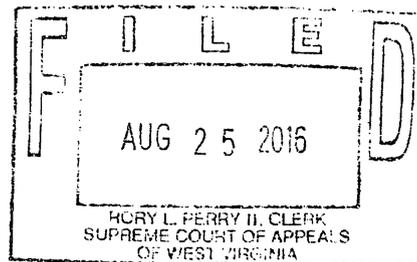


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

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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BRIEF ON BEHALF OF THE RESPONDENT

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**STATE OF WEST VIRGINIA ex rel. CHARLES T. MILLER,  
PROSECUTING ATTORNEY FOR KANAWHA COUNTY,**

*Petitioner Below, Respondent.*

**BRIEF ON BEHALF OF THE RESPONDENT**

The petitioner is seeking to do that which, by statute, he may not do. Erik Wells, a registered Democrat, could have, but did not, put forward his name for the nomination of the Democratic party for the office of county clerk for Kanawha County. Erik Wells, a registered Democrat, could have, but did not, request that the Democratic Executive Committee for Kanawha County, put forward his name for inclusion on the general election ballot for the office of county clerk of Kanawha County. Erik Wells, a registered Democrat, could have, but did not, request that the Chair of the Democrat Executive Committee, put forward his name for inclusion on the general election ballot for the office of county clerk of Kanawha County. Now, Erik Wells, a registered Democrat, seeks to render the statutory scheme regarding nominations and primaries irrelevant by seeking inclusion on the general election ballot as an Independent. To permit one who is affiliated with a major party to ignore the requirements of the West Virginia Code regarding the nomination and primary process for major party candidates and run as an Independent simply because he feels like it would render the primary process meaningless.

## I.

### STATEMENT OF THE CASE

As one is reminded *ad nauseum* by the constant prattle of the media, 2016 is an election year. West Virginia has enacted a statutory scheme regarding the process by which candidates file for office and obtain nomination. That scheme regulates the major parties, that is the Republican and Democratic parties; but also provides for a separate process which enables candidates not associated with those parties to be included upon the ballot.

Erik Wells was at all pertinent times, including (upon information and belief) today's date, a registered Democrat. (Appendix at 7, 55)

One seeking to run for a county-wide office, such as the office of the county clerk, as a major party candidate, may file a certificate of announcement with the county clerk no earlier than the second Monday of January of the year immediately preceding the primary, and no later than the last Sunday of that same January. West Virginia Code §3-5-7 (b) (2). Therefore, major party candidates for county-wide offices had to file a certificate of announcement between the dates of January 11, 2016, and January 31, 2016. (App. at 102-03.)

No member of the Democratic party filed to run as a candidate for the office of Kanawha County Clerk during the applicable January, 2016 filing period. However, even when no major party candidate files during the primary election filing period, a candidate for county-wide office may still be included on the general election ballot. The county party executive committee may nominate an individual to the vacant slot by acting within 30 days after the last date an individual may file. Therefore, the Democratic Executive committee could have proffered a name for the vacant county clerk's slot on or before March 1, 2016. West Virginia Code §3-5-19 (a) (3). (App. at 103.) Even if the executive committee declines to act, the chair of such committee may still

nominate a candidate for the open office, with an addition two days to act when the committee has failed to act. West Virginia Code §3-5-19 (a) (1). The additional two days expired on March 3, 2016. (App. at 106.)

A candidate from a major party *must* be nominated by a plurality of voters. West Virginia Code §3-5-4 (a).

No candidate for the office of county clerk of Kanawha County was nominated by the Democratic party. No individual filed and ran for his party's nomination during the primary election filing period; the executive committee nominated no one; and the chair of the executive committee nominated no one.

The process by which an individual who is not a major party candidate is placed upon the election ballot differs markedly from the process governing major party candidates. Any political party which polled less than 10 % of the votes cast for governor at the immediately preceding general election may nominate candidates by convention. West Virginia Code §3-5-22. Groups of citizens having no party organization may nominate candidates "otherwise" than by conventions or primary elections. West Virginia Code §3-5-23. (App. at 104.) In general, that process requires a certificate of announcement for the partisan elections; the solicitation of signatures of a sufficient number of signatures of registered voters, and the payment of the filing fee.

In the instant matter, Wells filed such certificate, but did not complete all the required information on that certificate. The form specifically advises that it must be complete in order to be accepted. Paragraph (9) requires the individual to state under oath that "I am a member of and affiliated with the following political party:\_\_\_\_\_". I am a member and affiliated with this political party as evidenced by my current voter's registration and I have not been registered

as a member of another political party within 60 days of this date.” West Virginia Code §3-5-7-(d) (6). (App. at 75.)

Wells did not reveal that he was (and is) a member of the Democratic party. Wells voted in the Democratic party primary in May (App. at 57). Wells testified that he was and remains a registered Democrat. (App at 100.)

The certificate of announcement proffered by Wells does not comply with the requirement of West Virginia Code §3-5-7 (d) (6) which *requires* a declaration of party affiliation.

Along with the woefully and deceptively incomplete certificate, Wells submitted the necessary number of signatures to be included on the ballot. (App. at 99.) The Republican Executive Committee timely filed a complaint contesting the candidacy. That complaint contained a certified copy of Wells’ registration as a Democrat. (App. at 100.)

A hearing was held on the Amended Petition for Writ of Quo Warranto, at which petitioner (and others) testified.

It was the contention of the petitioner below that he was not required to fill out the party affiliation part of the certificate of announcement, and that although a registered Democrat, he could be, and would be listed as an Independent on the ballot. The circuit court queried as to whether that deceived the voters. (Supplemental Appendix at 47.)

The petitioner testified that he presented the incomplete certificate of announcement to the clerk, and that when she told him he had to fill out Item 9, he said “according to code I’m able to leave that blank.” (Supp. App. at 55.) He then said the clerk went to a co-worker and told him he was correct and that he didn’t need to fill that out. (*Id.*)

The petitioner acknowledged on cross-examination that he was a registered Democratic, had been a registered Democrat for many years and had never been registered as an Independent.

(Supp. App. at 56.) The petitioner eventually testified that he made no effort to get on the ballot as a Democrat because he had no intention of running. He further stated that had he attempted to file, he would have been in violation of the Uniform Code of Military Justice. (Supp. App. at 57.) However, the petitioner acknowledged he was not a lawyer and had not asked for legal advice because he had no intention of running before all the applicable periods to run as a partisan candidate had closed. (Supp. App. at 62.) He referred to his “party” as a group of individuals coming together. (Supp. App. at 58.)

David Dodd, chief deputy for the clerk’s office, communicated to the petitioner at the time he filed his certificate of announcement that he be listed as a Democrat, and Wells refused. He then communicated to Wells that it would be set up as “no party.” (Supp. App. at 73.) He did not tell the clerk actually dealing with Wells that Wells did not have to answer the affiliation question. He was told that Wells was refusing to fill out that part of the form despite being asked to do so more than once, and Mr. Dodd’s response was fine, “we’ll deal with it later.” (Supp. App. at 74.) Dodd never told Wells, and never told the other deputy that it was permissible for Wells to leave that line blank. (*Id.*) On cross-examination, the deputy clerk clarified that the no party designation was something for the office’s computer system, but that did not relieve Mr. Wells from making some sort of declaration. (Supp. App. at 75.)

Carol Bright, a deputy county clerk testified that she informed the petitioner that he needed to fill out the political affiliation part of the form. (Supp. App. at 78.) The petitioner refused to provide his party affiliation. (Supp. App. at 79.) She did not tell the petitioner that he did not have to provide the party affiliation, but did ultimately tell the petitioner to leave the line blank and it would be dealt with later. (App. at 100-01, Supp. App. at 79.) Ms. Bright stated that on at least two occasions the petitioner refused to provide affiliation, and that her intent in telling the petitioner it

would be dealt with later was to avoid controversy. (Supp. App at 80-81.) The circuit court found specifically that the deputy clerks did not act to relieve the petitioner of his duty to complete the certificate of announcement; nor, could they under the law. (App. at 101.)

Upon recall, the petitioner stated that at the time he completed the certificate he was a registered Democrat and that he was running as “a person nominated by 900 citizens.” (Supp. App. at 83.) Despite his nomination forms identifying him as an “Independent”, the petitioner acknowledged he was not an Independent but a registered Democrat.

The circuit court specifically rejected Wells’ argument that he was unlawfully being denied “ballot access.” Nothing prevented Wells from filing as a candidate for the Democratic party nomination during the January filing period. (App. at 102.) Wells was released from active duty on February 16, 2016. (App. at 103). Therefore, he was not on active duty during the time period during which the county executive committee could have placed his name in nomination. That is Wells was released from duty well in advance in of the March 1, 2016 deadline for the executive committee to act. Moreover, he had the additional time period, until March 3, 2016, to seek action from the county chair. (App. at 103.)

The petitioner deliberately chose inaction. Why didn’t the petitioner seek validation from the voters, or the executive committee, or the county chair? According to his testimony it was because he hadn’t decided to run for office. (App. at 103;).

The court found that the petitioner had sufficient and reasonable opportunity to access the ballot through seeking nomination from either the committee or its chair. The court specifically found that this was not a matter of ballot access, but a case of the petitioner’s failure to act in a timely manner. (App. at 103.) The petitioner chose not to run, but unlike Calvin Coolidge, later regretted that choice.

Even after the filing of the pleadings in the proceeding below, and testimony on the issue, the circuit court judge could not determine what political affiliation the petitioner is claiming with respect to the general election, nor can that be determined by the county clerk. (App. at 102.) By failing to include his party affiliation in the certificate for announcement, the petitioner has created confusion for voters regarding who is running for office from what party, and what party philosophies the petitioner is affiliated with. The failure to include party affiliation creates an impossible situation for election officials when preparing the ballot and for voters when voting. If his name appears on the ballot with a Democratic party affiliation (the petitioner's voter registration) it

creates the impression to the voters that the Respondent is on the ballot either because he either won the primary election or had his name placed on the ballot by the Kanawha Democratic Executive Committee or the Chairperson thereof, which did not happen. If Respondent's name appears as Erik Wells, Independent—which is how he testified he is running, it is simply false or untrue because the Respondent is a registered Democrat. Either option would be inaccurate and create voter confusion. (App. at 102.)

The petitioner was a registered Democrat at the time of his filing for candidacy. The petitioner failed to disclose his party of registration as required on the certificate of announcement. As the petitioner is a Democrat, his candidacy is controlled by the provisions of West Virginia Code §3-5-7. His candidacy is not controlled by the provisions of West Virginia Code §3-5-23. That code section provides for ballot access for those who wish to run for office but are not members of an organized party having a nominating election or a nomination convention. (App. at 104.)

The circuit court further determined that the petitioner was not eligible for access pursuant to West Virginia Code §3-5-23 because that code provision applies to those having no party affiliation, and the petitioner at all relevant times was associated with the Democratic party.

Further, the petitioner's candidacy is invalidated by failing to disclose his membership in the Democratic party as required both by the certificate of announcement and state law. (App. at 101-02.)

Moreover, the court specifically rejected any applicability of *West Virginia Libertarian Party v. Manchin*, 165 W. Va. 106, 270 S.E.2d 634 (1980.) This respondent had more than adequate means of accessing the ballot as a Democrat and chose not to do so.

This is not a case of ballot access, but rather, a case of too little, too late. When the Respondent finally decided he wanted to run for office, after the primary election, it was too late to get on the ballot as a Democrat, so he was forced to try to go through the back door when legally he could not go through the front door. (App. at 104.)

The circuit court the amended petition, and this expedited appeal ensued.

## II.

### SUMMARY OF THE ARGUMENT

The petitioner is complaining that he is being denied access to the ballot when he has obtained the requisite number of signatures to be included on that ballot. However, the petitioner is ignoring the fact that as a registered Democrat, the petitioner must follow the procedures for nomination by his major party. The petitioner was not denied ballot access. Why the petitioner isn't on the ballot was because he didn't do anything. He could have, but did not, run for the nomination in the primary. He could have, but did not, request the nomination from the Democratic Committee. He could have, but did not, request the nomination from the Chair. The Department of Defense Directive 1344.10 did not preclude him from taking any of those steps, and in fact the petitioner, although originally proffering that he was debarred from filing because of his military service, simply had to acknowledge that he hadn't filed because he wasn't running. At some point, the petitioner was bitten by the bug of political fever and decided to run for office

as a—well, we don't know what the petitioner is trying to run as, because he deliberately refused to fill out that portion of the form.

The petitioner can't be on the ballot in November because he is a registered Democrat who ignored the requirements of major party candidacy until too late. The petitioner can't be on the ballot as an Independent because he is a registered Democrat who did not change his party affiliation more than 60 days before filing. The petitioner can't be on the ballot because he failed to complete the certificate of candidacy as required by state law.

### III.

#### STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The requirements for candidacy for political office in West Virginia are clear and unambiguous, so this area of the law is well-settled. It is the contention of the respondent that because the law is well settled, and because the circuit court judge correctly applied this well-settled law to undisputed fact that oral argument is unnecessary. The facts and legal argument are more than adequately presented in the briefs and appendix, and the decisional process would not be assisted by oral argument. Because of the expedited and time sensitive nature of this proceeding, the respondent believes that this matter could be decided by an Order, to be followed by memorandum decision or opinion.

### IV.

#### ARGUMENT

The petitioner casts his argument as a "ballot access" issue contending that once he acquired the requisite number of signatures he was entitled to be included on the general election ballot. That argument ignores the fact that the petitioner is *not* being denied access to the general election ballot because of any arbitrary and capricious action by those who supervise the election

process and ballot for Kanawha County elections. The petitioner may not be included on the general election ballot because he chose to ignore all of the options which would have permitted him to be on the ballot as a representative of the party to which he belongs, the Democratic party. Having decided at the last minute to fling his Democratic hat into the ring, he failed to follow the procedures to run as an unaffiliated or Independent candidate, by not changing his registration at least 61 days before filing his certificate of candidacy. He compounded the problem by refusing to complete the form by leaving his party affiliation blank. Those actions are deceptive and misleading. The circuit court found that the petitioner should not be included on the general election ballot. The circuit court's order was correct.

The West Virginia Constitution reserves to the Legislature the ability to make laws concerning public officials and the manner in which those officials assume office. Article IV, Section 8 provides that "The Legislature, in cases not provided for in this constitution, shall prescribe, by general laws, the terms of office, powers, duties and compensation of all public officers and agents, and the manner in which they shall be elected, appointed and removed." Additionally, Article IV, Section 11 provides that "The Legislature shall prescribe the manner of conducting and making returns of elections, and of determining contested elections; and shall pass such laws as may be necessary and proper to prevent intimidation, disorder or violence at the polls, and corruption or fraud in voting, counting the vote, ascertaining or declaring the result or fraud in any manner upon the ballot."

The ability of the Legislature to enact reasonable restrictions and regulations regarding the preparation of ballots and the conduct of elections has long been recognized. Despite the general constitutional provision providing that all males were entitled to vote, reasonable laws, including

restricting voting to registered voters have long been deemed appropriate. Article IV, Section 11, commands the legislature to enact appropriate laws for conducting elections.

“This provision is mandatory and plenary, and requires the legislature to prescribe all reasonable laws deemed necessary or proper for the prevention of fraud, securing the purity of elections and ascertaining the results. It imposes no restriction whatever upon the power of the legislature. It is a command and not a grant of power; because the power existed in the legislature independent of the Constitution.” *Halstead v. Rader*, 27 W. Va. 806 at 808. (1886.)

“The Constitution, in article IV, section 11, gives wide powers to the legislature to make all reasonable regulations and restrictions as to preparation of ballots and the conduct and returns of elections,” Syl. Pt 4, *Morris v. Board of Canvassers of City of Charleston*, 49 W. Va. 251 (1901.)

*Morris* involved a recount in an election which had originally resulted in a tie. At recount, several ballots were invalidated as it appeared some voters had voted on more than one ballot, without signifying the cancellation of the other ballot. *Morris*, the candidate, challenged the refusal to count ballots as an unconstitutional infringement as to the general provision in the West Virginia Constitution that all male citizens shall be entitled to vote.

The constitutional challenge was emphatically rejected with the *Morris* Court noting that Article IV, Section 11 “. . .not only allows, but commands, the legislature to make such regulations. . .the power to regulate elections is both plenary and mandatory upon the legislature.” *Morris*, 49 W. Va. 251 at 264. (Internal citation omitted.) Moreover, the opinion notes approvingly that even laws disenfranchising the voter for failure to register are valid, because the regulations do not disenfranchise but leave the voter to a “means of voting, though subject to a regulation with which he can comply”, thereby making the regulation a legitimate one. *Morris*, 49 W. Va. 251 at 263-264.

Under its plenary and mandatory power to regulate elections, the West Virginia Legislature has enacted statutes which clearly provide methods for major party candidates, third party candidates, and minor party or unaffiliated candidates to have access to the general election ballot.

If one chooses to run as a Democrat or as a Republican for political office, there is a well-defined process. One seeking to run for a county-wide office, such as the office of the county clerk as a major party candidate, may file a certificate of announcement with the county clerk no earlier than the second Monday of January of the year immediately preceding the primary, and no later than the last Sunday of that same January. West Virginia Code §3-5-7 (b) (2). No Democrat, including the petitioner, filed to run for the office of county clerk in Kanawha County. Although the petitioner was on active duty during part of the month of January, he was not precluded for filing for office because his active duty ceased in February, 2016, in plenty of time to request inclusion on the ballot from the Executive Committee or the party chair.

Because no one filed to run as a candidate, the Democrat Executive Committee had the ability to, essentially, nominate a candidate to be placed on the ballot. The county party executive committee may nominate an individual to the vacant slot by acting within 30 days after the last date an individual may file. Therefore, the Democratic Executive committee could have proffered a name for the vacant county clerk's slot on or before March 1, 2016. West Virginia Code §3-5-19 (a) (3). No name was proffered. Nothing prevented the petitioner from requesting that his name be proffered by the Committee.

Finally, the petitioner—or any individual similarly situated—has one final opportunity to be placed on the ballot as his party's candidate. Even if the executive committee declines to act, the chair of such committee may still nominate a candidate for the open office, with an additional two days to act when the committee has failed to act. West Virginia Code §3-5-19 (a) (1). The

petitioner did not avail himself of the opportunity to be placed on the ballot by that last, final alternative.

The option of obtaining a place on the general election ballot by running as an unaffiliated, Independent, or minor candidate is not available to this petitioner. The provisions of West Virginia Code §3-5-23 are not applicable to this petitioner because that provision of the election code provides a means of access to the ballot for “independent candidates without party affiliation.” *West Virginia Libertarian Party v. Manchin*, 165 W. Va. 206 at 212, 270 S.E.2d 634 at 640 (1980.) The petitioner is a registered Democrat. He is not an independent candidate without a party affiliation.

Moreover, the petitioner refused to disclose his party affiliation when he attempted to file his certificate of candidacy in July, 2016. W. Va. Code §3-5-7(d) requires, not requests, the putative candidate to declare his party affiliation. The petitioner proffers the excuse that he was told by a deputy clerk that he could ignore that mandatory provision of the elections code. That testimony demonstrates that rather granting the petitioner permission to ignore the law, the clerk and her supervisor were simply telling the petitioner that they’d take the form (and get the petitioner out of the office) and “deal” with the blank later. That was not an acceptance of the certificate, but rather an explicit warning that the form was incomplete and would not, in its present form be a valid certificate.

The problem of what the petitioner is as regards to party—a requirement as he must be identified on the ballot as a Democrat, Independent, Mountain, Tea or even Know-Nothing affiliate—is demonstrated by the petitioner’s own failure to identify what he is. He identified himself as an “independent” on the credentials shown to solicit petition signature. (App. at 72 ). Yet, at the hearing, the petitioner identified as a registered Democrat. (App. at 100.) If the

petitioner can't articulate whether he's a Democrat or Independent, how can voters, to whom party affiliation may be important, know whether to cast their votes for this petitioner or not?

The certificate of candidacy, incomplete as to party affiliation, is unacceptable and invalidates the attempted filing. As for petitioner's excuse that he was, in essence, given permission to break the law by the Deputy clerk who accepted the incomplete form, no individual—not the clerk, not the Governor, and not the President of the United States—can give anyone permission not to follow the law.

We are all required to follow the law and its dictates when it comes to living our own lives, including filing for political office. The bank teller can't give the robber permission to take money from the bank. The store clerk can't give permission for one to walk out the doors without paying at Kroger. And a deputy clerk can't give permission for a prospective candidate to fail to comply with the mandatory, statutory directives for completing the certificate.

The requirement for disclosing political affiliation under W. Va. Code §3-5-7 (d) (6) is not unconstitutional under either the United States or West Virginia Constitutions. That provision states specifically that:

For partisan elections, the name of the candidate's political party and a statement that the candidate: (A) Is a member of and affiliated with that political party as evidenced by the candidate's current registration as a voter affiliated with that party; and (B) has not been registered as a voter affiliated with any other political party for a period of sixty days before the date of filing the announcement;

Therefore, in order for the certificate of candidacy to be valid, the petitioner must disclose that he is a Democrat, which removes him as an eligible candidate for office, as he is not an unaffiliated candidate.

The petitioner asserts that he has a constitutional right to be included on the general election ballot. The petitioner is incorrect. *Storer v. Brown*, 415 U.S. 724 (1974) addressed a specific

provision of the California Elections Code which forbade a position on the ballot to an independent candidate for public office if he had a registered affiliation with a qualified political party within one year of the primary. Candidates who challenged that restriction as unconstitutional were denied relief. *Storer* sounds the death knell to the petitioner's First and Fourteenth Amendment claims.

The *Storer* Court noted that “. . .substantial state interest in encouraging compromise and political stability, in attempting to ensure that the election winner will represent a majority of the community and in providing the electorate with an understandable ballot and inferred that ‘reasonable requirements for ballot position’ . . .would be acceptable.” 415 U.S. 724 at 729. (Internal quotation and citation omitted.) “Moreover, as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos is to accompany the democratic processes.” *Storer*, 415 U.S. 724 at 730.

“It appears obvious to us that the one-year disaffiliation provision furthers the State's interest in the stability of its political system. We also consider that interest as not only permissible, but compelling and as outweighing the interest the candidate and his supporters may have in making a late rather than an early decision to seek independent ballot status.” *Storer*, 415 U.S. at 736.

Here, the legislatively enacted system of requiring those affiliated with a major party to participate in the party nomination process, along with the convention system for third-party candidates and a requirement that an individual who wishes to gather signatures and run as an unaffiliated candidate ensures the stability of the political process. The petitioner had equal opportunity with every other potential candidate in Kanawha County. It was his responsibility to either run as a Democrat, or to disaffiliate himself entirely from the Democratic party 60 days

before he filed his certificate of candidacy. Having taken neither option, the petitioner cannot be a valid candidate on the November general election ballot. His failure to choose either option was, in fact, his own choice.

Any suggestion that an affiliated candidate can also be an independent in some sort of “fusion” of parties is inappropriate. Such fusion or label would clearly be confusing to the electorate who deserve to know who they’re voting for and where that person lines up in the currently fractured voting divide. The idea of “fused” parties was rejected by a Minnesota ban which was affirmed by the United States Supreme Court in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997). That ban protected valid state interests such as the state’s interest in maintaining ballot integrity, the integrity of the political process, and political stability.

*Write-In Pritt Campaign v. Hechler*, 191 W. Va. 677, 447 S.E.2d 612 (1994) addressed the mechanism by which a loosely-affiliated group becomes an independent political party and is granted the same ballot access as a major political party.

There can be no question that a state has a legitimate interest in the smooth functioning of the electoral process. See *Storer v. Brown* 415 U.S. 724, 730, 94 S.Ct. 1274, 1279, 39 L.Ed.2d 714 (1974) (“there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes”). This legitimate state interest in overseeing the elective process permits the state to regulate the number of candidates and parties on the ballot, provided that the restrictions imposed are “reasonable[ ] [and] nondiscriminatory.” *Anderson v. Celebrezze*, 460 U.S. 780, 788, 103 S.Ct. 1564, 1570, 75 L.Ed.2d 547 (1983). Against this well-established foundation of permissible state regulation, however, is the equally well-established tenet that “[t]he right to form a party ... means little if ... [it] can be kept off the election ballot and thus denied an equal opportunity to win votes.” *Williams v. Rhodes*, 393 U.S. 23, 31, 89 S.Ct. 5, 10–11, 21 L.Ed.2d 24 (1968).

In *Socialist Workers Party v. Hechler*, 890 F.2d 1303 (4th Cir.1989), *cert. denied*, 495 U.S. 932, 110 S.Ct. 2173, 109 L.Ed.2d 502 (1990), the Fourth Circuit Court of Appeals stated,

these general principles [concerning ballot access] are not to be interpreted as an open sesame for minor parties and individuals who

want to appear on the ballot with the major candidates. ‘The State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates.’ *Id.* at 1304 (quoting *Anderson*, 460 U.S. at 788–89 n. 9, 103 S.Ct. at 1570 n. 9).

*Write-In Pritt Campaign v. Hechler*, 191 W. Va. 677, 679–80, 447 S.E.2d 612, 614–15 (1994)

The Court went on to note that West Virginia Code §3-5-23 had been previously recognized and upheld “. . .as providing the method for ballot-access for *third-party and independent party candidates*. Accordingly, this is the preferred statutory mechanism for gaining ballot access for *third-party or independent candidates*. . .” *Write-In*, 191 W. Va. 677 at 681, 477 S.E.2d at 616. (Emphasis added.)

The Legislature has heeded the commands of the state and federal constitutions in enacting reasonable restrictions regarding how any individual may be placed upon a ballot. A Democrat must follow the dictates of W. Va. Code §3-5-7. An unaffiliated candidate or an individual who previously was affiliated with a party but changes his registration two months before he files his candidacy may be placed upon the ballot in accordance with W. Va. Code §3-5-7 and W. Va. Code §3-5-23. However, one who is a Democrat and remains a Democrat may not utilize the provisions of §3-5-23 to sneak onto the ballot at the last minute.

Still other statutes ensure the integrity of the election process, itself, by requiring candidates for office to pledge to conduct their campaigns in such a manner so as to uphold “the full and free expression of the will of the voters” and to defend “the right of every qualified voter to full and equal participation in the electoral process.” W. Va.Code § 3–1B–5 (1995) (Repl. Vol. 2013). *See also* W. Va.Code § 3–5–7(d)(6)(B) (2015) (Supp.2015) (requiring candidate to maintain allegiance to his/her stated political party for specified period by verifying that he/she has been member of same political party for sixty days preceding filing of his/her “certificate of announcement”). *State ex rel. Biafore v. Tomblin*, 236 W. Va. 528, 545, 782 S.E.2d 223, 240 (2016) (Justice Davis dissenting.)

The petitioner is asserting that he was not required to file a certificate of announcement, merely a “nomination certificate” as described in W. Va. Code §3-5-23. The petitioner is incorrect. Although in order to have his name appear on the ballot, he did indeed need to acquire the requisite number of signatures on a “nomination certificate”, that does not relieve any candidate of the mandatory, and non-discretionary duty to file a certificate of announcement. The plain, concise, clear and unambiguous language contained in W. Va. Code §3-5-7 states “Any person who is eligible and seeks to hold an office or political party position to be filled by election in any primary or *general* election held under the provisions of this chapter shall file a certificate of announcement declaring his or her candidacy for the nomination or election to the office.” Candidates for an office to be filled by voters of a single county “shall file a certificate of announcement with the clerk of the county commission.” W. Va. Code §3-5-7 (b) (2). Petitioner’s reliance on *State ex rel. Browne v. Hechler* is misplaced. The statute has been amended since the *Browne* decision. That decision notes that “This ignores the fact, however, that W. Va.Code § 3–5–7(f) (1991) provides, ‘The provisions of this section shall apply to the *primary election* ...,’ and, therefore, the statute does not apply to the general election.” *State ex rel. Browne v. Hechler*, 197 W. Va. 612, 614, 476 S.E.2d 559, 561 (1996). In the current version of the statute, it is required that an individual seeking office to be filled by election in any general election shall file a certificate of announcement declaring his candidacy for election.

The term “any” means precisely that.

We are impressed that the word “any” represents a fundamental and irreducible concept. It is a statute wrought from the letters A, N and Y ; a monument to an idea; an artistic rendering designed to signify a meaningful unit of English language. The Court is led to the unavoidable conclusion that the word “any,” when used in a statute, should be construed to mean, in a word, any.

*Thomas v. Firestone Tire & Rubber Co.*, 164 W. Va. 763, 769, 266 S.E.2d 905, 909 (1980)

Moreover, the word “shall” as used in W. Va. Code §3-5-7 means that the obligation to file a certificate of announcement is mandatory and not permissive. “The word ‘shall’ in the absence of language in the statute showing a contrary intent on the part of the legislature, should be afforded a mandatory connotation.” Syl. pt. 2, *Terry v. Sencindiver*, 153 W.Va. 651, 171 S.E.2d 480 (1969). Syl. Pt. 5, *Rogers v. Hechler*, 176 W. Va. 713, 348 S.E.2d 299 (1986).

Additionally, the argument that petitioner was not required to fill out the certificate of announcement but merely needed to submit nominating certificates was not presented to the circuit court. “ ‘This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance.’ Syllabus Point 2, *Sands v. Security Trust Co.*, 143 W.Va. 522, 102 S.E.2d 733 (1958).” Syllabus point 2, *Duquesne Light Co. v. State Tax Department*, 174 W.Va. 506, 327 S.E.2d 683 (1984). Syllabus Point 5, *State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell*, 228 W. Va. 252, 719 S.E.2d 722 (2011). As the argument essaying that the petitioner was not required to provide a certificate of announcement, but only the nominating petitions was not presented to the circuit court, this Honorable Court should not consider it. However, the argument lacks merit.

There is nothing inconsistent between the provisions of W. Va. Code §3-5-7 and W. Va. Code §3-5-23. There is no “compliance or violation” choice; the statutes are not incompatible. That is, one who seeks to run as an unaffiliated candidate should not only actually be an unaffiliated candidate, but also perform an additional step for inclusion on the ballot. He must file a certificate of announcement and provide sufficient signatures on a nomination certificate to justify inclusion on the ballot.

The requirement that one follow the process to be placed upon the ballot as a member of a major party when one is affiliated with that party permits full access to the ballot. The requirement

that one disaffiliate from that party in order to run as an Independent (or whatever in this petitioner's case) equally permits full access to the ballot upon obtaining the requisite number of signatures.

However, the state has a valid and legitimate state interest in upholding the integrity of the process, encouraging compromise and political stability, avoiding election chaos, presenting the electorate with a clear and understandable ballot, and regulating the election to ensure it is fair, honest, and demonstrated by order rather than chaos.

To permit this petitioner, a Democrat, to circumvent the clearly delineated election processes and time requirements would indeed call open sesame upon the process. The statutory scheme regarding primary elections would be rendered, in essence, meaningless if one can retain party affiliation and yet seek to hoodwink the electorate by running as an "independent." It may also result in a plurality outcome if a candidate is promoted by fraud to defeat a duly nominated opponent.

For many voters, party affiliation is or can be a shorthand signal that the individual who represents a particular party also represents an agreement with many (if not all) principles espoused by that party. To permit one who is a Democrat to be on the ballot as an Independent fails to inform, accurately, the general electorate of the principles that individual may be identified with. To permit one who is a Democrat to get on the ballot via the petition process which was designed for third-party and independent candidates renders that primary process irrelevant.

The petitioner did not avail himself of the opportunity to run as a major party candidate. The petitioner did not avail himself of the opportunity to disaffiliate from the party and run as a true Independent. The petitioner deceptively omitted his party affiliation from his certificate of

candidacy rendering it incomplete and invalid. The petitioner may not be placed on the election ballot.

V.

### CONCLUSION

Based upon the foregoing recitation of fact and argument of law, the respondent respectfully requests that this Honorable Court affirm the Order of the circuit court of Kanawha County granting the Amended Petition of Quo Warranto.

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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

NO. 16-0779

ERIK PATRICK WELLS,

Respondent Below, Petitioner,

v.

STATE OF WEST VIRGINIA ex rel.  
CHARLES T. MILLER, PROSECUTING  
ATTORNEY FOR KANAWHA COUNTY,

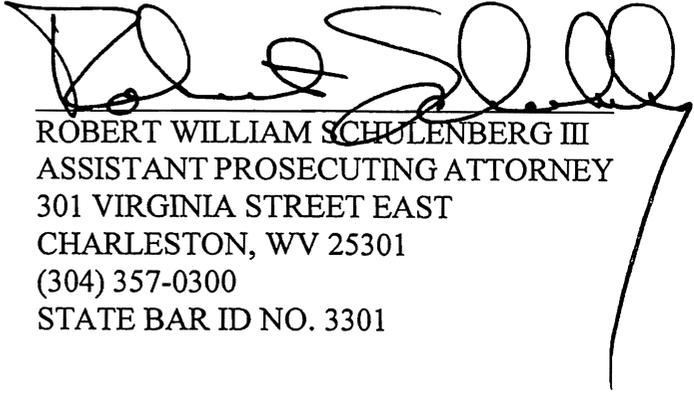
Petitioner Below, Respondent.

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CERTIFICATE OF SERVICE

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I hereby certify that the undersigned counsel personally delivered two (2) true copies of the foregoing Brief on Behalf of the Respondent were served upon the petitioner Erik Patrick Wells by hand-delivering the said true copies to the petitioner's counsel fo record, Thomas P. Maroney, at his offices located at 608 Virginia Street East, Charleston, West Virginia 25301, on this the 25<sup>th</sup> day of August, 2016.



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