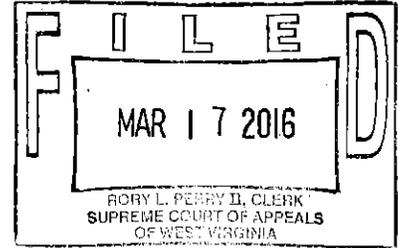


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 16-0226



WILLIAM R. WOOTON, candidate for )  
the Supreme Court of Appeals of West )  
Virginia, )  
Petitioner, )

v. )

ELIZABETH D. WALKER, candidate for )  
the Supreme Court of Appeals of West )  
Virginia; West Virginia Secretary of State )  
NATALIE E. TENNANT; West Virginia )  
State Election Commission members )  
GARY A. COLLIAS, and VINCENT P. )  
CARDI; West Virginia State Auditor )  
GLEN B. GAINER, III; and West )  
Virginia State Treasurer JOHN D. )  
PERDUE, )

Respondents. )

On Certified Question from the Circuit  
Court of Kanawha County  
(Case No. 16-AA-13)

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**BRIEF OF RESPONDENT ELIZABETH D. WALKER RELATING  
TO CERTIFIED QUESTION FROM THE CIRCUIT COURT OF  
KANAWHA COUNTY, JUDGE CHARLES E. KING, JR. (Case No. 16-AA-13)**

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**CERTIFIED QUESTION AND CIRCUIT COURT'S ANSWER**

This case is before the Court upon the following certified question presented by the Circuit Court of Kanawha County (the "Circuit Court"):

Was the West Virginia State Election Commission's certification of Respondent Wooton for public financing of his candidacy for the West Virginia Supreme Court of Appeals under West Virginia Code §§ 3-12-1, *et seq.*, valid?

The Circuit Court answered the certified question in the negative, concluding that the West Virginia State Election Commission's (the "SEC") certification of Petitioner William R. Wooton ("Wooton"), a candidate for the Supreme Court of Appeals of West Virginia (the "Supreme Court"), for public campaign financing of his candidacy under West Virginia Code §§ 3-12-1, *et seq.* was not valid.

As discussed more fully below, the Circuit Court answered the certified question correctly. This Court should similarly answer the certified question in the negative and invalidate and reverse the SEC's certification of Wooton for public financing of his candidacy for the Supreme Court.

**STATEMENT OF THE CASE**

Among others, Walker and Wooton are non-partisan candidates for a single seat on the Supreme Court, the election for which is scheduled for May 10, 2016. As of December 28, 2015, Wooton declared his intent to seek as much as \$525,000 in public campaign financing through the West Virginia Supreme Court of Appeals Public Financing Program (the "Program"), codified in Chapter 3, Article 12 of the West Virginia Code. Joint Appendix ("J.A.") 0001. The Program is administered by the SEC, which also promulgated rules authorized by the Legislature at West Virginia Code of State Rule ("CSR") § 146-5, *et seq.*

The Program provides for a “qualifying period,” which in this case began on December 28, 2015, when Wooton filed his “Declaration of Intent to Participate,” and ended on January 30, 2016. During the qualifying period, a “participating candidate” such as Wooton has an opportunity to raise a prescribed number and amount of “qualifying contributions” to prove viability and then request certification from the SEC to receive public campaign financing.

To be certified for public campaign financing by the SEC, Wooton was required to file a sworn statement referred to as an “Application for Certification,” verifying under oath that he had satisfied all of the Program’s requirements to receive public campaign financing. *See W. Va. Code § 3-12-10*. By legislative rule, Wooton was required to file the Application for Certification within two business days of the end of the qualifying period or, in this case, by February 2, 2016 (the “Application Deadline”). *See CSR § 146-5-6.1* (“[N]o later than two business days after the close of the qualifying period, a candidate who desires to apply for public financing funds shall file an Application for Certification with the Secretary.”).

Indisputably, Wooton failed to file his Application for Certification by the Application Deadline. J.A. 0002. Rather, on February 3, 2016, one day *after* the Application Deadline, Wooton filed his Application for Certification. J.A. 0002. Walker notified the SEC of this fatal flaw on that same day. J.A. 0005.

On February 5, 2016, the SEC held a hearing to consider, among other things, Wooton’s Application for Certification. J.A. 0446–0514. During the February 5, 2016 hearing, a representative from the Secretary of State confirmed that Wooton failed to meet the Application Deadline. J.A. 0494. The SEC, however, ignored Wooton’s failure to timely file his Application for Certification, and its own rule, and nevertheless certified Wooton and overruled Walker’s request for a stay of disbursement of public campaign funding to Wooton. J.A. 0503. Moreover,

the Secretary of State immediately ordered that the Auditor and Treasurer process a check in the amount of \$475,000.<sup>1</sup> J.A. 0517.

On February 9, 2016, Walker filed her Petition for Judicial Review of the February 5, 2016 Decision of the West Virginia State Election Commission Certifying William R. Wooton Pursuant to W. Va. Code § 3-12-10 and accompanying Application for Stay in the Circuit Court of Kanawha County. J.A. 0566, 0582. On February 11, 2016, Wooton filed his Motion to Certify Question to the West Virginia Court of Appeals and Memorandum in Opposition to Petitioner's Application for a Stay. J.A. 0594.<sup>2</sup> On March 3, 2016, Walker filed her Brief of Petitioner Relating to Certified Question, *see* J.A. 0607, and Wooton filed his Memorandum of Respondent Wooton in Support of the Decision of the State Election Commission ("Wooton Memo"). J.A. 0588.

On March 7, 2016, the Circuit Court issued its *Order Certifying Question to the West Virginia Supreme Court of Appeals*, in which it answered the certified question as follows:

Answer of the Circuit Court: No. The West Virginia State Election Commission's certification of Respondent Wooton for public financing of his candidacy for the West Virginia Supreme Court of Appeals under West Virginia Code §§ 3-12-1, *et seq.*, was not valid.

J.A. 0633.

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<sup>1</sup> W. Va. Code § 3-12-10(e) provides that a participating candidate may receive up to \$525,000, less the amount of qualifying contributions. In this case, Wooton raised \$50,000 in qualifying contributions and, therefore, received \$475,000 in public campaign financing from the Program.

<sup>2</sup> The Circuit Court did not rule on the Application for Stay. As of March 14, 2016, however, Wooton expressed his intention to begin spending the \$475,000 in state monies as of March 17, 2016 notwithstanding the pendency of this appellate action. Accordingly, Walker intends to file an Application for Stay with this Court to preserve those monies until, at a minimum, this Court can decide the merits of this case.

On March 9, 2016, this Court issued an Order directing the parties to simultaneously file briefs in this matter by March 17, 2016.

### **SUMMARY OF ARGUMENT**

Clear and unambiguous deadlines in the State's election law must be strictly enforced; otherwise, the integrity of the entire process will be "subject to constant allegations of arbitrariness or favoritism." *Brady v. Hechler*, 176 W. Va. 570, 574, 346 S.E.2d 546, 550 (1986).

The facts in this case are not in dispute. The plain language of CSR § 146-5-6.1 expressly requires that an Application for Certification "*shall*" be filed no later than February 2, 2016. Wooton *admittedly failed to file* his Application for Certification by February 2, 2016. Pursuant to the rules of statutory interpretation and well-established West Virginia Supreme Court precedent holding that election-law deadlines must be strictly enforced, the Court should answer the certified question in the negative and invalidate and reverse the SEC's certification of Wooton.

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

Oral argument in this case pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure has been scheduled for March 23, 2016 at 10:00 a.m.

### **ARGUMENT**

#### **A. Standard of Review**

The question certified in this case requires the Court to apply a *de novo* standard of review to interpret the enforceability of an unambiguous deadline set forth in a legislative rule. *See, e.g., Syl. Pt. 1, Gallapoo v. Wal-Mart Stores, Inc.*, 197 W.Va. 172, 475 S.E.2d 172 (1996) ("The appellate standard of review of questions of law answered and certified by a circuit court

is *de novo*.”); Syl. Pt. 1, *Light v. Allstate Ins. Co.*, 203 W.Va. 27, 506 S.E.2d 64 (1998) (“A *de novo* standard is applied by this Court in addressing the legal issues presented by a certified question from a federal district or appellate court.”). In its determination in the first instance, the Circuit Court applied the following standard of review as the question of law arose in the context of an underlying appeal of a final administrative determination by an agency or commission:

The circuit court shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

*Shepherdstown Volunteer Fire Dep't v. State ex rel. State of W. Virginia Human Rights Comm'n*, 172 W. Va. 627, 636, 309 S.E.2d 342, 351 (1983) (citing W. Va. Code § 29A-5-4(g)).

**B. The SEC’s Certification of Wooton Was Invalid and Should Be Reversed Because the SEC’s Interpretation of the Application Deadline Was Contrary to Fundamental Rules of Statutory Interpretation and the *Brady* Rule.**

The answer to the certified question turns on the Court’s interpretation of CSR § 146-5-6.1, which provides that:

After collecting sufficient numbers and amounts of qualifying contributions, and *no later than two business days after the close of the qualifying period*, a candidate who desires to apply for

public financing funds *shall file* an Application For Certification with the Secretary.

(emphasis added). As set forth below, the Court should invalidate the SEC's decision for two clear reasons: (i) the SEC's decision to certify Wooton arbitrarily ignored the plain and unambiguous language of the legislative rule, and (ii) the SEC's decision to certify Wooton is contrary to well-settled West Virginia Supreme Court precedent which requires that the Application Deadline be strictly enforced. As a result, the Court should answer the certified question in the negative and invalidate and reverse the SEC's certification of Wooton.

**1. The SEC's Certification of Wooton Should Be Invalidated and Reversed Based on the Clear and Unambiguous Language of CSR § 146-5-6.1.**

First, this Court's analysis must start with the most basic rule of statutory interpretation. *See Martin v. Hamblet*, 230 W. Va. 183, 187, 737 S.E.2d 80, 84 (2012). That is, "[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." *Id.* (citations omitted). "In other words, where the language of a statutory provision is plain, its terms should be applied as written and not construed." *Id.* (citations and internal quotations omitted); *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W.Va. 137, 145, 107 S.E.2d 353, 358-59 (1959) ("When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.").

W. Va. Code § 3-12-10 and CSR § 146-5-6.1 could not be more clear: Wooton was expressly required to file an Application for Certification as a prerequisite for certification and was required to do so no later than February 2, 2016, the Application Deadline. Wooton failed to file his Application for Certification by the Application Deadline. This should be the end of the

analysis and the basis upon which this Court invalidates and reverses the SEC's erroneous decision.

In an attempt to circumvent the application of the plain meaning rule, Wooton will undoubtedly urge this Court to ignore the fundamental principles of statutory interpretation and, instead, to "liberally construe" (*i.e.*, ignore) the two-day deadline. *See* J.A. 0589–0590. As an initial matter, rules of statutory *construction* (as opposed to interpretation) are only relevant when a statute or rule presents an ambiguity. *See Jones v. W. Virginia State Bd. of Educ.*, 218 W. Va. 52, 57–58, 622 S.E.2d 289, 294–95 (2005) (“[I]t is not for [courts] arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, *we are obliged not to add to statutes something the Legislature purposely omitted*. Moreover, [a] statute, or an administrative rule, may not, under the guise of ‘interpretation,’ be modified, revised, amended or rewritten.”) (internal citations and quotations omitted; alteration and emphasis original). CSR § 146-5-6.1 presents no ambiguity and, indeed, could not be more plain, clear or unambiguous. As a result, there is no reason for this Court to construe it, liberally or otherwise; rather, it must be applied as written.

Indeed, the Legislature did not include any provision requiring that Article 12 (or the accompanying legislative rules) be liberally construed and, accordingly, the Court cannot indulge Wooton's overture even if there was an ambiguity. Had the Legislature intended that Article 12 be construed liberally, it would have included a provision to that effect, as it has with respect to a

multitude of other West Virginia statutes.<sup>3</sup> The State's workers' compensation law -- on which Wooton relies for the proposition that Article 12 be liberally construed (J.A. 0590<sup>4</sup>) -- is one of them and expressly states that:

*It is the specific intent of the Legislature that workers' compensation cases shall be decided on their merits and that a rule of "liberal construction" based on any "remedial" basis of workers' compensation legislation shall not affect the weighing of evidence in resolving such cases.*

See W. Va. Code § 23-1-1(b) (emphasis added). Article 12 contains no such language. To accord Article 12 a liberal construction would therefore usurp the province of the Legislature and wholly disregard the provisions which the Legislature has passed by reading into Article 12 language that simply does not appear and which is entirely inconsistent with the Legislature's intent. Accordingly, the Court should apply CSR § 146-5-6.1 as it is plainly, clearly and unambiguously written and invalidate and reverse the SEC's decision to certify Wooton.

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<sup>3</sup> See, e.g., W. Va. Code § 8-22-26a(g) (West Virginia Municipal Police Officers and Firefighters Retirement System) ("This section shall be construed liberally to effectuate the purpose of establishing minimum pension benefits under this article for members and surviving spouses."); W. Va. Code § 29B-1-1 (Freedom of Information, Public Records) ("[T]he provisions of this article shall be liberally construed with the view of carrying out the above declaration of public policy."); W. Va. Code § 46A-6-101(1) (West Virginia Consumer Credit and Protection Act) ("[T]his article shall be liberally construed so that its beneficial purposes may be served."); W. Va. Code § 10-2A-26 (concerning the construction and funding of athletic establishments) ("This article being for the public health, safety, and welfare, shall be liberally construed to effectuate the purposes thereof."); W. Va. Code § 7-3-12 (concerning the construction and funding of county property) ("This act, being necessary for the health, welfare and public requirements of the public of the several counties, it shall be liberally construed to effectuate the purpose thereof."); W. Va. Code § 24C-1-8(a) (Underground Facilities Damages Prevention, One-Call System) ("This article shall be liberally construed so as to effectuate the public policy set forth in section one of this article.").

<sup>4</sup> Specifically, Wooton cites *Repass v. Workers' Compensation Commission Division*, 212 W.Va. 86, 92, 569 S.E.2d 162, 168 (2002) and *Plummer v. Workers' Compensation Division*, 209 W. Va. 710, 551 S.E.2d 46 (2001), both cases involving the State's worker's compensation statute.

**2. The SEC's Certification of Wooton Should be Invalidated and Reversed Based on This Court's Well-Established Precedent Requiring That Campaign-Related Deadlines be Strictly Enforced.**

Second, the Supreme Court's thirty-year-old precedent requires this Court to strictly enforce campaign-related deadlines, precisely the type of deadline imposed for filing an Application for Certification set forth in CSR § 146-5-6.1. *See, e.g., Brady v. Hechler*, 176 W. Va. 570, 571–72, 346 S.E.2d 546, 547–48 (1986) (granting mandamus relief directing the Secretary of State to strike a candidate from the ballot whose certificate of candidacy for nomination was one day late and explaining that, “[i]t is generally and almost universally held that statutory provisions in election statutes, requiring that a certificate or application of nomination be filed with a specified officer within a stipulated period of time, are mandatory.”); *Syl. Pt. 3, State ex rel. Baker v. Bailey*, 152 W. Va. 400, 400, 163 S.E.2d 873, 874 (1968) (“[w]here a statute provides for a thing to be done in a particular manner or by a prescribed person or tribunal it is implied that it shall not be done otherwise or by a different person or tribunal.”); *State ex rel. Vernet v. Wells*, 87 W.Va. 275 (1920) (striking candidates from local non-partisan ballots who had not filed certificates of nominations in time).<sup>5</sup> This approach is unwavering, mandatory and is fundamentally important to the State's election system because, “[o]therwise, the actions of the Secretary of State in that regard would be subject to constant allegations of arbitrariness or favoritism.” *Brady*, 176 W. Va. at 574, 346 S.E.2d at 550. And, in

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<sup>5</sup> The concept of strict compliance with filing deadlines is well-accepted under West Virginia law. *See Helton v. Reed*, 219 W. Va. 557, 561, 638 S.E.2d 160, 164 (2006) (explaining tax deadlines must be strictly enforced); *State ex rel. Clark v. Blue Cross Blue Shield of W. Virginia, Inc.*, 195 W. Va. 537, 542, 466 S.E.2d 388, 393 (1995) (“[S]trict compliance with all filing requirements is the rule in insurance insolvency cases.”); *Humble Oil & Refining Company v. Lane*, 152 W.Va. 578, 583, 165 S.E.2d 379, 383 (1969) (“[S]tatutes of limitations are favored in the law and cannot be avoided unless the party seeking to do so brings himself strictly within some exception. It has been widely held that such exceptions are strictly construed and are not enlarged by the courts upon considerations of apparent hardship.”) (internal quotations omitted).

this case, its application is particularly required due to the nearly half-million dollars in State money at issue and which Wooton received notwithstanding his failure to file his Application for Certification before the Application Deadline. Thus, any argument by Wooton that this Court should only require “substantial compliance” with the Application Deadline, rather than the “strict compliance” mandated by *Brady*, must be rejected.

Moreover, while Wooton cites two cases in support of his “substantial compliance” argument in the Wooton Memo,<sup>6</sup> these cases are readily distinguishable as both deal with a rule that *allows* substantial compliance with the State’s notification-through-publication requirements, not an election-law related deadline that is absolute and mandates complete compliance. As a result, the Court must apply the strict compliance rule of *Brady* and rule that the SEC’s certification of Wooton was invalid.

**C. The Court Should Reject Any Attempt by Wooton or the SEC to Justify the SEC’s Failure to Follow Its Own Rule.**<sup>7</sup>

Based on the record to date, the Court can expect the SEC and/or Wooton to offer a series of excuses to justify the SEC’s decision to disregard its own Application Deadline and erroneously certify Wooton, including that: (i) the Application Deadline is unconstitutional and unenforceable because the operative language is set forth in a legislative rule rather than statute; (ii) the SEC was within its discretion to ignore its own Application Deadline; and (iii) no one is harmed by the SEC’s certification of Wooton despite failing to meet the Application Deadline

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<sup>6</sup> See J.A. 0591–0592 citing *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 470 S.E.2d 162 (1996); *State ex rel. Smith v. Kelly*, 149 W. Va. 381, 141 S.E.2d 142 (1965).

<sup>7</sup> Because of the expedited nature of this proceeding, Respondent Walker does not have the benefit of a normal briefing schedule to review arguments that may be made by Wooton or the SEC. In an attempt to frame up the issues fully for the Court, Walker has addressed each of the arguments that have been made during the prior proceedings in this case; some or all of which may not be further advanced because of the obvious lack of merit highlighted in this brief.

because it is a mere formality in the certification process. As an initial matter, none of these arguments can prevail in light of the fundamental legal principles set forth above which mandate strict enforcement of the Application Deadline. And, in any event, each of these arguments, addressed in turn below, is wholly without merit in their own right and must be rejected.

**1. The Application Deadline Set Forth in CSR § 146-5-6.1 Carries the Full Force And Effect of Law.**

Wooton may argue here, as did his representative at the February 5, 2016 hearing, that the Application Deadline is unconstitutional and unenforceable because the two-day requirement was promulgated in a legislative rule (CSR § 146-5-6.1) as opposed to Article 12. J.A. 0500–0501. Indeed, the SEC’s Solicitor offered the SEC similar legal advice. J.A. 0497–0498. This argument is flatly wrong.

Specifically, a legislative rule such as CSR § 146-5-6.1 has the same force and effect of law. *See, e.g., Swiger v. UGI/AmeriGas, Inc.*, 216 W. Va. 756, 763, 613 S.E.2d 904, 911 (2005) (“[A] regulation that is proposed by an agency and approved by the Legislature is a ‘legislative rule’ as defined by the State Administrative Procedures Act, W. Va. Code, 29A–1–2(d) [1982], and *such a legislative rule has the force and effect of law.*”) (emphasis added) (quoting *Smith v. West Virginia Human Rights Comm’n*, 216 W.Va. 2, 602 S.E.2d 445 (2004)). “An administrative board must abide by its own rules and the legislative mandates.” *Tasker v. Mohn*, 165 W. Va. 55, 65, 267 S.E.2d 183, 189 (1980) (citing *Trimboli v. Board of Education of Wayne County, W.Va.*, 163 W. Va. 1, 254 S.E.2d 561 (W. Va. 1979)); *see also* Syl. Pt. 4, *State ex rel. Barker v. Manchin*, 167 W. Va. 155, 169, 279 S.E.2d 622, 631 (1981) (“When the Legislature delegates its rule-making power to an agency of the Executive Department..., it vests the Executive Department with the mandatory duty to promulgate and to enforce rules and regulations. Once the executive officer or agency has made and adopted valid rules and

regulations pursuant to the grant of the legislative powers, they take on the force of statutory law.”). “[A] properly promulgated legislative rule [] can be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious.” *Appalachian Power Co. v. State Tax Dep’t.*, 195 W.Va. 573, 578, 466 S.E.2d 424, 429 (1995). Thus, any notion that the Application Deadline is unenforceable because its enactment is in a legislative rule rather than a statute must be rejected.

**2. The Plain Language of CSR § 146-5-6.1 is Mandatory and Leaves the SEC No Discretion to Ignore Its Requirements.**

Next, Wooton and the SEC presumably will contend that the SEC had discretion to certify Wooton or, in other words, “forgive” its own Application Deadline. J.A. 0589–0590. Wooton’s argument not only ignores the basic rules of statutory interpretation discussed above, which necessarily must guide this Court’s review of the statutory provisions at issue, but also is wholly unfounded and unsupported by the actual statutory language at issue.

*First*, the SEC has a statutory duty to administer the Program *pursuant to the statutory provisions passed by the Legislature*. See W. Va. Code § 3-1A-5(b)(6) and W. Va. Code § 3-12-14. The Legislature did not, in either the statute, the legislative rules or in any other medium, accord the SEC any discretion in carrying out its duties, did not enable the SEC to interpret, construe or apply the clear statutory provisions relating to the Program and certainly did not vest the SEC with any power to disregard the clear and unambiguous language of Article 12 or the CSR in any manner.

*Second*, the notion of discretion in enforcing the Application Deadline is contrary to the Legislature’s and SEC’s choice of “shall” in the operative statute and legislative rule. See W. Va. Code § 3-12-10(a) (“To be certified, a participating candidate *shall apply* to the State Election Commission for public campaign funding”); W. Va. CSR § 146-5-6.1 (the candidate

“*shall file*” the Application For Certification “*no later than* two business days after the close of the qualifying period.”) (emphasis added). Indeed, “[t]he word ‘shall’ is mandatory.” *Keplinger v. Virginia Elec. and Power Co.*, 208 W.Va. 11, 21–22, 537 S.E.2d 632, 642–43 (2000) (citing *State v. Allen*, 208 W. Va. 144, 153, 539 S.E.2d 87, 96 (1999) (“Generally, ‘shall’ commands a mandatory connotation and denotes that the described behavior is directory, rather than discretionary.”); see also Syl. Pt. 1, *E.H v. Matin*, 201 W. Va. 463, 464, 498 S.E.2d 35, 36 (1997) (“It is well established that 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.”); *Rogers v. Hechler*, 176 W. Va. 713, 717, 348 S.E.2d 299, 303 (1986) (“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.” (quoting Syl. Pt. 2, *Terry v. Sencindiver*, 153 W.Va. 651, 171 S.E.2d 480 (1969)) (internal citations omitted). The law could not be more straightforward: shall means and must mean shall. Thus, the Application Deadline must be enforced as written.

The Wooton Memo ignores these most fundamental principles and, instead, cites to W. Va. Code § 3-12-10(h) as evidence “clearly communicating that the Commission has discretion with regards to enforcement of the Act’s provisions.” J.A. 0590. Section 3-12-10(h), however, provides the SEC’s continuing jurisdiction to sanction a participating candidate “if the candidate violates this article” (which imposes continuing obligations on the candidate) *after* the SEC has certified him or her. See W. Va. Code § 3-12-10(h) (“A candidate’s certification and receipt of public campaign financing may be revoked by the State Election Commission, if the candidate violates this article. A certified candidate who violates this article shall repay all moneys received from the fund to the State Election Commission.”). Section 3-12-10(h) has no impact

on the SEC's initial decision to certify a candidate and provides the SEC no discretion to ignore its own rules and certify a candidate who patently fails to meet them.<sup>8</sup>

**3. The SEC's Decision Affects the Substantial Constitutional Rights of Walker and Other Supreme Court Candidates.**

Finally, Wooton undoubtedly will attempt to marginalize the Application for Certification as merely a "*pro forma* step in the process," arguing that his admitted failure to meet the Application Deadline "caused no harm, and no other consequences resulted from it."

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<sup>8</sup> Relatedly, Walker expects Wooton or the SEC to make some sort of equitable argument based on the relief that Walker received with respect to her challenges to certain qualifying contributions of another participating candidate, Justice Brent D. Benjamin, which Walker filed on February 3, 2016. CSR § 146-5-7.3 provides that challenge forms must be filed "within two business days after the close of the qualifying period or the filing of a candidate's Application For Certification, whichever is earlier." According to Wooton's logic, the SEC agreed to consider Walker's challenges even though she filed them on February 3, 2016 (one business day after the deadline set forth in CSR § 146-5-7.3) and, therefore, was also justified in forgiving Wooton's admitted failure to meet the Application Deadline.

The argument is legally and factually without merit for a number of reasons. *First*, the SEC's decision to certify another candidate (namely, Justice Benjamin), and to permit Walker to lodge challenges to his qualifying contributions has nothing to do with Wooton, and there simply is no justification to impute the conduct of a collateral proceeding into providing "equitable" justifications for Wooton's failure to timely file his Application for Certification. *Second*, Wooton's argument is factually wrong as the SEC ultimately *did not* entertain the merits of any of the 365 challenges that Walker lodged against Justice Benjamin's qualifying contributions on February 3, 2016. J.A. 0394. *Third*, even if the SEC had entertained the merits of Walker's February 3, 2016 challenges, the SEC could have done so on solid legal authority as the law *does* allow excuse for failure to meet deadlines, even strict deadlines such as the Application for Certification, to avoid an absurd result. See Syl. Pt. 2, *Chevy Chase Bank v. McCamant*, 204 W.Va. 295, 512 S.E.2d 217 (1998) ("[T]he 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."). With respect to Walker's challenges, Benjamin did not file the receipts for qualifying contributions until the last day, thus rendering it impossible for Walker to challenge those same receipts in the same day. Unquestionably, to allow a candidate to avoid challenge by waiting until the last day is an absurd result by any measure. By contrast, there was no intervening act in Wooton's failure to file by the Application Deadline. Wooton simply missed the Application Deadline and not because of any impossibility. As a result, this argument lacks merit as well and should be disregarded.

J.A. 0591. Wooton’s attempt to dismiss the importance of filing the Application for Certification—a document so critical to the process the Legislature required it to be a sworn statement and upon which the SEC must rely in determining whether a candidate is eligible to receive public campaign funding—is wholly inapposite to the entire statutory scheme of Article 12 and overlooks and disregards the fundamental and sacred constitutional rights of free speech and substantive due process rights of Walker (and all of the other candidates) which the SEC’s decision directly affects. *See Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 339 (2010) (The First Amendment’s “fullest and most urgent application [is] to speech uttered during a campaign for political office.”) (internal quotations omitted); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring) (when assessing a State’s entrance into judicial elections, “constitutionally protected interests lie on both sides of the legal equation.”); *United States v. Salerno*, 481 U.S. 739, 746 (1987); *Rochin v. California*, 342 U.S. 165, 172 (1952); *Palko v. Connecticut*, 302 U.S. 319, 325–326 (1937); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 779–80 (1978).

Significantly, by failing to follow its own regulations, the SEC will force Walker, and presumably the other non-participating candidates, to spend or raise more money to exercise their own rights of free speech, money that they would not otherwise be required to raise had the SEC complied with its own rules. *See State ex rel. Loughry v. Tennant*, 229 W. Va. 630, 732 S.E.2d 507 (2012) (explaining that campaign expenditures in judicial elections warrant constitutional protections as a form of free speech and government involvement in this area warrants the strictest of scrutiny). This direct infringement on Walker’s constitutional right to free speech should not be permitted and any attempt by Wooton to trivialize the Application for

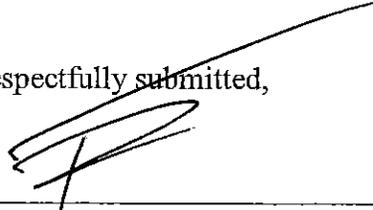
Certification or the Application Deadline should be rejected in light of the important constitutional rights at play in this certification and this election.

**CONCLUSION**

For the foregoing reasons, this Court should answer the certified question in the negative and invalidate and reverse the SEC's certification of Wooton pursuant to W. Va. Code § 3-12-1, *et. seq.*

Dated: March 17, 2016

Respectfully submitted,



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**Certificate of Service**

I, Thomas C. Ryan, certify that I caused to be served via first class mail a copy of the *Brief of Respondent Elizabeth D. Walker Relating to Certified Question from the Circuit Court of Kanawha County, Judge Charles E. King, Jr. (Case No. 16-AA-13)* along with a courtesy copy via email upon the following counsel of record, on March 17, 2016:

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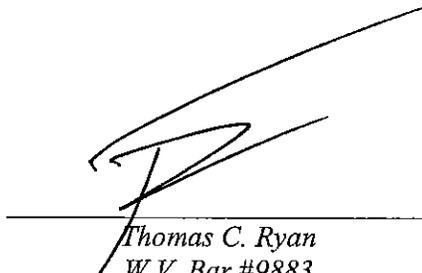
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