

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

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**Docket No. 12-0619**

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**ANTHONY J. VELTRI, RESPONDENT BELOW,**

Petitioner,

v.

**DIANE PARKER, IN HER CAPACITY AS CHAIR  
OF THE DEMOCRATIC EXECUTIVE COMMITTEE  
OF TAYLOR COUNTY, WEST VIRGINIA, AND  
JOHN MICHAEL WITHERS, PETITIONERS BELOW,**

Respondents.

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**BRIEF OF PETITIONER ANTHONY J. VELTRI**

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**I. ASSIGNMENTS OF ERROR**

A. The Circuit Court erred in holding that mandamus was the appropriate post-election procedure to determine a sworn official's qualifications. West Virginia law specifically forbids the use of mandamus for resolving the eligibility issues presented, and also identifies a proper alternative procedure that the Circuit Court wrongly avoided.

B. The Circuit Court wrongly relied on a single inapposite case, *Burkhart v. Sine*, 200 W. Va. 328, 489 S.E.2d 485 (1997), to justify its post-election mandamus removal of a sworn commissioner and installation of the losing candidate. *Burkhart* does not support these unprecedented actions. The Circuit Court also erroneously relied on *Burkhart* to circumvent well-settled West Virginia law barring the losing candidate from taking the seat if the winning candidate is later disqualified.

C. The Circuit Court erred by placing the burden of proof with Petitioner Anthony J. Veltri ("Commissioner Veltri") to show that redistricting actions were procedurally proper. West Virginia law, however, strongly presumes that public officials' actions are valid unless proven otherwise by clear and convincing evidence **by the challenging party** and only if society's interest in avoiding frivolous litigation over technicalities is outweighed.

D. The Circuit Court wrongly concluded that laches did not apply because it felt that Respondents Diane Parker and John Michael Withers ("Respondents") "vigorously pursued [their] rights ... as expeditiously as they could." The record does not support this conclusion.

E. The Circuit Court erred by not awarding Commissioner Veltri's attorneys' fees and costs.

F. The Circuit Court erred by refusing to consider pertinent redistricting evidence bearing on the issue of Commissioner Veltri's residency.

## II. STATEMENT OF THE CASE

Commissioner Veltri, a lifelong resident of Taylor County, West Virginia, has lived in the same home since 1944. Appendix Record (“AR”) 169. As early as February 1960, his voter’s registration records indicated that this residence is within Precinct 6 (Tygart District). *Id.*, AR 173. Beginning in the late 1960’s, Commissioner Veltri has been elected to various offices, including County Commissioner, which is the office he has held since 1992. AR 169-71. When filing his candidacy papers before every election, Taylor County officials verified Commissioner Veltri’s district by checking his stated address and precinct against the information contained in his voter’s registration records. AR 170. This process invariably resulted in Commissioner Veltri filing for candidacy as a representative of the Tygart District before each election, as public officials always verified and instructed him to do. *Id.*

The Taylor County Commission enacted four redistricting actions from December 1983 through December 1984. The first, which was proposed in November 1983 and adopted on December 30, 1983, moved a portion of Precinct 6 of Tygart District in which Commissioner Veltri resided to Precinct 7 of Western District. AR 106-10. The second action occurred on April 17, 1984, when the Commission reversed the December 1983 action because it “created an illegal precinct.” AR 113-14. This second action moved Commissioner Veltri’s residence back to Tygart District. Unlike in the minutes for the first action, the Clerk indicated that “[t]his [second] change is to be posted on the Court House Door.” *Compare* AR 106-10 *with* AR 113-14. Then, on April 24, 1984, the Commission discovered that the second action “had created a serious problem,” and thereafter unanimously moved to withdraw it on April 25, 1984. AR 115-16. This third action was intended to effectively reinstate the December 1983 order, which would again move Commissioner Veltri’s residence back to the Western District. AR 116.

Finally, on December 17, 1984, the Commission unanimously moved to “transfer voters moved from Precinct 6 to Precinct 7 back to their original Precinct [so that] Precinct 6 will remain in Tygart District.” AR 117. Commissioner Veltri’s residence was within the portion returned to the Tygart District. It is undisputed that Commissioner Veltri was not serving on the Commission during this time.

Presuming compliance with procedural requirements, the preceding redistricting actions and their effects on Commissioner Veltri’s residency<sup>1</sup> can most easily be seen in chart form:

<b>DATE/TIME PERIOD</b>	<b>VELTRI’S RESIDENCY</b>
Before December 30, 1983	Tygart District
December 30, 1983	Moves to Western District
April 17, 1984	Moves back to Tygart District
April 25, 1984	Moves to Western District
December 17, 1984 and since	Moves back to Tygart District

These redistricting events were generally summarized in the Commission’s meeting minutes, which are public records, and made headlines in the local newspaper. *The Mountain Statesman’s* front page headline on April 28, 1984 was “Precinct six will remain illegal.” AR 346. Respondent Withers was closely monitoring the validity of the Commission’s actions at the time, as he reportedly “asked [the Commission] if a candidate or voter can have precinct six votes thrown out since the district is illegal ... ‘I get to vote but I’m not sure my vote will count.’” *Id.*, AR 316. *The Mountain Statesman* later reported on March 6, 1986 that a citizen questioned the procedural validity of the December 1984 redistricting action. AR 347. Commissioner Don Shaffer reportedly admitted that the action could have been handled in a better fashion, but stressed that all of the affected voters were informed of the change. *Id.*

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<sup>1</sup> Remember that from 1944 to the present, Commissioner Veltri has lived at the same physical residence. AR 169.

The effects of the final two 1984 redistricting actions were reflected in Commissioner Veltri's voter's registration records. Clerk Fowler noted on May 4, 1984 that Commissioner Veltri's residence was in Precinct 7 (Western District), and then on December 17, 1984, she noted that his residence was in Precinct 6 (Tygart District). AR 174. Commissioner and Mrs. Veltri's voter's cards also reflect the 1984 return to the Tygart District. AR 175. So far as could be discovered, following the March 6, 1986 newspaper report, the procedural validity of the redistricting actions in the 1983-84 period went unquestioned and unchallenged for more than twenty five years until the Respondents filed this lawsuit on March 16, 2011.

In early 1986, Commissioner Veltri filed his candidacy for the Taylor County Board of Education. AR 170. Following residency verification procedures, public officials told Commissioner Veltri that he resided within Tygart District. *Id.* Accordingly, Commissioner Veltri appeared on the ballot and won as the Tygart District representative. *Id.*, AR 176. Meanwhile, Respondent Withers was elected as the Taylor County Commissioner from Tygart District in November 1986. AR 414. Following residency verification procedures, Commissioner Veltri filed his candidacy for Taylor County Commissioner in 1992, 1998, and 2004, and won all of these elections as the Tygart District representative. AR 170-71.

Prior to the 2008 election for the Western District seat, Respondent Parker filed a mandamus petition seeking to remove candidate Tansill from the ballot. AR 323-25. Consistent with the residency information contained in Commissioner Veltri's records, Respondent Parker represented to the Circuit Court of Taylor County that Commissioner Veltri was "the current County Commissioner serving from the Tygart District ...." AR 324. The Circuit Court agreed, finding as a fact that Commissioner Veltri resided in and represented the Tygart District in its December 2008 Order removing candidate Tansill. AR 280. As a result of Respondent Parker's

2008 pre-election lawsuit, David Gobel was installed as the Commissioner from the Western District, which is the position he holds today. AR 309.

At the 2010 election for the Tygart District seat, Commissioner Veltri received 2,797 votes (56%) and Respondent Withers received 2,217 votes (44%). AR 171, 177-78. After the Taylor County Commission certified these results, the Honorable Alan D. Moats administered the oath of office to Commissioner Veltri on December 28, 2010. AR 179.

More than four months after the 2010 election, the Respondents filed for mandamus seeking to disqualify and remove Commissioner Veltri from office. AR 3-8. Contrary to Respondent Parker's allegation in her September 2008 pre-election mandamus petition and the Circuit Court's December 2008 finding of fact, that Commissioner Veltri resides within Tygart District, the Respondents now claim that Commissioner Veltri resides in Western District. AR 5. Following discovery, the factual crux of their claim is that the December 1983 redistricting action met statutory procedural redistricting requirements, but the following redistricting actions in 1984 were procedurally improper. AR 96-97. Consequently, the Respondents contend that Commissioner Veltri's residence was never **properly** moved back into Tygart District and is therefore still in the Western District. AR 98-99. They argue that strict compliance with the West Virginia Constitution and Code, which prevent two commissioners from simultaneously serving from the same district, requires Commissioner Veltri's removal because Commissioner Gobel is already serving in Western District. AR 94-95, 268. Respondents also believe that Respondent Withers would be entitled to the seat despite losing the election. AR 6, 99-100.

Shortly after this petition was filed, Judge Moats recused himself and this Court appointed Judge Larry Starcher to preside. AR 9-10. Judge Starcher denied Commissioner Veltri's Motion to Dismiss on September 9, 2011 and allowed for discovery to proceed on the

question of Commissioner Veltri's residency. AR 75-81. Depositions were taken, documents were produced, and two rounds of summary judgment briefs were filed. *See* AR 1-2. The Respondents relied primarily on the relevant 1983-84 meeting minutes as evidence of their residency claims. AR 250 ("It is those minutes, the official record, that must be primarily relied upon."). The Circuit Court granted the Respondents' Motion for Summary Judgment on March 16, 2012 and ordered that Commissioner Veltri be removed due to procedural redistricting mistakes in 1984, and also held that Respondent Withers was entitled to the seat. AR 450-76.

Shortly before the Order was entered, Commissioner Veltri submitted a supplemental proposed order and included documentation of the County Commission's unanimous and finalized adoption of an independently-created redistricting plan on January 7, 2012. AR 445-49. Before its adoption, Commissioner Veltri notified the Circuit Court and the parties that this redistricting plan as proposed would reaffirm Commissioner Veltri's residence in the Tygart District. AR 318 n.6, 349-355. The Respondents strongly urged the Circuit Court to ignore evidence of the finalized January 2012 redistricting plan. AR 446-47. Commissioner Veltri (again) responded that the action merely reaffirmed his residence in the Tygart District, which is the central factual issue in this case. AR 449. Ultimately, the Circuit Court noted that it would not consider the evidence because "[i]t would not be consistent with good judgment to consider what might appear to be a 'current fix' to a past problem." AR 452 n.1.

Word of the Circuit Court's Order spread quickly, and with the possibility of the Order's execution the next morning before counsel had even received it, counsel for Commissioner Veltri verbally moved for a stay. AR 477-78. The Circuit Court granted the stay to allow Commissioner Veltri to prepare the Notice of Appeal and to file any post-judgment motions if he so desired. AR 479-80. Commissioner Veltri filed a Motion to Alter or Amend on March 28,

2012 and attached the documentary evidence of the finalized January 2012 redistricting action. AR 481-507. Judge Starcher also denied this Motion on April 16, 2012, and this appeal followed. AR 538-42.

### **III. SUMMARY OF ARGUMENT**

The Circuit Court erroneously granted mandamus because the first prerequisite, that the petitioner has a clear and enforceable right at the time of filing, was not met. Instead, and in violation of West Virginia law, the mandamus proceeding itself was used to determine the Respondents' rights and to try the ultimate title to Commissioner Veltri's office. The Circuit Court also wrongly avoided an alternative procedure which presented available and proper means of relief. Therefore, the third mandamus prerequisite, the absence of another adequate remedy, was not satisfied either.

The removal of a sworn commissioner and the installation of the losing candidate via post-election mandamus is also unprecedented. The Circuit Court's sole reliance on *Burkhart* is totally misplaced because this Court stressed that it was a pre-election challenge between two candidates, not a post-election challenge between a defeated candidate and a sworn official as in this case. Moreover, the constitutional provision cited has never been interpreted as a standalone and automatic removal provision in the post-election mandamus context, nor would its plain language support such an interpretation. Even if it did, and even if this Court finds that procedural mistakes from the early 1980's over which he had no control render Commissioner Veltri constitutionally ineligible, this Court has previously excused "technical impediments" to constitutional residency compliance where, as here, the evils sought to be prevented by the Constitution were not presented. Alternatively, if this Court affirms the exaltation of form over substance and removes Commissioner Veltri, the majority rule barring runner-up entitlement to

the seat would apply. Moreover, if Commissioner Veltri is to be removed, the statutory appointment procedure should be followed to fill the vacancy, which would also preclude Respondent Withers from taking the seat.

The Circuit Court's ruling regarding the burden of proof also undermines the sound policy of discouraging frivolous litigation over technicalities. This policy gives rise to the strong presumption that public officials' actions are procedurally proper. Commissioner Veltri, as the non-challenging party, does not have to produce evidence that the 1983-84 redistricting process was procedurally valid as the Circuit Court wrongly concluded. In any event, there is no clear and convincing evidence to support the Circuit Court's finding that Commissioner Veltri resides in Western District. Consequently, the Respondents did not satisfy their burden of proof.

Laches also prohibits their procedural challenge to the 1984 redistricting actions because the evidence upon which the Respondents primarily relied was contained in public and well-known sources for decades. Their own testimonies make clear that the Respondents have no valid excuse for their unreasonable delay which has greatly prejudiced Commissioner Veltri. West Virginia law also prohibits Respondent Parker from representing that Commissioner Veltri resides in Tygart District in September 2008 and then representing not even three years later to the very same court that Commissioner Veltri resides in Western District (in the same home).

If Commissioner Veltri prevails in this action, he should either be indemnified or be awarded his fees and costs for equitable and public policy reasons. No elected official should be expected to foot the bill to vicariously defend a former Commission's procedural actions dating back nearly three decades in order to retain his or her seat against the losing candidate.

Finally, even if all of Commissioner Veltri's other arguments fail, this Court should take the January 2012 redistricting evidence into account when deciding whether it is still necessary

to disenfranchise the voters of Taylor County. If in fact there was an unknown and technical residency impediment that has existed since 1984, and if that impediment is not excused under West Virginia law, then this Court could still fashion a prospective remedy by finding that the January 2012 redistricting action effectively cured the constitutional impediment.

**IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

This case presents issues proper for oral argument and consideration under Rule 20 of the West Virginia Rules of Appellate Procedure. The issue of whether the pre-election mandamus rules in *Burkhart* should be expanded to encompass post-election mandamus challenges is one of first impression. Moreover, fundamental issues of public importance are presented, such as whether candidates must second-guess residency representations given to them by public officials and whether post-election eligibility challenges turning on decades old procedural redistricting technicalities are to be permitted. This case also involves the constitutional question of whether art. IX, § 10 may properly be interpreted and applied as a standalone removal provision of a sworn county commissioner in the post-election mandamus context. For these reasons, oral argument under Rule 20 and resolution by this Court’s full opinion is proper.

**V. ARGUMENT**

**A. STANDARDS OF DECISION AND REVIEW**

Mandamus is “a drastic remedy to be invoked only in extraordinary situations.” *McComas v. Bd. of Educ. of Fayette Cnty.*, 197 W. Va. 188, 192, 475 S.E.2d 280, 284 (1996). “The standard of appellate review of a circuit court’s order granting relief through the extraordinary writ of mandamus is de novo.” Syl. Pt. 1, *Staten v. Dean*, 195 W. Va. 57, 464 S.E.2d 576 (1995). The prerequisites for mandamus are set forth in Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969): “A writ of mandamus will

not issue unless three elements co-exist-(1) a clear right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.”

This Court also reviews the Circuit Court’s interpretations of constitutional and statutory provisions under a de novo standard. *Phillip Leon M. v. Greenbrier Cnty. Bd. of Educ.*, 199 W. Va. 400, 404, 484 S.E.2d 909, 913 (1996). The Circuit Court’s findings of fact are generally reviewed for clear error, but “ostensible ‘findings of fact,’ which entail the application of law or constitute legal judgments which transcend ordinary factual determinations, must be reviewed *de novo*.” *State ex rel. Cooper v. Caperton*, 196 W.Va. 208, 213, 470 S.E. 2d 162, 167 (1996).

Importantly, as Commissioner Veltri’s eligibility is at the heart of this case, this Court should be guided by the longstanding principle that the right to hold office is the general rule and ineligibility the exception. Syl. Pt. 2, *Isaacs v. Bd. of Ballot Comm’rs*, 122 W. Va. 703, 12 SE.2d 510 (1940); *State ex rel. Thomas v. Wysong*, 125 W. Va. 369, \_\_\_\_, 24 S.E.2d 463, 467-68 (1943). Accordingly, election provisions are interpreted liberally to favor eligibility. *MacCorkle v. Hechler*, 183 W. Va. 105, 106, 394 S.E.2d 89, 90 (1990) (“[A] liberal application of any statute should be made so as to afford the citizens of this State ... an opportunity to vote for the persons of their choice.”) (quoting *State ex rel. Lockhart v. Rogers*, 134 W. Va. 470, 477, 61 S.E.2d 258, 262 (1950)); *State ex rel. Sowards v. Cnty. Comm’n of Lincoln Cnty.*, 196 W. Va. 739, 749-50, 474 S.E.2d 919, 929-30 (1996).

Lastly, the applicable standard of review of the Circuit Court’s Order denying Commissioner Veltri’s Rule 59(e) motion is the same standard of review which applies to the underlying judgment. *Mey v. Pep Boys-Manny, Moe & Jack*, 228 W. Va. 48, \_\_\_\_, 717 S.E.2d 235, 243 (2011). The underlying judgment here was the Circuit Court’s Order granting summary

judgment and mandamus, both of which are reviewed de novo. Syl. Pt. 1, *Staten*; Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). Thus, a de novo standard will also apply in reviewing the Circuit Court’s denial of Commissioner Veltri’s Rule 59(e) motion.

**B. THE CIRCUIT COURT IMPROPERLY GRANTED MANDAMUS**

*1. Respondents had no Clear Right to the Relief Sought at the Time Suit was Filed.*

Contrary to the Circuit Court’s conclusion that mandamus was proper, West Virginia law expressly prohibits the post-election use of mandamus to challenge the electoral qualifications of another or to try the ultimate title to office. To illustrate, the petitioner in *State ex rel. Porter v. Bivens*, 151 W. Va. 665, 155 S.E.2d 827 (1967) was elected as county commissioner, the results were certified, and he took the oath of office. However, the defeated incumbent refused to leave and thereafter filed an election contest. While the contest was pending, the elected commissioner filed for mandamus to compel the incumbent holdover to surrender the office. The holdover responded to the mandamus action by injecting allegations challenging the petitioner’s eligibility in an attempt to “convert the present proceeding, in which is involved only the prima facie legal right of the petitioner to be admitted to the office which he seeks, not his right to hold it permanently, into a trial of the ultimate title of the petitioner to that office[.]” *Id.* at 670-72, 155 S.E.2d at 831-32.

This Court rejected the holdover’s attempt to use mandamus to try the title to office, stating that “[t]hough he may challenge the eligibility and the qualification of the petitioner to hold the office in question in the pending election contest or other proper proceeding to try the title to the office or to remove the petitioner from it, he may not ... do so in this mandamus proceeding.” *Id.* at 672, 155 S.E.2d at 832. This Court granted mandamus because the petitioner had a clear and enforceable right to relief by virtue of winning a certified election and taking the

oath of office, and it also reasoned that to deny mandamus on those facts “would necessarily thwart the will of the electorate, the majority of whom have voted for and elected the petitioner .... This Court will not permit or sanction any such action.” *Id.* at 680, 155 S.E.2d at 835.

Consistent with *Porter*, this Court later held, “In that Mandamus was never intended to **determine** a right, but only to **enforce** a right, evidence cannot be taken and proof cannot be made in this Court or in a circuit court of this State which would permit, in the first instance, the trial of an election contest by the use of the writ of Mandamus.” Syl. Pt. 3, *State ex rel. Booth v. Bd. of Ballot Comm’rs of Mingo Cnty.*, 156 W. Va. 657, 196 S.E.2d 299 (1972) (emphasis added). In *Booth*, the petitioner filed for mandamus and sought to develop facts to support a fraud claim, believing that this would result in his name being placed on the ballot following the removal of his opponent’s name. *Id.* at 663, 196 S.E.2d at 305. After surveying several cases with varying views on the scope of mandamus, this Court denied mandamus relief and reasoned:

No case, however, discovered by the writer of this opinion, has enlarged the scope of the writ of Mandamus to the extent that it directly, cognitively and expressly permitted the writ to be used as a trial, weighing evidence and making factual determinations and superimposing thereon conclusions of law solving a contest by the opposing persons claiming candidacy to an office.

*Id.* at 670, 196 S.E.2d at 308-09.

The rule against the use of mandamus to try the title to office coincides with other limits relating to the first mandamus prerequisite: “Petitioners in mandamus must have a clear legal right to the relief sought therein and **such right cannot be established in the proceeding itself[,]**” but rather, “**must exist when the proceeding is instituted.**” Syl. Pt. 1, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (emphasis added); Syl. Pt. 3, *Traverse Corp. v. Latimer*, 157 W. Va. 855, 205 S.E.2d 133 (1974) (emphasis added) (quoting Syl. Pt. 2, *State ex rel. Jarrell v. Walker*, 145 W. Va. 815, 117 S.E.2d 509 (1960)). Thus, these

holdings show that there is a dispositive difference between using mandamus to enforce an already clear right (permitted) versus gathering and weighing evidence to determine ultimate title to the office in the proceeding itself (prohibited).

In this case and in violation of the foregoing law, Judge Starcher permitted the use of mandamus to try the title to Commissioner Veltri's office in the first instance. AR 76-77, 462. Unlike in *Porter*, where the petitioner's legal right was clear at the time of filing, Commissioner Veltri was the party here who won the certified election and took the oath of office long before this suit was filed. Accordingly, Judge Starcher's grant of mandamus following months of discovery flies in the face of this Court's holding that "[a] certificate of election is conclusive as to the result of the election until set aside or vacated in some manner authorized by law on direct attack and is **not subject to collateral proceedings by Mandamus.**" Syl. Pt. 11, *Booth* (emphasis added). Moreover, this Court in *Porter* granted mandamus to **prevent** the thwarting of the will of the electorate. By sharp contrast, the Circuit Court did the opposite by removing the people's chosen representative since 1992 and further denigrated their constitutional voting rights by installing the candidate they previously rejected by a double digit margin. AR 476. This complete disenfranchisement of the electorate should not be sanctioned.

In addition, in the same way as the *Booth* petitioner, the Respondents sought to use this mandamus proceeding to develop facts that they believed would disqualify Commissioner Veltri. In opposing Commissioner Veltri's Motion to Dismiss, the Respondents argued that the "circumstances of this particular case make such discovery and the collection of sworn depositions critically important[,] and that proceeding "without a period of discovery and sworn testimony [would] severely restrict the [Respondents] from preparing all of the evidence ...." AR 47. Their own arguments show that the Respondents had no clear and enforceable right

when they filed suit, as West Virginia law requires before mandamus will lie. It is axiomatic that if their right was clear when they filed suit, then there would have been no need for the “critically important” discovery they demanded.

The chronology of this case also confirms that the Respondents lacked a clear right at the time of filing. At the Respondents’ insistence and at great expense: depositions were taken, various minutes and other documents were produced, and two rounds of summary judgment briefs were filed. AR 1-2. After proposed findings of fact and conclusions of law were submitted, and exactly one year after suit was filed, the Circuit Court determined in the first instance that decades old procedural mistakes disqualified Commissioner Veltri. AR 450-76. This progression proves that the order in *Booth* was violated: “[E]vidence cannot be taken and proof cannot be made in this Court or in a circuit court of this State which would permit, in the first instance, the trial of an election contest by the use of the writ of Mandamus.” Syl. Pt. 3.

2. *The Circuit Court Wrongly Avoided an Available and Proper Alternative Procedure to Try the Title to Office.*

The Circuit Court also erred by ruling that the third mandamus prerequisite, the absence of another adequate remedy, was satisfied. AR 77, 462. The case law discussed in the preceding subsection, in prohibiting mandamus to try the title to office, naturally sets forth the “proper” alternative procedures:

[T]he pending election contest [codified in W. Va. Code § 3-7-6 and 3-7-7] ... is a **proper** proceeding to try the ultimate title of the petitioner to the office in question and his eligibility and qualification to continue to hold and occupy such office. ... Other proceedings in which the question of the ultimate title to and the eligibility and the qualification of the petitioner to hold and continue to occupy the office of commissioner of the county court are, **of course**, a removal proceeding under [W. Va. Code § 6-6-7], in which ... the eligibility and qualification of the petitioner may be summarily determined; a quo warranto proceeding which may be prosecuted by the attorney general or the prosecuting attorney of the county; and an information in the nature of a writ of quo warranto[.]

*Porter*, 151 W. Va. at 679-80, 155 S.E.2d at 835-36 (emphasis added); *See also State ex rel. Cline v. Hatfield*, 145 W. Va. 611, 613, 116 S.E.2d 703, 705 (1960) (“The title to public office should not be adjudicated upon application for mandamus. The proper remedies ... are a *quo warranto* proceeding, a proceeding upon an information in the nature of a writ of *quo warranto*, or an election contest.”) (citations omitted). This Court in *Booth* also held that the petitioner’s attempted proof of fraud “**must** be adduced before and determined by an election contest court as mandated by the West Virginia Constitution ... and the statutes of this State, Chapter 3 of the West Virginia Code ... or through Quo warranto or proceedings in the nature of Quo warranto” instead of by mandamus. 156 W. Va. at 676, 196 S.E.2d at 311 (emphasis added).

The Circuit Court improperly reasoned that a statutory removal proceeding was not available here solely because the Respondents’ removal request was not based on claims of misconduct or malfeasance. AR 76. However, apart from the explicit instructions in the case law, the statute itself makes clear that removal proceedings are in no way limited to these situations. West Virginia Code § 6-6-7 specifies that “[a]ny person holding any county ... office, may be removed ... for official misconduct, malfeasance in office, incompetence, neglect of duty or gross immorality **or for any of the causes or on any of the grounds provided by any other statute.**” (emphasis added). Despite this Court’s repeated instructions and the statute’s plain language, the Circuit Court concluded that the statutory removal proceeding was unavailable at the onset of this case. AR 76.

On-point precedent further contradicts the Circuit Court’s reasoning, that W. Va. Code § 6-6-7 is only available if the removal action is based on allegations of misconduct or malfeasance. For example, the plaintiffs in *Bevins v. Blackburn*, 142 W. Va. 564, 97 S.E.2d 46 (1957) sought to remove the defendant from the office of Councilman for the Third Ward

because they claimed he resided in another ward. Thus, the plaintiffs' removal action, exactly as the Respondents' here, focused exclusively on the satisfaction of statutory residency requirements. After analyzing the evidence, this Court found that the defendant was unqualified for office and remanded the case with the instruction that he be removed pursuant to W. Va. Code § 6-6-7. *Id.* at 575, 97 S.E.2d at 55. Therefore, as *Bevins* proves, the fact that the Respondents' removal request turns on residency issues instead of on misconduct does not mean that W. Va. Code § 6-6-7 is unavailable as the proper alternative to mandamus.

In sum, the Respondents' alleged rights were not clear when they filed suit, nor are they clear now. The Circuit Court also wrongly evaded an alternative procedure which this Court has repeatedly identified as proper for trying the title to office. Thus, this case should have been dismissed at the onset because at least two of the three mandamus prerequisites were not met.

3. *The Pre-Election Exception to the Rule Barring the Use of Mandamus to Try the Title to Office, and its Underlying Policies, do not Apply.*

As demonstrated above, West Virginia law prohibits the use of mandamus to determine qualifications for office. However, this Court has recognized a narrow pre-election exception. After reiterating its "firm belief that 'election Mandamus' may not be employed to try title to contested political offices," this Court in *State ex rel. Booth v. Bd. of Ballot Comm'rs of Mingo Cnty.* noted that "with the possible exception that we must recognize Mandamus has been used to find, **in advance of the election**, the disqualification of a particular candidate by reason of his pre-existing ineligibility." 156 W.Va. 657, 677, 106 S.E.2d 299, 312 (1972) (emphasis added). This Court also highlighted the policy considerations of pre-election mandamus: "Because there is an important public policy interest in determining the qualifications **in advance of an election**, this Court does not hold an election mandamus proceeding to the same degree of procedural rigor as an ordinary mandamus case." Syl. Pt. 3, *State ex rel. Sandy v. Johnson*, 212 W. Va. 343,

571 S.E.2d 333 (2002) (quoting Syl. Pt. 2, *State ex rel. Bromelow v. Daniel*, 163 W. Va. 532, 258 S.E.2d 119 (1979)) (emphasis added).

Critically, however, no case discovered in West Virginia or anywhere else has ever sanctioned the use of a post-election mandamus proceeding to try the ultimate title to office. This is not surprising in light of this Court's recognition of the sound public policies which strongly caution against expansion to the post-election context:

[T]he expansion of election mandamus in the last twenty years has been for the purpose of arresting election controversies at an **early stage** to provide **swift resolution** before both the candidates and the State or municipalities have incurred expense. **Once an election has been held, however, sound public policy dictates that newly elected officials not be vexed by continuing lawsuits;** consequently, the reasons which militate in favor of liberal access to the courts in election matters through election mandamus **before an election ... do not apply after the election has been held** with regard to general matters which could have been raised before.

*Marra v. Zink*, 163 W. Va. 400, 401-02, 256 S.E.2d 581, 583 (1979) (emphasis added).

The important pre-election/post-election distinction that has long been embedded in West Virginia law was entirely lost on the Circuit Court. Perhaps the most conspicuous of the Circuit Court's several errors was its reliance on one pre-election mandamus case, *Burkhart v. Sine*, 200 W. Va. 328, 489 S.E.2d 485 (1997), in support of its post-election mandamus rulings. AR 465-71. The pre-election exception and its underlying policies have absolutely no application here because the Respondents challenged Commissioner Veltri's qualifications four months **after** the election. Because a drastic judicial action of stripping the electorate of its voting rights via post-election mandamus should surely be supported by on-point precedent, and because there truly is none here, the Circuit Court's unilateral expansion and tortured application of *Burkhart* to the post-election context must be rejected.

**C. THE CIRCUIT COURT'S RELIANCE ON A PRE-ELECTION MANDAMUS CASE IS UNTENABLE BECAUSE THIS MANDAMUS ACTION WAS FILED MONTHS AFTER THE ELECTION**

*1. Burkhart Lends No Support for the Removal of a Sworn Commissioner and the Installation of the Losing Candidate via Post-Election Mandamus.*

To expose the several flaws in the Circuit Court's forced application of *Burkhart* to this case, a careful examination of that opinion is worthwhile. The main characters were Commissioner Dunham, and candidates Burkhart and Strauss. Commissioner Dunham was elected in 1994 to the Berkeley County Commission from the Valley District, which is where he resided when he filed his candidacy papers. However, a redistricting plan enacted between Dunham's filing and the general election placed his residence in the Norborne District, but he still appeared on the ballot as the representative for Valley. After the election, Commissioner Dunham learned that two sitting commissioners could not reside in the same district, so he then moved from Norborne into a rental property in Valley and changed his voter registration records in hopes of correcting the residency discrepancy. *Id.* at 329-30, 489 S.E.2d at 486-87.

Later, candidates Burkhart and Strauss won the 1996 primaries to represent the Valley and Norborne Districts, respectively, in the 1996 general election. In light of questions surrounding Commissioner Dunham's residency and its inevitable impact on the 1996 election, Burkhart filed a pre-election petition requesting that either: (1) Strauss be disqualified on the theory that he could not be "elected from" Norborne District because Commissioner Dunham resided in Norborne when he was elected; or (2) that Commissioner Dunham be removed, having forfeited his seat by moving from Norborne to Valley. Pre-election litigation between Burkhart and Strauss was ongoing at the time of the 1996 general election, which Strauss won. However, this Court importantly stayed the administration of the oath of office so that it could resolve the pre-election residency dispute. *Id.* at 330-31, 489 S.E.2d at 487-88.

Critically, this Court did not remove Commissioner Dunham from office, even though it rejected his excuse of ignorance of the changed boundary lines. *Id.* at 332-33, 489 S.E.2d at 489-90. Instead, this Court concluded that he was “elected from” the district in which he resided at the time of the general election, and that due to the “aberration” of the interim redistricting action, he was “elected from” Norborne District. *Id.* at 332, 489 S.E.2d at 489. This effectively disqualified candidate Strauss, whose qualifications were challenged pre-election and who had not taken the oath of office, as the winning candidate from Norborne and paved the way for candidate Burkhart to be seated as the candidate from Valley. *Id.* at 334, 489 S.E.2d at 491.

Though this Court did not ascribe bad motives to any of the participants, it noted, “In deciding this case, we must fashion a rule that is not only fair and consistent in application, but which will also discourage possible political manipulation of the election process in the future. A rule which would permit ‘suitcase gerrymandering,’ ... would not be fair.” *Id.* at 333, 489 S.E.2d at 490. After emphasizing multiple times that the litigants were **not** contesting the election results post-election, the expressly pre-election rule this Court fashioned was that:

In a situation where a **candidate** for County Commission contests the qualifications of another **candidate pre-election** in a mandamus proceeding, the litigation is not governed by the procedure provided in W. Va. Code §§3-7-6 and 3-7-7. If one **candidate** is found to be disqualified and the other **candidate** is in all respects qualified, the qualified candidate is entitled to fill the open seat on the County Commission.

Syl. Pt. 4, *Burkhart* (emphasis added).<sup>2</sup>

In this case, the Circuit Court’s application of *Burkhart* rests entirely on the inapt analogies of Commissioner Veltri to candidate Strauss and Respondent Withers to candidate Burkhart. AR 466-69. These analogies ignore the same fact that this Court stressed several times: candidate Strauss’s qualifications were challenged **pre-election** unlike Commissioner

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<sup>2</sup> For transparent reasons, the Respondents omitted the first sentence of this syllabus point when they filed their mandamus petition more than four months after the November 2010 election. AR 6 at ¶ 16.

Veltri's. The analogies also ignore the parallel fact that, unlike candidate Strauss, Commissioner Veltri was the certified winner of the election and had already been sworn into office. Therefore, this case does not present "a situation where a **candidate** for County Commission contests the qualifications of another **candidate pre-election** in a mandamus proceeding," as in *Burkhart*. Syl. Pt. 4, in part (emphasis added). Instead, a candidate who lost the certified election, Respondent Withers, first contested the qualifications of Commissioner Veltri, an elected and sworn official, **post-election**. This is a dispositive distinction for all of the reasons discussed in the preceding subsection. Therefore, the Circuit Court's unprecedented application of the *Burkhart* rule outside of this Court's expressly defined pre-election context is untenable.

Incredibly, the Circuit Court also invented a line of reasoning in *Burkhart* to support its removal of Commissioner Veltri, claiming that Commissioner Dunham kept his Norborne District seat because "there [was] no other Commissioner from that District." AR 470. Judge Starcher reasoned that by contrast, Commissioner David Gobel is already serving from the Western District, so Commissioner Veltri could not serve in that district. *Id.* However, this Court in *Burkhart* never said that Dunham could be "elected from" Norborne District and keep his seat only because no other commissioner was there. That issue was never discussed and thus had no bearing on this Court's decision to leave Commissioner Dunham in office. The Circuit Court should not be permitted to make up and then rely upon imaginary reasoning in an inapposite case to justify the removal of a sworn official, which did not even occur in *Burkhart*.

Even if the Circuit Court's fictional distinction to *Burkhart* applied, its analysis would still be incorrect. If, as the Circuit Court found, Commissioner Veltri has technically resided in Western District since December 1983, then he obviously was "elected from" Western in 1992, 1998, 2004 and 2010 because he never moved. He therefore preceded Commissioner Gobel,

who was “elected from”<sup>3</sup> Western in 2008. The Circuit Court thus failed to consider the consequences of its residency conclusion because under its own logic, Commissioner Gobel “cannot continue to serve from the District where he resides, there being a Commissioner on the Commission from that District.” AR 470.

2. *The Circuit Court Erroneously Relied on Burkhart to Circumvent more than a Century of Case Law to Seat Respondent Withers.*

The Circuit Court’s post-election mandamus removal of a sworn official and the installation of the losing candidate is not only unprecedented, but it also goes against more than a century of West Virginia case law. The majority rule which applies in this jurisdiction is that the runner-up is **not** entitled to the seat if the winner is later determined to be ineligible:

Sound public policy dictates that public elective offices be filled by those who have received the highest number of votes cast in the election for that office, and, it is a fundamental idea in all republican forms of government that no one can be declared elected and no measure can be declared carried unless he or it receives a majority or a plurality of the legal votes cast in the election.

Votes cast for a deceased, disqualified, or ineligible person, although ineffective to elect such person to office, are not to be treated as void or thrown away but are to be counted in determining the result of the election as regards the other candidates. Accordingly, the general rule is that **the fact that a plurality or a majority of the votes are cast for an ineligible candidate at a popular election does not entitle the candidate receiving the next highest number of votes to be declared elected.** In such case the electors have failed to make a choice and the election is a nullity.

*State ex rel. Jackson v. Cnty. Court of McDowell Cnty.*, 152 W. Va. 795, 802, 166 S.E.2d 554, 558 (1969) (quoting with approval 19 C.J.S. *Elections* § 243 at 676-77) (emphasis added). Time and again, this Court has applied the majority rule in various contexts dating back as early as 1882 and as recently as five years before the *Burkhart* decision. *Dryden v. Swinburne*, 20 W. Va. 89 (1882); *State ex rel. Depue v. Matthews*, 44 W. Va. 372, 29 S.E. 994 (1898); *State ex rel.*

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<sup>3</sup> Recall that the Taylor County Circuit Court actually installed Commissioner Gobel as the winner in December 2008 as a result of Respondent Parker’s pre-election mandamus action wherein she alleged, and the Circuit Court found as a fact, that Commissioner Veltri resided in the Tygart District. AR 280, 309, 324.

*Clayton v. Neal*, 122 W.Va. 501, 11 S.E.2d 109 (1940); *Orndorff v. Potter*, 125 W. Va. 785, 25 S.E.2d 911 (1943); *Slater v. Varney*, 136 W. Va. 406, 68 S.E.2d 757 (1951); *State ex rel. Harden v. Hechler*, 187 W. Va. 670, 421 S.E.2d 53 (1992).

The Circuit Court attempted to evade the majority rule by stating that these were “somewhat ancient cases that surely have been superseded by the more recent on-the-point holdings in *Burkhart*[.]” AR 470. The Circuit Court further noted that “our Supreme Court in *Burkhart* did briefly look to [*Jackson*] stating that the focus of the Court in *Jackson* was on a contested or disputed election regarding the number of votes cast for each candidate. ... Such is not the focus in the instant case.” AR 471.

Contrary to Judge Starcher’s assertion, **all** of the cases Commissioner Veltri provided still shepardize as good law. If, as the Circuit Court declared, they were “surely superseded” by *Burkhart*, then one would expect a discussion to that effect in the opinion. There is none. The Circuit Court’s discussion of this Court’s mention of *Jackson* is also misleading. Ironically, *Jackson* was cited for the proposition that the election contest statute (W. Va. Code § 3-7-6), which the Circuit Court avoided here, applies to **post-election** disputes of a different kind at issue than in the **pre-election** *Burkhart* case. 200 W. Va. at 333-34, 489 S.E.2d at 490-91. Thus, in no way did *Burkhart* even call into question, and much less “surely supersede” the several cases applying the majority rule. Since the post-election mandamus grant of entitlement to Respondent Withers cannot be supported by *Burkhart*, the Circuit Court’s deviation from the majority rule barring the runner-up from taking the seat is indefensible.

3. *The Circuit Court Wrongly Interpreted art. IX, § 10 of the West Virginia Constitution to Require the Automatic Removal of a Sitting Commissioner.*

The Circuit Court lastly relied on a novel interpretation of the language of art. IX, § 10 of the West Virginia Constitution as “dispositive of the issue of public policy discussed in several

cases cited by [Commissioner] Veltri[.]” AR 472. The Circuit Court’s interpretation and application of this constitutional provision is both unprecedented in the post-election mandamus setting and one that favors ineligibility, which is contrary to West Virginia law. *See* p. 10, *supra*.

Art. IX, § 10 of the West Virginia Constitution reads in relevant part:

The commissioners shall be elected by the voters of the county, and hold their office for a term of six years, ... but no two of said commissioners shall be elected from the same magisterial district. If two or more persons residing in the same district shall receive the greater number of votes cast at any election, then only the one of such persons receiving the highest number shall be declared elected, and the person living in another district, who shall receive the next highest number of votes, shall be declared elected. ... The commissioners of said commissions, now in office, shall remain therein for the term for which they have been elected, unless sooner removed therefrom, in the manner prescribed by law.

By dictating who “shall be declared elected,” art. IX, § 10 envisions an eligibility determination before anyone is sworn in, like in *Burkhart*, not a post-election mandamus removal action. It is noteworthy that when the framers addressed the removal of sworn commissioners, they did not speak in terms of being “declared elected.” Instead, they expressly stated that officials “now in office, shall remain therein ... unless sooner removed therefrom, in the manner **prescribed by law**[.]” thereby referring to other statutory removal provisions (*e.g.*, W. Va. Code § 6-6-7) which were erroneously avoided here. This provision simply does not prescribe an automatic removal procedure of sworn commissioners as applied by the Circuit Court.

To the contrary, the language of art. IX, § 10 suggests that an inadvertent violation of the rule against having two commissioners from the same district would not warrant immediate removal. In adopting this provision in 1974, the framers explicitly carved out an exception that the then-sitting commissioners should “remain therein for the term for which they have been elected ....” *Id.* If the framers felt that compliance with this rule was so essential that it could never be violated for any reason, they would not have provided this exception. Moreover, the framers could have included a removal provision within art. IX, § 10 itself instead of expressly

referring to other removal provisions “prescribed by law.” These reasons underscore the inappropriateness of the Circuit Court’s interpretation as requiring the automatic and unavoidable post-election removal of a sworn commissioner. At the very least, the alternative interpretation Commissioner Veltri advances favors eligibility as West Virginia law requires.

It must also be noted that **none** of the cases cited by the Circuit Court applied this constitutional provision in the post-election mandamus context to remove a sitting commissioner.<sup>4</sup> Therefore, Judge Starcher entered uncharted legal territory with his unique, post-election application of art. IX, § 10 as a standalone removal provision.

Even if this unprecedented interpretation of art. IX, § 10 is upheld, West Virginia case law contradicts the Circuit Court’s assertion that a strict adherence to art. IX, § 10 and Commissioner Veltri’s removal “cannot be avoided.” For example, in *Kincaid v. Mangum*, recognizing “that chaos would result” otherwise, this Court held that even though the Legislature had violated the Constitution by using an omnibus bill to promulgate legislative rules, it would apply its holding prospectively and not void all of the regulations improperly enacted. 189 W. Va. 408, 412-16, 432 S.E.2d 74, 82-86 (1993). In *Winkler v. W. Va. Sch. Bldg. Auth.*, this Court

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<sup>4</sup> In addition to *Burkhart*, the Circuit Court also referenced the Final Order from Evidentiary Hearing in *Parker, et al. v. Reneman, et al.*, Civ. Action No. 08-C-70 (Cir. Ct. Taylor Cnty. Dec. 12, 2008) in a **pre-election** mandamus action and quoted a lengthy passage from the Order which cites *Burkhart* and its application of the constitutional provision at issue. AR 468 n.10. It also referenced this Court’s recent ruling in *State ex rel. Boley v. Tennant*, 228 W. Va. 812, 724 S.E.2d 783 (2012) to “reiterate[] the importance of the constitutional provisions regarding residency.” *Id.* at n.11. Once again, *Boley* was a **pre-election** mandamus decision and therefore, just like *Burkhart* and *Parker*, does nothing to legitimize or support the Circuit Court’s Oder in this post-election mandamus case.

Also, after this appeal was filed, this Court released a three-page memorandum decision in *Buckner v. Vinciguerra*, Case No. 11-0707 (May 25, 2012), wherein *Burkhart* and its application of art. IX, § 10 were cited solely for the proposition that “a member of the County Commission is deemed to be elected from the magisterial district in which that person resides on the day that person is elected to serve on the County Commission, that is, the date of the general election.” Though *Buckner* was not a pre-election mandamus action, the respondent immediately instituted an election contest under W. Va. Code §§ 3-7-6 and 3-7-7 before the election results were certified, unlike the Respondents here. The opinion was silent as to this issue, but counsel for the respondent in *Buckner* confirmed in a telephone conversation with counsel for Commissioner Veltri on June 7, 2012 that the winning candidate never took the oath of office, unlike Commissioner Veltri, before his qualifications were challenged and before he was declared ineligible on account of his residency. Thus, aside from being a memorandum decision with no precedential value, *Buckner* would not support the Circuit Court’s post-election mandamus Order either.

applied a prospective remedy when it found that bonds issued by the School Building Authority caused an unconstitutional indebtedness to the state. 189 W. Va. 748, 764, 434 S.E.2d 420, 436 (1993). Thus, even constitutional violations need not be remedied retroactively. The post-election reversal of the 2010 election results and the removal of a sitting, four-term commissioner due to decades old procedural mistakes would constitute a retroactive remedy.

Not only can this Court fashion prospective remedies, but it can excuse constitutional residency violations entirely under certain circumstances that are particularly relevant to this case. In *Martin v. Jones*, two serving state delegates were concerned about the effects of a recent redistricting on their constitutional eligibility to continue to serve. 186 W. Va. 684, 685, 414 S.E.2d 445, 446 (1992) The Secretary of State advised them, and this Court agreed that they would be constitutionally ineligible to run in their new districts due to the redistricting. However, this Court noted that the delegates were not seeking to engage in fraudulent candidacies, but rather, like Commissioner Veltri, were merely hopeful to continue their current laudable enterprise of public service. *Id.* at 685-86, 414 S.E.2d at 446-47. Importantly, this Court excused this “technical impediment,” stating, “Certainly the drafters never envisaged this situation where a technical impediment would prevent serving legislators from continuing to represent their own constituents. . . .” *Id.* at 686, 414 S.E.2d at 447. Moreover, this Court reasoned that to deny the delegates’ constituents the right to their continued service on those technical grounds “would be the ultimate exaltation of form over substance.” *Id.*

Much more so here, Judge Starcher’s turning back of the clock multiple decades to find a technical impediment to disenfranchise the electorate represents the ultimate exaltation of form over substance at the voters’ expense. As in *Martin*, “[n]one of the evils our *Constitution* seeks to avoid by this residency requirement ... is even vaguely suggested by the[se] facts ....” *Id.* at

685-86, 414 S.E.2d at 446-47. Therefore, this Court should again reject this ultimate exaltation of form over substance and excuse the technical impediment, if in fact there was one, and allow Commissioner Veltri to continue in his current laudable enterprise of public service.

4. *The Circuit Court Improperly Relied on Burkhart to Evade the Legislature's Mandated Method for the Filling of Vacancies.*

The Circuit Court erroneously ruled that the statutory appointment procedure for filling county commission vacancies was inapplicable. AR 466. In addition to the majority rule barring Respondent Withers from taking the seat if Commissioner Veltri must be removed, the statute would also prevent his appointment because he is not a member of Commissioner Veltri's political party. As West Virginia Code § 3-10-7 makes clear, "**Any vacancy** in the office of county commissioner ... shall be filled by the county commission of the county[.] ... Persons appointed shall be of the same political party as the officeholder vacating the office and shall continue in office until the next general election is certified[.]" (emphasis added). The Circuit Court referred to the following dicta in *Burkhart*, 200 W. Va. at 334, 489 S.E.2d at 491 to support its mistaken conclusion:

We pause here to note that as we are just now determining candidate qualifications, there is no way a vacancy could previously have been declared by the County Commission. There can be no vacancy before there is even a qualified candidate. In other words, a candidate must possess the required qualifications for an office, be lawfully elected to and assume the office, then vacate that office before a vacancy can be declared. The voters filled the open seat by voting for the only qualified candidate in the County Commission race, Burkhart.

AR 466-67. This language is readily distinguishable when read in context of the pre-election facts. At the time this Court stated "as we are just now determining candidate qualifications," candidate Burkhart, unlike the Respondents here, had already raised the qualification issue **pre-election**. This Court also stayed the oath of office to candidate Strauss until it could,

immediately following the election, resolve the qualification issue that was raised pre-election. In that different procedural context, it is easy to understand how this Court could say that “there is no way a vacancy could previously have been declared by the County Commission” because at that point, candidate Strauss had not even taken the oath of office unlike Commissioner Veltri.

By contrast, the Circuit Court’s ruling defies all reason in that it ordered that a sworn commissioner be removed from office, unlike in *Burkhart*, yet it determined that this would somehow not create a vacancy. *Burkhart* cannot support this illogical conclusion because of its distinctly different procedural context. For purposes of determining whether a vacancy exists, there is a major difference between staying the administration of the oath of office to a winning candidate as in *Burkhart*, and the removal of an already sworn official as was ordered here.

In sum, the Circuit Court’s misplaced analogies and distinctions to *Burkhart* should be rejected because it was expressly and undeniably a pre-election mandamus case wherein no sworn official was removed. Alternatively, if *Burkhart* is to be of any guidance here, the much more natural and appropriate analogy would be Commissioner Veltri to Commissioner Dunham, who notably retained his office despite the residency discrepancy.

**D. THE CIRCUIT COURT ERRONEOUSLY REVERSED THE STRONG PRESUMPTION OF VALIDITY AND INCORRECTLY PLACED THE BURDEN OF PROOF ON COMMISSIONER VELTRI**

The Respondents seek to disqualify Commissioner Veltri and obtain his seat by challenging the procedural validity of the County Commission’s redistricting actions in 1984. This Court has made it clear, however, that such frivolous litigation over technicalities is to be highly discouraged. Accordingly, certain presumptions and burdens of proof serve to promote that sound policy. For example, “The presumption that public officers discharge their duties in a regular manner is a strong presumption compelled first by experience and second by society’s

interest in avoiding frivolous litigation over technicalities.” Syl. Pt. 2, *Roe v. M & R Pipeliners, Inc.*, 157 W. Va. 611, 202 S.E.2d 816 (1973). This presumption can only be overcome by clear and convincing evidence and only if, on balance, the substantive rights of the challenging party outweigh society’s interest in avoiding frivolous litigation over technicalities. *Id.* at Syl. Pt. 3.

At issue in *Roe* was whether the clerk’s failure to attach a legally-required order of attachment to a creditor’s lis pendens affected the priority of another creditor. *Id.* at 613, 202 S.E.2d at 818. The trial court set aside the lis pendens because there was no proper order of attachment, but this Court reversed, declaring that “our law has attempted to instill public confidence that citizens will not be deprived of their property by virtue of the nonfeasance of public officers through establishing a **‘violent’ presumption that public officers discharge their duties in a regular and legal manner.**” *Id.* at 618-19, 202 S.E.2d at 821 (emphasis added). West Virginia courts must “indulge the presumption of regularity of official duties in the strongest possible form where the party seeking to challenge the presumption can demonstrate no injury to himself save the loss of advantage which would have accrued to him by virtue of the court invalidating a particular official proceeding.” *Id.* at 619-20, 202 S.E.2d at 821.

To the extent that the factual crux of this case is whether the Commission posted notice on the courthouse door and in some public place for thirty days before adopting redistricting plans<sup>5</sup> more than a quarter century ago, this case epitomizes “frivolous litigation over technicalities.” Like the non-challenging party in *Roe*, it is undisputed that Commissioner Veltri had no control over the officials’ actions at issue. Also, Respondent Withers had no greater interest in seeing that the officials satisfied the procedural requirements in 1984 than any other citizen. The only material difference between this case and *Roe* is one that strengthens the

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<sup>5</sup> As the Circuit Court emphasized, these are the only mandatory procedural redistricting requirements outlined in West Virginia Code § 7-2-2. *See* AR 463.

presumption of legality even further here. In *Roe*, it was clear that the challenging party would gain an advantage (higher priority) if the court invalidated the public official's actions. By contrast and as demonstrated above, even if there was clear and convincing evidence that Commissioner Veltri resides in Western District, both the majority rule and the statutory appointment procedure would prevent Respondent Withers from taking the seat if Commissioner Veltri were removed. Because Respondent Withers has **no** post-election mandamus entitlement right, it cannot be argued that on balance, the prejudice to his non-existent substantive right would outweigh society's compelling interest in avoiding the flood of frivolous litigation over technicalities that the Circuit Court's Order would only invite if affirmed. In other words, since Respondent Withers as the challenging party would gain **no** advantage if the 1984 proceedings at issue were invalidated, the strong presumption of validity cannot be overcome.

The Circuit Court failed to distinguish or even cite *Roe* in its one-paragraph discussion of the burden of proof, merely stating that it did "not see burden of proof as a matter of serious contention in this case." AR 472. Contrary to everything *Roe* stands for, however, it found that "[n]o evidence was provided to the court to demonstrate that the [1984 redistricting actions] complied with the statutory mandates," and concluded that "neither respondent produced any evidence – documents, minutes, or otherwise – that demonstrate that the statutory [requirements were met]." AR 457, 474. These statements demonstrate that Judge Starcher reversed the presumption of validity and shifted the burden of proof onto the non-challenging parties.

The Circuit Court also quoted only half of Commissioner Veltri's discovery response and wrongly interpreted it as an unacceptable excuse of ignorance of his true residency. AR 465-66. The Respondents wanted Commissioner Veltri to admit that the 1983-84 redistricting actions at issue placed his residence within the Western District. AR 147. Because the Respondents are

challenging the procedural validity of public officials' actions, they were apparently hopeful that Commissioner Veltri would meet their burden for them. Because Commissioner Veltri cannot perform the judicial balancing test set forth in Syllabus Point 3 of *Roe*, but benefits from the strong presumption of validity under Syllabus Point 2, his **entire** response - that he was "without sufficient information to admit or deny" because it was "unknown whether ... all requirements set forth under the West Virginia Code to legally effectuate such changes had been met" - cannot legitimately amount to an unacceptable excuse of ignorance. AR 147.

Even if Commissioner Veltri's full response could be spun in that manner, it must be remembered that the "unacceptable excuse" language in *Burkhart* was directed at Commissioner Dunham, who **retained** his seat. In the midst of this discussion, this Court warned that "[t]o be elected from one district and thereafter move in order to keep another potential candidate from running is impermissible." 200 W. Va. at 333, 489 S.E.2d at 490. Unlike Commissioner Dunham, Commissioner Veltri has lived in the same home for nearly seventy years, so the potential for suitcase gerrymandering on his part and the similar evils that the *Burkhart* and the constitutional residency rules were designed to prevent are not presented. In any event, since Commissioner Dunham's "unacceptable excuse" did not cost him his seat, the Circuit Court's reliance on this language cannot possibly justify Commissioner Veltri's removal.

Most importantly, if the *Roe* burden is shifted onto the non-challenging party, then the sound policies which require this legal mechanism will necessarily be undermined. Indeed, there are sweeping and disturbing policy implications of Judge Starcher's ruling in this regard. The Order did not specify what additional steps Commissioner Veltri should have taken to avoid being "unacceptably ignorant" of his true residency, above and beyond those he took every time

he filed his candidacy papers.<sup>6</sup> Apparently, his only sin was taking Taylor County public officials at their word when they consistently told him for decades that he resided within Tygart District. The absurd implication is that citizens must instinctively distrust the residency information conveyed to them by public officials and scour meeting minutes, maps, and other documents dating back several decades just to make sure that a former Commission posted notice on the courthouse door for thirty days prior to redistricting. Otherwise, they risk losing their elected position because one procedural misstep over which they had no control a generation earlier may **technically** place their residence in an unexpected district. This is the preposterous yet unavoidable import of the Order, which would certainly have a strong chilling effect on attracting rational citizens to run for office if adopted as the law in West Virginia.

In any event, if this Court determines that the strong presumption of validity may be rebutted even where the Respondents have no post-election mandamus entitlement rights, then it must re-evaluate the Circuit Court's residency findings *de novo*<sup>7</sup> and through the proper evidentiary lens of *Roe*. As the Respondents argued and as the Circuit Court found, the minutes are supposedly "clear" that the December 1983 redistricting (moving Commissioner Veltri to Western District) was procedurally proper but that subsequent redistricting actions (returning him to Tygart District) were procedurally improper. AR 250, 457-58 at ¶ 17, 474. However, even after emphasizing the mandatory, thirty-day posting requirements on the court house door and in some public place in W. Va. Code § 7-2-2, the Circuit Court did **not** conclude that these

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<sup>6</sup> It should also be noted that if Respondent Withers had the great misfortune of residing within the same portion of Precinct 6 at issue as Commissioner Veltri does and had he won the November 2010 election, he would have been just as disadvantaged as Commissioner Veltri because they both took the same general steps to verify in which precinct and district they resided when they were running for office. *Compare* AR 170-71 *with* AR 417.

<sup>7</sup> *See* p. 10, *supra*. Determining whether the procedural redistricting requirements outlined in W. Va. Code § 7-2-2 were satisfied during the 1983-84 redistricting process necessarily entails the application of law and constitutes a legal judgment which transcends ordinary factual determinations. Thus, a *de novo* review applies.

redistricting requirements were satisfied in December 1983. AR 463, 474 at ¶ 3.<sup>8</sup> Indeed, this conclusion is impossible because there is no evidence in the minutes, upon which the Respondents urged the Circuit Court to primarily rely, to that effect. AR 106-110, 250. Moreover, the fact that the minutes specify that notice of the second action was “to be posted on Court House Door[,]” (AR 114) where no such notation appears in the minutes for the first action, strongly suggests that these posting requirements were **not** met in December 1983. Even Respondent Withers, who extensively reviewed the minutes himself, testified that he “would not have information” on whether these requirements were satisfied in December 1983. AR 413.

Therefore, the Respondents’ factual premise crumbles because there is no evidence indicating that Commissioner Veltri’s residence was ever **properly** moved to Western District. It follows that Commissioner Veltri resides in Tygart District, as must be strongly presumed under *Roe* and as he had been told by public officials for decades.

**E. THE RESPONDENTS’ ATTEMPT TO CHALLENGE AND INVALIDATE DECADES OLD REDISTRICTING ACTIONS IS BARRED BY LACHES**

The Circuit Court wrongly rejected Commissioner Veltri’s laches defense, concluding that the Respondents “vigorously pursued [their] rights ... as expeditiously as they could.” AR 472-73. This conclusion is completely belied by the Respondents’ own testimonies, and further ignores West Virginia law holding that laches precludes parties from pursuing stale claims in reliance on information contained in well-known and public records.

Put simply, “[l]aches is the delay in the assertion of a right which works to the disadvantage of another.” Syl. Pt. 4, *Litz v. First Huntington Nat’l Bank*, 120 W. Va. 281, 197 S.E. 746 (1938) (quoting Syl. Pt. 4, *Hall v. Mortg. Corp.*, 119 W. Va. 140, 192 S.E. 145 (1937)).

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<sup>8</sup> It is also interesting that, at the same time, the Circuit Court concluded that one of the reasons why the December 1984 action was procedurally insufficient was because “[t]he minutes indicate ... no placement of information about the action on the Court House door[.]” AR 474 at ¶ 5.

Upon the defendant's showing of a prejudicial delay, the burden shifts to the plaintiff to provide a satisfactory excuse in order to rebut the presumption of assent, acquiescence, or waiver. *See* Syl. Pt. 2, *Bryant v. Groves*, 42 W. Va. 10, 24 S.E. 605 (1896); Syl. Pt. 2, *Trader v. Jarvis*, 23 W. Va. 100 (1883). Where the plaintiff challenges the legality of a matter involving the public interest, she must demonstrate that she was diligent in bringing the action or else laches applies. Syl. Pt. 3, *Maynard v. Bd. of Educ. of Wayne Cnty.*, 178 W. Va. 53, 357 S.E.2d 246 (1987). Finally, "Ignorance of facts is no excuse in equity for unreasonable delay in asserting one's right, when such ignorance is willful and results from lack of proper diligence to seek well-known sources of information." Syl. Pt. 4, *O'Neal v. Moore*, 78 W. Va. 296, 88 S.E. 1044 (1916); *see also* *Plant v. Humphries*, 66 W. Va. 88, 66 S.E. 94, 97-98 (1909); *Mace v. Guyan Collieries Corp.*, 111 W. Va. 532, 539-40, 163 S.E. 37, 40 (1931).

Contrary to Judge Starcher's conclusion, the Respondents have no valid excuse for their claimed ignorance of the 1983-84 redistricting actions they now challenge.<sup>9</sup> Because the supposedly "clear" facts in the public meeting minutes, upon which the Respondents and the Circuit Court primarily relied, were just as "clear" in late 1984, claimed ignorance of the "facts" contained therein cannot be an acceptable excuse under *O'Neal*, *Plant* and *Mace*. Moreover, the fact that the very same redistricting procedure now challenged was also questioned in March 1986 proves that, had the Respondents acted with the diligence required to avoid the bar of laches, they could have brought this challenge decades ago. AR 347.

The Respondents and the Circuit Court place great weight on the County Clerk's incomplete response to the March 2010 FOIA request to excuse their prejudicial delay. AR 31,

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<sup>9</sup> Since the sole focus of the Circuit Court's two-paragraph discussion of the laches issue is on the Respondents' actions and the timing of their discovery of the "facts," Commissioner Veltri assumes that he satisfied his initial burden of showing delay and prejudice and that the burden then shifted to the Respondents to present a satisfactory excuse. If necessary, please see AR 311-13 for Commissioner Veltri's showing as to the prejudicial delay.

47, 53-55, 356-58, 458 at ¶ 22, 472-73. This excuse is unsatisfactory for several reasons. Respondent Parker testified that she knew the records requested in her FOIA letter were public, that she was experienced in matters of public records, and that no one prevented her from looking through the requested records herself. AR 384-85. Respondent Withers also conceded the last two points in his deposition, and was a County Commissioner from 1986 to 1990. AR 419. Thus, not only was he closely monitoring the Commission's redistricting actions in 1984 (AR 316, 346), but the book of meeting minutes was a well-known and easily accessible source of information to him from 1986 to 1990. *See O'Neal*, 88 S.E. at 1048 (applying laches and noting that the petitioner "knew where the information could be gotten" and had ready access to that information because his office was right by the courthouse). Critically, when asked why she did not go to the Clerk's office to look at the records in light of her experience, Respondent Parker testified, "**I didn't want to look through years of minutes and records.** That was the reason for [the] FOIA [request] to the clerk to find out what the maps were of magisterial bounds and precinct boundaries. That was the purpose." AR 385 (emphasis added).

This Court has held, "A party must exercise diligence when seeking to challenge the legality of a matter involving a public interest[.]" Syl. Pt. 3, *Maynard*.<sup>10</sup> The Respondents - not the County Clerk or anyone else - are the ones challenging the 1984 redistricting actions at issue. Their duty of diligence cannot be outsourced merely because Respondent Parker "didn't want to look through years of minutes and records." Equity does not tolerate such "indolent ignorance" of the facts as a satisfactory excuse for delay. *See Syllabus, Plant*, 66 S.E. 94. The

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<sup>10</sup> The Circuit Court tried to explain away this syllabus point by claiming that "public employment issues are not equivalent to provisions of the *Constitution* regarding the election of the County Commissioners." AR 473 n.14. This is a false distinction and wrongly conflates the factual matters being challenged with the governing law that applies to those facts. The Respondents are not challenging the legality of constitutional provisions. Rather, like the challenged "**manner** of expenditure of public funds" in *Maynard*, 178 W.Va. at 61, 357 S.E.2d at 255, the Respondents are challenging the validity of the **manner** of the 1983-84 redistricting actions - both of which are done by public officials and both are clearly "matter[s] involving a public interest." Thus, the syllabus point applies.

Respondents' own testimonies therefore prove that they "stood idly by and allowed the rights of others to vest. [Thus, they are] bound by such evident acquiescence. It must be so in the interest of justice and the progress of human affairs." *Id.* at 97.

Even if they were diligent in challenging the 1984 redistricting procedures, Respondent Parker waived her ability to assert that Commissioner Veltri resides in the Western District by representing to the same court not even three years earlier that Commissioner Veltri resided in Tygart District. AR 323 at ¶ 4. West Virginia law will not tolerate Respondent Parker's politically-convenient about-face regarding the same fact. "Parties will not be permitted to assume successive inconsistent positions in the course of a suit or a series of suits in reference to the same fact or state of facts." Syl. Pt. 3, *E.H. v. Matin*, 189 W. Va. 102, 428 S.E.2d 523 (1993) (quoting Syl. Pt. 2, *Dillon v. Bd. of Educ.*, 171 W. Va. 631, 301 S.E.2d 588 (1983)).<sup>11</sup>

For the identical policy reasons discussed in the preceding section, this Court should apply the bar of laches to this untimely challenge, uphold the sound principles of equity discussed in the overlooked cases, and prevent the Respondents and future parties from reaping the political rewards of their decades long and willful idleness at the voters' expense.

**F. COMMISSIONER VELTRI CANNOT FAIRLY BE EXPECTED TO PERSONALLY FUND THE VICARIOUS DEFENSE OF THE 1983-84 COUNTY COMMISSION**

In light of the facts of this case, fundamental notions of justice and fairness require that Commissioner Veltri either be indemnified from public funds, or alternatively, that the Respondents pay his fees and costs if he prevails. Under current West Virginia law,

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<sup>11</sup> The Circuit Court also tried to dodge this syllabus point by creating its own exception to the rule, claiming that Respondent Parker "was not changing positions in reference to the same fact or state of facts ... but rather stating what she understood the facts to be at different points in time having later received new information." AR 473 n.13. This is an exception that finds no support in the plain language of the syllabus point. Regardless, under the laches rules applicable to this case, the standard is not when one **actually** receives "new" information that contradicts an earlier factual position taken; it is when, through the exercise of diligence in searching well-known sources, one **could have** obtained that "new" information. Her own testimony shows that Respondent Parker's ignorance was willful, and therefore, "what she understood the facts to be at different points in time" is entirely irrelevant.

Commissioner Veltri may not be indemnified from public funds “because [this] election contest does not arise from a candidate’s performance of any official duty of the public office in question.” Syl. Pt. 5, *State ex rel. Hicks v. Bailey*, 227 W. Va. 448, 711 S.E.2d 270 (2011). In order to retain his seat, however, Commissioner Veltri has had the thankless task of vicariously defending decades old “performances of official duties” of a former Commission over which he had no control. Had he been a Commissioner during that time, this case **would** arise from his own performance of his redistricting duties and indemnification would be proper under *Hicks*. However, it would be patently unfair to deny him indemnification where he has vicariously defended much earlier performances of others’ official public duties. Because the Respondents challenge the procedural validity of the former Commission’s redistricting actions and do not challenge anything Commissioner Veltri has done while in office or as a candidate, this is not a purely personal legal battle between the political contestants like the kinds cited in *Hicks*. *Id.* at 452, 711 S.E.2d at 274. Thus, an exception to *Hicks* should be considered on these unique facts.

Alternatively, if he prevails, Commissioner Veltri’s attorneys’ fees should be paid by the Respondents in addition to the costs that are statutorily mandated by West Virginia Code § 3-7-9. There is express statutory authorization for an award of fees where a person has successfully defended against an action seeking his or her removal from office under West Virginia Code § 11-8-31a. But even if there was no statutory authorization, “There is authority in equity to award to the prevailing litigant his or her reasonable attorney's fees ... when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons.” *Id.* at Syl. Pt. 3 (quoting Syl. Pt. 3, in part, *Sally–Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (1986)). Where decades old redistricting procedural technicalities are unearthed and challenged **post-election** by the losing candidate and his party leader to oust a sworn official by alleging his residence in

Western, and where not even three years earlier the same party leader alleged his residence to be in Tygart to gain another political benefit, the line between acceptable pre-election, partisan zeal to unacceptable and oppressive post-election vexation is crossed. If sworn officials must personally pay for the defense of such vexatious post-election claims brought by the losing candidate, then no fair-minded citizen would ever run for office. Therefore, public policy and equitable justifications warrant that either Commissioner Veltri be indemnified or that the Respondents pay his costs and reasonable attorneys' fees if he prevails.

**G. THE CIRCUIT COURT WRONGLY REJECTED RELEVANT EVIDENCE CONCERNING THE MAIN FACTUAL RESIDENCY ISSUE**

In denying Commissioner Veltri's Rule 59(e) Motion to Amend, the Circuit Court accused him of attempting to use evidence of the January 2012 redistricting action to "bootstrap his position as a Taylor County Commissioner by changing the boundaries of the magisterial districts so as to put him in the proper district during the pendency of the case[,]" and concluded that "this evidence cannot overcome the fact that [Commissioner Veltri] did not reside in the proper district when 'elected' in 2010. The constitutional impediment remains." AR 539. Contrary to the Circuit Court's unfounded accusations, the fact of the matter is that an independent third-party, Jo Vaughan, developed the redistricting plan's details and computer-generated the boundaries, not Commissioner Veltri. AR 506. Moreover, the plan's adoption was unanimously approved by all Commissioners. *Id.*

The Circuit Court grossly mischaracterized the purpose for which Commissioner Veltri submitted this evidence, which in reality was to merely accentuate the pointlessness of disenfranchising the electorate in light of the fact that whatever unknown impediment which may have existed since 1984 had since been cured. A prospective and remedial finding that the January 2012 redistricting brought the composition of the Commission into harmony with the

Constitution, assuming there was an impediment, is within this Court's power and is supported by the *Kincaid* and *Winkler* cases. See pp. 24, 25, *supra*. Furthermore, such a remedy avoiding a disenfranchisement scenario would be much more democratic than retroactively applying the Circuit Court's residency finding in March 2012 to reverse the November 2010 election. In short, if all of Commissioner Veltri's other arguments fail, this Court should find that the January 2012 redistricting action cured any unknown impediment to constitutional compliance.

## VI. CONCLUSION

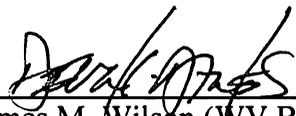
As Justice Cleckley rightly observed in *Sowards*, 196 W. Va. at 749, 474 S.E.2d at 929, "voters have a right to expect their electoral choices to be honored by the State." Accordingly, and "[t]o achieve the goal of enfranchisement wherever possible, we believe judicial authority to take a candidate off the ballot, **especially after the voters have expressed their preference**, should be sparingly used." *Id.* at 750, 474 S.E.2d at 930 (emphasis added). Aside from the fact that Taylor County voters had expressed their overwhelming preference for Commissioner Veltri over Respondent Withers long before this suit was filed, this Court should be even more reluctant to uphold the disenfranchisement of the electorate because there is no precedent for the post-election mandamus removal of a sworn official and the installation of the losing candidate. More importantly, the several crucial public policies this Court has consistently sought to promote, as illustrated throughout this brief, would necessarily be undermined if the Circuit Court's Order is affirmed and adopted as law.

WHEREFORE, for all of the foregoing reasons, this Court should DENY the Respondents' writ of mandamus and DISMISS all of their claims against Commissioner Veltri with prejudice. This Court should further ORDER that: (1) Commissioner Veltri remain in office as did Commissioner Dunham in *Burkhart* and the serving officials in *Martin*; (2)

Commissioner Veltri either be indemnified for his vicarious defense of the 1983-84 Taylor County Commission, or that his reasonable attorneys' fees in these proceedings and the lower proceedings be paid by the Respondents, in addition to an award of his costs for the successful defense in this suit seeking his removal; and (3) The costs of this appeal be paid by the Respondents pursuant to West Virginia Rule of Appellate Procedure 24(a).

Respectfully submitted this 16<sup>th</sup> day of August, 2012.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 16<sup>th</sup> day of August, 2012, I served the foregoing "***Brief of Petitioner Anthony J. Veltri***" upon the following counsel of record by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

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