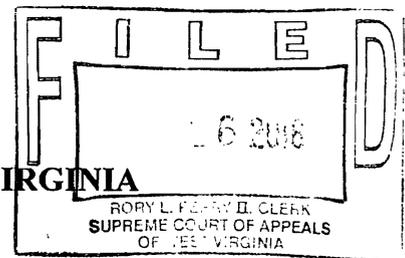


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**



**No. 16-0779**

**ERIK PATRICK WELLS,  
Respondent Below, Petitioner**

**v.**

**STATE OF WEST VIRGINIA ex rel. CHARLES T. MILLER,  
Prosecuting Attorney for Kanawha County,  
Petitioner Below, Respondent**

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**REPLY OF PETITIONER**

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## SUMMARY OF REPLY ARGUMENT

The response brief fails to address the dual issues before the Court. At issue are the federal and state constitutions' rights of voting citizens to select a nominee and the rights of citizens to run for public office, which are rights being guaranteed by the constitutional protection requiring the proper application of W. Va. Code §§ 3-5-23, 3-5-24 and 3-5-7 of freedom of expression, association and equal protection. These rights cannot be denied by narrow ballot access by state statutes.

W. Va. Code §§ 3-5-23 and 3-5-24 are the controlling sections for general election ballot access by nomination petition which mandates that the Nomination Petition "Shall be filed not later than August 1 proceeding the November general election." W. Va. Code § 3-5-24(a) [Emphasis added.] W. Va. Code §§ 3-5-23 and 3-5-24 make no reference to filing under § 3-5-7.

The Respondent erroneously believes that a candidate filing a petition for ballot access under W. Va. Code § 3-5-23 must file a Candidate's Certificate of Announcement under W. Va. Code § 3-5-7 before the candidate can be placed on the ballot. It is impossible for a nomination petition candidate to comply with § 3-5-7 since Nomination Petitions are not circulated until after the primary and the certificate of candidacy under § 3-5-7 must be filed or postmarked before midnight of the last Saturday in January.<sup>1</sup>

In July 2016, sixteen persons were issued Official Credentials pursuant to W. Va. Code § 3-5-23(d) to solicit signatures of duly registered voters of Kanawha County for Erik Wells' (a duly registered Democrat voter in Kanawha County, West Virginia) name to be placed on the November 8, 2016 general election ballot for the office of the County Clerk of Kanawha County as Independent candidates. [App. p. 11 – Petitioner Below's Writ Exhibits 2A-P.]

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<sup>1</sup> Nomination Certificates, Secretary of State Form P-3, under §§ 3-5-23 and 24, and Certificates of Announcement of Candidacy, Secretary of State Official Form C-1, under § 3-5-7, are two separate and distinct forms.

Mr. Wells timely filed the Nomination Petitions<sup>2</sup> containing 1019 Signatures and filing fee were filed with the office of the Clerk of the County Commission on July 18, 2016, and 900 of the signatures were found to be valid signatures. (Agreed fact at hearing.) [App. p. 34.] Of the 1019 signatures, 656 were Democrats, 135 were Republicans, 3 were Libertarians, 3 were Mountain Party, 137 were members of no party, and 13 were registered as Independent. [App. p. 99 - Circuit Court Final Order.] Duly registered voters may vote in the primary and sign Nominating Petitions. See W. Va. Code § 3-5-23(d).

Erik Wells voluntarily presented his Candidate's Certificate of Announcement with the Clerk of the County Commission of Kanawha County on July 18, 2016, and it was accepted and duly recorded. Item nine was left blank. [App. p. 75.] The Candidate's Certificate of Announcement under W. Va. Code § 3-5-7 does not require that it be filed or that item nine be designated under §§ 3-5-23 or 3-5-24. See State ex re. Browne v. Heckler, 197 W.Va. 612 (1996).

Respondent's statement to this Court submits to the Court that the Petitioner raised for the first time the issue of not being required to fill out the Certificate of Announcement in the Circuit Court is incorrect. Petitioner, in his Amended Response, raised the issue of W. Va. Code § 3-5-7 (App. p. 78) there was testimony by Mr. Wells on this issue (Supp. App. pp. 53-77), and Petitioner included the issue in his proposed Findings of Fact and Conclusions of Law before the Circuit Court, and the Circuit Court based its ruling in part on failure to properly file a Candidate's Certificate of Announcement under W. Va. Code § 3-5-7.

The facts that Mr. Wells was on active duty with the United States Navy, nor his failure to seek legal advice from the United States Navy Judge Advocate General's staff regarding

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<sup>2</sup> See Footnote 1.

restrictions on candidacy, and his failure to make a decision to seek ballot access through the Kanawha County Democratic Executive Committee or the Chairwoman of the Committee are not relevant to the issues before the Circuit Court nor are they relevant here.

## REPLY ARGUMENT

### A. STATUTORY ISSUES

Chapter 3-5-23 of the W. Va. Code provides that a citizen may become a candidate by filing a Nominating Certificate containing the signatures equal to or more than 1% of the votes cast for the office sought at the last general election.

§ 3-5-23(a)(d) provide as follows:

“Certificate nominations; requirements and control; penalties.  
(a) Groups of citizens having no party organization may nominate candidates who are not already candidates in the primary election for public office otherwise than by conventions or primary elections. In that case, the candidate or candidates, jointly or severally, shall file a nomination certificate in accordance with the provisions of this section and the provisions of section twenty-four of this article.”  
[Emphasis added]

“(d) The certificates...and may designate, by not more than five words, a brief name of the party which the candidates represent and may adopt a device or emblem to be printed on the official ballot. All candidates nominated by the signing of the certificates shall have their names placed on the official ballot as candidates, as if otherwise nominated under the provisions of this chapter. [Emphasis added]

The Secretary of State shall prescribe the form and content of the nomination certificates to be used for soliciting signatures.”

The use of the word “shall” as used in 3-5-23(a) and (d) is mandatory and the use of the word “may” is permissive. Warner-Goodwin v. Bd. of Ed. of Upsher County, 179 W.Va. 423.

The language in § 3-5-23(a) “Groups of citizens having no party organization” refers to those citizens who may be registered as a voter in a particular party, but not actively involved

with a political party, or no party at all, who may wish to nominate someone by petition. The statute, W. Va. Code § 3-5-23, does not use the term political party as defined under W. Va. Code § 3-1-8, but refers to groups of voting citizens having no active or affiliation with a principle or political organization. Voters here have a separate statutory scheme under W. Va. Code § 3-5-23 for ballot access for third parties or independent candidates. See Write-In Pritt Campaign v. Heckler, 191 W.Va. 677, 681 (1994). Under W.Va. Code § 3-1-10, a political party can only act as a unit in a legally organized meeting to be valid or legal. 6B M.J. Elections § 26. State v. County Court, 147 W.Va. 63 (1962). “Groups of citizens having no party organization” is a generic term, which by definition, include those citizens who are duly registered voters. Here 137 are members of no party, 13 registered as Independent, and many of the 656 Democrats, 135 Republicans, 3 Libertarians, and 3 Mountain Party members who may not be actively involved with the party of their registration, but want to nominate a candidate for a particular office signed the Nomination Petitions. The 900 voting citizens here want Erik Wells to be a candidate for the office of the County Clerk of Kanawha County. An Independent candidate under W. Va. Code 3-5-23 literally means that a qualified citizen of any party or no party may elect not to run in a recognized party primary, but may elect to secure a position on the general election ballot by utilizing the ballot nominating certificate provisions of W. Va. Code §§ 3-5-23 and 3-5-24.

This Court in State ex rel. Browne v. Heckler, 197 W. Va. 612 (1996), has specifically addressed the issue if a candidate who is nominated by Nominating Certificate, Secretary of State Form P-3, under W. Va. Code § 3-5-23, holding that under W. Va. Code § 3-5-23, a candidate who qualifies for inclusion on the general election ballot by method other than primary

election and who meets the August 1st deadline by filing a Nominating Certificate, is not required to file a Certificate under W. Va. Code § 3-5-7 and shall appear on the ballot.

The Court in Browne then noted:

"...W. Va. Code § 3-5-7(a) (1991) provides, 'The certificate of announcement shall be filed . . . not later than the first Saturday of February next preceding the primary election day . . . .' and does not refer to the general election, to July 2, to August 1, or to any other date...."

"...The purposes of imposing deadlines for filing declarations of candidacy under W. Va. Code § 3-5-7 (1991) are to ensure the orderly administration of primary elections and to provide notice to the electorate of the identity of candidates seeking their party's nomination. Where nomination for candidates for inclusion on the general election ballot occurs through a mechanism other than primary election, however, the filing of a 'declaration of candidacy' would not serve the purposes of the statute." Id. at 614.

The Respondent/Petitioner Below advanced the proposition that the Certificate of Announcement is incomplete, since item nine was left blank. While West Virginia Code § 3-5-7 authorizes the Secretary of State to create a form for the Certificate of Announcement, the form is not required under §§ 3-5-23 or 24. § 3-5-23 clearly mandates: "All candidates nominated by the signing of the certificates [of nomination] shall have their names placed on the official ballot as candidates, as if otherwise nominated under the provisions of this chapter." [Emphasis added] Mr. Wells was not required under §§ 3-5-23 or 24 to file a Certificate of Announcement under § 3-5-7.

The term "certificate of announcement" described in W. Va. Code § 3-5-7 with required filing deadlines are also found in W. Va. Code §§ 3-5-11 and 3-5-19(a)(2)(3), which is for the filling of vacancies in nominations and party executive committees caused by the failure of a candidate to file or the withdrawal. In these sections of the Code, it is mandatory that the Certificate of Announcement be filed in accordance with the deadlines.

However, under W. Va. Code §§ 3-5-21 party convention nominations and 3-5-22, which refers to other party and group nominations procedures, the term “certificates of announcement” is missing in W. Va. Code § 3-5-7 and the language certificates of nominations are to be certified in the same manner as found in § 3-5-23 and filed in § 3-5-24. This Court has consistently stated “[T]he The Legislature, when it enacts legislation, is presumed to know of its prior enactments.” Manchin v. Dunfee, 174 W. Va. 532, 535 (1984). [Citations omitted.] It is obvious that by the omission of any reference in Code § 3-5-23 to § 3-5-7, that candidates under § 3-5-23 do not file Certificates of Candidacy under § 3-5-7.

This Court in Dunfee at 535 addressed the doctrine of interpretation of statutory procedures *expressio unius est exclusio alterius*, the expressed mention of one thing implies the exclusion of another applies. The doctrine supports the position of Mr. Wells. W. Va. Code § 3-5-23 uses the technical word “Candidate Nomination Petition” (Secretary of State Form P-3) to be filed, while W. Va. Code § 3-5-7 uses the technical word “Candidate Certificate of Announcement”<sup>3</sup> (Secretary of State Form C-1) to be filed. In Dunfee, this Court found that “Technical words used in a statute will be presumed to have been used in a technical sense and will ordinarily be given their strict meaning...” [Citations omitted.] “We have stated consistently that ‘the Legislature, when it enacts legislation, is presumed to know of its prior enactments.’” [Citation omitted.] These are two separate and technically different forms found in separate sections of the Code. Following these principles, the legislature specifically intended there to be two separate filings with those candidates utilizing the primary route under W.Va. Code § 3-5-7, would file before the last Saturday in January, and those candidates utilizing the

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<sup>3</sup> Chapters §§ 3-5-23 and 24 refer to the Nominating Certificate Form P-3 not “a Certificate of Announcement Form C-1” under § 3-5-7, and clearly are not related to each other.

nomination by petition would under W.Va. Code §§ 3-5-23, 3-5-24, 3-5-21 and 3-5-22 before August 1.

W. Va. Code §§ 3-5-23, 3-5-24, 3-5-21 and 3-5-22 do not reference nor require that the candidate file a Certificate of Candidacy under § 3-5-7, nor do the sections require the candidate to indicate what political party, if any, he or she is a member of, or to indicate what party, if any, he represents. The candidate is free to say nothing. The candidate under W. Va. Code § 3-5-23 may be a registered voter of any party, an Independent, or no party at all. The statute § 3-5-23 merely states that the candidate “may adopt, by not more than five words, a brief name of the party which the candidate represents.” [Emphasis added.] Here a large group of diversified citizens secured the signatures of 1019 voters to place the name of Erik Wells on the November 8, 2016, ballot exercising their federal and state constitutional rights of freedom of expression. The Clerk certified that 900 names were valid Kanawha County voters. [App. p. 34.] W. Va. Code § 3-5-23(d) then becomes mandatory stating “All candidates nominated by the signing of the certificate shall have their names placed on the official ballot as candidates as if otherwise nominated under the provisions of this chapter.” [Emphasis added.]

The preparation and form of general election ballots is found in W. Va. Code 3-6-2(a)(1)(2) provides:

“(a) All ballots prepared under the provisions of this section are to contain:

(1) The name and ticket of each party which is a political party under the provisions of section eight, article one of this chapter;

(2) The name chosen as the party name by each group of citizens which has secured nomination for two or more candidates by petition under the provisions of section twenty-three, article five of this chapter;... [Emphasis added.]

W. Va. Code § 3-6-2 further provides that the ballot is laid out in parallel columns, rows or pages as required by the party emblem (3-6-2(c)(2)) with the party placed to the left or first column, row or page whose candidate had the highest votes at the last presidential, next second highest vote and so on. Any group or third parties who did not have a presidential candidate are to be placed in sequence in which the final Certificate of Nominations were filed. (W. Va. Code § 3-6-2(c)(2)). Mr. Wells' name would then be placed to the right under a heading of Independent Candidates.

## **B. CONSTITUTIONAL ISSUES**

The West Virginia Supreme Court of Appeals in West Virginia Libertarian Party v. Manchin, 165 W.Va. 206, (1980), a ballot access case, held that it must apply the holdings of the United States Supreme Court in the field of ballot access cases under the First and Fourteenth Amendments of the United States Constitution, of Lubin v. Panish, 415 U.S.709 (1974), and Bullock v. Carter, 405 U.S. 134 (1972), Manchin, 165 W.Va. at 210-211. The Court in Manchin opined that Lubin and Bullock found “that open access to the ballot plays a vital role in giving an opportunity to candidates and voters who espouse various political and social viewpoints – an essential part of right of free expression guaranteed by the First Amendment.”

In Reynolds v. Sims, 377 U.S. 533, 555, 84 S. Ct. 1362, 1378, 12 L. Ed. 2d 506, 523 (1964), the Supreme Court addressed both candidate and voter rights holding:

“...candidates' rights are necessarily tied to voters' rights. Clearly, ‘the right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on the right strike at the heart of representative democracy.’

Bullock also spoke to voter and candidate rights holding:

“A citizen's right to vote is not worth much if the law denies his or her candidate of choice the opportunity to run. ‘The rights of voters and the rights of candidates do not lend themselves to neat

separation; laws that affect candidates always have at least some theoretical, correlating effect on voters.” Bullock at 143.  
[Emphasis added]

A citizen can become an independent candidate under § 3-5-23 without giving up his or her party affiliation. A person need not choose the political party route if he wants to appear on the ballot in the general election by showing substantial support under W. Va. Code § 3-5-23.

In Manchin, the Supreme Court of Appeals adopted the holding in Storer v. Brown, 415 U.S. 724 (1974), and Lubin v. Panish addressed the question if an independent candidate must give up his party affiliation by holding a candidate need not “choose the political party route if he wants to appear on the ballot in the general election? We think not.” Storer at 745-46, 39 L. Ed. 2d at 732, 94 S.Ct. at 1286. [Emphasis added] and in Lubin held:

“This legitimate state interest, however, must be achieved by a means that does not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued availability of political opportunity. The interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance. The right of a party or an individual to a place on a ballot is entitled to protection and is intertwined with the rights of voters.” [Emphasis added.] Lubin at 716.

The Supreme Court of Appeals in Manchin also referred to Williams v. Rhodes, 393 U.S. 23 (1968), where the United State Supreme Court regarding rights of voters and candidates holding:

“...the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment. And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States. Similarly we have said with reference to the right to vote:

‘No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.’” [Emphasis added.]

”The right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot.’ Williams v. Rhodes, 393 U.S. 23, 31 (1968).”

The Supreme Court of Appeals in Manchin, after carefully considering the holdings of the United States Supreme Court in Lubin, Bullock, Storer and Williams, held:

“We, therefore, hold that W. Va. Code, 3-5-23, violates the Equal Protection Clause of both the United States and the West Virginia Constitutions to the extent that it fails to extend to the independent candidate the same right to ballot access as that of the political party candidate.” Id. at 213-214. [Emphasis added]

The rule in Manchin specifically finds that under the First and Fourteenth Amendments of the United States Constitution and the West Virginia Constitution that W. Va. Code §§ 3-5-23 and 3-5-24 must provide ballot access so a citizen can run independently of a recognized political party without giving up his political party status.

Respondent relies on the holding of Storer v. Brown, 415 U.S. 724, where the Supreme Court addressed the California statute dealing with party switching. Here, Mr. Wells has not switched parties, and W. Va. Code § 3-5-7(d)(6) does not apply to groups of citizens who nominate a candidate by petition under W.Va. Code §§ 3-5-23 and 3-5-24.

Respondent also mistakenly states that Petitioner under W. Va. Code § 3-5-7(d)(6) proposed that West Virginia law permits a fusion of minor parties and candidates with major parties or candidates, i.e., Democrats, Republicans, Independents and other parties. Petitioner has not stated there is party fusion between Mr. Wells and any other party and has correctly stated that W. Va. Code § 3-5-7(d)(6) does not apply to Candidate Petitions (Secretary of State

From P-3) under W. Va. Code §§ 3-5-23 and 3-5-24, and Respondent's reliance on Timmons v. Twin Cities, 520 U.S. 351 (1997), a case reviewing Minnesota election statutes relating to party fusion, is misplaced.

Under Minnesota law, an individual is prohibited from appearing on the ballot as a candidate of more than one party, which is termed fusion. The 900 citizens here are not advocating that Mr. Wells appear on the November ballot both as an Independent and Democrat and/or Republican or any other recognized political party. These 900 citizens have fully complied with the nominating provision of W. Va. Code §§ 3-5-23 and 3-5-24, and are requesting his name be placed on the ballot as mandated by these statutes and appear on the general election ballot mandated by W. Va. Code 3-6-2(a)(2) as it appeared on the petitions as Independent and not as a Democrat.

### CONCLUSION

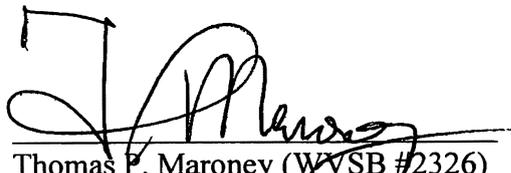
Mr. Wells has fully complied with the substantive and procedural requirements of West Virginia Code §§ 3-5-23 and 3-5-24 which this Court found is sufficient to allow ballot certification under its holding in the election law case Wooten v. Walker, No. 16-0226, decided April 19, 2016.

There are no statutory provisions denying ballot access by nomination petition under § 3-7-23 to citizens registered to any political party or no party. Groups of citizens under §§ 3-5-21, 3-5-22 and 3-5-23 are free to nominate any qualified citizen. There are no compelling state interests in requiring candidates, here Mr. Wells, to file a Certificate of Candidacy under § 3-5-7. To deny ballot access to Mr. Wells and the 900 voters would violate the constitutional rights of freedom of expression, association and equal access found in the First and Fourteenth

Amendments of the United States Constitution, and Article III, Sections 6, 7 and 17, and Article IV, Sections 1 and 4, of the West Virginia Constitution.

Erik Wells respectfully requests that this Court find that he has met all of the requirements of W. Va. Code §§ 3-5-23 and 3-5-24, and that under the federal and West Virginia Constitutions the 900 voters of Kanawha County have exercised their rights of freedom of expression and can vote for a voice of their choice in Erik Wells, and this Court order that his name be placed on the November 8, 2016, for the office of the Clerk of the County Commission of Kanawha County.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Maroney', written over a horizontal line.

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2

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v.

**STATE OF WEST VIRGINIA ex rel. CHARLES T. MILLER,  
Prosecuting Attorney for Kanawha County,  
Petitioner Below, Respondent**

**CERTIFICATE OF SERVICE**

I, Thomas P. Maroney, counsel for Petitioner herein, do hereby certify that I served a true and accurate copy of *REPLY OF PETITIONER* upon counsel of record via **hand-delivery** on this the 25<sup>th</sup> day of August 2016.

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