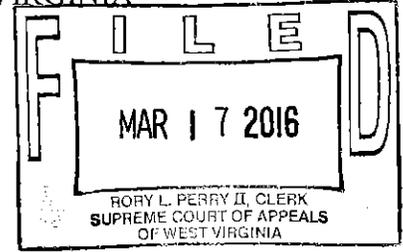


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 16-0228



BRENT D. BENJAMIN, 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.)

Appeal from a Final Order of the Circuit)
Court of Kanawha County)
(Case No. 16-AA-13)

BRIEF OF RESPONDENT ELIZABETH D. WALKER

Submitted by:

K&L GATES LLP
Thomas C. Ryan (WVSB #9883)
210 Sixth Avenue
Pittsburgh, PA 15222
Tel: (412) 355-6500
Fax: (412) 355-6501
thomas.ryan@klgates.com

Counsel for Respondent Elizabeth D. Walker

TABLE OF CONTENTS

	Page
NO ASSIGNMENTS OF ERROR	1
STATEMENT OF THE CASE	1
A. The Program	1
1. The Exploratory Period.....	2
2. The Declaration Of Intent To Participate And Ensuing Qualifying Period	3
3. The Application For Certification.....	5
4. Distribution Of Public Campaign Funds To Certified Candidates	6
B. Benjamin’s Attempt To Qualify For Campaign Financing Under The Program. ..	6
1. Benjamin’s Qualifying Period	7
2. Benjamin’s Application for Certification	8
3. SEC Consideration Of Electronic Contributions with No Contributor Signature.	9
4. The SEC’s Certification Of Benjamin.....	14
5. Walker’s Appeal And The Order Reversing The SEC’s Certification	15
SUMMARY OF ARGUMENT	15
STATEMENT REGARDING ORAL ARGUMENT AND DECISION	16
ARGUMENT.....	16
A. Standard Of Review.....	16
B. Walker Has Standing To Challenge The SEC’s Decision.....	17
C. The Circuit Court Did Not Abuse Its Discretion In Ruling That The SEC Erred In Certifying Benjamin To Receive Public Campaign Financing.	18
1. The Court Did Not Abuse Its Discretion In Finding That The SEC Clearly Erred In Accepting Benjamin’s Delinquent Exploratory Report.....	18
2. The Court Did Not Abuse Its Discretion In Finding That The SEC Erred In Determining That Benjamin Failed To Obtain The Required Number and Amount of Qualifying Contributions.....	24
D. The Circuit Court Did Not Abuse Its Discretion In Ruling That The SEC Violated Walker’s Constitutional Rights By Ignoring The Law And Its Own Rule In Certifying Benjamin.	27
CONCLUSION.....	29

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Anderson v. Bessemer City</i> , 470 U.S. 564 (1985).....	17
<i>State ex rel. Baker v. Bailey</i> , 152 W. Va. 400, 163 S.E.2d 873 (1968).....	20
<i>Bartles v. Hinkle</i> , 196 W. Va. 381, 472 S.E.2d 827 (1996).....	17
<i>Bd. of Educ. of Cty. of Mercer v. Wirt</i> , 192 W. Va. 568, 453 S.E.2d 402 (1994).....	17
<i>Brady v. Hechler</i> , 176 W. Va. 570, 346 S.E.2d 546 (1986).....	19, 20, 21, 26
<i>Citizens United v. Fed. Election Comm'n</i> , 558 U.S. 310 (2010).....	27
<i>In re Emily G.</i> , 224 W. Va. 390, 686 S.E.2d 41 (2009).....	17
<i>Feroleto Steel Co. v. Oughton</i> , 230 W. Va. 5, 736 S.E.2d 5 (2012).....	22
<i>Gentry v. Mangum</i> , 195 W. Va. 512, 466 S.E.2d 171 (1995).....	16
<i>Gribben v. Kirk</i> , 195 W. Va. 488, 466 S.E.2d 147 (1995).....	17
<i>Hensley v. West Virginia DHHR</i> , 203 W. Va. 456, 508 S.E.2d 616 (1998).....	17
<i>Lujan v. Defs. of Wildlife</i> , 504 U.S. 555 (1992).....	17
<i>Martin v. Hamblet</i> , 230 W. Va. 183, 737 S.E.2d 80 (2012).....	23
<i>Nixon v. Shrink Mo. Gov't PAC</i> , 528 U.S. 377 (2000) (Breyer, J., concurring)	27

<i>Phillips v. Fox</i> , 193 W. Va. 657, 458 S.E.2d 327 (1995).....	17
<i>State v. General Daniel Morgan Post No. 548, V.F.W.</i> , 144 W.Va. 137 107 S.E.2d 353 (1959).....	23
<i>Tasker v. Mohn</i> , 165 W. Va. 55, 267 S.E.2d 183 (1980).....	20
<i>State ex rel. Vernet v. Wells</i> , 87 W. Va. 275, 104 S.E. 591 (1920).....	21
<i>Walker v. West Virginia Ethics Comm'n</i> , 201 W. Va. 108, 492 S.E.2d 167 (1997).....	16

Statutes

CSR § 146-5-11.4	5
CSR § 146-5-3.6.e	1
CSR § 146-5-4	3
CSR § 146-5-5.1	4
CSR § 146-5-5.4	4
CSR § 146-5-5.4.c	1
CSR § 146-5-6.1	2
W. Va. Code § 3-9-3(b)	3
W. Va. Code § 3-12-1(14)	3
W. Va. Code § 3-12-1 through § 3-12-16.....	9
W. Va. Code § 3-12-2.....	2, 25, 26
W. Va. Code § 3-12-3(4)	3, 19
W. Va. Code § 3-12-3(5)	2, 18
W. Va. Code § 3-12-7.....	3, 7
W. Va. Code § 3-12-8.....	9
W. Va. Code § 3-12-8(d)	<i>passim</i>

W. Va. Code § 3-12-911, 13, 15

W. Va. Code § 3-12-9(a)4

W. Va. Code § 3-12-9(b)4, 24

W. Va. Code § 3-12-9(b)(2).....1, 9

W. Va. Code § 3-12-9(f).....5

W. Va. Code § 3-12-10.....2, 6, 15

W. Va. Code § 3-12-10(a)5

W. Va. Code § 3-12-10(b)*passim*

W. Va. Code § 3-12-10(b)(2).....18, 24

W. Va. Code § 3-12-10(b)(5).....20

W. Va. Code § 3-12-11(a)6

W. Va. Code § 3-12-1322

W. Va. Code § 3-12-13(a)6

W. Va. Code § 3-12-13(c)5, 21, 22

W. Va. Code § 3-12.3(4).....14

Rules

Rule 20 of the West Virginia Rules of Appellate Procedure16

NO ASSIGNMENTS OF ERROR

Respondent Elizabeth D. Walker (“Walker”) asserts there is no assignment of error and the March 4, 2016 order (the “Order”) entered by the Circuit Court of Kanawha County (Kaufman, J.) (“Circuit Court”) should be affirmed. The Circuit Court soundly exercised its discretion in reversing the clearly erroneous decision of the West Virginia State Election Commission (the “SEC” or “Commission”) to certify the Petitioner Brent D. Benjamin (“Benjamin”) to receive public campaign financing from the West Virginia Supreme Court of Appeals Public Campaign Financing Program because:

- (i) Benjamin neglected to file “exploratory reports” timely as required by W. Va. Code § 3-12-8(d) and W. Va. Code of State Regulation (“CSR”) § 146-5-3.6.e and, moreover, the SEC lacked discretion under a “hardship exemption” codified at W. Va. Code § 3-12-8(d) to forgive Benjamin’s failure to comply with the filing deadlines; and
- (ii) Benjamin failed to submit at least 500 “qualifying contributions” with an accompanying physical signature from the contributor, as expressly required by W. Va. Code § 3-12-9(b)(2) and W. Va. CSR § 146-5-5.4.c.

Based on the foregoing, the Circuit Court did not abuse its discretion in finding that the SEC violated Respondent Elizabeth D. Walker’s (“Walker”) First and Fourteenth Amendment rights to free speech and substantive due process, respectively.

STATEMENT OF THE CASE

Benjamin appeals from the Order reversing the SEC’s decision certifying him as qualified to receive public campaign financing from the West Virginia Supreme Court of Appeals Public Campaign Financing Program (the “Program”).

A. The Program

In 2010, the West Virginia Legislature enacted the Program, pursuant to which candidates running for Justice of the Supreme Court may receive and utilize public monies to

finance their campaigns. The Legislature memorialized its intent behind the Program: (1) to ensure the impartiality and integrity of the judiciary; (2) to strengthen the public confidence in the courts; and (3) to protect the Constitutional rights of voters and candidates from increasingly large amounts of money being spent to influence the outcome of elections. *See* W. Va. Code § 3-12-2. The Program and its requirements are codified in Chapter 3, Article 12 of the West Virginia Code, and the SEC has promulgated rules authorized by the Legislature at West Virginia Code of State Rule (“CSR”) 146-5, *et seq.* (2014) to administer it. Together, the statute and the legislative rules set forth the requirements that a candidate must satisfy in order to be certified by the SEC as qualified to receive public campaign financing under the Program.

The Program prescribes a two-step process, during which the candidate must meet specific requirements and observe certain restrictions, culminating in a decision by the SEC to certify (or not to certify) a candidate pursuant to W. Va. Code § 3-12-10 as qualified to receive public campaign funding. Specifically, in order to be certified by the SEC and receive public campaign financing under the Program, a candidate is required to file a sworn statement known as an “Application for Certification” stating, among other things, that the candidate has “met all other requirements of [Article 12]” and must file that Application “no later than two business days after the close of the qualifying period[.]” *See* W. Va. Code § 3-12-10; *see also* CSR § 146-5-6.1.

1. The Exploratory Period

Beginning as early as January 1, 2015 until no later than January 30, 2016, any potential candidate for Supreme Court can raise “exploratory contributions” to “examine his or her chances of election and to qualify for public campaign financing.” W. Va. Code § 3-12-3(5). During the “exploratory period,” a participating candidate may accept an “exploratory

contribution” only from an individual in amount of no more than \$1,000, not to exceed a maximum of \$20,000. W. Va. Code § 3-12-3(4). Each exploratory contribution must be accompanied by a receipt, and the participating candidate must file an exploratory report at the beginning of each month, detailing all exploratory contributions, expenditures and obligations along with all receipts for contributions received during the prior month. W. Va. Code § 3-12-8(d).

The exploratory reports must be filed electronically, “[p]rovided, [t]hat a committee may apply for an exemption in case of hardship pursuant to subsection (c) of section five-b, article eight of this chapter,” which that statute in turn provides, “[c]ommittees required to report electronically may apply to the State Election Commission for an exemption from mandatory electronic filing in the case of hardship. An exemption may be granted at the discretion of the State Election Commission.”

2. The Declaration Of Intent to Participate And Ensuing Qualifying Period

The Program then creates a qualifying period “during which participating candidates may raise and spend qualifying contributions in order to receive public campaign financing.” *See* W. Va. Code § 3-12-1(14). The qualifying period commences with the candidate’s filing of a Declaration of Intent to Participate with the SEC attesting, under penalty for false swearing as provided by W. Va. Code § 3-9-3(b), that s/he (i) is qualified to be placed on the ballot; (ii) if elected, is eligible to hold the office sought; and (iii) has complied with, and will continue to comply with, all requirements of the public financing law including restrictions on contributions and expenditures. *See* W. Va. Code § 3-12-7; *see also* CSR § 146-5-4.

Any contributions accepted thereafter are deemed “qualifying contributions” and are subject to the following limitations:

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

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

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

- (f) Printed name of the candidate;
- (g) The signature of the person who collection the contribution;
- (h) The contributor's printed name, signature, street address and zip code;
- (i) The amount of the contribution;
- (j) The date of the contribution;
- (k) The Congressional District in which the contributor is registered to vote;
- (l) If contribution is \$25 or more, the contributor's phone number, occupation and name of employer;
- (m) A statement above the contributor's signature confirming the contributor understands the purpose of the contribution is to assist the participating candidate in obtaining public campaign finance funds, the contribution was made without coercion, and the contributor has not been reimbursed, received or promised anything of value for making the contribution.

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

Similar to exploratory reports, a participating candidate must electronically file monthly reports of qualifying contributions, including receipts for those contributions, at the beginning of each month with the Secretary of State. *See* W. Va. Code § 3-12-9(f).

3. The Application For Certification

To qualify for public campaign financing under the Program, a participating candidate must file a sworn Application for Certification subject to the penalty of perjury, with the SEC within two business days after the close of the qualifying period, certifying that s/he has complied with all the Program's statutes and regulations. *See* W. Va. Code § 3-12-10(a); *see also* CSR § 146-5-6.1. The Application for Certification must state that the candidate:

- (i) Has signed and filed a declaration of intent as required by section seven of this article;
- (ii) Has obtained the required number and amount of qualifying contributions as required by section nine of this article;
- (iii) Has complied with the contribution restrictions of this article;
- (iv) Is eligible, as provided in section nine, article five of this chapter, to appear on the nonpartisan judicial election ballot; and
- (v) Has met all other requirements of this article.

See id. The statute also requires candidates to file a final report “[n]o later than two business days after the close of the qualifying period” summarizing:

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

See W. Va. Code §3-12-13(c); *see also* CSR § 146-5-11.4. This reporting obligation is “in addition to any other reporting required by this chapter,” which would include the monthly

reporting obligations during the exploratory period and the qualifying period. W. Va. Code § 3-12-13(a).

4. Distribution Of Public Campaign Funds To Certified Candidates

Once a candidate is certified pursuant to W. Va. Code § 3-12-10, “[t]he [SEC], acting in concert with the State Auditor’s office and the State Treasurer’s office, shall have a check issued within two business days after the date on which the candidate is certified, to make payments from the fund for nonpartisan judicial election campaign period available to a certified candidate.” *See* W. Va. Code § 3-12-11(a). In a contested nonpartisan judicial election, such as the one at issue here, “a certified candidate shall receive \$525,000 in campaign financing from the fund, minus the certified candidate’s qualifying contributions.” *Id.*

B. Benjamin’s Attempt To Qualify For Campaign Financing Under The Program

Among others, Walker and Benjamin are candidates for a single seat on the Supreme Court that is currently held by Benjamin, the election for which is scheduled for May 10, 2016. J.A. 002069. On or about February 18, 2015, Benjamin filed a pre-candidacy form with the Secretary of State declaring his intent to seek re-election to the Supreme Court. J.A. 000046. On or about April 15, 2015, Benjamin filed an amended pre-candidacy form with the Secretary of State, changing his political party to “non-partisan” and affirmatively enrolling in electronic report filing with the Secretary of State. J.A. 000047.

Benjamin raised campaign contributions on March 3, April 20, 27, 29, May 20, June 22 and July 21 and 22, 2015. J.A. 000181-000183. Benjamin did not file any exploratory reports at the beginning of the corresponding months.

1. Benjamin's Qualifying Period

On September 11, 2015, Benjamin filed his Declaration of Intent to Participate. J.A. 000050. Accordingly, pursuant to W. Va. Code § 3-12-7, Benjamin's exploratory period ended, and he entered the qualifying period.

On October 1, 2015, Benjamin was provided an electronic form from the Secretary of State's office entitled "WV Supreme Court of Appeals Public Campaign Financing Monthly Report for _____ (month)" ("WV Supreme Court of Appeals PCF Monthly Report"). J.A. 001640-001643. The WV Supreme Court of Appeals PCF Monthly Report was drafted by the Secretary of State in such a way that it could be used to submit either exploratory contributions or qualifying contributions. *Id.* As of October 1, 2015, Benjamin did not file any exploratory reports.

On October 1, 2015 though, Benjamin did submit his first qualifying report of qualifying contributions received in September ("the September QC Report"). J.A. 001640-001643. Benjamin initially filed the September QC Report by email while the Secretary of State's office updated the online filing system. J.A. 001997. The September QC Report reflected zero dollars in qualifying contributions. *Id.*

On November 1, 2015, Benjamin submitted a report online of qualifying contributions collected by his campaign during October, which reflected the receipt of \$1,360 of qualifying contributions from 20 contributors. J.A. 001644-001648.

On December 1, 2015, Benjamin submitted a report online of qualifying contributions collected by his campaign during November, which reflected the receipt of \$1,299 of qualifying contributions from 69 contributors, for a total of \$2,659 in qualifying contributions. J.A. 001649-001654.

On January 1, 2016, Benjamin submitted a report online of qualifying contributions collected by his campaign during December, which reflected the receipt of \$4,045 of qualifying contributions from 85 contributors, for a total of \$6,704 in qualifying contributions. J.A. 001655-001660. On January 31, 2016, Benjamin submitted an amended December report, the only difference between the Amended December QC Report and the December QC Report is an additional \$10 qualifying contribution, raising the total amount of qualifying contributions collected to \$6,714. J.A. 001661-001666.

On February 1, 2016, Benjamin submitted a report online of qualifying contributions collected by his campaign during January, which reflected the receipt of \$34,797 of qualifying contributions from a total of 409 contributors, for a total of \$41,511 in qualifying contributions. J.A. 001667-001678. Of those amounts, 113 contributors provided \$10,466 on Friday, January 29 and 178 provided \$15,702 on January 30, the last day of the qualifying period. At least 228 of the qualifying contributions submitted with the January QC Report were made online and did not contain a handwritten signature. J.A. 001382-001611.¹ In total, Benjamin submitted 583 contributions, totaling \$41,511, which he sought to be considered qualifying contributions. J.A. 000106.

2. Benjamin's Application For Certification

The statutory deadline for Benjamin to submit his Application for Certification was February 2, 2016. W. Va. Code § 3-12-10(b) and CSR § 146-5-6.1. Benjamin's campaign manager, Darrell Shull, submitted an Application for Certification sworn by Benjamin via email at 4:55 p.m. on February 2, 2016. J.A. 001822. The Application for Certification attached to the 4:55 p.m. email was time-stamped at 5:09 p.m. on February 2, 2016. *Id.* Benjamin's sworn

¹ See Exhibit A, which is a list identifying by J.A. number the electronic contributions received by Benjamin in late January with no physical handwritten signatures.

Application for Certification stated that his “campaign has complied with and will continue to comply with all requirements set forth in the W. Va. Code throughout the applicable campaign.”

J.A. 000106. Benjamin’s sworn Application for Certification further stated that he had “complied with the contribution restrictions of W. Va. Code § 3-12-1 through § 3-12-16....” *Id.*

At 6:18 p.m. on February 2, 2016, Timothy Leach, Solicitor to the West Virginia State Election Commission, responded to Mr. Shull, asking, “Does the candidate wish to certify that he has met all requirements of the code *before* obtaining the confirmation signatures?” J.A. 001990 (emphasis added). Mr. Shull responded at 6:22 p.m., to “Please stand by - I am speaking with legal counsel now.” *Id.* The Secretary of State nonetheless presented Benjamin’s sworn Application for Certification that was time-stamped at 5:09 p.m. to the SEC as the official copy. J.A.000732.

3. SEC Consideration Of Electronic Contributions With No Contributor Signature

On February 2, 2016, Walker challenged 154 of Benjamin’s qualifying contributions. J.A. 000782-000936.² Walker included with her challenge a separate “Qualifying Contribution Challenge Form” that had been provided by the Secretary of State for each challenged qualifying contribution identifying the specific alleged deficiency, including receipts of certain qualifying contributions that were made online but did not have a handwritten signature. *Id.* Among those forms, Walker specifically challenged six of the 154 qualifying contributions that were paid electronically, but the receipt did not have a physical signature of the contributor, as required by W. Va. Code § 3-12-9(b)(2). *Id.* at 000824, 000840, 000877, 000878, 000935, and 000936.

² Walker was also the first person to raise the issue that Benjamin had yet to file anything related to the exploratory contributions he had received, “West Virginia Code § 3-12-8 requires that all exploratory contributions be reported. [Benjamin] has not reported any exploratory contributions. However, upon information and belief, at least three fundraising events for the benefit of the Candidate were held during the Exploratory Period.” J.A. 000779.

a. The SEC's February 3rd Meeting

On February 3, 2016, the SEC took up Walker's challenges to, among others, the "electronic contribution - no signature" challenges, specifically contributors Delligati, Harrington, Reed, J. Charnock, Bell and Capehart because the contributor receipt did not contain a handwritten signature. J.A. 000466:1-000545:21. The overriding legal issue was whether the SEC was going to allow an electronic confirmation, whether by return email or a unique "transactional ID number," to replace the participating candidate's statutory obligation to obtain a physical signature for each contributor. The commissioners recognized the gravity of their decision:

Sec. Tennant: But you are right, Professor [Cardi], too that I feel as though, here we go, we're plowing new territory, we are setting precedent with this vote. Am I putting too much emphasis on that when I say that?

Ms. Summitt: No.

Sec. Tennant: Setting a precedent with this vote?

Ms. Summitt: Yeah.

Mr. Collias: Yeah, I think we are.

J.A.000474:8-17. Chairman Collias and Commissioner Cardi immediately recognized the fatal flaw in the electronic contributions with no physical signatures and expressed their disapproval:

Mr. Collias: Well, I don't really need to cross that ground because I don't think that any of these meet the requirements for the Code because none of them contain signatures. J.A.000506:15-19.

* * *

Mr. Collias: I mean I'm just taking it literally. I think there needs to be a signature from the contributor. And there's not a signature from the contributor. Case closed. This whole subject wouldn't have been a matter of one minute's discussion to me. I mean it's just

there's no ambiguity in it at all in my view. Objections to all these should be sustained.

Maybe the legislature should change the law, but the way it is, there's no signatures from the contributors. I don't care if it came directly from Ann Charnock. It doesn't make any difference to me. That's why I think we ought to vote on it, but if you all disagree with me, then --. J.A. 000510:20-000511:8.

Mr. Cardi: I think we've got to receive a receipt signed by the contributor and we haven't received that for [Delligati]. J.A. 000516:21-23.

Sec. Tennant: At the same time, then, you have to understand that a vote does set precedent for later on.

Mr. Collias: Well, fine. I mean, and later on if we set a precedent, then that will have to be dealt with.

J.A. 000523:18-23. The SEC, voting 2-1, sustained Walker's challenge to Delligati's qualifying contribution. J.A. 000523.

In voting to sustain Walker's challenge to Harrington, Commissioner Cardi expressly stated his belief that a "transactional ID number" on an electronic contribution cannot replace Benjamin's obligation under W. Va. Code. § 3-12-9 to have a physical signature. J.A. 000526-000527. Likewise, the SEC sustained Walker's challenges to Reed (J.A. 000531), J. Charnock (J.A. 000544), Bell (J.A. 000545) and Capehart (J.A. 000550).

b. The SEC's February 4 Meeting

On February 1, 2016 at 4:47 p.m., Benjamin had filed additional receipts supporting the qualifying contributions reported on the January QC Report. J.A.001381. Walker was provided a copy of those receipts by the Secretary of State's office on February 2, 2016. The next day, February 3rd, Walker challenged 365 of those contributions. J. A. 001107-001315. Walker

included the SEC's "Qualifying Challenge Contribution Form" providing the specific basis for each challenge. *Id.*

Among those, Walker challenged 201 electronic contributions that were apparently made online on either January 29 or January 30, but did not have a handwritten contributor signature. J.A. 001107. *In other words, Walker challenged 201 contributions based on the very same reason that the SEC sustained similar challenges on that very same day.* J.A. 000523

On February 4, 2016, the SEC convened to, among other things, consider Walker's 201 "electronic contribution - no signature" challenges. J.A. 000579. The SEC, however, refused to entertain the merits of any of Walker's 365 challenges. J.A. 000613-000614, 000657, 000662, 000676-000677. The Secretary of State, without consultation of the other commissioners, had decided after the February 3rd meeting that Walker was required to include a copy of the receipt for the respective challenged contribution, along with the Secretary of State's own "Qualifying Contribution Challenge Form" that provided the specific basis for each challenge. J.A.000613:20-000614:3; 000657:9-16; 000662:14-23; 000676:24-000679:10. Those same receipts at issue were at all times in the custody, control and possession of the Secretary of State. J.A. 000624-00626. Nonetheless, because of the Secretary's unilateral decision, the SEC refused to entertain the merits of any of Walker's challenges, including the legally insufficient 201 "electronic contribution - no signature" challenges. J.A. 000613-000614, 000657, 000662, 000676-000677.

The SEC also voted to reconsider its decision to sustain the challenge to the qualifying contributions of Delligati, Harrington, Reed, J. Charnock, and Bell only because Benjamin apparently had obtained and submitted a physical signature for each of these contributors before

the end of the qualifying period, which was February 2nd. J.A.000691-000692. Those, documents, however were never made a part of the record. J.A.002066-002095.

c. The February 5 Meeting

On February 5, 2016, the Secretary of State's office represented to the SEC that Benjamin had satisfied four of the five prerequisites under W. Va. Code § 3-12-10(b), including that 512 of the 583 contributions that Benjamin sought to be considered "qualifying contributions" satisfied the statutory requirements of W. Va. Code §3-12-9. J.A.000726-00728. Specifically, Solicitor Leach stated that, "[a]ll were receipted with all necessary information and statements, the process we've been challenging over the last two days. The candidate is eligible to be certified under 3-5-9." J.A. 000728. This representation was made notwithstanding that at least 191³ of Benjamin's 583 qualifying contributions were electronic contributions with no physical signatures. J.A. 000106. Accordingly, by deduction, the representation of the Secretary of State's representative to the SEC had to include the 191 qualifying contributions received online that did not contain a handwritten signature, the exact same reason that the SEC rejected seven of Benjamin's qualifying contributions on February 3rd.

The Secretary of State's representative also advised the SEC that the only outstanding issue was Benjamin's failure to file any exploratory reports. J.A. 000737-000739. Despite raising exploratory contributions as early as April 2015, Benjamin had yet to file an exploratory

³ 229 of Benjamin's contributions submitted on February 2, 2016, which the SEC considered on February 4, 2016, were electronic and originally lacked handwritten signatures. See Exhibit 1. Of these 229 electronic contributions, Walker challenged a total of 216 contributions on multiple grounds; 201 of these 216 challenges specifically mentioned the electronic receipt or the missing handwritten signature. Of the 216 challenged contributions, 191 have no physical signature in the record -- that is, Benjamin did not later provide a signature for these contributions. *Id.*

report as of February 2nd. *Id.* The Secretary of State and Benjamin claimed a computer glitch prevented Benjamin from filing those reports. J.A.000710–000711; 001771.

The SEC allowed Benjamin to request an exemption under W. Va. Code § 3-12-8(d) from the electronic filing requirement. J.A. 000709. The SEC granted the hardship exemption allowing Benjamin until February 10, 2016 to file the exploratory reports. J.A. 000717.

On February 8, 2016, Benjamin filed an exploratory period summary report showing that he had raised \$9,950 during the exploratory period, including \$200 from West Virginians for Coal on April 29, 2015 and \$500 from the First Energy Political Action Committee on April 17, 2015 (J.A. 000185); monthly exploratory reports for September (J.A. 000160–000161) and exploratory contribution receipts (J.A. 000191–000206). Receipt of monies from political action committees is prohibited under the Program. W. Va. Code § 3-12.3(4).

On February 9, 2016, Benjamin filed an amended exploratory period summary report (J.A. 001693–001703); amended monthly reports (J.A. 001704–001705); amended exploratory contribution receipts (J.A. 001723–001738); and documentation indicating that Benjamin returned the exploratory contributions he had retained from the two political action committees (J.A. 000208).

4. The SEC's Certification Of Benjamin

On February 10, 2016, the SEC convened to consider Benjamin's Application for Certification. J.A. 000213. The SEC voted to deem the exploratory summary report, the monthly exploratory period reports and the exploratory contributions receipts filed timely. J.A.000239–000240. As Chairman Collias stated, "And we've just acted today to extend that time, and we have the authority to do that, we believe, or if we don't have the authority to do it, we've still done it. With that said, do I have a motion to certify Benjamin?" *Id.* at 000248. The

SEC certified Benjamin. 000249. The Secretary of State immediately thereafter notified the Auditor and Treasurer that the SEC had authorized the disbursement of funds. J.A. 001799.

5. Walker's Appeal and the Order Reversing the SEC's Certification

On February 16, 2016, Walker filed her *Petition for Judicial Review of the February 10, 2016 Decision of The West Virginia State Election Commission Certifying Brent D. Benjamin Pursuant to W. Va. Code § 3-12-10* (the "Petition"). J.A. 000005–000032. Benjamin filed a response in opposition to the Petition on February 25, 2016. J.A. 001805–001817.

On February 26, 2016, the Circuit Court held a hearing on Walker's Petition. J.A. 001863–002000.

On March 4, 2016, the Circuit Court entered the Order finding that the SEC's certification was clearly erroneous because: (i) the SEC misapplied the hardship exemption to excuse Benjamin's failure to file the exploratory reports timely; and (ii) the SEC clearly erred in certifying that Benjamin had obtained the requisite number of qualifying contributions because at least some portion of the 512 recognized by the Secretary of State include some portion of the 191 Benjamin submitted on February 2nd that were electronic contributions with no physical signatures -- a fatal flaw by the SEC's own reasoning, let alone insufficient under the W. Va. Code § 3-12-9. J.A. 002069–002095. As a result of its erroneous certification, the Circuit Court found that the SEC violated Walker's constitutional rights to free speech and substantive due process. J.A. 002069–002095.

This appeal followed.

SUMMARY OF ARGUMENT

The Circuit Court correctly reversed the SEC's erroneous decision to certify Benjamin as qualified to receive public campaign financing because Benjamin did not satisfy the non-

discretionary criteria required to be certified under W. Va. Code § 3-12-10(b). In doing so, the Circuit Court correctly determined that: (i) the SEC erred in misapplying the hardship exemption for electronic filing, thereby permitting Benjamin to file delinquent exploratory reports as much as four months late; and (ii) the SEC erred in finding that Benjamin had obtained the requisite number of qualifying contributions where the underlying SEC record clearly showed that Benjamin had failed to submit at least 500 qualifying contributions with an accompanying physical signature, an unambiguous statutory requirement for certification and *consistent with the SEC's own ruling in this matter.*

This Court should affirm the Circuit Court's decision.

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 11:00 a.m.

ARGUMENT

A. Standard Of Review

When reviewing a Circuit Court's decision, this Court applies the following standard of review:

In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review.

Syl. Pt. 2, *Walker v. West Virginia Ethics Comm'n*, 201 W. Va. 108, 492 S.E.2d 167 (1997).

"A party challenging a circuit court's evidentiary rulings has an onerous burden because a reviewing court gives special deference to the evidentiary rulings of a circuit court." *Gentry v.*

Mangum, 195 W. Va. 512, 518, 466 S.E.2d 171, 177 (1995). Specifically, “[a] trial court abuses its discretion if its ruling is based on an erroneous assessment of the evidence or the law.”

Bartles v. Hinkle, 196 W. Va. 381, 389, 472 S.E.2d 827, 835 (1996) (citation omitted). In other words, “[u]nder the abuse of discretion standard, we will not disturb a circuit court’s decision unless the circuit court makes a clear error of judgment or exceeds the bounds of permissible choices in the circumstances.” *Hensley v. West Virginia DHHR*, 203 W. Va. 456, 461, 508 S.E.2d 616, 621 (1998) (quoting *Gribben v. Kirk*, 195 W. Va. 488, 500, 466 S.E.2d 147, 159 (1995)).

A finding is only clearly erroneous when “although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *In re Emily G.*, 224 W. Va. 390, 394, 686 S.E.2d 41, 45 (2009). See also *Phillips v. Fox*, 193 W. Va. 657, 661–62, 458 S.E.2d 327, 331–32 (1995). Indeed, the clearly erroneous standard “does not entitle a reviewing court to reverse the finder of fact simply because it may have decided the case differently.” *Bd. of Educ. of Cty. of Mercer v. Wirt*, 192 W. Va. 568, 578–79, 453 S.E.2d 402, 412–13 (1994) (citing *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)). “A reviewing court . . . must affirm if the circuit court’s account of the evidence is plausible in light of the record viewed in its entirety.” *Phillips*, 193 W. Va. at 661–62, 458 S.E.2d at 331–32 (quoting *Anderson*, 470 U.S. at 573–74) (internal quotation marks omitted).

B. Walker Has Standing To Challenge The SEC’s Decision.

As a threshold matter, the Circuit Court correctly determined that Walker has standing to appeal the SEC’s decision to certify Benjamin. To have standing, (1) Walker must have suffered an “injury in fact;” (2) there must be a casual connection between “the injury and the conduct

complained of;” and (3) the injury must be “redressed by a favorable decision.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (internal citations omitted). For the reasons articulated by the Circuit Court, Walker unquestionably has standing to pursue the appeal.

C. The Circuit Court Did Not Abuse Its Discretion In Ruling That The SEC Erred In Certifying Benjamin To Receive Public Campaign Financing.

The Circuit Court correctly determined that the SEC erred in certifying Benjamin to receive public campaign financing under W. Va. Code § 3-12-10(b) for two reasons. *First*, the Circuit Court correctly held that Benjamin failed to meet the filing requirements set forth in W. Va. Code §§ 3-12-3(5) and 3-12-8(d) with respect to exploratory contributions and, further, that the SEC erred in granting him a hardship exemption to belatedly file the required reports. *Second*, the Circuit Court correctly held that Benjamin failed to obtain “the required number and amount of qualifying contributions,” as is required under W. Va. Code § 3-12-10(b)(2). As a result, the Circuit Court correctly concluded that Benjamin had not “met all other requirements of [Article 12]” and, therefore, that the SEC’s decision to certify him was in error.

1. The Court Did Not Abuse Its Discretion In Finding That The SEC Clearly Erred In Accepting Benjamin’s Delinquent Exploratory Report.

It is undisputed that Benjamin failed to file any report disclosing his receipt of nearly \$10,000 in exploratory contributions until February 8, 2016, over one week after the close of the qualifying period. In view of this undisputed fact, and the filing requirements set forth in Article 12, the Circuit Court correctly determined that, at the latest, Benjamin was required to file an exploratory report on or before October 1, 2015 -- the first month after Benjamin unquestionably became a “participating candidate.” J.A. 002083. The Circuit Court further determined that the SEC erred in granting Benjamin a hardship exemption to deem his delinquent reports timely based on the assertion of Benjamin and the Secretary of State that the state’s website was not

equipped for electronic filing. In this regard, the Circuit Court correctly found the hardship exemption applies to the *form* of the filing, not the *timing* of the filing and that the SEC lacks authority to invoke the exemption to deem timely exploratory reports that Benjamin could have filed directly with the Secretary of State's office and which were not timely filed due to neglect and not a "glitch" in the electronic filing system.

a. **The Circuit Court Did Not Abuse Its Discretion In Determining That The October 1 Deadline For Filing Benjamin's Exploratory Report Must Be Strictly Enforced Under *Brady*.**

Pursuant to W. Va. Code § 3-12-3(4), all contributions that a candidate receives prior to filing a Declaration of Intent are deemed exploratory contributions. *See* W. Va. Code § 3-12-3(4) (defining "exploratory contribution" as "a contribution of no more than \$1,000 made by an individual adult, including a participating candidate and members of his or her immediate family, during the exploratory period *but prior to filing the declaration of intent.*") (emphasis added). Pursuant to W. Va. Code § 3-12-8(d), "[a]t the beginning of each month a participating or certified candidate or his or her financial agent shall report all exploratory contributions, expenditures and obligations along with all receipts for contributions received during the prior month to the Secretary of State. Such reports shall be filed electronically." The Circuit Court determined, that Benjamin's exploratory contribution report, reflecting the nearly \$10,000 in exploratory contributions he received prior to filing his Declaration of Intent, was due no later than October 1, 2015, but was not filed until February 8, 2016. J.A. 002052⁴; *see also* J.A. 002082–002083 at ¶ 14–15.

⁴ A significant portion of the February 26 Circuit Court hearing concerned when Benjamin became a "participating candidate" and, therefore, was obligated to file exploratory reports with the SEC. Benjamin contended that he did not intend to participate in the Program in the first part of 2015 and, as a result, did not have any obligation to file exploratory reports for the contributions received prior to the filing of the Declaration of Intent. J.A. 001957. That issue is

The Circuit Court correctly determined that a participating candidate that has not filed the appropriate reports, including those under W. Va. Code § 3-12-8(d) has not “met all other requirements of this article” as set forth in W. Va. Code § 3-12-10(b)(5) and, therefore, cannot be certified. J.A. 002082 at ¶ 10 (**A candidate may not be certified if s/he does not comply with these reporting obligations.**) (emphasis in original). As a result, the Circuit Court’s decision should be affirmed.

In reaching this conclusion, the Circuit Court relied upon three strong legal grounds, all of which mandate affirmance of its decision. *First*, the Circuit Court found that, “[a]n administrative board must abide by its own rules and the legislative mandates.” J.A. 002080 at ¶ 2 (citing *Tasker v. Mohn*, 165 W. Va. 55, 65, 267 S.E.2d 183, 189 (1980) (citations omitted)). Section 8(d) and the corresponding legislative rule, CSR § 146-5-3.6.e, required Benjamin to report his receipts, expenditures and obligations of exploratory contributions at the beginning of each month. He failed to do so. Simply put, then, the SEC cannot ignore the statute and its own rule.

Second, as an election-law related deadline, the Circuit Court correctly determined that the reporting deadline for the exploratory report must be strictly enforced. J.A. 002083 at ¶ 18 (relying upon *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

irrelevant for this appeal because the Circuit Court based its ruling on a determination that Benjamin was required to file an exploratory report after filing of his Declaration of Intent on September 11, 2015.

period of time, are mandatory.”)); Styl. Pt. 3, *State ex rel. Baker v. Bailey*, 152 W. Va. 400, 163 S.E.2d 873 (1968) (“[w]here a statute provides for a thing to be done in a particular manner or by a prescribed person or tribunal it is implied that it shall not be done otherwise or by a different person or tribunal.”); *State ex rel. Vernet v. Wells*, 87 W. Va. 275, 104 S.E. 591 (1920) (striking candidates from local non-partisan ballots who had not filed certificates of nominations in time). Strict adherence to deadlines related to political campaigning activity is paramount because, “[o]therwise, the actions of the Secretary of State in that regard would be subject to constant allegations of arbitrariness or favoritism.” *Brady*, 176 W. Va. at 574, 346 S.E.2d at 550.

Accordingly, the Circuit Court found, “[n]othing could be so political as running for public office and the method by which and from what sources are funded.” J.A. 002083 at ¶ 17. The Circuit Court is absolutely correct. The Program is a product of the State’s decision to enter and influence the political outcome of judicial elections. In politics, money equals votes and, in this case, the State injected nearly a half-million dollars into a race for the highest court. The SEC must follow the process which the Legislature specifically designed to ensure that a decision to qualify any candidate is beyond reproach. To allow the SEC to certify Benjamin despite his clear failure to follow the rules does not fulfill the Program’s objective to ensure integrity in the judicial process and, instead, threatens to have the opposite effect, contrary to the express purposes of the statute.

Third, the Circuit Court employed basic rules of statutory construction to dismantle the SEC’s attempt to salvage Benjamin’s delinquent filing. Specifically, the SEC invoked W. Va. Code § 3-12-13(c), which provides in relevant part, “(c) No later than two business days after the close of the qualifying period [February 2], a participating candidate or his or her financial agent shall report to the Secretary of State on appropriate forms a summary of: (1) All exploratory

contributions received and funds expended or obligated during the exploratory period together with copies of any receipts not previously submitted for exploratory contributions.” Under the SEC’s interpretation, Section 13(c)(1) acted as a “catch-all” provision allowing Benjamin to cure his failure to file the exploratory report by October 1 simply by filing a “final summary report” by February 2nd. J.A. 000216.

The Circuit Court correctly rejected that interpretation. Significantly, the precursor section of W. Va. Code § 3-12-13, specifically section (a), provides that “[p]articipating candidates and certified candidates shall comply with this section *in addition to any other reporting required by this chapter.*” (emphasis added). “[A]ny other reporting required by this chapter” includes the reporting required by Section 3-12-8(d). W. Va. Code §3-12-13(c), therefore, applies only to the candidates filing of a *final* report and does not affect, displace or otherwise impact the candidate’s obligation to file monthly reports as required by the statute, including reports of exploratory contributions pursuant to Section 3-12-8(d). Accordingly, the Circuit Court found that final reporting requirements of Section 13(c) cannot be read to eliminate Benjamin’s independent reporting requirements of Section 3-12-8(d). J.A. 002083 at ¶ 18 (citing *Feroleto Steel Co. v. Oughton*, 230 W. Va. 5, 9, 736 S.E.2d 5, 9 (2012) (“A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute.”)).

Similarly, the Circuit Court correctly determined that the SEC’s interpretation would effectively render the entire exploratory period meaningless because every participating candidate going forward could simply not file any exploratory reports and wait until the end of the qualifying period to do so. *See* J.A. 002087 at ¶ 40, 42–43. The SEC cannot interpret the statute in such a manner as to essentially write out any of the exploratory reporting requirements.

b. The Circuit Court Correctly Found That the SEC Misapplied The Hardship Exemption.

The Circuit Court also correctly concluded that the SEC's interpretation of the hardship exemption -- which Benjamin requested claiming that the failure to file reports was the result of a "glitch" in the Secretary of State's online campaign reporting platform -- violated the basic rules of statutory construction. J.A. 002085 at ¶¶ 24-26 (citing *Martin v. Hamblet*, 230 W. Va. 183, 186–87, 737 S.E.2d 80, 82–84 (2012) ("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.") (citations 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.").

Specifically, the Circuit Court correctly determined that the hardship exemption can only be invoked to allow a participating candidate to file by other means (*i.e.*, in person, by mail, facsimile, or email), but cannot otherwise be used to waive a filing deadline. It is undisputed that Benjamin was aware of the electronic filing issue as early as October 1, 2015. J.A. 002085 at ¶ 29 (citing J.A. 001990). Further, by that same day, Benjamin had been provided an electronic copy of the Secretary of State's West Virginia Supreme Court of Appeals PCF Monthly Report. J.A. 002085 at ¶ 30 (citing J.A. *Id.* at ¶ 29). Thus, if, in fact, Benjamin could not file his report online, he should have requested the hardship exemption as of October 1, 2015 and then filed the exploratory report by alternative means. J.A. 002085 at ¶ 31.⁵ He did not and, as a result, the

⁵ As noted by the Circuit Court, Benjamin actually used that very same form to file his initial qualifying period report via email, rather than online, with no objection from the Secretary of State. J.A. 002086 at ¶ 31.

Circuit Court correctly concluded that, “**Justice Benjamin’s failure to file the exploratory monthly reports was not attributable to an electronic ‘glitch,’ rather neglect to which the hardship exemption does not apply.**” *Id.* at ¶ 33 (emphasis in original).

2. The Court Did Not Abuse Its Discretion In Finding That The SEC Erred In Determining That Benjamin Failed To Obtain The Required Number and Amount of Qualifying Contributions.

Before the SEC may consider an Application for Certification, the Secretary of State is charged by statute to provide the SEC notice “that a participating candidate has received the required number and amount of qualifying contributions.” *See* W. Va. Code § 3-12-10(b). At that point, Article 12 directs that the SEC shall determine, among other things, whether the participating candidate has “obtained the required number and amount of qualifying contributions as required by section nine of this article.” *See* W. Va. Code § 3-12-10(b)(2). Pursuant to Section 9(b), a participating candidate must have submitted a written receipt for each qualifying contribution, which includes, among other things, “the contributor’s signature.” W. Va. Code § 3-12-9(b); *see also* CSR § 146-5-5.4.c. (“All [qualifying] contributions must be acknowledged by a receipt, on forms provided by the SEC, which includes each of the following . . . [t]he contributor’s printed name, signature, street address, and zip code.”).

The record in this case is indisputable that Benjamin failed to meet the requirements of Section 9(b). Specifically, Benjamin only submitted 583 qualifying contributions, which included the tidal wave of 229 online contributions that flooded into Benjamin’s campaign on the last four days of the qualifying period. J.A. 001382–001611. Benjamin filed receipts for those electronic contributions at 4:47 p.m. on February 1, J.A. 001381, and none of those contributions included a physical, handwritten signature.

Walker was provided a copy of those receipts on February 2, 2016 and, upon review, immediately filed a challenge to 201 of Benjamin's qualifying contributions and specifically identified their lack of a physical, handwritten signature on the Secretary of State's own "Qualifying Contribution Challenge Form." J.A. 1107-1315.

During a February 3, 2016 SEC meeting, Chairman Collias and Commissioner Cardi correctly voted to sustain six of Walker's challenges to "electronic contribution - no signature" receipts that Benjamin had previously filed. J.A.000526, 000527, 000531, 000544, 000545, 000550. This ruling was consistent with the statutory requirement that each contribution include an accompanying signature from the contributor, a requirement that is "**an essential, non-discretion part of this Program**" that "**goes to the heart of accountability, integrity and confidence in this election Funding Program.**" J.A. 002076 at ¶ 52 (citing W. Va. Code § 3-12-2) (emphasis in original). Indeed, in Chairman Collias' view, the signature requirement is not even a debatable point: an electronic contribution without a physical signature does not qualify, "[c]ase closed." J.A. 000510

After the February 3, 2016 meeting, the Secretary of State unilaterally decided that the SEC should not entertain Walker's February 3 challenges, including the challenges to the 201 "electronic contribution - no signature" contributions, unless Walker not only submitted the prescribed "Qualifying Contribution Challenge Form," (which she did), but also included a copy of each respective receipt. J.A. 000626-000627. These are the same receipts that Benjamin had filed with the SEC late February 1st. J.A. 001381. Notably, this change in protocol was not used to consider Walker's challenges during the February 3 meeting -- the Secretary of State unilaterally changed the rules on Walker after that meeting and in the midst of Benjamin's certification process without consulting her fellow SEC commissioners. Finding that the

Secretary of State had provided notice of this change in procedure on the night of February 3rd, the SEC refused to even consider the merits of Walker's challenges.

The Circuit Court correctly found that the SEC's decision in this regard was clear error. It is undisputed that Benjamin does not have the requisite number of qualifying contributions unless the Secretary of State improperly counted the 191 "electronic contribution - no signature" receipts that Benjamin submitted on February 1. As an initial matter, the Secretary of State violated her statutory obligation to confirm for the SEC that Benjamin had obtained the requisite number of qualifying contributions. W. Va. Code § 3-12-10. Indeed, the Secretary of State's representation to the SEC is *directly contrary to the will of the Commission*, evidenced by the votes cast by the majority, Chairman Collias and Commissioner Cardi. The burden to ensure that Benjamin's qualifying contributions comport with the statute and the SEC's precedent does not rest with Walker -- the statute clearly assigns that responsibility to the Secretary of State.

To be clear: as it stands, the SEC has certified a participating candidate to receive nearly a half-million dollars in state monies to campaign for Supreme Court despite a record that indisputably shows that he failed to obtain the requisite number of qualifying contributions, the hallmark of the entire Program. The Secretary of State and the SEC apparently did not review the receipts. The *only* reason the Benjamin's "electronic contribution - no signature" receipts were not counted is because Walker did not provide a copy of the receipt that she had received from the SEC. Benjamin's certification is not only contrary to the Program's objectives, but will actually serve to undermine the public's confidence in the judiciary and the integrity of the process. This arbitrary type of conduct is precisely the reason election laws must be strictly enforced, "[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.

Accordingly, the Court should find that the Circuit Court did not abuse its discretion by determining that the SEC erred in finding that Benjamin had submitted the requisite number and amount of qualifying contributions, and, therefore he is not qualified under W. Va. Code § 3-12-10(b) to receive public campaign financing. J.A. 002070 at ¶ 6.

D. The Circuit Court Did Not Abuse Its Discretion In Ruling That The SEC Violated Walker's Constitutional Rights By Ignoring The Law And Its Own Rule In Certifying Benjamin.

As a fundamental principle, the Circuit Court correctly recognized the constitutional significance of the SEC's conduct, a decision to certify Benjamin to receive nearly a half-million dollars in state monies. J.A002070–002071, at ¶¶ 7–11. The State has made the policy decision to involve state money in the Supreme Court election, a decision that amounts to “political speech.” *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.”). Accordingly, the SEC's conduct, as a creature of the State, must be reconciled against Walker's fundamental constitutional rights of free speech and substantive due process. *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.”).

Here, as set forth above, the SEC voted to certify Benjamin notwithstanding his indisputable failure to file an exploratory report timely and his failure to submit the requisite number of receipts of qualifying contributions that contained a handwritten signature. With respect to the latter, that decision by the SEC not only failed to comport with the plain and unambiguous statutory requirements, but also the SEC's own ruling in this matter. Accordingly,

the Circuit Court did not abuse its discretion by recognizing that the SEC's erroneous certification runs afoul of Walker's constitutional rights.

Moreover, Walker raised this fatal issue by challenge; the only reason that the SEC did not entertain that challenge was because Walker did not provide the SEC with a copy of the challenged receipt, which was in the government's possession. In practical terms, the Secretary of State shifted its statutory responsibility to Walker and effectively overruled the SEC's majority ruling on the signature requirement and counted offensive contributions.⁶ This unsupportable act cannot stand. Further, the Secretary of State's unilateral decision to change the rules during the certification process is not compatible with Walker's right to substantive due process. Had the Secretary of State not changed the rules, the record is clear that Chairman Collias and Commissioner Cardi would have rejected at least 191 of Benjamin's qualifying contributions, rendering him not qualified to receive funding. Allowing this injustice to stand is wholly inconsistent with the Legislature's intent that this Program be used to ensure fairness of democratic elections, protect the impartiality and integrity of the judiciary, and strengthen the public confidence in the judiciary. J.A. 002069 (quoting W. Va. Code § 3-12-2(1)-(10)).

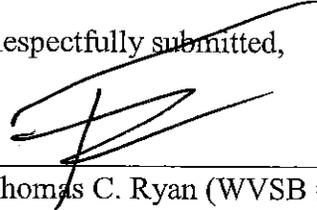
⁶ As the record stands, the SEC rejected Capehart's qualifying contribution because Benjamin failed to obtain a physical signature to supplement the electronic receipt. JA 000546-000500. Yet, at the same time, the SEC certified 191 other qualifying contributions notwithstanding the fact that those contributions suffer from the same exact infirmity. *See* Exhibit A for a list of Joint Appendix references. The SEC's certification is simply incompatible with its own position and interpretation of W. Va. Code § 3-12-9(b)(2).

CONCLUSION

Based on the foregoing, this Court should affirm the Circuit Court's March 4, 2016 Order reversing the SEC's decision to certify Benjamin as qualified to receive public campaign financing from the Program.

Dated: March 17, 2016

Respectfully submitted,



Thomas C. Ryan (WVSB #9883)
K&L Gates LLP
210 Sixth Avenue
Pittsburgh, PA 15222
Tel: (412) 355-6500

Certificate of Service

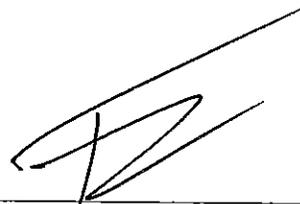
I, Thomas C. Ryan, certify that I caused to be served by first class mail a copy of the *Brief of Respondent Elizabeth D. Walker* upon the following counsel of record on March 17, 2016:

Jonathan R. Marshall, Esq.
jmarshall@baileyglasser.com
Maryl C. Sattler, Esq.
msattler@baileyglasser.com
Bailey Glasser LLP
209 Capitol Street
Charleston, WV 25301

Richard L. Gottlieb, Esq.
rgottlieb@lgcr.com
Spencer D. Elliot, Esq.
selliott@lgcr.com
Lewis Glasser Casey & Rollins, PLLC
BB&T Square, Suite 700
300 Summers Street
P.O. Box 1746
Charleston, WV 25326-1746

Counsel for Petitioner the Honorable Brent D. Benjamin, Esq.

Counsel for Respondents The Honorable Natalie E. Tennant, Vincent P. Cardi, Esq. and Gary A. Collias, Esq.



Thomas C. Ryan
W.V. Bar #9883

Exhibit A

No.	First	Last	Signature Challenged	Challenged, Generally	Physical		Contribution Date	Joint		Joint	
					Signature	Supplemented		Appendix Page	Appendix Page	Signature Date	Signature Page
1	Shelitta	Thomas	Yes	Yes	No	No	1/29/2016	JA001382			
2	Deborah	Walker	Yes	Yes	No	No	1/30/2016	JA001384			
3	Chris	Walters	Yes	Yes	No	No	1/29/2016	JA001385			
4	Ronald	Walters	Yes	Yes	No	No	1/29/2016	JA001386			
5	Charles	Webb	Yes	Yes	No	No	1/29/2016	JA001387			
6	Ronnie	Wentz	Yes	Yes	No	No	1/30/2016	JA001388			
7	Beth	White	Yes	Yes	No	No	1/30/2016	JA001389			
8	April	Workman	Yes	Yes	No	No	1/30/2016	JA001391			
9	David	Workman	Yes	Yes	No	No	1/30/2016	JA001392			
10	Scott	Andrews	Yes	Yes	No	No	1/30/2016	JA001393			
11	Sondra	Andrews	Yes	Yes	No	No	1/30/2016	JA001394			
12	Julie	Archer	Yes	Yes	No	No	1/30/2016	JA001395			
13	Erika	Bailey	Yes	Yes	No	No	1/30/2016	JA001396			
14	Leona	Boggs	Yes	Yes	No	No	1/29/2016	JA001399			
15	Stacie	Boggs	Yes	Yes	No	No	1/30/2016	JA001400			
16	Thomas	Boggs	Yes	Yes	No	No	1/29/2016	JA001401			
17	Lauren J.	Booth	Yes	Yes	No	No	1/29/2016	JA001402			
18	Steven R.	Broadwater, Jr.	Yes	Yes	No	No	1/29/2016	JA001403			
19	Ryan	Buck	Yes	Yes	No	No	1/30/2016	JA001404			
20	Kevin	Burgess	Yes	Yes	No	No	1/29/2016	JA001405			
21	Katherine	Burruss	Yes	Yes	No	No	1/30/2016	JA001406			
22	Sarah	Castle	No	No	No	No	1/27/2016	JA001407			
23	Beth	Clark	Yes	Yes	No	No	1/29/2016	JA001408			
24	Kristi	Cline-White	Yes	Yes	No	No	1/27/2016	JA001409			
25	Leo	Cremeans	Yes	Yes	No	No	1/30/2016	JA001410			
26	Elizabeth	Duffield	Yes	Yes	No	No	1/29/2016	JA001411			
27	Carletta	Fannin	Yes	Yes	No	No	1/30/2016	JA001413			
28	Robert	Fannin	Yes	Yes	No	No	1/30/2016	JA001414			
29	Jacqueline	Farrell	Yes	Yes	No	No	1/30/2016	JA001415			

30	Kathryn	Farrell	Yes	Yes	No	1/30/2016	JA001416
31	Mark	Farrell	Yes	Yes	No	1/29/2016	JA001417
32	Patrick	Farrell	Yes	Yes	No	1/30/2016	JA001418
33	Paul	Farrell	Yes	Yes	No	1/30/2016	JA001419
34	Sean	Farrell	Yes	Yes	No	1/30/2016	JA001420
35	Paige	Flanigan	Yes	Yes	No	1/29/2016	JA001421
36	Patricia	Garren	Yes	Yes	No	1/30/2016	JA001423
37	John	Goodall	Yes	Yes	No	1/30/2016	JA001424
38	Robin	Harlow	Yes	Yes	No	1/30/2016	JA001425
39	Frank	Hartman	Yes	Yes	No	1/30/2016	JA001426
40	Greg	Hewitt	Yes	Yes	No	1/30/2016	JA001427
41	Lee	Kayser	Yes	Yes	No	1/29/2016	JA001428
42	Janet	Keating	Yes	Yes	No	1/30/2016	JA001429
43	Mitchell	Klein	Yes	Yes	No	1/29/2016	JA001430
44	Robert	Kuenzel	Yes	Yes	No	1/30/2016	JA001431
45	Theresa	Kuenzel	Yes	Yes	No	1/30/2016	JA001432
46	Brandley	Layne	Yes	Yes	No	1/29/2016	JA001433
47	Kellen	Leef	Yes	Yes	No	1/29/2016	JA001434
48	Derrick	Lefler	Yes	Yes	No	1/29/2016	JA001435
49	Justin	Marcum	Yes	Yes	No	1/30/2016	JA001438
50	A Nease	Markins	Yes	Yes	No	1/29/2016	JA001439
51	Sarah	McDaniel	Yes	Yes	No	1/29/2016	JA001440
52	Joshua	McGrew	Yes	Yes	No	1/30/2016	JA001441
53	Christopher	Miller	Yes	Yes	No	1/29/2016	JA001443
54	Fred	Mohr	Yes	Yes	No	1/30/2016	JA001444
55	Amy	New	Yes	Yes	No	1/29/2016	JA001445
56	Steve	New	Yes	Yes	No	1/29/2016	JA001446
57	Jed	Nolan	Yes	Yes	No	1/30/2016	JA001447
58	Jill	Nolan	Yes	Yes	No	1/30/2016	JA001448
59	Jonathan	O'Dell	Yes	Yes	No	1/30/2016	JA001449
60	Jay	O'Diell	Yes	Yes	No	1/29/2016	JA001450
61	Rita	Pelfrey	No	Yes	No	1/30/2016	JA001454
62	Paul	Perfater	Yes	Yes	No	1/30/2016	JA001455
63	David	Pollard	Yes	Yes	No	1/29/2016	JA001457

64	Lynn	Pollard	Yes	No	1/29/2016	JA001458
65	Honey	Powe	Yes	No	1/27/2016	JA001459
66	Mitzi	Rick	Yes	No	1/30/2016	JA001460
67	Anthony	Salvatore	Yes	No	1/29/2016	JA001461
68	Jennifer	Shell	Yes	No	1/30/2016	JA001462
69	Philip	Shell	Yes	No	1/30/2016	JA001463
70	Stephen	Shell	Yes	No	1/30/2016	JA001464
71	Michael C.	Sheridan	Yes	No	1/29/2016	JA001465
72	Charlie	Stevens	Yes	No	1/30/2016	JA001466
73	Amanda	Taylor	Yes	No	1/30/2016	JA001467
74	Jodie	Walker	Yes	No	1/30/2016	JA001468
75	Steven	Wolfe	Yes	No	1/30/2016	JA001469
76	Cathy	Young	Yes	No	1/29/2016	JA001470
77	Clint	Young	Yes	No	1/30/2016	JA001471
78	Saun	Capehart	Yes	No	1/30/2016	JA001473
79	Deborah	DeMoss	Yes	No	1/30/2016	JA001474
80	Taylor	Downs	Yes	No	1/30/2016	JA001476
81	Kayleen	Fitzsimmons	Yes	No	1/30/2016	JA001478
82	Richard	Forren	Yes	No	1/30/2016	JA001479
83	William	Frame	Yes	No	1/30/2016	JA001480
84	Robert	Harless	Yes	No	1/30/2016	JA001481
85	Chris	Hood	Yes	No	1/30/2016	JA001482
86	John	Hunter	Yes	No	1/30/2016	JA001483
87	Harri	Joseph	Yes	No	1/30/2016	JA001484
88	Jordan	Laird	Yes	No	1/30/2016	JA001486
89	Timothy	Manchin	Yes	No	1/30/2016	JA001488
90	Sandra	Marinacci	No	No	1/30/2016	JA001489
91	David	Marshall	Yes	No	1/30/2016	JA001490
92	Patricia	Marshall	Yes	No	1/30/2016	JA001491
93	Adam	McCoy	Yes	No	1/30/2016	JA001492
94	Douglas	Miley	Yes	No	1/30/2016	JA001493
95	Heidi	Miley	Yes	No	1/30/2016	JA001494
96	Susan	Miley	Yes	No	1/30/2016	JA001495
97	Tim	Miley	Yes	No	1/30/2016	JA001496

Benjamin v. Walker, et al.
Case No. 16-0228

98	Lorraine	Nickerson	Yes	No	1/30/2016	JA001497
99	Guy	Panrell	Yes	No	1/30/2016	JA001498
100	Lenard	Panrell	Yes	No	1/30/2016	JA001499
101	Jane	Peak	Yes	No	1/27/2016	JA001500
102	Jacob	Robinson	Yes	No	1/29/2016	JA001502
103	Lacy	Santorine	Yes	No	1/30/2016	JA001503
104	Lora Kaye	Santorine	Yes	No	1/30/2016	JA001504
105	Trae	Santorine	Yes	No	1/30/2016	JA001505
106	Gloria A.	Saunders	Yes	No	1/30/2016	JA001506
107	John	Saunders	Yes	No	1/30/2016	JA001507
108	Amy	Schmitt	Yes	No	1/30/2016	JA001508
109	Sarah K.	Shaffer	Yes	No	1/30/2016	JA001509
110	William	Summers	Yes	No	1/30/2016	JA001511
111	Ralph	Troisi	Yes	No	1/30/2016	JA001512
112	Christopher	Turak	Yes	No	1/29/2016	JA001513
113	Jonathan	Turak	Yes	No	1/30/2016	JA001514
114	Melissa	Turner	Yes	No	1/30/2016	JA001515
115	Jayla	Walker	Yes	No	1/30/2016	JA001516
116	Boyd	Warner	Yes	No	1/29/2016	JA001517
117	Jeanne	Warner	Yes	No	1/29/2016	JA001518
118	Kelly	Wiseman	Yes	No	1/30/2016	JA001522
119	Todd	Wiseman	Yes	No	1/30/2016	JA001523
120	J. Zachary	Zatezalo	No	No	1/30/2016	JA001524
121	Benjamin	Adams	Yes	No	1/30/2016	JA001526
122	Aaron	Amore	Yes	No	1/30/2016	JA001527
123	Charles	Bailey	Yes	No	1/29/2016	JA001528
124	Joel	Baker	Yes	No	1/30/2016	JA001529
125	Robert	Barrat	Yes	No	1/28/2016	JA001530
126	Cynthia	Barrett	Yes	No	1/30/2016	JA001531
127	Joshua	Barrett	Yes	No	1/29/2016	JA001532
128	Robert	Bastress	Yes	No	1/29/2016	JA001533
129	Matthew	Berthold	Yes	No	1/29/2016	JA001534
130	Dennis P.	Brady	Yes	No	1/29/2016	JA001536
131	D. Michael	Burke	Yes	No	1/30/2016	JA001537

132	Andrew	Byrd	Yes	Yes	No	1/29/2016	JA001538
133	Sharon	Byrd	Yes	Yes	No	1/30/2016	JA001539
134	Cheri	Callaghan	Yes	Yes	No	1/30/2016	JA001540
135	Michael	Callaghan	Yes	Yes	No	1/30/2016	JA001541
136	Stuart	Calwell	Yes	Yes	No	1/30/2016	JA001542
137	Josh	Chandler	Yes	Yes	No	1/29/2016	JA001544
138	Tara	Chandler	Yes	Yes	No	1/29/2016	JA001545
139	Laura	Davis	Yes	Yes	No	1/29/2016	JA001548
140	Kimberly	Dillard	Yes	Yes	No	1/29/2016	JA001550
141	J. Timothy	Dipiero	Yes	Yes	No	1/29/2016	JA001551
142	April	Ferrebee	Yes	Yes	No	1/30/2016	JA001551
143	Damon	Ellis	Yes	Yes	No	1/29/2016	JA001552
144	Joseph	Ferretti	Yes	Yes	No	1/30/2016	JA001554
145	Lori	Gillispie	Yes	Yes	No	1/29/2016	JA001555
146	Amanda	Greere	Yes	Yes	No	1/30/2016	JA001557
147	Georgia	Griffith	Yes	Yes	No	1/30/2016	JA001558
148	Kelly	Griffith	Yes	Yes	No	1/30/2016	JA001559
149	Lindsay	Jackfert Griffith	Yes	Yes	No	1/29/2016	JA001560
150	Truman	Griffith	Yes	Yes	No	1/29/2016	JA001561
151	Jeffrey	Gustafson	Yes	Yes	No	1/30/2016	JA001562
152	David	Hammer	Yes	Yes	No	1/29/2016	JA001563
153	Jeffrey	Harlow	Yes	Yes	No	1/30/2016	JA001564
154	Cynthia	Harman	Yes	Yes	No	1/30/2016	JA001565
155	Patrick	Jacobs	Yes	Yes	No	1/30/2016	JA001566
156	Rhonda	Jacobs	Yes	Yes	No	1/30/2016	JA001567
157	Chris	Janelle	Yes	Yes	No	1/30/2016	JA001568
158	David	Johnston	Yes	Yes	No	1/29/2016	JA001569
159	Jennifer	Lacy	Yes	Yes	No	1/29/2016	JA001570
160	Lisa	Lambert	Yes	Yes	No	1/30/2016	JA001571
161	Bernard	Layne	Yes	Yes	No	1/30/2016	JA001572
162	Jonathan	Mani	Yes	Yes	No	1/29/2016	JA001573
163	Patrick	Maroney	Yes	Yes	No	1/30/2016	JA001574
164	Daniel	Mead	Yes	Yes	No	1/30/2016	JA001577
165	Emily A.	Mead	Yes	Yes	No	1/30/2016	JA001578

166	Marilyn	Monahan	Yes	No	1/30/2016	JA001579
167	Richard	Monahan	Yes	No	1/30/2016	JA001580
168	Richard	Otten	Yes	No	1/27/2016	JA001582
169	Edwin	Pancake	Yes	No	1/30/2016	JA001583
170	Emmett	Pepper	Yes	No	1/30/2016	JA001584
171	Talbot	Powell	Yes	No	1/27/2016	JA001585
172	Christian	Rose	Yes	No	1/30/2016	JA001587
173	Katie	Rose	Yes	No	1/30/2016	JA001588
174	Amanda	Rowe	Yes	No	1/30/2016	JA001589
175	Ben	Salango	Yes	No	1/29/2016	JA001590
176	Tera	Salango	Yes	No	1/29/2016	JA001591
177	Lawrence	Schultz	Yes	No	1/29/2016	JA001592
178	Benjamin	Sheridan	Yes	No	1/29/2016	JA001593
179	Donald	Shoemaker	Yes	No	1/30/2016	JA001594
180	Lonnie	Simmons	Yes	No	1/29/2016	JA001595
181	Lynnett S.	Simon	Yes	No	1/29/2016	JA001596
182	Cheryl	Simpson	Yes	No	1/29/2016	JA001597
183	John	Skinner	Yes	No	1/29/2016	JA001600
184	Stephen	Skinner	Yes	No	1/29/2016	JA001601
185	Donna	Smeltzer	Yes	No	1/30/2016	JA001604
186	Lisa	Spencer	Yes	No	1/30/2016	JA001606
187	Bruse	Sperow	Yes	No	1/30/2016	JA001607
188	Ruth	Sperow	Yes	No	1/30/2016	JA001608
189	Ryan	Stewart	Yes	No	1/30/2016	JA001609
190	Paul	Stroebel	Yes	No	1/30/2016	JA001610
191	Robert	Taylor	Yes	No	1/29/2016	JA001611
192	William	Tiano	No	Yes	1/30/2016	JA001383
193	Sydney	Whittington	No	Yes	1/29/2016	JA001390
194	Kenneth	Bannon	No	Yes	1/30/2016	JA001397
195	John	Barrett	Yes	Yes	1/30/2016	JA001398
196	Larry	Duffield	No	Yes	1/29/2016	JA001412
197	Mark	Garren	No	Yes	1/29/2016	JA001422
198	Chad	Lovejoy	No	Yes	1/29/2016	JA001436
199	Sara	Lovejoy	No	Yes	1/30/2016	JA001437
					1/30/2016	JA001616
					1/30/2016	JA001625
					1/29/2016	JA001635
					1/30/2016	JA001633
					1/30/2016	JA001629
					1/29/2016	JA001633
					1/29/2016	JA001639
					1/29/2016	JA001637
					1/30/2016	JA001637

Benjamin v. Walker, et al.

Case No. 16-0228

200	James	McQueen	Yes	Yes	1/30/2016	JA001442	1/30/2016	JA001639
201	Tony	O'Diell	Yes	Yes	1/29/2016	JA001451	1/29/2016	JA001622
202	Josh	Pearson	No	No	1/30/2016	JA001452	1/30/2016	JA001634
203	John	Pelfry	No	Yes	1/30/2016	JA001453	1/30/2016	JA001638
204	Tom	Peyton	No	No	1/29/2016	JA001456	1/29/2016	JA001632
205	Melissa	Downs	No	No	1/30/2016	JA001475	1/30/2016	JA001633
206	Barbara	Fish	Yes	Yes	1/30/2016	JA001477	1/30/2016	JA001629
207	Jeffrey	Kessler	No	No	1/30/2016	JA001485	1/30/2016	JA001635
208	Samuel	Madia	No	Yes	1/30/2016	JA001487	1/30/2016	JA001634
209	Laura	Pollard	No	No	1/30/2016	JA001501	No date	JA001639
210	Alex	Shook	No	Yes	1/30/2016	JA001510	1/30/2016	JA001636
211	Kristin	Wear	No	No	1/30/2016	JA001519	1/30/2016	JA001636
212	Jordin	Wilcher	Yes	Yes	1/30/2016	JA001520	1/30/2016	JA001636
213	Scott	Windom	No	No	1/30/2016	JA001521	1/30/2016	JA001626
214	Ron	Zavolta	No	Yes	1/30/2016	JA001525	1/30/2016	JA001626
215	Mary	Bowers	Yes	Yes	1/30/2016	JA001535	1/30/2016	JA001620
216	Virginia	Carper	Yes	Yes	1/30/2016	JA001543	1/30/2016	JA001620
217	JP	Corley	No	Yes	1/30/2016	JA001546	1/30/2016	JA001621
218	Sarah	Corley	Yes	Yes	1/30/2016	JA001547	1/30/2016	JA001620
219	Paul	Davis	No	No	1/29/2016	JA001549	1/29/2016	JA001630
220	Shawn	Gillispie	Yes	Yes	1/29/2016	JA001556	1/29/2016	JA001638
221	Matthew	Martin	Yes	Yes	1/30/2016	JA001575	1/30/2016	JA001621
222	Sean	McGinely	No	No	1/29/2016	JA001576	1/29/2016	JA001632
223	Paula	Moore	Yes	Yes	1/30/2016	JA001581	1/30/2016	JA001621
224	Carl J.	Roncaglione	Yes	Yes	1/30/2016	JA001586	1/30/2016	JA001622
225	John	Skaggs	Yes	Yes	1/30/2016	JA001598	1/30/2016	JA001623
226	Andrew	Skinner	Yes	Yes	1/29/2016	JA001599	No date	JA001624
227	Kathy	Skinner	No	Yes	1/29/2016	JA001602	1/29/2016	JA001629
228	Susan	Skinner	Yes	Yes	1/30/2016	JA001603	1/30/2016	JA001623
229	Douglas	Spencer	No	No	1/29/2016	JA001605	1/29/2016	JA001634