter should be remanded back to the WVSEC to review the violation, as determined by this Court, determine whether such violation warrants a fine or outright disqualification. Under the West Virginia Administrative Procedures Act: "The court may affirm the order or decision of the agency or remand the case for further proceedings." W. Va. Code § 29A-5-4(g); *see also* Syl. Pt. 4, *In re Sommerville*, 178 W. Va. 694, 364 S.E.2d 20, (1987) (When we are confronted with an

inadequate record from an administrative agency subject to the supervision of this Court, such that we are unable to make a proper determination of the merits of the case, we will remand the case for additional factual development.).

### CONCLUSION

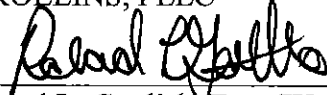
The Act is reform legislation that should be liberally construed under a substantial compliance standard in accordance with the Legislature's stated intent. The record below in this proceeding, and in the proceeding involving Mr. Wooton, establishes that the WVSEC attempted to exercise that role in a manner that was fair and equitable to both the petitioning candidates and to the challenger. The WVSEC asserts that the record supports findings by the WVSEC not only that the Benjamin campaign substantially complied with the certification requirements under the Act, but that the Walker campaign failed to present adequate evidence of 365 otherwise late challenges which were required to be evaluated in less than 24 hours. Consistent with this Court's prior decision in *Loughry, supra*, it serves the beneficial purposes of the Act to afford a petitioner relief from strict construction of provisions of the Act where such construction would create an unjust result.

WHEREFORE, the WVSEC respectfully requests that the Court (i) affirm the WVSEC certification of Justice Benjamin under the Act, (ii) if the Court finds a violation of the Act, remand the matter to the WVSEC in order to permit the WVSEC to exercise its statutory discretion to assess and weigh the penalty for any such violation, and (iii) grant such other and further relief as the Court deems appropriate.

Respectfully submitted,

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Members of the West Virginia State  
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRENT D. BENJAMIN, candidate for the  
Supreme Court of Appeals of West Virginia

Petitioner,

v.

ELIZABETH D. WALKER, candidate for the  
Supreme Court of Appeals of West Virginia;  
WEST VIRGINIA SECRETARY OF STATE  
NATALIE TENNANT; West Virginia State  
Election Commission members, GARY A.  
COLLIAS and VINCENT P. CARDI,

Respondents.

CERTIFICATE OF SERVICE

I have on this the 17th day of March served the foregoing Brief electronically (as indicated) and via U.S. mail, postage prepaid as follows:

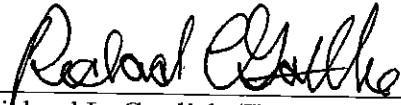
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A handwritten signature in black ink, appearing to read "Richard L. Gottlieb", written over a horizontal line.

Richard L. Gottlieb (WVSB 1447)