

16-0228

**SUPREME COURT OF APPEALS OF WEST VIRGINIA
NOTICE OF APPEAL**

FILED
MAR 8 2016
<small>RORY L. PERRY II, CLERK SUPREME COURT OF APPEALS OF WEST VIRGINIA</small>

Use this form only for an appeal from a final judgment of a Circuit Court.

ATTACH COPIES OF ALL ORDERS BEING APPEALED

1. COMPLETE CASE TITLE AND CASE NUMBERS IN CIRCUIT COURT

(Include all party designations, such as plaintiff, intervenor, etc. Use an extra sheet if necessary.)

Elizabeth D. Walker, candidate for the Supreme Court of Appeals of West Virginia, Petitioner v. Natalie E. Tennant, ex-officio, Gary A. Collias, and Vincent P. Cardi, members of the West Virginia State Election Commission; and Brent D. Benjamin, candidate for the Supreme Court of Appeals of West Virginia, Respondents. Civil Action Number 16-AA-17.

2. COUNTY APPEALED FROM AND NAME OF JUDGE(S) WHO ISSUED DECISION(S)

(If the presiding judge was appointed by special assignment, include an explanation of the circumstances on an extra sheet.)

Circuit Court of Kanawha County, Judge Tod J. Kaufman

3. PETITIONER(S) (List all parties who join in the petition for appeal and provide the name, firm name, address, phone number, and e-mail address of counsel of record for each party. Self-represented parties must provide an address and telephone number.)

Justice Brent D. Benjamin. Please see addendum for counsel information. Petitioner does not yet know whether the State Election Commission intends to join the Petition for Appeal.

4. RESPONDENT(S) (List all parties against whom the appeal is taken and provide the name, firm name, address, phone number, and e-mail address of counsel of record for each party. Self-represented parties must provide an address and telephone number.)

Elizabeth D. Walker. Counsel: Thomas C. Ryan, K&L Gates LLP, 210 Sixth Avenue, Pittsburgh, PA 15222; Phone 412-355-8335; thomas.ryan@klgates.com

5. NON-PARTICIPANT(S) (List any parties to the lower court action that will not be involved in the appeal and provide the name, firm name, address, telephone number and e-mail address of counsel of record for each non-participant. Provide the name, address and telephone number of any self-represented litigant who was a party to the lower court action but is not participating in the appeal.)

SHORT CASE NAME: Benjamin et al. v. Walker

6. Date of Entry of Judgment: 03 / 04 / 2016

Date of Entry of Judgment on Post-Trial Motions, if any:

(1) / / (2) / / (3) / /

7. CRIMINAL CASES:

Defendant's Sentence:

Bail Status:

8. ABUSE AND NEGLECT CASES: On an extra sheet, provide a list of the names, ages, and parent's names of all minor children, a brief description of the current status of the parental rights of each parent as of the filing of the notice of appeal, a description of the proposed permanent placement of each child, and the name of each guardian *ad litem* appointed in the case.

9. Is the order or judgment appealed a final decision on the merits as to all issues and all parties? ☒ YES / ☐ NO

If your answer is no, was the order or judgment entered pursuant to R. Civ. P. 54(b)? ☐ YES / ☐ NO

If your answer is no, you must attach a brief explanation as to why the order or judgment being appealed is proper for the Court to consider.

10. Has this case previously been appealed? ☐ YES / ☒ NO

If yes, provide the case name, docket number and disposition of each prior appeal.

11. Are there any related cases currently pending in the Supreme Court or in a lower tribunal? ☒ YES / ☐ NO

If yes, cite the case, provide the status, and provide a description of how it is related.

12. Is any part of the case confidential? ☐ YES / ☒ NO

If yes, identify which part and provide specific authority for confidentiality.

13. If an appealing party is a corporation, an extra sheet must list the names of parent corporations and the name of any public company that owns ten percent or more of the corporation's stock. If this section is not applicable to the appealing party, please so indicate below.

☐ The corporation who is a party to this appeal does not have a parent corporation and no publicly held company owns ten percent or more of the corporation's stock.

14. Do you know of any reason why one or more of the Supreme Court Justices should be disqualified from this case?

- ☒ YES / ☐ NO If yes, set forth the basis on an extra sheet. Providing the information required in this section does not relieve a party from the obligation to file a motion for disqualification in accordance with Rule 33.
-

15. Is a transcript of proceedings necessary for the Court to fairly consider the assignments of error in the case?

- ☒ YES / ☐ NO If yes, you must complete the appellate transcript request on page 4 of this form.
-

16. NATURE OF CASE, RELIEF SOUGHT, and OUTCOME BELOW

(Limit to two double-spaced pages; please attach.)

17. ASSIGNMENTS OF ERROR

Express the assignments in the terms and circumstances of the case, but without unnecessary detail. Separately number each assignment of error and for each assignment:

- (1) state the issue;
- (2) provide a succinct statement as to why the Court should review the issue.

Limit to eight pages double-spaced; please attach.

18. ATTACHMENTS

Attach to this notice of appeal the following documents in order:

- (1) extra sheets containing supplemental information in response to sections 1 - 14 of this form;
- (2) a double-spaced statement of the nature of the case, not to exceed two pages, as material required by section 16 of this form;
- (3) a double-spaced statement of the assignments of error not to exceed eight pages as required by section 17 of this form;
- (4) a copy of the lower court's decision or order from which you are appealing;
- (5) a copy of any order deciding a timely post-trial motion; and
- (6) a copy of any order extending the time period for appeal.
- (7) the statutory docket fee of \$200; or a copy of the lower court's granting of the application for fee waiver in this case. The statutory docket fee does not apply to criminal cases, appeals from the Worker's Compensation Board of Review or original jurisdiction actions.

NOTICE:

You must file a separate affidavit and application anytime your financial situation no longer meets the official guidelines or anytime the court orders you to do so.

SHORT CASE NAME: Benjamin et al. v. Walker

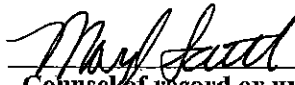
CERTIFICATIONS

STATE OF WEST VIRGINIA

I hereby certify that I have performed a review of the case that is reasonable under the circumstances and that the contents of the Notice of Appeal are accurate and complete.

03 / 08 / 2016

Date



Counsel of record or unrepresented party

I hereby certify that on or before the date below, copies of this notice of appeal and attachments were served on all parties to the case, and copies were provided to the clerk of the circuit court from which the appeal is taken and to each court reporter from whom a transcript is requested.

03 / 08 / 2016

Date



Counsel of record or unrepresented party

SHORT CASE NAME: Benjamin et al. v. Walker

**SUPREME COURT OF APPEALS OF WEST VIRGINIA
APPELLATE TRANSCRIPT REQUEST FORM**

INSTRUCTIONS

- (1) If a transcript is necessary for your appeal, you must complete this form and make appropriate financial arrangements with each court reporter from whom a transcript is requested.
- (2) Specify each portion of the proceedings that must be transcribed for purposes of appeal. See Rule of Appellate Procedure 9(a).
- (3) A separate request form must be completed for each court reporter from whom a transcript is requested. If you are unsure of the court reporter(s) involved, contact the circuit clerk's office for that information.
- (4) Failure to make timely and satisfactory arrangements for transcript production, including necessary financial arrangements, may result in denial of motions for extension of the appeal period, or may result in dismissal of the appeal for failure to prosecute.

Name of Court Reporter, ERO, or Typist: Natalie Wandling

Address of Court Reporter: 112 Dominic Drive, Scott Depot, WV 25560

Civil Action No.: 16-AA-17

County: KANAWHA

Date of Final Order: 03 / 04 / 2016

Date of Proceeding	Type of Proceeding	Length of Proceeding	Name of Judge(s)	Portions Previously Prepared
02 / 26 / 2016	Hearing	120 Pages	Honorable Tod Kaufman	N/A
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CERTIFICATIONS

I hereby certify that the transcripts requested herein are necessary for a fair consideration of the issues set forth in the Notice of Appeal.

I hereby further certify that I have contacted the court reporter and satisfactory financial arrangements for payment of the transcript have been made as follows:

- ☒ Private funds. (Deposit of \$ 924 enclosed with court reporter's copy.)
- ☐ Criminal appeal with fee waiver (Attach order appointing counsel or order stating defendant is eligible.)
- ☐ Abuse & neglect or delinquency appeal with fee waiver (Attach order appointing counsel.)
- ☐ Advance payment waived by court reporter (Attach documentation.)

Date mailed to court reporter


Counsel of record or unrepresented party

ADDENDUM A

3. Petitioners

Justice Brent D. Benjamin is represented by Benjamin Bailey, Jonathan Marshall, and Maryl Sattler, Bailey & Glasser LLP, 209 Capitol Street, Charleston WV 25301, (304) 345-6555, bbailey@baileyglasser.com, jmarshall@baileyglasser.com, msattler@baileyglasser.com.

The State Election Commission is represented by Richard Gottlieb and Spencer Elliot, Lewis Glasser Casey & Rollins, PLLC, 300 Summers Street, Suite 700 P.O. Box 1746 Charleston WV 25326, (304) 345-2000, selliot@lgcr.com.

11. Related Cases

Respondent Beth Walker has filed a similar lawsuit in a related case, *Elizabeth D. Walker v. Natalie Tennant, Gary Collias, and Vincent Cardi, members of the West Virginia State Election Commission; Glen B. Gainer, III, West Virginia State Auditor; John D. Perdue, West Virginia State Treasurer; and William R. Wooten*, which is pending in Kanawha County. A motion to certify a question has been filed and is pending. If the questions are certified to this Court, there will be significant overlap between the issues presented in that case and this one.

14. Disqualification

Justice Benjamin is a party to this case, and is therefore disqualified under Rule 2.11 of the Code of Judicial Conduct.

ADDENDUM B

16. Nature of Case, Relief Sought, and Outcome Below

In September 2015, Justice Brent D. Benjamin became a participating candidate in the Public Campaign Financing Program. That same month, he filed a Declaration of Intent formally announcing his participation. Thereafter, his campaign collected more than five hundred qualifying contributions, as provided for by statute.

On February 2, 2016, Justice Benjamin filed his Application to participate in the program, certifying that he had and would continue to comply with the Program's requirements. Later that evening, the Benjamin campaign attempted to file a Final Exploratory report, which was also due that day, but was unable to do so due to a problem with the Secretary of State's electronic filing system. The Benjamin campaign requested and was granted a hardship exemption to file the report in paper form on February 9, 2016.

On February 3, 2016, Beth Walker filed 154 challenges to Justice Benjamin's qualifying contributions. The SEC spent seven hours considering those challenges. While the February 3 meeting was in session, Walker filed an additional 365 challenges – even though the Secretary of State's regulations required any challenges to be filed within two days of the close of the qualifying period. The State Election Commission considered the challenges nonetheless, and rejected all 365 as devoid of evidence.

On February 10, 2016, the State Election Commission found that the Benjamin campaign had complied with all requirements of the statute, and certified him to participate in the Program. On February 16, 2016, Beth Walker filed this lawsuit in the Circuit Court of Kanawha County, claiming that the SEC's decision certifying Justice Benjamin was incorrect and violated her constitutional rights.

The Circuit Court reversed the decision of the SEC, finding that its decision certifying Justice Benjamin was clearly erroneous, and further holding that Beth Walker's First Amendment and substantive due process rights had been violated. In doing so, the Circuit Court failed to give proper deference to the factual findings of the SEC, instead substituting its own judgment for that of the agency. Additionally, the Circuit Court made findings that are clearly erroneous, unsupported by the record, and that disregard the plain language of the statute. The Circuit Court's order should be reversed and the State Election Commission's decision should be reinstated.

ADDENDUM C

17. Assignments of Error

1. **The Circuit Court erred in finding that disqualification is the automatic remedy for a late financial report under the Public Campaign Financing statute.**

The Public Campaign Financing statute contains numerous financial reporting requirements, and expressly provides that the SEC may impose a civil penalty of \$100 per day for any candidate who violates any reporting requirement. W. Va. Code § 3-12-16(d). In extreme cases, the SEC has the discretion to decide whether a candidate's non-compliance is severe enough to warrant disqualification. W. Va. Code § 3-12-10(h) ("A candidate's certification . . . *may* be revoked by the State Election Commission, if the candidate violates this article.") (emphasis added).

The Circuit Court erred by disregarding this plain language, instead finding that the Public Campaign Financing statute must be strictly construed and that any late filing results in automatic disqualification.

2. **The Circuit Court erred in finding that Justice Benjamin had not met the requirements of the Public Campaign Financing statute.**

The State Election Commission thoroughly considered Justice Benjamin's qualifications for public financing at four separate public meetings. Following those meetings, the State Election Commission concluded -- correctly -- that Justice Benjamin and his campaign had met the requirements to qualify for the Public Campaign Financing Program. Justice Benjamin complied with the Public Campaign Financing statute, and the Circuit Court erred in concluding that he had not.

First, the Circuit Court failed to give proper deference to the SEC's factual findings in this regard, instead substituting its own findings for that of the SEC. For example:

- The SEC found that Justice Benjamin was prevented from filing his final exploratory report on the deadline due to a technical problem with the Secretary of State's electronic filing system. This finding was supported by substantial evidence in the record, including the testimony of Secretary of State employees who confirmed the technical problem prevented the filing. The Circuit Court rejected this finding, instead concluding – without basis – that the computer problem had not caused the late filing.
- The SEC found that Justice Benjamin had collected 512 qualifying contributions and that those contributions were supported by the required documentation. The Circuit Court rejected this finding and concluded instead that the Benjamin campaign had failed to meet the qualifying contribution requirement.
- The SEC found that Justice Benjamin's application was timely and accurate. The Circuit Court rejected this finding, concluding instead that the application was inaccurate because the Benjamin campaign had not met all requirements of the Public Campaign Financing Statute.

The Circuit Court's findings were clearly erroneous and unsupported by the record. The SEC's findings were supported by substantial evidence in the record, and the Circuit Court erred by failing to give them deference.

Second, the Circuit Court failed to apply the plain language of the Public Campaign Financing statute. The statute expressly provides that only "participating candidates" are required to file monthly reports, and that those reports only relate to contributions "received during the immediately preceding month." W. Va. Code § 3-12-13(b). Justice Benjamin did not become a participating candidate until September 2015. After that point, he did not receive any exploratory

contributions (and therefore had nothing to report). The Circuit Court's finding that he failed to file required reports misconstrues the statute and is plain error.

Third, the Circuit Court plainly erred by finding that a person challenging a qualifying contribution under the statute does not bear the burden of proving his or her challenges.

Fourth, the Circuit Court plainly erred in concluding that the State Election Commission lacks the authority to grant a one-week extension of time to a candidate who could not electronically file a financial report due to a glitch in the Secretary of State's electronic filing system. The statute explicitly gives the SEC the authority to grant a hardship exemption to the filing requirement. W. Va. Code § 3-12-8(d) ("a committee may apply for an exemption in case of hardship. . .") The SEC properly concluded that an extension of time was necessary under the circumstances of the hardship exemption because electronic filing was unavailable on the deadline. *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)).

Fifth, the Circuit Court plainly erred in concluding that electronic signatures are not signatures for purposes of the Public Campaign Financing Act. *See* W. Va. Code § 2-2-10(c) (providing that an electronic signature satisfies the signature requirement unless the statute provides otherwise). Moreover, because this issue was not raised in the Petition, the Circuit Court abused its discretion by considering it.

Finally, the Circuit Court plainly erred in concluding that Beth Walker's First Amendment and substantive due process rights had been violated and that she had standing to sue.

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

ELIZABETH D. WALKER, candidate for
the Supreme Court of Appeals of West
Virginia,

Petitioner,

v.

Civil Action No.: 16-AA-17
Judge Tod J. Kaufman

NATALIE E. TENNANT, ex-officio,
GARY A. COLLIAS, and VINCENT P.
CARDI, members of the West Virginia
State Election Commission; and BRENT
D. BENJAMIN, candidate for the
Supreme Court of Appeals of West
Virginia,

Respondents.

ORDER IN THE APPEAL OF

ELIZABETH D. WALKER v. STATE ELECTION COMMISSION

As spending by candidates and independent parties increases, so does the perception that contributors and interested third parties hold too much influence over the judicial process.

W. Va. Code § 3-12-2(8).

The Public Campaign Financing Program (hereinafter the "Financing Program") was established for three important legislative purposes: (1) to ensure the fairness of democratic elections in this state; (2) to 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; (3) to protect the impartiality and integrity of the judiciary; and (4) to strengthen public confidence in the judiciary. W. Va. Code § 3-12-2(1)-(10)¹. The statute itself

¹ The West Virginia Supreme Court of Appeals Public Financing Program In 2010, the West Virginia Legislature enacted the West Virginia Supreme Court of Appeals Public Financing Program (the "Program"). The Program and its requirements are codified in Chapter 3, Article 12 of the West Virginia Code, and the Legislature has also enacted legislative rules -- West Virginia Code of State Rule ("CSR") 146-5, et seq. -- to administer it.

seeks to balance the expensive playing field, where any lawyer running for West Virginia Supreme Court of Appeals can have a chance to fairly compete in our elective method of selecting judges.

Candidates who participate in the Public Campaign Financing Program must agree to reject large donations and eschew funding from out-of-state groups. To access the public money, the candidate must gather 500 small contributions from individual West Virginia voters. Each qualifying contribution can be as little as \$1.00; no more than \$100 can be accepted from one donor. Candidates who meet these requirements receive a set amount of money from the public Fund to conduct their campaigns -- thereby ensuring that citizens who *contribute* get a bargain for their buck with the public money obtained, and the candidate can forego having to spend their own money or raising money from contributions, thereby creating a playing field that heretofore favored the rich, the entrenched (incumbents who can campaign *while in office* for years) or those who have the ability to raise large sums of money.

PROCEDURAL HISTORY

This matter is before the Court on Elizabeth Walker's (the challenger's) Petition for Judicial Review of the State Election Commission's Decision certifying Justice Brent D. Benjamin to participate in the Public Campaign Financing Program. Ms. Walker is a candidate for election to the West Virginia Supreme Court of Appeals. One seat is on the ballot to be filled by the election scheduled for May 10, 2016.

On February 10, 2016, the State Election Commission certified Justice Benjamin to receive funding from the Public Campaign Financing Program. On February 16, 2016 Elizabeth Walker filed this lawsuit claiming that the SEC's decision certifying Justice Benjamin was erroneous, an abuse of the State Election Commission's authority, contrary to the statute, and

violative of certain constitutional rights she may be accorded as an opposing candidate by virtue of the discretion used by the SEC to release these public monies. Justice Benjamin filed a response on February 25, 2016, arguing that the SEC's certification decision was correct and that, Beth Walker lacked the standing to sue.

The Court has considered the written submissions of Petitioner and Respondent Benjamin and held a hearing on February 26, 2016 which lasted for several hours. The Court compliments both lead counsel at the trial level, Jonathan Marshall, Esq. of Bailey and Glasser for Justice Benjamin, and Thomas Ryan, Esq. of K ad L Gates for Elizabeth Walker. Both did an able job orally and in briefs for their clients' cause. Further, it should be noted that Justice Benjamin attended the hearing in the Circuit Court and his appearance as a client was appreciated and noted.

THE ISSUE OF STANDING

The State's involvement in this campaign, through both process and the substantive release of funds has dramatically altered the balance of the playing field. In order to establish standing, the legality of the SEC customs depends considerably upon whether Ms. Walker herself is an object of the forgone action itself. There can be little question that the SEC's release of funds has or will cause her financial injury (or votes) and that a judgement in her favor will redress it. (Her candidacy's involvement in this very challenge at the SEC level before the funds were released substantiated her causal connection between the injury and the SEC's conduct complained of. Therefore, Ms. Walker is **HELD** to have standing to bring this suit².

² Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

STANDARD OF REVIEW

This case is before the Court on an administrative appeal under West Virginia Code § 29A-5 et seq. and Rule 2 of the West Virginia Rules of Procedure for Administrative Appeals.

In such an appeal, the Circuit Court is to reverse, vacate, or modify the agency's decision if:

[T]he 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 discretion³.

This Court will only consider those issues properly raised by written brief in this proceeding. *See* W. Va. Code § 29A-5-4(e), the record below and the demonstrative charts used at the hearing connected with the briefs, arguments and previously addressed evidence.

FINDINGS OF FACT

1. Respondent Justice Brent D. Benjamin and Petitioner Elizabeth Walker are among the candidates in the 2016 election for a single seat on the West Virginia Supreme Court of Appeals scheduled state-wide for May 10, 2016.

³ Syl. Pt. 2, *Shepherdstown Volunteer Fire Dept. v. State ex rel. State of West Virginia Human Rights Comm'n*, 172 W. Va. 627, 628, 309 S.E.2d 342, 343 (1983); *see also* W. Va. Code §29A-5-4 (same). "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).

"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).

2. At the time Justice Benjamin began his campaign, he was as a regular candidate seeking re-election to the West Virginia Supreme Court of Appeals, meaning that he was eligible to raise any of the amount of money he was able to.

3. On February 18, 2015, Justice Benjamin filed a pre-candidacy form with the Secretary of State, through which he declared his intent seek re-election to the Supreme Court. Petitioner's Designation of Record ("Petitioner's Record") at Exhibit ("Ex.") A.

4. On March 30, 2015, Justice Benjamin filed an amended pre-candidacy form with the Secretary of State, through which he changed his political party to "non-partisan" and enrolled in electronic report filing with the Secretary of State. Petitioner's Record at Ex. B.

5. Justice Benjamin's "exploratory period" for the election began on February 18, 2015.

6. From January 2015 until September 2015, the Committee to Re-Elect Justice Benjamin received \$9,950 in pre-candidacy contributions. (Ex. CC, Exploratory Summary Report.)

7. Justice Benjamin raised exploratory contributions, as that term is defined in W. Va. Code § 3-12-1(4), on March 3, April 20, 27, 29, May 20, June 22 and July 21 and 22, 2015.

8. On September 11, 2015, Justice Benjamin filed a Declaration of Intent publicly announcing his intent to participate in the West Virginia Supreme Court of Appeals Public Campaign Financing Program, and became a participating candidate under the statute. (Ex. P, Declaration of Intent.)

9. Accordingly, pursuant to W. Va. Code § 3-12-7, Benjamin's exploratory period ended on September 11, 2015 when he filed his Declaration of Intent to Participate.

10. From September 2015 through January 2016, The Committee to Re-Elect Justice Benjamin ("Benjamin campaign") collected qualifying contributions.

11. Justice Benjamin's campaign did not file any exploratory reports or receipts for contributions, as required by W. Va. Code § 3-12-8 (d), with respect to the exploratory contributions he raised on March 3, April 20, 27, 29, May 30, June 22 and July 21 and 22, 2015 until February 8, 2016. Petitioner's Record at Ex. H.

12. Justice Benjamin and/or his campaign asserts that the reason that he did not file any reports or receipts reflecting collection of exploratory contributions until February 8, 2016 is because the electronic filing system established by the Secretary of State was unequipped to receive said reports.

13. On October 1, 2015, Justice Benjamin was provided an electronic form from the Secretary of State's office entitled "WV Supreme Court of Appeals Public Campaign Financing Monthly Report for _____ (month)."⁴

14. The WV Supreme Court of Appeals PCF Monthly Report was drafted by the Secretary of State in such a way that it could be used to submit either exploratory contributions or qualifying contributions. *Id.*

15. Justice Benjamin's "qualifying period" for the election began on September 11, 2015 and ended on January 30, 2016.

16. On October 1, 2015, Justice Benjamin or his campaign submitted a report of "qualifying contributions," as that term is defined in W. Va. Code § 3-12-1(13), that were

⁴ ("WV Supreme court of Appeals PCF Monthly Report"). Petitioner's Supplement to Respondent State Election Commission Certification and Designation of Record Pursuant to Rule 4 ("Petitioner's Supplement") at Ex. PP (also marked as Ex. C during the February 26, 2016 hearing ("Circuit Court Hearing")).

collected by his campaign during the period commencing on September 11, 2015 and ending on September 30, 2015 ("the September QC Report").⁵

17. Justice Benjamin initially filed the September QC Report by email while the Secretary of State's office updated the online filing system. Circuit Court Hearing at Ex. C.

18. The September QC Report reflected zero dollars in qualifying contributions. *Id.*

19. On November 1, 2015, Benjamin submitted a report online of qualifying contributions collected by his campaign during the period commencing on October 1, 2015 and ending on October 31, 2015 (the "October QC Report")⁶.

20. The October QC Report reflected the receipt of \$1,360 of qualifying contributions from 20 contributors. *Id.*

21. On December 1, 2015, Benjamin submitted a report online of qualifying contributions collected by his campaign during the period commencing on November 1, 2015 and ending on November 30, 2015 (the "November QC Report")⁷.

22. The November QC Report reflected the receipt of \$1,299 of qualifying contributions from 69 contributors, for a total of \$2,659 in qualifying contributions. *Id.*

23. On January 1, 2016, Benjamin submitted a report online of qualifying contributions collected by his campaign during the period commencing on December 1, 2015 and ending on December 31, 2015 (the "December QC Report")⁸.

24. The December QC Report reflected the receipt of \$4,045 of qualifying contributions from 85 contributors, for a total of \$6,704 in qualifying contributions. *Id.*

⁵ SEC Record at Ex. W.

⁶ SEC Record at Ex. X.

⁷ SEC Record at Ex. Y.

⁸ SEC Record at Ex. Z.

25. On January 31, 2016, Benjamin submitted an amended report online of qualifying contributions collected by his campaign during the period commencing on December 1, 2015 and ending on December 31, 2015 (the "Amended December QC Report")⁹.

26. The only difference between the Amended December QC Report and the December QC Report is an additional \$10 qualifying contribution, raising the total amount of qualifying contributions collected to \$6,714. *Id.*

27. On February 1, 2016, Benjamin submitted a report online of qualifying contributions collected by his campaign during the period commencing on January 1, 2016 and ending on January 31, 2016 (the "January QC Report")¹⁰.

28. The January QC Report reflected the receipt of \$34,797 of qualifying contributions from a total of 409 contributors, for a total of \$41,511 in qualifying contributions. *Id.*

29. Of those amounts, 113 contributors provided \$10,466 on Friday, January 29 and 178 provided \$15,702 on January 30, the last day of the "qualifying period."

30. At least 192 of the qualifying contributions submitted with the January QC Report were made online *and did not contain a handwritten signature. The handwritten signatures are needed to investigate and verify credibility of the donor and is required by Statute.*

31. In total, Justice Benjamin submitted 583 contributions, totaling \$41,511, which he sought to be considered "qualifying contributions."

32. The statutory deadline for Benjamin to submit his Application for Certification was February 2, 2016.

⁹ SEC Record at Ex. AA.

¹⁰ SEC Record at Ex. BB.

33. Justice Benjamin's campaign manager, Darrell Shull, submitted an Application for Certification sworn by Justice Benjamin via email at 4:55 p.m. on February 2, 2016. Circuit Court Hearing Ex. E, SEC Record Ex. Q, and Petitioner's Supplement at Ex. PP.

34. The Application for Certification attached to the 4:55 p.m. email was time-stamped at 5:09 p.m. on February 2, 2016.

35. Justice Benjamin's sworn Application for Certification stated that his "campaign has complied with and will continue to comply with all requirements set forth in the W. Va. Code throughout the applicable campaign." SEC Record Ex. Q.

36. Justice Benjamin's sworn Application for Certification further stated that he had "complied with the contribution restrictions of W. Va. Code § 3-12-1 through § 3-12-16...." *Id.*

37. At 6:18 p.m. on February 2, 2016, Timothy Leach, Solicitor to the West Virginia State Election Commission, responded to Mr. Shull, asking, "Does the candidate wish to certify that he has met all requirements of the code before obtaining the confirmation signatures?" Circuit Court Hearing Ex. E.

38. Mr. Shull responded at 6:22 p.m., to "Please stand by - I am speaking with legal counsel now." *Id.*

39. The Secretary of State presented Justice Benjamin's sworn Application for Certification that was time-stamped at 5:09 p.m. to the SEC as the official copy. *See* SEC Record at Ex. E.¹¹

40. On February 2, 2016, Ms. Walker challenged 154 of the contributions Justice Benjamin sought to be considered "qualifying contributions" pursuant to W. Va. Code § 3-12-

¹¹ The Court ruled from the bench and on the trial court record and so FINDS that the Secretary of State and the SEC had discretion within the custom and practice and option of extending office hours at election time in the Secretary of State's Office to accept E-mail stamped at 5:09 P.M. on February 2, 2016 under the facts of this case.

10(g), which encompassed certain qualifying contributions Benjamin had received prior to January 2016. SEC Record at Ex. R.

41. Ms. Walker included with her challenge a separate "Qualifying Contribution Challenge Form" that had been provided by the Secretary of State for each challenged qualifying contribution identifying the specific alleged deficiency, including receipts of certain qualifying contributions that were made online but did not have a handwritten signature. *Id.* at Ex. T.

42. Ms. Walker also stated that, "West Virginia Code § 3-12-8 requires that all exploratory contributions be reported. [Benjamin] has not reported any exploratory contributions. However, upon information and belief, at least three fundraising events for the benefit of the Candidate were held during the Exploratory Period." *Id.* at Ex. R.

43. On February 1, 2016 at 4:47 p.m., Benjamin filed the receipts supporting the qualifying contributions reported on the January QC Report. *Id.* at V.

44. Ms. Walker was provided a copy of those receipts by the Secretary of State's office on February 2, 2016.

45. On February 3, 2016, Ms. Walker challenged 365 contributions that she was provided on February 2nd, including receipts of certain contributions that were made online but did not have a handwritten signature. *Id.* at Ex. S.

46. Ms. Walker included with her challenge a separate "Qualifying Contribution Challenge Form" for each challenged qualifying contribution identifying the specific alleged deficiency, including her challenge to those receipts of certain qualifying contributions that were made online but did not have a handwritten signature. *Id.* at Ex. U.

47. On February 3, 2016, the SEC convened to review the 154 challenges filed by Walker on February 2nd. SEC Record at Ex. E.

48. Among others, Ms. Walker challenged the electronic qualifying contributions of Delligati, Harrington, Reed, J. Charnock and Bell because the receipt did not contain a handwritten signature. *Id.* at Exs. T and E (202:1-281:21).

49. **The SEC voted to sustain Ms. Walker's challenge because the qualifying contributions received electronically did not have a handwritten signature, as prescribed by W. Va. Code § 3-12-9(b)(2). *Id.* at Ex. E (202:1-281:21)**

50. On February 4, 2016, the SEC convened to review the 365 challenges brought by Ms. Walker on February 3rd in response to the receipts submitted by Justice Benjamin on February 1st and received by Ms. Walker on February 2nd.

51. **Among the 365 challenged, at least 192 of those contributions were electronic qualifying contributions that did not contain a handwritten signature, the same issue the SEC decided the day before was a fatal defect. SEC Record at Exs S. U and V.**

52. **The validity of handwritten signatures of the donors is an essential, non-discretion part of this Program. It goes to the heart of accountability, integrity and confidence in this election Funding Program. W. Va. Code § 3-12-2**

53. The SEC refused to entertain the merits of any of Walker's 365 challenges because the Secretary of State had decided on the evening of February 3rd that Walker was required to include a copy of the receipt for the respective challenged contribution, along with Secretary of State's "Qualifying Contribution Challenge Form" that provided the specific basis for each challenge. SEC Record at Ex. F (39:20-40:3; 83:9-16; 88:14-23; 302:24-303:10).

54. Those same receipts at issue were at all times in the custody, control and possession of the Secretary of State.

55. The SEC voted to reconsider its decision to sustain the challenge to the qualifying contributions of Delligati, Harrington, Reed, J. Charnock, and Bell as the Justice Benjamin had obtained and submitted a physical signature for each of these contributors before the end of the qualifying period, which was February 2nd. *Id.* at (117:23-118:6).

56. Those physical signatures, however, were apparently not made part of the record in this matter.

57. The record contains no evidence that Benjamin submitted handwritten signatures with the receipts for the 192 qualifying contributions reported on February 1st before February 2nd, the end of the qualifying period.

58. On February 5, 2016, the Secretary of State's office represented to the SEC that 512 of the 583 contributions that Benjamin sought to be considered "qualifying contributions" satisfied the statutory requirements of W. Va. Code §3-12-9. SEC Record at Ex. G (22-23).

59. By deduction, the Secretary of State's representative's representation to the SEC had to include the 192 qualifying contributions received online that did not contain a handwritten signature.

60. As of February 2, 2016, the end of the "qualifying period," Justice Benjamin's campaign failed to file any report conveying any exploratory contributions or receipts.

61. On February 5, 2016, Justice Benjamin's representative requested an exemption from the electronic filing requirement. SEC Record at Ex. G (5-21); Ex PP (February 5, 2016 email from Mr. Shull to Mr. Leach sent at 12:10 p.m.).

62. The SEC granted the hardship exemption allowing Benjamin until February 10, 2016 to file the exploratory reports. *Id.*

63. On February 8, 2016, Benjamin filed an exploratory period summary report showing that he had raised \$9,950 during the exploratory period, including \$200 from West Virginians for Coal on April 29, 2015 and \$500 from the First Energy Political Action Committee on April 17, 2015 (*Id.* at Ex. CC); monthly exploratory reports for September (*Id.* at Ex. DD); and exploratory contribution receipts (Ex. GG).

64. On February 9, 2016, Benjamin filed an amended exploratory period summary report (Ex. EE); amended monthly reports (Ex. FF); amended exploratory contribution receipts (Ex. HH); and documentation indicating that Benjamin returned the exploratory contributions he had retained from the two political action committees (Ex. II).

65. On February 10, 2016, the SEC convened to consider Justice Benjamin's Application for Certification. Ex. KK.

66. Justice Benjamin's representative offered SEC Record Ex. LL in support of the request for the application of the hardship exemption to the filing of the exploratory period paperwork.

67. Ms. Walker's representative offered SEC Record Ex. MM in support of her opposition to the application of the hardship exemption to the filing of the exploratory period paperwork.

68. The SEC voted to deem the exploratory summary report, the monthly exploratory period reports and the exploratory contributions receipts filed timely. SEC Record at Ex. KK (30-33).

69. On February 10, 2016, the SEC voted to certify Benjamin pursuant to W. Va. Code §3-12-10(b) to receive public campaign financing funds. SEC Record at KK (40).

70. The Secretary of State immediately thereafter notified the Auditor and Treasurer that the SEC had authorized the disbursement of the public funds. Record at Ex. OO.

This Review Petition

1. On February 16, 2016, Ms. Walker filed her *Petition for Judicial Review of the February 10, 2016 Decision of The West Virginia State Election Commission Certifying Brent D. Benjamin Pursuant to W. Va. Code § 3-12-10* (the "Petition") and *Application for Stay* (the "Application for Stay").

2. Through the Petition, Ms. Walker appeals the SEC's February 10, 2016 decision certifying Benjamin pursuant to W. Va. Code § 3-12-10 on grounds that Benjamin:

- (i) failed to timely file reports and receipts for exploratory contributions pursuant to W. Va. Code § 3-12-8(d) and was not entitled to a hardship exemption extending the strict deadline set forth in the statute to file those reports and receipts;
- (ii) failed to timely file an Application for Certification pursuant to W. Va. Code § 3-12-10(a) and CSR 146-5-6.1; and
- (iii) failed to meet the threshold five hundred qualifying contributions for certification pursuant to W. Va. Code § 3-12-9(c).

3. As part of her Application for Stay, Ms. Walker sought an order preventing Benjamin from expending the state campaign finance funds until her Petition could be decided on the merits.

4. Justice Benjamin filed a response in opposition to the Application for Stay on February 24, 2016.

5. Justice Benjamin filed a response in opposition to the Petition on February 25, 2016.

6. On February 26, 2016, the Circuit Court held a hearing, lasting three hours more or less, on Ms. Walker's Petition. All counsel was present and appeared at the hearing.

Conclusions of Law

1. **Legislative rules have the force and effect of law and must be enforced as written.** *See, e.g., Swiger v. UGI/AmeriGas, Inc.*, 216 W. Va. 756, 763, 613 S.E.2d 904, 911 (2005) (“[A] regulation that is proposed by an agency and approved by the Legislature is a ‘legislative rule’ as defined by the State Administrative Procedures Act, W. Va. Code, 29A–1–2(d) [1982], and *such a legislative rule has the force and effect of law.*”) (emphasis added) (quoting *Smith v. West Virginia Human Rights Comm’n*, 216 W.Va. 2, 602 S.E.2d 445 (2004)).

2. **Further, “[a]n administrative board must abide by its own rules and the legislative mandates.”**¹²

¹² *Tasker v. Mohn*, 165 W. Va. 55, 65, 267 S.E.2d 183, 189 (1980) (citing *Trimboli v. Board of Education of Wayne County, W.Va.*, 163 W. Va. 1, 254 S.E.2d 561 (W. Va. 1979)); *see also State ex rel. Barker v. Manchin*, 167 W. Va. 155, 169, 279 S.E.2d 622, 631 (1981) (“When the Legislature delegates its rule-making power to an agency of the Executive Department..., it vests the Executive Department with the mandatory duty to promulgate and to enforce rules and regulations. Once the executive officer or agency has made and adopted valid rules and regulations pursuant to the grant of the legislative powers, they take on the force of statutory law.”).

3. “[A] properly promulgated legislative rule [] can be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious.” *Appalachian Power Co. v. State Tax Dep’t.*, 195 W.Va. 573, 466 S.E.2d 424 (1995).

4. Thus, together, *the statute and the rules set forth the requirements that a candidate must satisfy in order to be certified by the SEC as eligible to receive public campaign financing under the Program.*

5. The statute establishes an exploratory period “during which a participating candidate may raise and spend exploratory contributions to examine his or her chances of election and to qualify for public campaign financing” under Article 12. *See* W. Va. Code § 3-12-3(5).

6. “The exploratory period begins on January 1 the year before the election in which the candidate may run for Justice of the Supreme Court of Appeals and ends on the last Saturday in January of the election year.” *See id.*

7. An individual candidate’s filing of his or her Declaration of Intent to Participate marks the end of the exploratory period. *See* W. Va. Code § 3-12-3(4) (defining “exploratory contribution” as “a contribution of no more than \$1,000 made by an individual adult, including a participating candidate and members of his or her immediate family, during the exploratory period *but prior to filing the declaration of intent.*”) (emphasis added).

8. Pursuant to W. Va. Code § 3-12-8(d), “[a]t 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.”

9. Pursuant to W. Va. Code § 3-12-13(c), “[n]o later than two business days after the close of the qualifying period, a participating candidate or his or her financial agent shall report to the Secretary of State on appropriate forms a summary of... (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.” *See also* CSR § 146-5-11.4.

10. **A candidate may not be certified if s/he does not comply with these reporting obligations.** *See* W. Va. Code § 3-12-10(b)(5).

11. Justice Benjamin’s “exploratory period” for the election began on no later than February 18, 2015 and ended on September 11, 2015, when his honor signed his Declaration of Intent to Participate. *See* W. Va. Code §§ 3-12-3(4), (5).

12. As such, from February 18, 2015 through and until September 11, 2015, Justice Benjamin was entitled to seek “exploratory contributions” “to examine his [] chance of election and to qualify for public financing for public financing” and was required to electronically file with the Secretary of State reports of those contributions including underlying receipts on a monthly basis. *See* W. Va. Code §§ 3-12-3(5), 3-12-8(d); *see also* CSR 146-5-11.3.

13. 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.

14. The Justice or his campaign failed to comply with the deadlines set forth in W. Va. Code §§ 3-12-3(5), 3-12-8(d) and CSR 146-5-11.3 because the Justice and/or his campaign did not timely file reports of exploratory contributions until February 8, 2016.

15. 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.

16. Under West Virginia Supreme Court precedent, this Court must strictly enforce the reporting deadlines set forth in W. Va. Code §§ 3-12-3(5), 3-12-8(d) and CSR 146-5-11.3.¹³

17. Strict adherence to deadlines related to political campaigning activity is paramount because, “[o]therwise, the actions of the Secretary of State in that regard would be subject to constant allegations of arbitrariness or favoritism.” *Brady*, 176 W. Va. at 574, 346 S.E.2d at 550. Nothing could be so political as running for public office and the method by which and from what sources campaigns are funded.

18. At the latest, once Benjamin became a “participating candidate” on September 11, 2015, he was required to file an exploratory report no later than October 1, 2015; otherwise, the entire statutory scheme surrounding the exploratory contribution period would be rendered meaningless, and each part of a statute must be given effect. *Feroleto Steel Co. v. Oughton*, 230 W. Va. 5, 9, 736 S.E.2d 5, 9 (2012).

¹³ 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 that a certificate or application of nomination be filed with a specified officer within a stipulated period of time, are mandatory.”); *Styl. Pt. 3, State ex rel. Baker v. Bailey*, 152 W. Va. 400, 163 S.E.2d 873 (1968) (“[w]here a statute provides for a thing to be done in a particular manner or by a prescribed person or tribunal it is implied that it shall not be done otherwise or by a different person or tribunal.”); *State ex rel. Vernet v. Wells*, 87 W. Va. 275 (1920) (striking candidates from local non-partisan ballots who had not filed certificates of nominations in time); see also *Helton v. Reed*, 219 W. Va. 557, 561, 638 S.E.2d 160, 164 (2006) (explaining tax deadlines must be strictly enforced); *State ex rel. Clark v. Blue Cross Blue Shield of W. Virginia, Inc.*, 195 W. Va. 537, 542, 466 S.E.2d 388, 393 (1995) (“[S]trict compliance with all filing requirements is the rule in insurance insolvency cases.”). *Humble Oil & Refining Company v. Lane*, 152 W. Va. 578, 165 S.E.2d 379 (1969) (internal quotations omitted) (“[S]tatutes of limitations are favored in the law and cannot be avoided unless the party seeking to do so brings himself strictly within some exception. It has been widely held that such exceptions are strictly construed and are not enlarged by the courts upon considerations of apparent hardship.”).

19. To be certified under Article 12, a candidate must have “met all other requirements of [Article 12],” including the reporting requirements set forth in W. Va. Code §§ 3-12-3(5), 3-12-8(d) and CSR 146-5-11.3. *See* W. Va. Code § 3-12-10(b)(5).

20. Because Justice Benjamin did not meet the reporting requirements set forth in W. Va. Code §§ 3-12-3(5), 3-12-8(d) and CSR 146-5-11.3, the SEC’s certification was clearly erroneous and is hereby be **REVERSED** by this Court.

a. The Hardship Exemption

21. Counsel for Justice Benjamin and his campaign asserts that the Justice or his campaign were *physically unable* to submit such reports and receipts because the Secretary of State’s online campaign finance reporting system was not equipped to accept the exploratory period reports because he had initial registered as a “non-participating candidate.” *See* SEC Record at Exs. G, KK.

22. Accordingly, on February 5, 2015, Justice Benjamin requested a “hardship exemption” from the electronic filing obligation.

23. West Virginia Code § 3-12-8(d) provides as follows:

(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, article eight of this chapter. If the candidate decides not to run for office all unspent or unobligated exploratory contributions shall be sent to the State Election Commission for deposit in the fund. If the candidate decides to run for office as a nonparticipating candidate the unspent or unobligated exploratory contributions shall be used in accordance with articles eight and twelve of this chapter.

24. In reviewing this statutory provision, the Court is guided by the basic rules of statutory construction¹⁴.

25. “The primary rule of statutory construction is to ascertain and give effect to the intention of the Legislature.”¹⁵

26. “A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.”¹⁶

27. The Court finds that W. Va. Code § 3-12-8(d) clearly and unambiguously applies to the *form or manner* in which a candidate files his/her receipts (*i.e.*, electronically or otherwise) and does not affect the *timing* of that filing.

28. As a result, the hardship exemption would only apply had the issue with the electronic filing become known on February 5, 2015.

29. The facts, however, clearly show that Justice Benjamin and the Secretary of State’s office knew of the electronic-filing issue early as October 1, 2015. *See* Circuit Court Hearing Ex. C.

30. Moreover, the facts in this case show that Justice Benjamin had an electronic copy of the Secretary of State’s West Virginia Supreme Court of Appeals PCF Monthly Report as early as October 1, 2015. *See id.*

¹⁴ *See Martin v. Hamblet*, 230 W. Va. 183, 187, 737 S.E.2d 80, 84 (2012).

¹⁵ *Id.* at 186 and at 82.

¹⁶ *Id.* (citations omitted). “In other words, where the language of a statutory provision is plain, its terms should be applied as written and not construed.” *Id.* (citations and internal quotations omitted); *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W.Va. 137, 145 107 S.E.2d 353, 358-59 (1959) (“When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.”).

31. Indeed, Benjamin used that form to file his initial qualifying contribution report, with no objection from the Secretary of State. *Id.*

32. There was nothing at all preventing Justice Benjamin or his campaign to use the same very form to timely file the exploratory period report as early as October 1, 2015, but failed to do so, as required by law.

33. **Justice Benjamin's failure to file the exploratory monthly reports was not attributable to an electronic "glitch," rather neglect to which the hardship exemption does not apply.**

34. Accordingly, the hardship exemption did not apply and the SEC 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 same.

35. The SEC also relied upon what was described as a "catch-all" provision of W. Va. Code § 3-12-13(c) to extend the filing deadline for his exploratory period report from October 1, 2015 to the end of the qualifying period, in this case February 2, 2015. *See* SEC Record at Ex. G.

36. The SEC's reliance on Section 13(c) to deem the late-filed exploratory monthly reports timely was clearly erroneous as a matter of law.

37. W. Va. Code §3-12-13(c) provides as follows,

(c) No later than two business days after the close of the qualifying period, a participating candidate or his or her financial agent shall report to the Secretary of State on appropriate forms a summary of:

(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; and

(2) All qualifying contributions received and funds expended or obligated during the qualifying period together with copies of any receipts not previously submitted for qualifying contributions.

38. The precursor section of W. Va. Code §3-12-13, specifically section (a), provides that “[p]articipating candidates and certified candidates shall comply with this section *in addition to any other reporting required by this chapter.*” (emphasis added).

39. “[A]ny other reporting required by this chapter” includes the reporting required by Section 3-12-8(d).

40. W. Va. Code §3-12-13(c), therefore, applies only to the candidates filing of a *final* report and does not affect, displace or otherwise impact the candidate’s obligation to file monthly reports as required by the statute, including reports of exploratory contributions pursuant to Section 3-12-8(d).

41. The final reporting requirements of Section 13(c) cannot be read to eliminate the independent reporting requirements of Section 3-12-8(d).

42. “A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute.” *Feroletto Steel Co. v. Oughton*, 230 W. Va. 5, 9, 736 S.E.2d 5, 9 (2012).

43. Applying W. Va. Code § 3-12-13(c) as permitting candidates to file exploratory reports outside of the deadline established by W. Va. Code § 3-12-8(d) would undermine the letter and intent of W. Va. Code § 3-12-8(d).

44. The failure of the Justice Benjamin campaign to comply with W. Va. Code §§ 3-12-3(5), 3-12-8(d) and CSR 146-5-11.3, and was not entitled to a hardship exemption to

belatedly file those reports, the SEC's decision to certify him was clearly erroneous as a matter of face and law.

45. **The requirements relating to qualifying contributions must be satisfied.**

46. The statute creates a qualifying period "during which participating candidates may raise and spend qualifying contributions in order to receive public campaign financing."

See W. Va. Code § 3-12-1(14).

47. Any contributions accepted thereafter are deemed "qualifying contributions" and are subject to the following limitations:

- (i) A candidate may not accept more than one qualifying contribution from a single individual;
- (ii) A qualifying contribution may not be less than \$1 nor more than \$100;
- (iii) The contributions must be made by at least 500 registered voters;
- (iv) At least 10% of the total number of voters contributing must be registered to vote in each Congressional District; and
- (v) The participating candidate must collect at least \$35,000 but not more than \$50,000 in qualifying contributions.

See W. Va. Code § 3-12-9(a); *see also* CSR 146-5-5.1.

48. Each qualifying contribution must be accompanied by a receipt, on forms provided by the SEC, which include the following:

- (i) Printed name of the candidate;
- (ii) The signature of the person who collection the contribution;
- (iii) The contributor's printed name, signature, street address and zip code;
- (iv) The amount of the contribution;
- (v) The date of the contribution;
- (vi) The Congressional District in which the contributor is registered to vote;

- (vii) If contribution is \$25 or more, the contributor's phone number, occupation and name of employer;
- (viii) A statement above the contributor's signature confirming the contributor understands the purpose of the contribution is to assist the participating candidate in obtaining public campaign finance funds, the contribution was made without coercion, and the contributor has not been reimbursed, received or promised anything of value for making the contribution.

See W. Va. Code § 3-12-9(b); *see also* CSR 146-5-5.4.

49. Justice Benjamin's qualifying period began on September 11, 2015 and ended on January 30, 2016. *See* W. Va. Code § 3-12-3(14).

50. During the qualifying period, Justice Benjamin was entitled to collect "qualifying contributions," subject to certain parameters set forth in W. Va. Code §3-12-9 and CSR 146-5-5 et seq. and was also required to electronically file monthly reports of such contributions with the Secretary of State. *See* W. Va. Code §3-12-9(f).

51. The Secretary of State's office represented to the SEC that Justice Benjamin 512 of the 583 contributions submitted by Justice Benjamin during the qualifying period satisfied the statutory requirements. *See* SEC Record at Ex. G (22-23).

52. Justice Benjamin submitted receipts for at least 192 contributions on February 1st for contributions that were submitted electronically and did not have a handwritten signature, as is required by W. Va. Code § 3-12-9(b)(iii). *See* SEC Record at Ex. V.

53. The SEC had determined during its February 3, 2015 meeting (the previous day) that qualifying contributions submitted electronically without an accompanying handwritten signature were insufficient. *See* SEC Record at Ex. E (202:1-281:21)

54. Without these 192 contributions, Justice Benjamin would not have the requisite 500 qualifying contributions which he was statutorily required to obtain pursuant to W. Va. Code § 3-12-9(a) before the end of the qualifying period, February 2, 2016.

55. To be certified under Article 12, a candidate must timely file an Application for Certification and have “obtained the required number and amount of qualifying contributions as required by section nine of [Article 12].” See W. Va. Code § 3-12-10(b)(2).

56. Because Justice Benjamin did not obtain the required number of qualifying contributions as required by W. Va. Code § 3-12-9(a), the SEC’s certification of Benjamin was clearly erroneous and is hereby **REVERSED**.

57. Ms. Walker received copies from the Secretary of State’s office of receipts of qualifying contributions on the last day of the qualifying period, February 2, 2016, that had been filed by Benjamin late on February 1.

58. Ms. Walker filed challenges to 365 of those receipts on February 3rd, including challenges to 192 of those qualifying contributions that were received by Benjamin electronically, but did not contain a handwritten signature.

59. Ms. Walker included a “Qualifying Contribution Challenge Form” prescribed by the Secretary of State specifying the basis for each challenge. See SEC Record at Ex. U.

60. On the evening of February 3, 2016, the Secretary of State unilaterally decided that Walker was also required to provide “evidence,” which was a copy of the actual receipt for each challenged contribution. See SEC Record at Ex. F.

61. Those same receipts, however, were in the custody, control and possession of the Secretary of State. *Id.*¹⁷.

62. Because Ms. Walker did not also provide the SEC a copy of each receipt that was challenged, the SEC refused to entertain the merits of any of the challenges she brought on February 2nd.

63. This act of the SEC was and clearly erroneous and therefore is hereby **REVERSED.**

64. The Secretary of State has a statutory obligation under W. Va. Code § 3-12-10(b) to review and verify that Benjamin's qualifying contributions are legitimate and that they satisfy the statutory requirements set forth in W. Va. Code § 3-12-9.

65. The SEC had ruled the day before that qualifying contributions received electronically must still be accompanied by a handwritten signature.

66. W. Va. Code § 3-12-10(g) provides that "[a]ny person may challenge the validity of any contribution listed by a participating candidate by filing a written challenge with the State Election Commission setting forth any reason why the contribution should not be accepted as a qualifying contribution."

67. Ms. Walker's submission of the Qualifying Contribution Challenge Form complied with the statute.

68. W. Va. CSR §146-5-7.3 provides that "[t]he challenger should attach any evidence, affidavits, or notarized statements to the form." (emphasis added).

¹⁷ The Secretary of State was indispensably intertwined in the executive branch actions in carrying out the requirements of Code 43. The Secretary also was indispensably intertwined in the SEC hearings and challenges to the election laws procedures.

69. The Secretary of State's interpretation of CSR §146-5-7.3 as a mandatory obligation for Ms. Walker to not only file a written challenge, (which she did) but also to provide the SEC a copy of the underlying challenged receipt, a document that was in the SEC's custody, control and possession, was clearly erroneous as a matter of law.

70. The Secretary of State's attempt to shift this burden to Ms. Walker's campaign the night before the hearing was an unfair shifting or placing of responsibility. At the very least, the matter is not spoken to in any previous practice or the statute or rules in place for Finance Program challenges.

71. The SEC's decision to not entertain the merits of Ms. Walker's February 3rd challenges is not and cannot be supported by the facts in this case.

72. This is particularly true considering that at least 192 of the qualifying contributions challenged by Ms. Walker should not have counted under the SEC's own interpretation of W. Va. Code §3-12-9, had the merits been considered.

RULING

1. Justice Benjamin and/or his campaign did not satisfy the requirements relating to filing an application for certification pursuant to W. Va. CSR 146-5-6.1

2. The Application for Certification must state that the candidate:

- (i) Has signed and filed a declaration of intent as required by section seven of this article;
- (ii) Has obtained the required number and amount of qualifying contributions as required by section nine of this article;
- (iii) Has complied with the contribution restrictions of this article;

- (iv) Is eligible, as provided in section nine, article five of this chapter, to appear on the nonpartisan judicial election ballot; and
- (v) Has met all other requirements of this article.

See *id.*

3. As discussed above, Justice Benjamin or his campaign did not meet “all other requirements of [Article 12].”

4. Justice Benjamin failed to file exploratory reports as required under W. Va. Code §§ 3-12-3(5) and 3-12-8(d)

5. The hardship exemption did not relieve Justice Benjamin of his obligation to file those reports as early as October 1, 2015.

6. Justice Benjamin failed to obtain the required number of qualifying contributions because at least 192 of the 512 of the qualifying contributions that the Secretary of State’s office represented to the SEC were electronic contributions that did not contain a handwritten signature, a requirement that the SEC had already ruled during its February 3rd meeting was required.

7. The SEC’s certification of Justice Benjamin was clearly erroneous and must be **REVERSED** because it directly violated Walker’s constitutional rights to free speech and substantive due process under the First and Fourteenth Amendments of the United States Constitution. See U.S. Const. amend. I, amend XIV, § 1¹⁸

¹⁸Substantive due process protects a citizen from arbitrary government action which infringes upon her fundamental rights. See *United States v. Salerno*, 481 U.S. 739, 746 (1987); *Rochin v. California*, 342 U.S. 165, 172 (1952) and *Palko v. Connecticut*, 302 U.S. 319, 325–326 (1937)); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 779 (1978) (explaining that substantive due process applies to the fundamental right to free speech); *State ex rel. Loughry v. Tennant*, 229 W. Va. 630, 732 S.E.2d 507 (2012) (explaining that campaign expenditures in judicial elections warrant constitutional protections as a form of free speech and government involvement in this area warrants the strictest of scrutiny).

8. The SEC, as a “creature” of the state of West Virginia, is a state actor within the meaning of the Fourteenth Amendment and is held to that Amendment’s standards¹⁹.

9. The First Amendment’s “fullest and most urgent application [is] to speech uttered during a campaign for political office.”²⁰

10. By certifying Justice Benjamin, notwithstanding his failure to meet the clear and unambiguous statutory requirements and deadlines, including the SEC’s decision to entertain the merits of Ms. Walker’s February 3 challenges for the reasons set forth above, the SEC’s decision caused public campaign monies to be improperly injected in to the campaign for Supreme Court.

11. For all of the foregoing reasons, the SEC’s decision to certify Benjamin as eligible to receive public campaign financing from the Program is hereby **REVERSED**.

Conclusory Ruling

The SEC’s certification has prejudiced the substantial rights of Ms. Walker because the administrative findings, conclusions, decisions and order are: (1) in violation of constitutional and statutory provisions; (2) and in excess of the statutory authority; (3) were made upon unlawful procedures; (4) clearly wrong in view of the reliable, probative and substantial evidence on the whole record; and (5) are characterized by abuse of discretion or clearly unwarranted exercise of discretion. For these reasons, this case is **REVERSED**.

A complete record has been made below and in this Court and, along with all exhibits is prepared for immediate review and all objections and exceptions to this Order and hereby preserved.

¹⁹ See U.S. Const. amend. XIV, § 1; *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). The First Amendment right to freedom of speech also extends to the states. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

²⁰ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 339 (2010) (internal citations omitted).

The Clerk of this Court is ORDERED to send certified copies of this ORDER to all
counsel of record.

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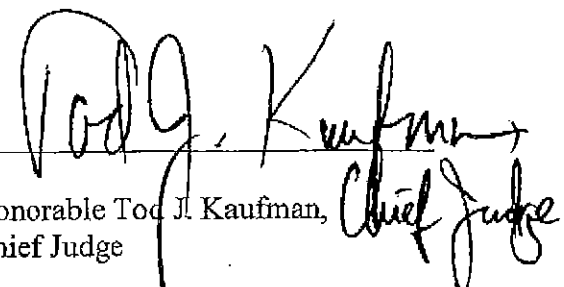
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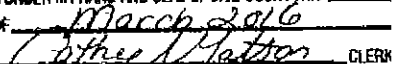
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ENTER this ORDER this 4th day of March, 2016.


Honorable Todd J. Kaufman,
Chief Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 4th
DAY OF March 2016

CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
Clerk