

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

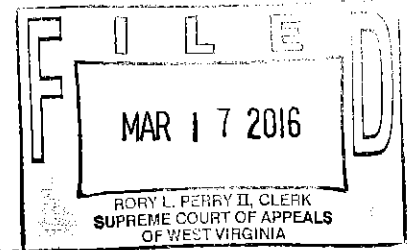
**Brent D. Benjamin, candidate for the
Supreme Court of Appeals of West Virginia**

Petitioner,

vs.

**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.



No. 16-0228

**(On Appeal from the Circuit Court
of Kanawha County 16-AA-17)**

Petitioner's Brief

Benjamin Bailey (WVSB No. 200)
Jonathan R. Marshall (WVSB No. 10580) *Counsel of Record*
Maryl C. Sattler (WVSB No. 11733)
Bailey & Glasser, LLP
209 Capitol Street
Charleston, West Virginia 25301
Telephone: (304) 345-6555
Facsimile: (304) 342-1110

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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.

SUMMARY OF THE ARGUMENT

The State Election Commission did exactly what the Legislature directed and empowered it to do: consider the requirements to receive public financing under the State's public financing law and determine whether a candidate met those requirements. After four separate hearings and hours spent investigating contribution challenges and campaign finance reports, the Commission concluded that Justice Brent Benjamin met all requirements for public financing.

The Circuit Court disregarded the legislatively-mandated process by sweeping aside the bipartisan Commission's findings and swapping out the Commission's judgment for its own, all based on a cold record and after a single hearing. The Circuit Court's decision violated settled law requiring a reviewing court to respect an agency's findings, regardless of whether the court would have reached a different conclusion on the same set of facts.

The Circuit Court also rejected the Commission's correct legal determinations. For example, while a century of law establishes that candidates for elected office are not disqualified based solely on a late financial statement or other minor procedural infraction—and while the statute says nothing to suggest a departure from this rule—the Circuit Court held that *any* belated financial report in an election-related case requires automatic disqualification even if it was impossible to file the report. Similarly, the Circuit Court disregarded the legislative mandate that an electronic signature will suffice on a campaign report, and concluded electronic signatures were invalid.

Petitioner respectfully asks this Court to restore the settled rule of law requiring deference to an agency's determinations, and to reject the Respondent's attempt to usurp the bipartisan State Election Commission's procedures, expertise, and reasoned judgment.

STATEMENT OF THE CASE

Justice Brent D. Benjamin is a candidate seeking re-election to the West Virginia Supreme Court of Appeals. Respondent Beth Walker is a candidate seeking the same seat on the Court.

The Public Campaign Financing Program

There are two types of candidates for the West Virginia Supreme Court of Appeals. A candidate may proceed as a regular candidate under the traditional campaign rules. Alternatively, a candidate may elect to participate in public financing. A candidate who is seeking public financing is known under the statute as a “participating candidate.” W. Va. Code § 3-12-3(11). Nothing in the statute prohibits a candidate from starting out as a traditional candidate and then later switching to a participating candidate.

A candidate who intends to participate in public financing can collect up to \$20,000 in exploratory contributions during the exploratory period. W. Va. Code § 3-12-3(4). This election cycle, the exploratory period ran from January 1, 2015 to January 30, 2016. W. Va. Code § 3-12-3(5). If a candidate’s total exploratory donations exceed \$20,000, the excess must be paid to the Fund. W. Va. Code § 3-12-8(a).

A candidate seeking public financing must file a Declaration of Intent prior to the end of the qualifying period. W. Va. Code § 3-12-7. The qualifying period begins on September 1 of the year preceding the election year. W. Va. Code § 3-12-3(13). Like the exploratory period, the qualifying period ends on the last Saturday in January of the election year. *Id.* Once a candidate files a Declaration of Intent, he can no longer receive exploratory contributions. *Id.* In other words, while the exploratory and qualifying periods overlap, once a candidate begins collecting qualifying contributions, he can no longer collect exploratory contributions.

After filing a Declaration of Intent but before certification for public financing, a candidate must gather at least 500 qualifying contributions from individual West Virginia voters. W. Va. Code § 3-12-9(c). Each qualifying individual donor contribution can be as little as \$1.00, but no more than \$100. W. Va. Code § 3-12-9(a). The total amount of the qualifying contributions must be no less than \$35,000; if the aggregate amount exceeds \$50,000, the excess must be paid to the Fund. *Id.* Candidates who meet these requirements receive a set amount of money from the Fund to conduct their campaigns.

After a candidate has collected the requisite number of qualifying contributions, he or she applies to the Commission to be certified to receive public financing. W. Va. Code § 3-12-10(a). A candidate's Application must include a sworn statement that he or she has and will comply with all requirements of the Program. W. Va. Code § 3-12-10(a). The Application must be filed within two business days of the close of the qualifying period. W. Va. C.S.R. § 146-5-6. Here, the end of the qualifying period was midnight, January 30, 2016.

Once the candidate has filed the Application, the bipartisan State Election Commission convenes within three business days to consider the candidate's qualifications. W. Va. Code § 3-12-10(d). The Commission determines whether the candidate or candidate's committee: (1) has signed and filed a declaration of intent; (2) has obtained the required number and amount of qualifying contributions; (3) has complied with the contributions restrictions; (4) is eligible to appear on the nonpartisan judicial election ballot; and (5) has met all other requirements of West Virginia Code Chapter 3 Article 12. W. Va. Code § 3-12-10(b). If the candidate is certified by the Commission, funding is disbursed to his or her campaign within two business days. W. Va. Code § 3-12-10(e).

Challenges to Qualifying Contributions

Any person who believes a candidate's qualifying contribution is invalid can file a challenge with the State Election Commission. W. Va. Code § 3-12-9(g). The challenge must be filed with and received by the Secretary of State within two business days after the close of the qualifying period or after the filing of the candidate's Application, whichever is earlier. W. Va. C.S.R. § 146-5-7.3. Once a challenge is filed, the State Election Commission must decide its validity by the end of the following business day. *Id.* Any contribution that is successfully challenged can be replaced within five business days. *Id.*

Justice's Benjamin Campaign and Beth Walker's Challenges

Justice Benjamin began his campaign as a traditional candidate seeking re-election to the Court under the normal campaign rules. From January 2015 until September 2015, the Committee to Re-Elect Justice Benjamin ("Benjamin Campaign" received \$9,950 in pre-candidacy contributions, \$700 of which were later rejected and returned to the donors. JA1680-90, JA1722, JA1693-1705. Because he was a traditional candidate during this period, he was not required to file periodic financial reports.

In September 2015, Justice Benjamin decided to enter the Public Campaign Financing Program. Shortly after becoming a participating candidate in September 2015, he filed a Declaration of Intent formally announcing his participation. JA776.

From September 2015 through January 2016, the Committee to Re-Elect Justice Benjamin ("Benjamin Campaign") collected qualifying contributions as required by the statute. Justice Benjamin filed monthly reports reflecting those qualifying contributions on October 1, November 1, December 1, January 1, and February 1. JA1640-1679. Justice Benjamin did not

collect any exploratory (or traditional) contributions after he became a participating candidate in September 2015, and therefore did not file any monthly exploratory reports during this period.

At 4:55 p.m. on Tuesday, February 2, 2016, Justice Benjamin filed an Application and sworn statement stating that he had and would continue to comply with the requirements of the Public Campaign Financing Program by e-mail. JA1822-24.

Later that evening, the Benjamin Campaign attempted to file a Summary Exploratory Financial Report,¹ but the Secretary of State's electronic filing system would not permit him to do so. The Secretary of State's Office confirmed on the record at the Commission proceeding that Justice Benjamin was (and remains) unable to file this specific type of report on the electronic filing system. JA710-712, JA718, JA720-721.

Also on February 2, 2016, Beth Walker filed 154 challenges to Benjamin's qualifying contributions. JA782-936. The next day, the State Election Commission convened a special emergency meeting to consider Beth Walker's challenges. JA265-574. The SEC spent seven hours considering Walker's 154 objections. *Id.* Walker did not submit any evidence to support her challenges. JA782-963. Many of the challenges were proven false, either by the Secretary of State or by the Benjamin Campaign. JA265-574. For example, Walker contended – without evidence or support – that Deloris Jean Davis, who provided a qualifying contribution to the Benjamin Campaign, was not a registered voter. JA858. In fact, Ms. Davis is a registered voter, as proven by a certified copy of her voter registration card that the Benjamin Campaign obtained from the Kanawha County Courthouse. JA599.

While the seven-hour meeting was taking place on February 3, Walker (who did not personally attend) filed an additional 365 objections to Benjamin's qualifying contributions.

¹ This is a final summary report that details all of the candidate's exploratory contributions and expenditures to date.

JA937-1316. These 365 objections were filed after the February 2, 2016 deadline in the Commission's regulations. W. Va. C.S.R. § 146-5-7.3. The Commission nonetheless decided to hear Walker's untimely challenges. JA586-587.

The State Election Commission notified the Walker campaign that if it wanted to pursue the 365 challenges, it needed to bring the proper support for each such challenge to the Commission meeting. The Walker campaign confirmed on the record that it had received these instructions and understood them. JA596:6-7, JA620:13-21, JA643:9-23, JA652:17-22.

For example, the Walker campaign's representative stated on the record: "I was told yesterday that I had to bring evidence to back up my challenges today." JA596:6-7; *see also* JA652:17-22. Despite receiving the Commission's instructions, Walker did not submit any evidence in favor of her objections. JA596 at ll. 6-7, JA620:13-21, JA643:9-23, JA652:17-22.

Additionally, the Walker campaign was given an opportunity at the Commission meeting to provide evidence or articulate a basis for the objections, but it declined to do so. JA620:13-21, JA643:9-23, JA660-61. Instead, the Walker campaign stated that it intended to rely solely on the challenge forms it had previously submitted to the Commission. For example, when asked to provide an explanation for a specific objection, the Walker campaign stated: "I don't have a comment on that." JA643. When asked again if it had any evidence to support its objections, the Walker campaign responded "Only what was submitted." JA620. The Commission therefore rejected Walker's 365 objections for lack of evidence. JA660-662.

On February 5, 2016, the Commission held a meeting at which it considered Justice Benjamin's request for a hardship exemption to file his Summary Exploratory Financial Report in paper form. JA705-773. The Commission granted his request, and gave the campaign until February 10, 2016, to do so. JA716-17.

On February 8, 2016, the Benjamin Campaign filed a Summary Exploratory Financial Report. JA1680-1690. The report inadvertently included \$700 in exploratory contributions that had been rejected and returned by the Benjamin Campaign. JA1722-23. On February 9, 2016, the Benjamin Campaign filed an Amended Summary Exploratory Financial Report to remove the \$700 in exploratory contributions that had been returned. JA1693, JA1722-23.

On February 10, 2016, the State Election Commission held a public meeting to consider Justice Benjamin's request for certification for public financing. At the meeting, the Commission determined that Justice Benjamin had met all of the Program's requirements and voted unanimously to certify him. JA1780:1-15; *see also* W. Va. Code § 3-12-10(b).

On February 16, 2016, Walker filed a Petition for Judicial Review in the Circuit Court of Kanawha County, claiming that the Commission's decision was an abuse of discretion and violated her constitutional rights. JA002-32. Justice Benjamin filed a response, asserting that he was properly certified and, further, that Walker had not been harmed by the Commission's decision. JA1805-29. The Court held a hearing on February 26, 2016. JA1863-2000. On March 4, 2016, the Circuit Court entered an Order reversing the State Election Commission's decision as arbitrary, capricious, and an abuse of discretion. JA2066-95.

STANDARD OF REVIEW

"On 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." Syl. Pt. 1, *Muscatell v. Cline*, 196 W.Va. 588, 590, 474 S.E.2d 518, 520 (1996).

In an administrative appeal under West Virginia Code § 29A-5 *et seq.* and Rule 2 of the West Virginia Rules of Procedure for Administrative 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 discretion.

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).

“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).

ARGUMENT

- I. **The State Election Commission’s decision that Justice Benjamin met all requirements to qualify for the Public Campaign Financing Program was not arbitrary, capricious, or an abuse of discretion.**

The State Election Commission correctly certified Justice Benjamin to participate in the

Public Campaign Financing Program—and it certainly did not abuse its discretion or act in an arbitrary or capricious manner. In reversing this decision, the Circuit Court improperly substituted its own judgment for that of the State Election Commission. Justice Benjamin complied with all requirements of the Act before he was certified by the Commission, and the Circuit Court erred in concluding that he had not.

This Court has clearly set forth the standard of review for a circuit court considering an administrative agency's appeal:

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 (1998) (emphasis added). Significantly, “neither this Court nor the circuit court may supplant a factual finding of the Commission merely by identifying an alternative conclusion that could be supported by substantial evidence.” *In re Queen*, 196 W. Va. 446, 476, S.E.2d 483, 487 (1996).

Recently, in *West Virginia Racing Commission v. Reynolds*, this Court applied this rule and overturned the decision of a circuit court that had reversed an agency determination based on the court's own view of the evidence in the record, without giving proper deference to the agency's findings. The Court explained: “The circuit court's findings well may be supported by substantial evidence, but this does not mean that the Commission's findings are not also supported by substantial evidence.” 236 W. Va. 398, 398, 780 S.E.2d 664, 671 (2015). Simply put: “the fact that the circuit court's review of the evidence resulted in the circuit court reaching an alternative conclusion based on substantial evidence is not a valid reason to reverse the Commission's findings.” *Id.* Here, as in *Reynolds*, the Circuit Court rejected the State Election Commission's factual determinations – which were reached after four different hearings and

supported by substantial evidence in the record – and supplanted those determinations with its own.

A. The Commission's decision that Justice Benjamin was not required to file monthly exploratory reports was not arbitrary, capricious, or an abuse of discretion.

The Public Campaign Financing Act sets forth periodic financing reporting deadlines that apply only to participating candidates. A “participating candidate” is defined as “a candidate who is seeking election to the Supreme Court of Appeals and is attempting to be certified in accordance with section ten of this article to receive public campaign financing from the fund.”

W. Va. Code § 3-12-3(11).

The Acts provides as follows:

During the exploratory and qualifying periods, *a participating candidate* or his or her financial agent shall submit, on the first of each month, a report of all exploratory and qualifying contributions along with their receipts and an accounting of all expenditures and obligations *received during the immediately preceding month.*

W. Va. Code § 3-12-13(b) (emphasis added).

Justice Benjamin entered the election as a traditional candidate collecting pre-candidacy contributions. Like Beth Walker, he was therefore not obligated to file exploratory reports. He then decided to become a participating candidate in September 2015.² Once he became a participating candidate, his campaign promptly began filing monthly reports setting forth all qualifying contributions received during the immediately preceding month, as required by the statute. JA1640-1679. His campaign did not file monthly exploratory reports because he did not

² Nothing in the statute suggests that a regular candidate cannot become a participating statute. See W. Va. Code § 3-12-1 *et seq.*; see also *Smith v. Crawford*, 645 So. 2d 513, 525 (Fla. Dist. Ct. App. 1994) (applying Florida's public finance law and reversing a trial court that held a candidate could not qualify for public financing after switching races and applicable public finance law because nothing in the statute purported to “penalize a candidate who withdraws from one race and lawfully enters another”).

receive any exploratory contributions while he was a participating candidate, and therefore by statute had nothing to report from the “immediately preceding month.” W. Va. Code § 3-12-13(b).

The Circuit Court found, however, that Justice Benjamin was required (and failed) to file monthly *exploratory* reports beginning in October 2015. The Circuit Court acknowledged that Justice Benjamin did not receive exploratory contributions during this period, but concluded nonetheless that he should have filed monthly reports containing contributions received in January through August – despite the plain language of the statute to the contrary. W. Va. Code § 3-12-13(b) (monthly reporting requirements apply to contributions “received during the immediately preceding month”).

In support of its conclusion, the Circuit Court explained that applying the statutory provision as written “would undermine the letter and intent of W. Va. Code § 3-12-8(d).” JA2087. The Circuit Court erred. Applying the plain language as written supports the letter of the law. Section 3-12-8(d), like § 3-12-13(b), applies *only* to participating or certified candidates and provides *only* for the reporting of contributions received during the preceding month. Specifically: “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 added). Nothing in § 3-12-8(d) requires candidates to report contributions that were not received during the previous month. The statute unambiguous. The Circuit Court was bound to apply its plain meaning.

Further, the Circuit Court failed to cite any source suggesting that the intent of § 3-12-8(d) was to create a complicated regulatory trap. The intent of the reporting obligations—

according to the statutory language—is, of course, to obtain correct reports of contributions for publicly-funded candidates. And the statute provides for contributions made before the candidate declares for public financing. It expressly provides that any contributions not previously reported must be included on a candidate's final Summary Exploratory Financial Report:

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.

W. Va. Code § 3-12-13(c) (emphasis added). Thus, not only does the statute provide for all contributions to be reported prior to certification, eliminating the Circuit Court's practical concerns about applying its plain language, it also expressly anticipates that a candidate may need to report exploratory contributions "not previously submitted." *Id.*

The Circuit Court plainly erred by ignoring the plain language of the statute limiting monthly exploratory reports to contributions received during the immediately preceding month. *See Inhabitants of Montclair Twp. v. Ramsdell*, 107 U.S. 147, 152 (1883) (explaining that courts must "give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed"). Its interpretation of the reporting requirements is contrary to the plain, unambiguous language of the statute and must be reversed.

Further, the Secretary of State's office confirmed, consistent with the statute, that the Benjamin Campaign was not required to file any monthly exploratory reports because it was in the qualifying period and would only be receiving qualifying contributions. JA1787 ("Lisa did inform you correctly. During the qualifying period, which is September 2015 through January 2016, only the monthly qualifying contributions are reported. All transactions that occurred

before that time period would be filed on the General-First report which is due March 26-April 1, 2016.”).

B. The State Election Commission did not abuse its discretion by granting the Benjamin Campaign a one-week extension of time to file his final Summary Exploratory Financial Report.

As noted above, in addition to monthly reporting requirements, the Public Campaign Financing Program statute provides that candidates must file a final Summary Exploratory Financial Report “[n]o later than two business days after the close of the qualifying period.” W. Va. Code § 3-12-13(c)(1). All reports filed under the West Virginia Public Campaign Financing Act must be filed electronically with the Secretary of State; there is no paper filing option unless the candidate obtains a hardship exemption from the Commission. W. Va. Code §3-12-13.

Justice Benjamin attempted to file his final Summary Exploratory Report electronically on the deadline, but was unable to do so because of a technical problem with the Secretary of State’s electronic filing system. JA710-712, JA718, JA720-21. Employees of the Secretary of State’s Office confirmed the existence of this technical problem in the system and represented to the State Election Commission that, in fact, the Secretary of State’s online filing system will not accept Justice Benjamin’s final Summary Exploratory Financial Report due to the way his candidacy was entered into the system. *Id.* The Benjamin Campaign accordingly asked the Commission for a hardship exemption to permit it to file the final Summary Exploratory Financial Report in paper form. JA708-17. The Commission granted the exemption, and gave the campaign until February 10, 2015, to file a paper report.³ JA717, JA745-47.

³ The Benjamin campaign filed its Summary Exploratory Report on February 8, 2016. JA1680-90. Out of an abundance of caution, the Benjamin campaign also filed monthly exploratory reports for September-January on that date, even though it had no exploratory contributions to report during that period and had already reported its qualifying contributions. JA1691-92. The following day, the campaign filed an Amended Summary Exploratory Report on February 9, 2016, in order to correctly reflect that

The Circuit Court's analysis of the hardship exemption is based on its mistaken impression that the hardship exemption related to the monthly exploratory reports when, in reality, it related to the final Exploratory Summary Report due in February 2016. But even if its analysis could be applied to the actual hardship exemption at issue in this case, it is apparent from the record that the Commission acted properly and within its authority.

1. The Commission's findings were supported by substantial evidence in the record.

The State Election Commission made a factual determination that the Benjamin Campaign was unable for reasons beyond its control to file on the deadline. JA710-712, JA718, JA720-21. That determination was supported by substantial evidence in the record, including in-person testimony by employees of the Secretary of State who confirmed the State's technical issue. *Id.* Because the Commission's determination was supported by substantial evidence in the record, it was binding on the Circuit Court. *See In re Queen*, 196 W. Va. 446, 476, S.E.2d 483, 487 (1996) ("Neither this Court nor the circuit court may supplant a factual finding of the Commission merely by identifying an alternative conclusion that could be supported by substantial evidence.").

The Circuit Court criticizes the Benjamin Campaign because it concludes that the campaign knew of the electronic filing problem in October 2015. JA2085. But the email the Court relied on to reach this conclusion relates to a different electronic filing problem. JA1786-90. Specifically and as set forth above, the Benjamin Campaign reached out to the Secretary of State's office to notify it that it was unable to file certain *monthly* reports and that problem was

certain contributions incorrectly included on the original report had been rejected and returned to the contributors. JA1704-38.

fixed by the Secretary of State.⁴ *Id.* At that point, the Benjamin Campaign did not know that it would also be unable to file a final Summary Exploratory Report.

The Circuit Court's reading of the October 2015 email took the communications out of context and was clearly incorrect. More importantly, the Circuit Court could not rely on a single email to override the factual determinations of the State Election Commission. There is substantial evidence in the record establishing that the Benjamin Campaign was physically unable to file its final Exploratory Summary Report on the deadline due to technical problem in the Secretary of State's mandatory electronic filing system. *See e.g.*, JA710-712, JA718, JA720-21. The Commission's determination in this regard was correct and is entitled to deference from this Court.

2. *The State Election Commission had the authority to grant an extension under the circumstances.*

Because the Benjamin Campaign was unable to electronically file its final Summary Exploratory Report on the deadline, the Commission concluded that it should be granted a hardship exemption so that it could file its report a week later. JA716-17, JA240-41.

The Act expressly gives the State Election Commission 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 Circuit Court determined that this provision applies only to the form of the filing, not the timing. Nothing in the statute suggests as much, but even if that were the case, the Commission had implicit authority to grant an extension of time when necessary under the circumstances of the hardship exemption. This Court has been clear that there are "certain circumstances in which an agency may perform a function that is implied, but

⁴ The emails between the Benjamin campaign and the Secretary of State's office specifically referenced monthly reports and were dated in October 2015, many months before the final Summary Exploratory Report could have been filed. JA1786-90

not specifically permitted, by statute”; an agency’s authority includes ““such other powers as are necessary or reasonably incident to the powers granted.””) *See Walker v. W. Va. Ethics Comm’n*, 201 W. Va. 108, 121, 492 S.E.2d 167, 180 (1997) (quoting *Walter v. Ritchie*, 156 W. Va. 98, 108, 191 S.E.2d 275, 281 (1972)). Here, granting the hardship exemption without an extension of time would have rendered the hardship exemption meaningless because electronic filing was unavailable on the deadline.

Additionally, the electronic filing deadline should be deemed equitably tolled by the technical problem with the Secretary of State’s electronic filing system. When a party is prevented from doing something on the deadline due to extreme circumstances outside his control, the deadline may be deemed equitably tolled. *See McKibben v. E. Hospitality Mgmt.*, 288 F. Supp.2d 723, 725 (N.D. W. Va. 2003) (equity required that a complaint be deemed timely filed when the plaintiff was prevented from filing due to extreme inclement weather that closed the courthouse). In fact, the Court has held that 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 such construction would lead to injustice and absurdity.” *Id.* (quoting Syl. Pt. 2, *Chevy Chase Bank v. McCamant*, 204 W. Va. 295, 512 S.E.2d 217 (1998)).

Finally, even if the Commission had not had the authority to grant the extension, the remedy is not to disqualify Justice Benjamin from participating in public financing. It is undisputed that the Benjamin Campaign submitted all required financial reports before the State Election Commission voted on his certification. Nowhere in the statute does it indicate that its requirements are to be strictly construed, or that a candidate who has filed a single report one week after a deadline due to circumstances outside his control should be excluded. Such an interpretation is inconsistent with the important legislative purposes underlying the Public

Campaign Financing Program. *See* W. Va. Code § 3-12-2. Instead, even if a violation of the statute had occurred, the statute grants the Commission the authority to determine whether a candidate should be fined or decertified. W. Va. Code § 3-12-16(d) (providing discretionary penalty of \$100 per day for late-filed financial reports); 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). Accordingly, even if Justice Benjamin had not been granted the hardship exemption, he would not be disqualified from public financing.

C. The Commission’s determination that Justice Benjamin obtained the requisite number of qualifying contributions was not arbitrary, capricious, or an abuse of discretion.

At the hearing on Justice Benjamin’s certification, the State Election Commission correctly determined that the Benjamin Campaign met the qualifying contribution requirement. JA0135-JA0139, JA1744-JA1745, JA1780:1-14. The Circuit Court rejected these factual findings, concluding instead that Justice Benjamin failed to collect the requisite number of qualifying contributions. JA2088-2090.

The Circuit Court’s conclusion was clearly erroneous and an abuse of discretion for several reasons. First, the Commission’s determination that the Benjamin Campaign had submitted 512 qualifying contributions is a factual determination supported by substantial evidence in the record, and the Circuit Court was required to give it deference. Second, the Circuit Court plainly erred in concluding that electronic signatures are impermissible. Third, the Circuit Court erred in considering issues that were not briefed and had been waived below. Finally, the Circuit Court erred in concluding that disqualification from public financing was required; instead, the statute provides for a five-day period to cure challenged signatures.

1. *Electronic signatures are permissible.*

At the outset, the Circuit Court plainly erred in concluding that electronic signatures are not permissible under the Public Campaign Financing statute.⁵

West Virginia law is clear: “If a law requires a signature, an electronic signature satisfies the law.” W. Va. Code § 39A-1-7(d); *see also* W. Va. Code § 2-2-10(c) (electronic signatures are presumed acceptable unless the statute provides otherwise); W. Va. Code § 39A-1-7 (“A record or signature may not be defined legal effect or enforceability because it is in electronic form.”). Further, under West Virginia law, an “electronic signature” is defined broadly: “‘Electronic signature’ means an electronic sound, symbol or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.” W. Code § 39A-1-2(8).

Similarly, federal law provides that electronic signatures are valid signatures. 15 U.S. Code § 7001(a) (providing that a signature may not be denied legal effect solely because it is in electronic form). Like the West Virginia statute, the federal Act defines electronic signature broadly to mean “an electronic sound, symbol or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.” *Id.* § 7006(5).

Courts interpreting identical statutory provisions have held that a candidate may use an electronic signature to satisfy the signature requirement in election statutes. In *Anderson v. Bell*,

⁵ At its February 3, 2016 meeting, the State Election Commission determined that six contributions with electronic signatures were not acceptable. JA0447-548. The following day, the State Election Commission reconsidered and reversed its decision with respect to five of the contributions that were submitted with supplementary written receipts. JA0690-0692. The Benjamin campaign maintained during the February 3 meeting that electronic signatures are allowed, and intended to provide the Commission with additional authority on this point during the February 4, 2016 meeting. Because the Walker campaign waived its remaining objections, however, the Commission did not have an opportunity to reconsider its decision.

the court considered whether a candidate for Utah governor could use electronic signatures for purposes of a petition for nomination to appear on the ballot. 234 P.3d 1147, 1148 (Utah 2010). The candidate had submitted a petition that contained electronic signatures. *Id.* The state Lieutenant Governor's Office rejected the petition, concluding that electronic signatures do not constitute signatures under the Utah Election Code. The Utah Supreme Court reversed, holding that an electronic signature meets the law's signature requirement. *Id.* at 1156. In doing so, the court relied on Utah Code § 46-4-201 which is identical to West Virginia Code § 39A-1-7, and states: "If a law requires a signature, an electronic signature satisfies the law." Utah Code § 46-4-201; W. Va. Code § 39A-1-7(d) (same). The court explained: "This language could not be more straight forward; an electronic signature will satisfy any law that demands a signature." *Anderson*, 234 P.3d at 1153.

Here, as in *Anderson*, state law provides that an electronic signature will satisfy any law demanding a signature. The Benjamin Campaign submitted electronic contributions with unique transaction identifiers that meet the statutory definition of an electronic signature. JA1317-1639. For many of those receipts, the Benjamin Campaign also followed up with handwritten signatures. JA0464-JA0465. Moreover, nothing in the Public Campaign Financing Act provides that electronic signatures are unacceptable or otherwise overrides the clear provision of West Virginia Code § 39A-1-7. To the contrary, the Act itself expressly provides for candidates to accept electronic contributions. W. Va. Code § 3-12-3(13) (defining a qualifying contribution to include contributions made "in the form of an electronic payment").

Simply put, when a statute provides that a signature is required, an electronic signature is sufficient unless provided otherwise. The Benjamin Campaign's electronic contributions were valid.

In concluding that electronic signatures were not permissible, the Circuit Court relied on its own policy considerations that are found nowhere in the statute. JA02073. The Circuit Court's Order explained, without citation, that "handwritten signatures are needed to investigate and verify credibility of the donor and is required by Statute." *Id.* ¶ 30. Nothing in the statute indicates that handwritten signatures are required, or that they should be used to verify credibility of the donor. Further, the State Election Commission expressly considered whether it could compare a signature to verify the donor, and concluded that it could not because the donor could have signed the receipt through an agent, or simply could have used a different signature than the one on his or her voter registration card. JA0386-JA0388.

Mr. Collias: Well, he could have registered to vote thirty, forty years ago when he was eighteen, so that signature could be thirty or forty years old on the one, and the other it was a few months ago. I mean we don't have the competency to be declaring that the signatures are from different people. They may look different, but maybe the person signs different things differently. I mean, I don't know, but I'm not willing to go there.

JA0386:1-9.

2. *The Commission's factual determinations were entitled to deference.*

The State Election Commission determined that Justice Benjamin had submitted at least 512 qualifying contributions totaling \$36,174. JA0726-JA0727. The Commission found that 22 percent of those contributions were in legislative district one, 46.8 percent were in district two, and 31 percent in district three. *Id.* The Commission further concluded that all of the 512 qualifying contributions were receipted "with all necessary information and statements." JA0728. These factual findings are supported by the record and meet the statutory requirements of W. Va. Code § 3-12-9. The Circuit Court erred by failing to defer to them. *See, e.g., Reynolds*, 780 S.E.2d at 671; *In re Queen*, 476 S.E.2d at 487 (explaining that a court may not "supplant a

factual finding of the Commission merely by identifying an alternative conclusion that could be supported by substantial evidence”).

3. *Walker waived her objections to Benjamin's qualifying contributions by failing to properly raise them before the Commission.*

In any event, Walker's objections are waived. The Circuit Court expressly stated in its Order that it would only consider issues that had been briefed by the parties. JA2069 (“This Court will only consider those issues properly raised by written brief in this proceeding.”) (citing W. Va. Code § 29A-5-4(e)). The electronic signature issue was never mentioned in either party's brief.

Instead, Walker's Petition stated only that she appealed the Commission's decision “in its determinations that Benjamin presented a sufficient number of compliant exploratory contributions and qualifying contributions.” JA0028. Walker never identified which of her challenges she wished to appeal, and provided no factual or legal basis for her claim. While Walker asserted in her Petition that she would be filing a supplemental brief with this information, she never did so. Walker's attorney referenced this issue for the first time before the Circuit Court at the hearing, but provided no notice as to which of the 500+ challenges the Walker campaign was pursuing.

Moreover, Walker waived her objections to Benjamin's qualifying contributions by failing to properly raise them below. Walker filed over 500 challenges to Benjamin's contributions. After spending an entire day considering the first 154 challenges that Walker filed, the Commission learned that she had filed 365 additional challenges.

The Commission's regulations require that any 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. C.S.R. § 146-

5-7.3. Walker's second set of challenges failed to meet this deadline, as they were filed on February 3 – more than two business days after the close of the qualifying period. JA1107-1316.

Despite the fact that the challenges were untimely, the Commission determined that it would consider them at another hearing the next day, but informed the Walker campaign that the Secretary of State's office would not be conducting an investigation to find evidence of the challenges. Instead, Walker, as the challenger, would be required to bring evidence to support her challenges to the hearing. Walker representative Joe Reidy acknowledged that Walker received this information and understood it, but nonetheless failed to bring any support or evidence for their challenges. JA0596:6-7 ("I was told yesterday that I had to bring evidence to back up my challenges today.")

Sec. Tennant: Do you have evidence for any of these?

Mr. Reidy: Only what was submitted.

Sec. Tennant: Which is just the challenge page that was submitted?

Mr. Reidy: Yes.

Sec. Tennant: Okay. So all we have are challenge pages with no evidence, with nothing to back up the challenges.

JA0620:13-21.

Mr. Cardi: Okay. And does [Walker representative] Joe [Reidy] 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.

JA0652:17-22. Furthermore, when asked to provide the basis for Walker's objections, the Walker campaign could not do so:

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.

JA0643:9-14.

By failing to present any evidence to support her challenges – even after being explicitly informed by the Commission and Secretary of State's office that she must do so – Walker waived her right to object to Benjamin's qualifying contributions.

The Circuit Court concluded instead that the burden of providing evidence to support Walker's challenges fell on the State Election Commission and the Secretary of State's office, rather than the Walker campaign. The Circuit Court ruled: "On the evening of February 3, 2016, the Secretary of State unilaterally decided that Walker was also required to prove 'evidence,' which was a copy of the actual receipt for each challenged contribution." JA2090. This contention is wrong on its face.

To the contrary, the record shows that Secretary of State did not "unilaterally" decide that evidence was required. Instead, the State Election Commission determined – during both its February 3 and February 4 meetings – that a challenger must present some support for their challenges. *See* JA000390:23-24 (acknowledging that "the burden should be on the objector and not on the Secretary of State's office"); JA000619:11-13 ("[D]idn't we opine yesterday that you can't just say this thing doesn't qualify? You have to have some evidence that it doesn't qualify."); JA000562, JA000620 ("Well I mean if there's no evidence, then what's the basis of the challenge? I mean why is there a good faith reason to believe that these don't qualify if there's no evidence that they don't qualify?") Commission member Professor Vincent Cardi noted:

You just can't say, well, this person is not registered to vote. You've got to say that we looked into it and here's the evidence that shows that they're not registered to vote. Otherwise, we're wasting our time trying to do our investigation when it's the challenger that's got the burden of moving forward.

JA000620:2-7. Commission member Gary Collias further explained:

I mean you need to be able to articulate what you're objecting to. You just can't stand up and say I object to this entire proceeding and everything that ever happens. And I mean I don't know how we're supposed to adjudicate, decide objections if we don't know exactly what the objection is to which one and why it's being made.

JA000562:15-21.

For all of these reasons, the Commission voted to reject all challenges not accompanied by evidence. The Commission's determination in this regard was reasonable and supported by the statute and its regulations. *See* W. Va. C.S.R. § 146-5-7.3 ("The challenger should attach any relevant evidence, affidavits, or notarized statements to the form. . . ."). The Circuit Court's finding that "Secretary of State unilaterally decided that Walker was also required to prove 'evidence'" is clearly contradicted by the record.

The Circuit Court erred in considering issues that were not briefed and had been waived below. The court further erred in determining that the Secretary of State's office unilaterally decided that a challenger is required to support her challenges.

4. *Justice Benjamin is entitled to an opportunity to cure any deficiency in qualifying contributions.*

A candidate seeking public financing must first obtain 500 qualifying contributions. W.Va. Code § 3-12-10(b)(2). The State Election Commission found that the Benjamin Campaign collected 512 properly-supported qualifying contributions. JA0726-JA0728. The Circuit Court reversed this determination. This reversal was wrong for two reasons. First, as explained earlier, there is little question that the Benjamin met – in fact, exceeded – the qualifying contribution requirement. Second, even if he had not, the statute and its regulations both expressly provide that a candidate is entitled to an opportunity to cure any successful challenges to qualifying contributions.

The Act itself provides that within five days of a challenge being filed, a candidate may replace the challenged contribution with a new one. W. Va. Code § 3-12-10. Similarly, the regulations extend the time for the Commission to rule on an Application of a candidate where there has been a successful challenge. W. Va. C.S.R. § 146-5-6b. The Circuit Court did not address any of these provisions.

Respondent Walker may claim that the statute required Justice Benjamin to obtain a replacement contribution within five days of the date of the challenge itself, and that any attempt to cure now would be untimely. But here, the State Election Commission denied the vast majority of Walker's challenges within a day of their being filed – giving the campaign no opportunity to cure. The statute does not address the situation presented here, where the Commission promptly rejects a challenge before the cure-period is over, but is then reversed by the Circuit Court. Even if any challenges were valid, precluding Justice Benjamin from curing the challenged contributions now would lead to unfairness and absurdity. *See Chevy Chase Bank v. McCamant*, 204 W. Va. 295, 512 S.E.2d 217 (1998) (explaining that 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 such construction would lead to injustice and absurdity”). Thus, if this Court were to conclude that the Benjamin Campaign did not have a sufficient number of qualifying contributions, this matter should be remanded so that Justice Benjamin could cure any defect.

D. The Commission's determination that Justice Benjamin's Application was timely and accurate was not arbitrary, capricious, or an abuse of discretion.

Finally, the Circuit Court erred in determining that Justice Benjamin's Application for Certification was not accurate and timely. Respondent Walker has contended that the Application was untimely because it was time-stamped at 5:09 p.m. on February 2nd. JA0020.

The Circuit Court rejected this argument but concluded that the Application was inaccurate because Justice Benjamin had failed to meet the requirements of the statute. JA2074; JA2092-2093.

1. The Application was timely.

At the outset, Respondent Walker contends that Benjamin's Application for Certification was untimely because it is time-stamped 5:09 p.m. on February 2nd. JA0020. Walker agrees that February 2nd was the appropriate filing date, but claims that the application should have been filed nine minutes earlier, by 5:00 p.m. *Id.* Walker is wrong on both the law and the facts.

First, there is no requirement – either in the statute or its regulations – that the application be filed by 5:00 p.m. The statute itself merely provides that that “To be certified, a participating candidate shall apply to the State Election Commission for public campaign financing from the fund and file a sworn statement that he or she has complied and will comply with all requirements of this article throughout the applicable campaign.” W. Va. Code § 3-12-9. The deadline for the application is found in the regulations adopted by the Commission, which provide for the Application to be filed “no later than two business days after the close of the qualifying period.” W. Va. C.S.R. § 146-5-6. The end of the qualifying period was midnight on January 30, 2016. There is no question that Justice Benjamin's application, which was filed on February 2nd, was filed within two business days of the close of the qualifying period. (Ex. Q, Date-Stamped Application.) Neither the statute nor the regulations require an Application to be filed by any particular time of day.

But even if such a timing requirement existed, the Application was submitted to the Secretary of State at 4:55 p.m. on February 2nd. JA1822-23. As was explained on the record at the Commission hearing on February 5, the later time stamp reflects the time that Tim Leach

opened the email, rather than the time it was submitted to the Secretary of State. JA0731. Mr. Leach – like most people – does not open all emails immediately upon receipt.

Walker also claims that the facts surrounding the filing of the Application are “uncertain” because when asked, a Secretary of State employee allegedly told an unnamed Walker representative that the Application had not been filed as of 9:00 p.m. on February 2nd. JA0020 n.1. But even if that claim were correct, it is irrelevant here. Secretary of State attorney Tim Leach – who apparently was the Secretary of State employee Walker referenced – has explained that if he made such a statement, it was a simple mistake. JA0730-33.

Benjamin’s Application was filed on February 2nd, within two business days of the close of the qualifying period. And the email to Mr. Leach conclusively establishes that the Application was filed at 4:55 p.m., not 5:09 p.m. as Walker contends. JA1822-23. There is simply no question that the Application was timely.

2. *The Application was accurate.*

Nor is there any question that the Application was accurate at the time it was filed. In filing the Application, Justice Benjamin certified that he had and would continue to comply with the requirements of the Public Campaign Financing Act. JA1822-23. As explained earlier, Justice Benjamin and his campaign complied with all of the Act’s requirements. His Application was accurate at the time it was filed.

Furthermore, even if Justice Benjamin had made an error prior to the Application, the certification in the Application reflected his good faith belief that all requirements had been met. *See Jarjura for Comptroller v. State Elections Enft Comm’n*, 4 A.3d 356, 360 (Conn. Super. Ct. 2010) (holding that a candidate for public financing was permitted to supplement his application with information and substitution after it was filed). Indeed, and as set forth above, the statute

expressly provides a candidate with the opportunity to cure certain issues that arise after his Application has been filed. *See* West Virginia Code § 3-12-10.

II. The State Election Commission has discretion to determine the proper remedy for violation of the Public Campaign Financing Act.

The State Election Commission properly determined that Justice Benjamin's campaign had complied with all requirements of the Public Campaign Financing Act prior to his certification. But even if it had not, the Circuit Court's conclusion – that the *only* available remedy for any deviation is automatic disqualification – not only disregards the plain language of the statute, but would eviscerate the Public Campaign Financing Program and its important legislative purposes. It also ignores nearly a century of election law jurisprudence in this state, which clearly establishes that technical issues and timing violations of financial reporting statutes do not automatically require disqualification.

Under the Circuit Court's interpretation, candidates for the Public Campaign Financing Program are required to file *twenty-six* different financial reports prior to their Application for Certification – regardless of when they enter into the Program. If even one of those reports is late – for any reason, no matter how extenuating the circumstances – the State Election Commission would be bound to disqualify the candidate from public financing. This interpretation cannot be reconciled with the plain language of the statute or this Court's precedent.

A. Plain Language of the Statute

The plain language of the Public Campaign Financing Act is clear that not all errors result in automatic disqualification. In finding otherwise, the Circuit Court relied on West Virginia Code § 3-12-10(b)(5), which merely provides that before certifying a candidate, the State Election Commission "shall" determine whether the candidate, among other things, "has met all other requirements of this article." W. Va. Code §3-12-10(b)(5). When the State Election

Commission decided Justice Benjamin's certification, it determined that he had met all requirements of the article. JA1780:1-15. Nothing in the Act or its regulations requires mandatory disqualification for a late-filed financial report.

Rather, if a participating candidate violates a reporting requirement, the SEC may impose a civil penalty of \$100 per day. W. Va. Code § 3-12-16(d) ("In addition to any other penalties imposed by the law, the State Election Commission may impose a civil penalty for a violation . . . of any reporting requirement imposed by this article in the amount of \$100 per day.") For more serious violations, the SEC can – but is not required – to disqualify the candidate. 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 did not cite or address either of these provisions.

Instead, the Circuit Court ignored the statutory penalty provisions – which plainly give the Commission discretion to determine the appropriate remedy for violation of a reporting deadline – and instead concluded that *any* late report requires disqualification because it found that "strict adherence to deadlines related to political campaigning activity is paramount." JA2083 ¶ 17. Nothing in the statute or its regulations requires or supports this result.

B. Existing case law supports Justice Benjamin's interpretation.

The Circuit Court further erred by relying on a line of cases involving the narrow problem of a candidate who missed a filing deadline to appear on the ballot, while ignoring a century of case law holding that a candidate should not be disqualified for a late-filed financial report. JA2083 at n.13.

In the line of cases relied on by the Circuit Court, this Court specifically limited its holding, stating that "statutory provisions in elections statutes *requiring that a certificate or*

application of nomination be filed with a specified officer within a stipulated period of time, are mandatory.” *Brady v. Hechler*, 176 W. Va. 570, 571-72, 346 S.E. 546, 547-48 (1986) (emphasis added); *see also State ex rel. Vernet v. Wells*, 87 W. Va. 275 (1920). In this case, there is no question that Justice Benjamin appropriately filed to run, and even timely filed his application for public financing. *Hechler* and *Vernet* have never been extended to the financial reporting deadlines in the Public Campaign Financing Act.

Nor should they be. In both *Hechler* and *Vernet*, the public interest required the Secretary of State to determine with finality what candidates will appear on the ballot. Those same interests are not present here, or in any other case involving simple financial reports rather than certificates of application. Instead, as this Court has explained, the purpose of financial disclosures is as follows:

First, disclosure provides information as to the sources of the candidate's funds and where he spends them, thus, it permits the voter to evaluate the candidate's potential allegiances by being able to identify those who have contributed to his campaign, as well as those who have received money. Second, disclosure also exposes to the light of publicity the large contributions and expenditures, thus, deterring possible corruption and illegal expenditures. Finally, disclosure provides a means of detecting violations of contribution and expenditure limitations.

State ex rel. Cohen v. Manchin, 175 W. Va. 525, 534, 336 S.E.2d 171, 180 (1984).

Consistent with these purposes, this Court has held – for nearly a century – that candidates for elected office are not disqualified based solely on a late financial statement or other minor procedural infractions. For example, in *State ex rel. Hall v. Gilmer County Court*, 87 W.Va. 437, 105 S.E. 693, 694-95 (1921), a candidate for sheriff failed to meet the deadline for filing his itemized and verified detailed statement of expenses incurred and obligations assumed. The Court explained that while the deadlines existed for the purpose of exacting promptness, the statute nonetheless “manifests no express or implied determination to disqualify permanently one who is tardy in that respect from discharging the functions and receiving the emoluments of the

office to which he has been elected.”⁶ *Id.* Instead, the statute provided a discretionary penalty for a late-filed financial report. *Id.* Based on these statutory provisions, the Court concluded that disqualification was not the appropriate remedy. *Id.*

This Court has repeatedly reaffirmed the principles articulated in *Hall*. See *State v. Bd. of Canvassers*, 87 W. Va. 472, 105 S.E. 695, 696 (1921) (excusing candidate’s late filing of financial statements); see also *State ex rel. Bumgardner v. Mills*, 132 W. Va. 580, 595, 53 S.E.2d 416, 427-8 (1949) (“[T]he failure of a candidate who receives the highest number of votes in an election to file [the statement of financial transactions] does not relieve the board of its plain statutory duty to issue to him a certificate of the result of the election.”); *State ex rel. Zickefoose v. West*, 145 W. Va. 498, 533-34, 116 S.E.2d 398, 417 (1960) (noting that argument that nominee could be disqualified based on failure to file required financial statements “has been expressly disapproved by subsequent decisions of this Court”); Syl. Pt. 8, *State ex rel. Cohen v. Manchin*, 175 W.Va. 525, 336 S.E.2d 171 (1985) (“The provisions of W. Va. Code, 3–8–5, relating to the filing of financial reports ‘setting forth all financial transactions which have taken place by the date of such report,’ must be taken to mean that the closing dates in Section G of the official reporting form issued by the Secretary of State of the State of West Virginia must be construed to be the date of the report, and such date *must be reasonably close to the filing deadline* for the particular report.”) (emphasis added).

West Virginia is not alone on this point. In applying their own election-related statutes, courts in other states agree that, absent a statutory provision to the contrary, minor procedural infractions do not disqualify a candidate. See *Romaine v. Suffolk County Bd. of Elections*, 65

⁶ The Court was interpreting Section 8b(8) of Chapter 5 (Code Supp. 1918, § 188h), repealed Acts, 1990 Reg. Sess., Ch. 2.

A.D. 3d 993, 995 (N.Y. App. Div. 2009) (procedural error did not render petitions invalid or warrant exclusion); *Jenkins v. Hale*, 190 P.3d 175, 178-80 (Ariz. 2008) (same); *Bee v. Day*, 189 P.3d 1078, 1081 (Ariz. 2008) (same); *In re Nomination Petition of Driscoll*, 847 A.2d 44, 53 (Pa. 2004) (same); *Hoffman v. Waterman*, 141 S.W.3d 16 (Ky. Ct. App. 2004) (same); *Pulver v. Allen*, 242 A.D.2d 398, 399 (N.Y. App. Div. 1997) (same).

For example, in *Davis v. Reynolds*, 592 So. 2d 546, 554-56 (Ala. 1991), the Supreme Court of Alabama held that an election commission could not refuse to certify a candidate due to a late-filed financial disclosure. The court concluded that as long as a late-filed financial disclosure was filed before the election, it was subject only to a statutory penalty – not disqualification. *Id.* at 556. The court explained that such a result balanced the need for transparency to the electorate with the severity of disqualification. *Id.*

In this case, Justice Benjamin filed all of the required financial reports before he was certified by the State Election Commission. Every exploratory contribution that Justice Benjamin received was reflected on his final Summary Exploratory Report, regardless of when it was collected. JA1693-1703. No one has alleged that the reports themselves were not proper, or that any candidate has suffered prejudice because of their timing. The Commission was fully justified in finding that Justice Benjamin had met “all other requirements” of the statute when it certified him for public financing.

The Public Campaign Financing Act gave the State Election Commission the discretion to determine the appropriate remedy for a late report in those circumstances. The Circuit Court clearly erred by holding that automatic disqualification was required as a matter of law.

C. The Circuit Court's interpretation would undercut the remedial purpose of the Public Campaign Financing Program.

The Act should be construed to encourage participation, rather than as a regulatory trap that causes campaigns that have limited their fundraising efforts for months to then lose the funding that was the entire purpose of the restraint. West Virginia adopted public campaign financing for judicial elections on the recommendation of the Independent Commission of Judicial Reform, which was created by Governor Joe Manchin and chaired by retired U.S. Supreme Court Justice Sandra Day O'Connor. *State ex rel. Loughry v. Tennant*, 229 W. Va. 630, 633, 732 S.E.2d 507, 510 (2012) (describing the history of the Program). The Commission identified three "troubling trends" in the state's judicial system: (1) the erosion of public confidence in the system; (2) the voluminous caseload before the West Virginia Supreme Court of Appeals; and (3) the surge in judicial campaign expenditures. *Id.* The Commission specifically noted: "As 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.*

To address this issue, the Commission recommended that the Legislature adopt a public financing program for Supreme Court elections:

West Virginia has witnessed a steady and substantial increase in the amount of money raised and spent by candidates in elections for Supreme Court of Appeals seats. As campaign expenditures rise, so too does the threat of bias, and certainly the public perception of bias, as candidates face mounting pressure to accept donations from lawyers and parties that may appear before them once they take a seat on the bench. This Commission therefore recommends a public financing pilot program to investigate the potential for removing the specter of out-of-control and otherwise troublesome spending from judicial elections.

Id. at 511 (quoting Report of Independent Commission on Judicial Reform). Indeed, not only are these interests remedial, the United States Supreme Court has recognized that safeguarding

public confidence in the fairness and integrity of the elected judges constitutes a compelling state interest. *See Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1666 (2015).

The Circuit Court's order is inconsistent with this history and with the remedial purpose of the Public Campaign Financing Act. "Where an act is clearly remedial in nature, we must construe the statute liberally so as to furnish and accomplish all the purposes intended." *See Barr v. NCB Mgmt. Servs. Inc.*, 227 W. Va. 507, 513, 711 S.E.2d 577, 583 (2011) (quotation marks and citations omitted). In this case, the legislature established the Public Campaign Financing Program for three important legislative purposes: (1) to ensure the impartiality and integrity of the judiciary; (2) to increase the public confidence in the courts; and (3) to protect the Constitutional rights of voters and candidates from increasingly large amounts of money being raised and spent from private donors who wish to influence the outcome of elections. W. Va. Code § 3-12-2(1)-(10). There is little question that the Act is remedial, and should therefore be construed liberally "so as to furnish and accomplish all purposes intended." *Barr*, 711 S.E.2d at 583. Further: "Effect should be given to the spirit, purpose and intent of the lawmakers without limiting the interpretation in such a manner as to defeat the underlying purpose of the statute." Syl. Pt. 6, *State ex rel. Cohen v. Manchin*, 175 W. Va. 525, 527, 336 S.E.2d 171, 173 (1984).

The important legislative purposes behind the Public Campaign Financing Program can only be achieved if candidates participate in the Program. The purpose of the Act is therefore to encourage and facilitate – not prevent – candidate participation in public campaign financing. The Circuit Court's order would undercut these purposes, creating a minefield of procedural barriers to certification and ensuring that one minor mistake, even if promptly corrected, would require automatic disqualification.

This was not the legislature's intent. The statute's plain language gives the State Election Commission the discretion to fashion an appropriate remedy for a late-filed financial report. The hyper-technical "gotcha" objections accepted by the Circuit Court, if allowed to disqualify Justice Benjamin, would undermine public confidence in the courts and the constitutional rights of Justice Benjamin and his contributors who intended for him to receive public campaign financing. The Circuit Court's order was clearly erroneous and an abuse of discretion, and must be reversed.

III. Beth Walker's constitutional rights were not violated by the Commission's decision to certify Justice Benjamin for public financing.

The Circuit Court further erred in determining that Beth Walker's First Amendment and substantive due process rights were violated by the State Election Commission's decision to certify Justice Benjamin for public financing. The court concluded that the Commission's certification decision "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 Fourteen Amendments of the United States Constitution." (Order at p. 28, ¶ 7.) Specifically, the court concluded that the Commission's decision "caused public monies to be improperly injected in to the campaign for Supreme Court." (*Id.* at p. 29, ¶ 10.) This conclusion is wrong for two reasons.

As explained earlier, the State Election Commission's decision certifying Justice Benjamin was correct and supported by substantial evidence in the record. Beth Walker and her campaign were given the opportunity to be fully heard at each of the Commission's four meetings on the subject. The Commission's actions did not violate any of Walker's constitutional rights. The Public Campaign Financing Program does not prevent Walker from engaging in political speech. Walker has contended that Justice Benjamin's participation in the Program will

violate her Constitutional rights by making it more difficult for her to compete in the election. JA0038. But the mere fact that Benjamin's campaign will make it more difficult for Walker to compete is not a Constitutional violation. Rather, it is the very nature of a contested election.

Neither Walker nor the Circuit Court cited a single case explaining how allowing an opposing candidate to participate in public financing would violate her right to free speech under the First Amendment, and through the First Amendment, "substantive" due process. Her speech is not impeded at all. Indeed, the Constitutional harm that Walker claims is not the result of the Commission's actions in this case. Instead, Walker's complaints go to the heart of the Public Campaign Financing Program. While Walker may disagree with the Program, it was created for important legislative purposes and has been upheld by the West Virginia Supreme Court of Appeals. *See* W. Va. Code § 3-12-2 (legislative purpose); *State of W. Va. ex rel. Loughry v. Tennant*, 229 W. Va. 630, 632, 732 S.E.2d 507, 519 (2012) (explaining that the portions of the Public Campaign Financing Program applicable here are "constitutionally sound"); *see also Williams-Yulee*, 135 S. Ct. at 1668 (finding state's interest in assuring public confidence in judicial integrity constitutes a compelling state interest sufficient to justify restrictions on judicial candidate's speech). She could have elected to receive public financing herself but decided against that course. That tactical decision gives her no constitutional interest in preventing Justice Benjamin from participating.

Because she was not harmed by the State Election Commission's decision, Walker also failed to state a claim under the Administrative Procedures Act. The Administrative Procedures Act provides that "[a]ny person adversely affected by a final order or decision in a contested case is entitled to judicial review" W. Va. Code § 29A-5-4(a). The Public Campaign Financing Act provides that "[a]ny person adversely affected by a decision of the State Election

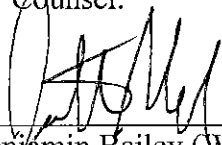
Commission under this article” can seek judicial review. W. Va. Code § 3-12-10(i). Similarly, a circuit court may only revise or reverse an agency’s determination if the “substantial rights of the petitioner or petitioners have been prejudiced” by the agency’s decision.

Here, Beth Walker has no legally-protected interest in preventing the Benjamin Campaign from participating in public financing. Her substantial rights have not been prejudiced, and she is not a person “adversely affected” by the Commission’s decision. W. Va. Code § 29A-5-4(a); W. Va. Code § 3-12-10(i). Walker therefore was not entitled to seek judicial review of the Commission’s decision in this case, and the Circuit Court erred in considering her Petition.

CONCLUSION

The State Election Commission correctly concluded that Justice Benjamin qualified to participate in the Public Campaign Financing Program. The Circuit Court’s order reversing that decision is clearly erroneous and an abuse of discretion and should accordingly be reversed.

JUSTICE BRENT D. BENJAMIN
By Counsel.



Benjamin Bailey (WVSB No. 200)
Jonathan R. Marshall (WVSB No. 10580)
Maryl C. Sattler (WVSB No. 11733)
Bailey & Glasser, LLP
209 Capitol Street
Charleston, West Virginia 25301
Telephone: (304) 345-6555
Facsimile: (304) 342-1110

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**Brent D. Benjamin, candidate for the
Supreme Court of Appeals of West Virginia**

Petitioner,

**No. 16-0228
(On Appeal from the Circuit Court
of Kanawha County 16-AA-17)**

vs.

**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

The undersigned hereby certifies that a copy of the foregoing **Petitioner's Brief** was served upon Counsel, via US Mail as set forth below, this 17th day of March 2016:

Thomas C. Ryan
K&L Gates LLP
210 Sixth Avenue
Pittsburgh, PA 15222
Thomas.Ryan@klgates.com

Richard L. Gottlieb
Spencer D. Elliott
Lewis Glasser Casey & Rollins, PLLC
300 Summers Street, Suite 700
PO Box 1746
Charleston, WV 25326


Mary C. Sattler (WVSB #11733)