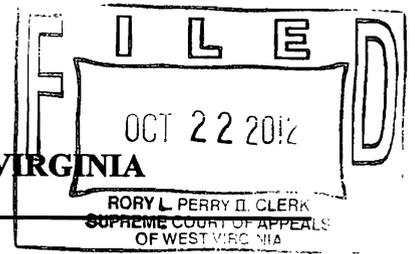


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**



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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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**REPLY BRIEF OF PETITIONER ANTHONY J. VELTRI**

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## I. ARGUMENT

### A. THE MANDAMUS PREREQUISITES REMAIN UNSATISFIED.

The Respondents feel they are entitled to post-election mandamus because the “changes made by the Commission in December of 1983 resulted in the residence of Tony Veltri being placed in the Western Magisterial District.” Resp. Br. at 2. Even if those underlying factual assertions were true, which Commissioner Veltri disputes as further discussed below, mandamus relief still must be denied because the Respondents have failed to meet all the prerequisites.

The Respondents try to satisfy the “clear legal right” prerequisite by arguing that “at the time of the filing of the verified petition, the Respondents attempted to enforce a clear legal right that their elected County Commissioner comply with the Constitution and the laws of the State of West Virginia.” Resp. Br. at 15. But before they could establish that a violation of the law even existed, they argued at the motion to dismiss stage that “critically important” discovery was still necessary or else they would be “severely restrict[ed] ... from preparing all of the evidence” to establish the violation. *See* Petr’s Br. at 13-14 (citing AR 47). In light of their own requests, it cannot be believably argued that the Respondents demonstrated a clear legal right to the relief sought at the time of filing; one which “cannot be established in the [mandamus] proceeding itself[,]” but rather, “**must** exist when the proceeding is instituted.” Petr’s Br. at 12 (emphasis added) (citations omitted).

The Respondents then attempt to establish that the “absence of another adequate remedy” prerequisite is met by claiming that “West Virginia Code § 6-6-7 [the removal statute] ... is simply not ‘equally convenient, beneficial, or effective’ in that it requires the involvement of at least 50 persons and is designed for matters of ‘official misconduct, malfeasance, neglect of duty or gross immorality ...’ and grounds for removal are to be strictly construed.” Resp. Br. at 14 n. 2 (citations omitted). The statutory language which the Circuit Court and the Respondents

conveniently omit makes clear that grounds for removal are not limited to these situations. Petr's. Br. at 15. In fact, this Court ordered that the statutory removal procedures be followed when it concluded in *Bevins v. Blackburn*, 142 W. Va. 564, 97 S.E.2d 46 (1957) that a sitting official was disqualified **only** because statutory residency requirements were not met, which is exactly the allegation here. Petr's. Br. at 15-16. The Respondents are therefore wrong in arguing that another adequate remedy besides mandamus does not exist in this type of situation.

Finally, the Respondents mistakenly contend that Commissioner Veltri "cites no case which supports [his] assertion that West Virginia law prohibits the use of mandamus in post-election situations such as the current proceeding." Resp. Br. at 14. In this proceeding, the Respondents have attempted to use post-election mandamus for these purposes: to call a sworn official's qualifications into question, to try the title to his public office following a "critically important" discovery period, and to disenfranchise the electorate by setting aside and reversing the certified results of the 2010 election. Because the election results were certified and Commissioner Veltri received the oath of office well before the Respondents filed for mandamus, this Court's unmistakable holding cannot be avoided: "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, *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). Moreover, this Court has made perfectly clear that "[t]he 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." *State ex rel. Cline v. Hatfield*, 145 W. Va. 611, 613, 116 S.E.2d 703, 705 (1960) (emphasis added). This Court's holdings, which Commissioner Veltri

discussed at length on pages 11-17 of his Brief, make no allowances for the use of post-election mandamus for these purposes where other “proper” procedural alternatives are available.

Not only have the Respondents’ attempts to satisfy the mandamus prerequisites fallen far short, but they have also failed to provide any case law from any jurisdiction where the court permitted the use of post-election mandamus to assert and develop facts through discovery to try a sworn official’s eligibility, contest the title to his office, and set aside the certified results of an election. Because the mandamus prerequisites are not met, mandamus relief cannot be granted.

**B. RELIANCE ON *BURKHART* AND ART. IX, § 10 TO SUPPORT THE REMOVAL OF A SWORN OFFICIAL VIA POST-ELECTION MANDAMUS IS INDEFENSIBLE.**

The Respondents incorrectly claim that “the focus of the [*Burkhart*] discussion remains the Petitioner’s assertion that post-election mandamus actions are forbidden.” Resp. Br. at 16. In fact, the lead-in sentence to Commissioner Veltri’s comprehensive discussion of *Burkhart v. Sine*, 200 W. Va. 328, 489 S.E.2d 485 (1997) is that “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.” Petr’s. Br. at 17. Thus, Commissioner Veltri’s main focus is that *Burkhart* does not **apply** to post-election mandamus actions or support the removal of a sworn official and therefore cannot be relied upon here. If the Respondents still maintain that *Burkhart* applies to post-election mandamus actions, Commissioner Veltri refers to his Brief at pages 18-21 which argues otherwise.

The Respondents on page 16 defend the Circuit Court’s reliance upon *Burkhart*, when it claimed that this Court allowed Commissioner Dunham to keep his seat because “there [was] no other Commissioner from that District.” AR 470. The Respondents do not dispute that this reasoning was nowhere to be found in *Burkhart*, but argue that this unspoken reasoning is

nevertheless supported “given the Constitution of this State.” Resp. Br. at 16. The fact remains that this Court was completely silent on that issue. The Respondents again miss the bigger point, which is that even if the Circuit Court’s distinction (fictional or not) to *Burkhart* applied, then Commissioner Gobel’s removal would be required instead of Commissioner Veltri’s under the Circuit Court’s logic. Petr’s. Br. at 20-21.

The Respondents next try to distinguish the host of West Virginia cases that Commissioner Veltri cites applying the majority rule against runner-up entitlement by arguing that none dealt with the specific constitutional provision at issue in *Burkhart* and in this case regarding county commissioners: art. IX, § 10. Resp. Br. at 16-18.<sup>1</sup> Commissioner Veltri already addressed the Circuit Court’s erroneous declaration that *Burkhart* “surely superseded” all of these cases. Petr’s. Br. at 22. To the extent that the Respondents’ distinction implies that art. IX, § 10 and/or this Court’s interpretation of that provision in *Burkhart* may represent an exception to the majority rule, Commissioner Veltri again maintains that *Burkhart* does not apply in the post-election mandamus context. *Id.* In addition, this Court has **never** interpreted or applied art. IX, § 10 to require the “unavoidable” removal of a sworn official by post-election mandamus, nor would its plain language support such a novel interpretation. *Id.* at 22-24. For these reasons, the Respondents’ reliance on *Burkhart* and/or art. IX, § 10 as an implied exception to the majority rule is totally misplaced.<sup>2</sup>

For the same reasons, the Respondents cannot legitimately point to art. IX, § 10 or West Virginia Code § 7-1-1b in arguing that longstanding principles of judicial review are suspended in this case. Resp. Br. at 7-10. This Court, in describing a “just and magnanimous judicial

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<sup>1</sup> This is an easy but meaningless distinction to make where all of the cases Commissioner Veltri cites but one, *State ex rel. Harden v. Hechler*, 187 W. Va. 670, 421 S.E.2d 53 (1992), were decided before art. IX § 10 was even enacted in 1974.

<sup>2</sup> Not only would the majority rule deprive Respondent Withers of post-election entitlement if Commissioner Veltri is removed, but statutory appointment procedures for the filling of “[a]ny vacancy” would also bar him from the seat. *See* Petr’s. Br. at 26-27. The Respondents also failed to address this argument in their Response Brief.

approach,” held that the “right of a citizen to hold office is the general rule; ineligibility the exception. Courts are hesitant to take action resulting in deprivation of the privilege to hold office, except under clear and explicit constitutional or statutory requirement.” *Isaacs v. Bd. of Ballot Comm’rs*, 122 W. Va. 703, \_\_\_\_, 12 SE.2d 510, 512 (1940). Even assuming that Commissioner Veltri resides in Western District, there is no “clear and explicit” requirement in art. IX, § 10 or West Virginia Code § 7-1-1b that would result in an “unavoidable” deprivation of the privilege to hold office via post-election mandamus, as the Respondents wrongly conclude. This would especially be true if it was discovered post-election that decades old procedural redistricting errors technically placed the sworn official in a district other than the one listed on the official’s voter’s records. Therefore, the standard of review requiring a liberal interpretation of election provisions, to “achieve the goal of enfranchisement wherever possible,” applies here. *State ex rel. Sowards v. Cnty. Comm’n of Lincoln Cnty.*, 196 W. Va. 739, 749, 474 S.E.2d 919, 929 (1996).

The Respondents further argue that Commissioner Veltri’s reading of art. IX, § 10 “appears to be an attempt to permit ineligible persons to hold important offices and become eligible for so long as they survive the 10-day notice requirement provided by [the election contest procedures outlined in W. Va. Code § 3-7-6].” Resp. Br. at 19. This is a completely inaccurate characterization of Commissioner Veltri’s constitutional argument. The **only** location in art. IX, § 10 where the framers addressed the removal of “commissioners ... now in office” makes clear that removal is to be done “in the manner prescribed by law.” Petr’s. Br. at 23. Commissioner Veltri explicitly referenced the statutory removal provisions in W. Va. Code § 6-6-7 as the most obvious example of a removal method “prescribed by law,” not the election contest statute of W. Va. Code § 3-7-6. Petr’s. Br. at 23. Unlike the election contest statute, there is **no** time limit for the removal of a sworn official in W. Va. Code § 6-6-7. Therefore, by

citing the removal statute as an example of a removal procedure “prescribed by law,” Commissioner Veltri could not possibly be suggesting that any ineligible official is immune from removal “so long as they survive the 10-day notice requirement” in the election contest statute.

Lastly, it is imperative to note that even if Commissioner Veltri resides in Western District, even if the mandamus prerequisites were satisfied, and even if the Respondents and the Circuit Court are correct that *Burkhart* and/or art. IX, § 10 may be interpreted to require Commissioner Veltri’s removal by post-election mandamus on these facts, this Court has previously fashioned prospective remedies for admitted constitutional violations in *Kincaid v. Mangum*, 189 W. Va. 408, 412-16, 432 S.E.2d 74, 82-86 (1993) and in *Winkler v. W. Va. Sch. Bldg. Auth.*, 189 W. Va. 748, 764, 434 S.E.2d 420, 436 (1993). Petr’s Br. at 24-25. But more importantly, this Court has also excused constitutional residency violations entirely where, just as in this case, the evils sought to be prevented by the residency requirements were not presented and where the voters would be deprived of the continued service of their elected officials if form was exalted over substance. *Martin v. Jones*, 186 W. Va. 684, 414 S.E.2d 445 (1992); Petr’s Br. at 25-26. It speaks volumes that, like so many other main points and cases discussed throughout Commissioner Veltri’s Brief, the Respondents failed to even address these cases and arguments. Their silence as to *Kincaid*, *Winkler*, and *Martin* is particularly significant because if the analogous principles from any one of these cases are applied here, then all of the Respondents’ legal arguments would be trumped.

**C. THE RESPONDENTS’ IGNORANCE IS NO EXCUSE FOR THEIR DECADES LONG DELAY IN CHALLENGING THE PROCEDURAL VALIDITY OF THE 1983-84 REDISTRICTING ACTIONS.**

Even if this Court concludes that Commissioner Veltri resides in the Western District, the Respondents still have not presented a satisfactory excuse to rebut the presumption of waiver,

acquiescence, and assent raised by their highly prejudicial, nearly three decade delay in challenging the procedural validity of the redistricting actions in 1983 and 1984.

First of all, and to be clear, Commissioner Veltri has never disputed the actual timing of the Respondents' discovery of the "facts." As the Respondents correctly note, Commissioner Veltri agreed early on with the timeline given by the Respondents and the Circuit Court regarding the post-election discovery. Resp. Br. at 20 n. 7 (citing AR 165 n. 4). But the Respondents wrongly believe that these admissions, which were made only to show that "this is clearly a post-election challenge, and is wholly distinct from the pre-election mandamus proceedings in *Burkhardt*[,]" are somehow in "direct contradiction" to the laches argument. *Id.* This is a red herring because resolution of the laches issue here does not begin and end with a simple determination of **when** the challenging party discovered the "facts." Instead, Commissioner Veltri has consistently maintained that where, as here, the challenging party relies on public and well-known sources of information, the relevant laches question is whether the challenging party **could have** discovered the "facts" earlier through the exercise of reasonable diligence. See AR 317, 491; Petr's. Br. at 33, 35 n. 11. Therefore, there is no contradiction whatsoever in admitting to a timeline of the Respondents' discovery of the "facts" while at the same time arguing that they could have discovered the "facts" much sooner had they exercised reasonable diligence as equity requires.

It is clear that the Respondents feel that their ignorance of the "facts" from 1984 to 2011 is enough to avoid the bar of laches. Resp. Br. at 20-22. However, the core of Commissioner Veltri's laches argument is that "[i]gnorance 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." Petr's. Br. at 33 (emphasis added) (quoting 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)). Commissioner Veltri demonstrated, by referring to the Respondents' sworn testimony, that their ignorance resulted from a lack of proper diligence in searching public sources that were well-known to them. Petr's. Br. at 34-35. It is telling that neither the Circuit Court nor the Respondents in their Brief challenged or even addressed the application of this Court's well-established holdings in *O'Neal*, *Plant*, and *Mace* to this case.

In another attempt to blame others for their ignorance and failure to exercise reasonable diligence, the Respondents now raise an issue that was not ruled upon by the Circuit Court. They claim that the County Commission, Clerk, and Commissioner Veltri failed to "keep in a well-bound book, marked 'election precinct record', a complete record of all their proceedings hereunder and of every order made creating a precinct or precincts or establishing a place of voting therein[.]" as West Virginia Code § 3-1-7(d) requires. Resp. Br. at 22. The Respondents argue that "[t]his well-bound book would have been the location that citizens of Taylor County could well have looked if they had questions regarding the eligibility of Petitioner Veltri ...." *Id.* Since Commissioner Veltri was not a Commissioner during the 1983-84 period when the relevant redistricting actions took place, he had nothing to do with the alleged failure to keep the "election precinct record" which may or may not<sup>3</sup> have contained the relevant documents from that time. More importantly, the Respondents are admittedly well-versed in matters dealing with public records and knew where they were, especially the relevant meeting minutes as Respondent Withers was also a Commissioner from 1986-1990. Petr's. Br. at 34. For these

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<sup>3</sup> By its terms, W. Va. Code § 3-1-7(d) only pertains to the creation of precincts or voting places therein, not the changing of precinct or district boundaries, which are the relevant occurrences in this case.

reasons, it is disingenuous for the Respondents to suggest that their decades long ignorance is excusable due to the claimed lack of an election precinct record book.<sup>4</sup>

For these reasons, and for those more fully set forth in Commissioner Veltri's Brief at pages 32-35, the Circuit Court's conclusion that the equitable bar of laches did not apply on these facts was in error and should be reversed.

**D. THE RESPONDENTS FAIL TO SATISFY THEIR BURDEN OF PROOF THAT COMMISSIONER VELTRI RESIDES IN WESTERN DISTRICT.**

The Circuit Court wrongly found, and the Respondents incorrectly argue that, based on the records produced in this case, the "changes made by the Commission in December of 1983 resulted in the residence of Tony Veltri being placed in the Western Magisterial District." AR 457-58 at ¶ 17; Resp. Br. at 2.

The Respondents, as the parties who challenge the procedural validity of decades old redistricting actions, do not dispute that they bear the burden of proof. Commissioner Veltri thoroughly discussed the burden of proof and related principles and policies under *Roe v. M & R Pipeliners, Inc.*, 157 W. Va. 611, 202 S.E.2d 816 (1973) and their application to this case. Petr's. Br. at 27-32. In response, the Respondents devote a mere paragraph to address these arguments, and only claim that their request to the Circuit Court to uphold their interpretation of this State's Constitution and statutes was not frivolous and that this is not the type of litigation envisioned in *Roe*. Resp. Br. at 19-20.<sup>5</sup>

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<sup>4</sup> The Respondents also wrongly accuse Commissioner Veltri of joining Clerk Thompson "late in this proceeding" in arguing laches. Resp. Br. at 20. To the contrary, Commissioner Veltri pled laches as an affirmative defense in his Answer (AR 86), then he further developed the equitable defense he had earlier preserved when the Circuit Court requested additional summary judgment briefing related to the law of equity. AR 311-18.

<sup>5</sup> The Respondents also accuse Commissioner Veltri of "speculating" that the Circuit Court reversed the burden of proof. Resp. Br. at 20. Speculation is unnecessary where the Circuit Court held, as a conclusion of law, that "neither respondent produced any evidence – documents, minutes, or otherwise – that demonstrate that the statutory required notice, advertisements and postings were in fact undertaken." AR 474 ¶ 5. There is no plausible interpretation of that conclusion other than that the burden of proof was wrongly placed on the non-challenging

Contrary to the Respondents' view, Commissioner Veltri has never asserted or even remotely suggested that a constitutional or statutory violation, or the Respondents' attempts to enforce the laws (as they incorrectly interpret them) are "frivolous." Instead, Commissioner Veltri relies upon *Roe* because the challenging party there, **exactly** as the Respondents here, accused a public official of failing to comply with a procedural requirement for the sole purpose of attempting to deprive the non-challenging party, who had no control over the alleged procedural shortcoming, of a benefit. The "frivolous technicality" in *Roe* was the clerk's procedural error in omitting a legally-required order of attachment to a creditor's lis pendens – not the challenging party's attempt to point out an alleged violation of the law. 157 W. Va. at 613, 202 S.E.2d at 818. Likewise, the same principles discussed in *Roe* are triggered here because the Respondents accuse the 1983-84 Commission of failing to comply with legally-required redistricting procedures for the sole purpose of ousting a longtime public servant, who had nothing to do with the decades old alleged procedural errors, from his seat. Accordingly, this is precisely the type of litigation *Roe* envisions.

Noticeably absent from both the Respondents' Brief and the Circuit Court's Order was any discussion of the undisputed fact that Commissioner Veltri's residence has been listed as Precinct 6 (Tygart District) in his voter's registration records and voter ID card since 1984. AR 170-75. Moreover, he always relied upon this residency information in good faith, as well as the verification of the same by Taylor County officials, each time he filed his candidacy papers. *Id.* It is troubling that these crucial and undisputed facts are given no weight at all in the Respondents' or the Circuit Court's analysis of Commissioner Veltri's residency. One of the unsettling implications that necessarily follows is that these residency facts and the steps

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parties and that the strong presumption of validity was incorrectly reversed. This conclusion violates everything *Roe* stands for, as previously argued in detail. Petr's Br. at 27-32.

Commissioner Veltri (and Respondent Withers, too, for that matter<sup>6</sup>) took to verify his residency are insufficient. Indeed, it appears that future candidates must completely disregard the most common and widely-accepted methods of determining where one should vote and run for office if they wish to avoid the same unfortunate situation in which Commissioner Veltri now finds himself. These absurd implications of the Respondents' position and the Circuit Court's Order completely undermine the sound policies this Court recognized and sought to promote in *Roe*. Petr's Br. at 30-31.

Instead of responding to the inevitable policy consequences of their position on these facts, the Respondents merely cite *Burkhart v. Sine*, 200 W. Va. 328, 332-33, 489 S.E.2d 485, 489-90 (1997) for the proposition that “[a] candidate for public office has a duty to know in which district he resides and from which district he is running.” Resp. Br. at 16. Commissioner Veltri already addressed the Circuit Court's and the Respondents' misplaced reliance on this language to support of the removal of a sworn commissioner. Petr's. Br. at 30 (noting that Commissioner Dunham in *Burkhart* **retained** his elected seat despite his “inexcusable” ignorance of his residency). For the obvious policy reasons previously set forth, this Court should be loathe to adopt the Respondents' position that the “duty to know” from *Burkhart* must: (1) include an automatic distrust of residency information contained in one's voter's records and confirmed by public officials, and (2) require a thorough investigation of every redistricting action dating back several decades just to ensure that each and every procedural redistricting requirement was met. *See* Petr's. Br. at 30-31.

Even if this Court concludes that the strong presumption of validity may be overcome where there is no post-election mandamus entitlement right<sup>7</sup>, the Respondents produced no clear and convincing evidence that Commissioner Veltri resides in the Western District. Oddly, both

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<sup>6</sup> *See* Petr's. Br. at 31 n. 6; Resp. Br. at 21 n. 8.

<sup>7</sup> This conclusion would violate the balancing test set forth in Syllabus Point 3 of *Roe*. Petr's. Br. at 28-29.

the Circuit Court and the Respondents list among the reasons why the December 1984 redistricting action was procedurally improper was that “[t]he minutes indicate no ... placement of information about the action on the Court House door.” AR 474 at ¶ 5; Resp. Br. at 5. Yet it is undisputed that the meeting minutes relating to the December 1983 action, upon which the Respondents previously urged the Circuit Court to “primarily” rely to conclude that Commissioner Veltri resides in Western District (AR 250), contain absolutely no indication of compliance with this mandatory posting procedure either. *See* Petr’s Br. at 31-32; AR 106-10. Thus, the redistricting action they claim was procedurally proper to move Commissioner Veltri into Western District fails to meet one of the same procedural standards that they impose on subsequent redistricting actions. This procedural double standard is but one illustration of how the burden of proof remains unsatisfied.<sup>8</sup>

The Respondents now place greater weight on various maps and on Nancy Fowler’s deposition testimony to establish Commissioner Veltri’s residence in Western District. Resp. Br. at 3-5. Commissioner Veltri previously raised valid objections to this evidence and now reincorporates the same objections and analysis here. AR 255-56. Additionally, Ms. Fowler as the record keeper and County Clerk during the relevant 1983-84 period testified that these maps contained discrepancies, were out of date, and did not accurately reflect the boundaries as she understood them to be after December 1984 – the location of which placed Commissioner Veltri within the Tygart District as she consistently represented to him for the next several years. AR

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<sup>8</sup> The Respondents also point to answers to their discovery requests given by the current Taylor County Clerk, Georgianna Thompson, to support their position that Commissioner Veltri resides in Western District. Resp. Br. at 2. Clerk Thompson is not a party to this appeal, and Commissioner Veltri as the Petitioner here obviously cannot be charged with a former litigant’s admissions. In any event and as established above, there is no evidence in the meeting minutes that Clerk Thompson produced showing that notice was posted on the court house door relating to the 1983 redistricting action. The meeting minutes are therefore inconsistent with the Respondents’ factual residency position. Accordingly, Clerk Thompson denied the Respondents’ request for admission. AR 140-41.

231-36.<sup>9</sup> Therefore, these maps and Ms. Fowler's testimony do not amount to clear and convincing evidence that Commissioner Veltri resides in Western District.

The Respondents also misleadingly claim that Ms. Fowler "testified in this proceeding that all legal procedures were undertaken and completed" relating to the December 1983 redistricting action. Resp. Br. at 5. In reality, the most Ms. Fowler could remember about the procedures surrounding the December 1983 action was that it was "legally" and "properly advertised" and that a hearing date was set. AR 242-43. But given that she noted in the minutes for the second redistricting that notice was "to be posted on the Court House Door" (AR 114), where no such notation appears in the minutes relating to the December 1983 action (AR 106-110), her mention of a legal and proper "advertisement" cannot reasonably be interpreted to include posting on the court house door and in some public place. Instead, a more realistic explanation is that she was referring to one of the procedural requirements for **precinct** changes outlined in West Virginia Code § 3-1-7, one of which is publication of a "Class II-0 legal advertisement." The bottom line is that she never testified that notice was posted on the court house door or in a public place in the affected districts, as West Virginia Code § 7-2-2 expressly mandates. Therefore, the Respondents' claim that Ms. Fowler's testimony included "all" legal procedures is simply not true.

Because the Respondents cannot point to clear and convincing evidence that the December 1983 redistricting was done in full compliance with **all** procedural requirements, it follows that Commissioner Veltri continued to reside in Tygart District. This is also consistent

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<sup>9</sup> Furthermore, even Respondent Withers testified that he had noticed another discrepancy with these maps before this suit was filed. In one instance, the location of the map's boundaries did not match up with the accompanying metes and bounds allegedly sent by the State Redistricting Office. See AR 404-05, 415-16; pp. 5-7, 47-50 of Dep. of John Michael Withers. It is true, as the Respondents note (Resp. Br. at 3 n. 1), that Commissioner Veltri does not dispute where his residence is located on these deeply flawed maps. But this cannot control or amount to clear and convincing evidence of residency in Western District given that: (1) Commissioner Veltri's voter's records have indicated that he has resided in Tygart District since 1984; and (2) there are several evidentiary problems and admitted discrepancies associated with these maps.

with Commissioner Veltri's records, Respondent Parker's residency allegation in 2008, and the Taylor County Circuit Court's finding of fact in December 2008. Because Commissioner Veltri resides in Tygart District, there is no factual basis for the Respondents' alleged constitutional and statutory residency violation.

**E. THE CIRCUIT COURT WRONGLY DENIED COMMISSIONER VELTRI'S MOTION TO ALTER OR AMEND.**

This Court should note that it need not reach the issue of whether Commissioner Veltri's Motion to Alter or Amend was properly denied unless and until it affirms each of the following aspects of the Circuit Court's Summary Judgment Order in the Respondents' favor:

(1) The prerequisites for mandamus, particularly those requiring that a clear legal right exist at the time of filing and that no other alternative procedures exist, were satisfied. AR 473-74. In other words, post-election mandamus may be used for the purpose of asserting, then developing through discovery, facts to try the ultimate title to a sworn official's public office;

(2) By establishing the procedural validity of the December 1983 redistricting action and the procedural invalidity of the subsequent redistricting actions, the Respondents satisfied their burden of proof that clear and convincing evidence exists that Commissioner Veltri resides in Western District. AR 472. Indeed, there would be no constitutional residency issue if Commissioner Veltri resides in Tygart District. It must also be determined whether the principles discussed in *Roe* apply; and if so, whether the Circuit Court's Order violated them;

(3) The Respondents presented a satisfactory excuse for their ignorance of the "facts" contained in public and well-known sources of information, and sufficiently demonstrated that they were reasonably diligent in order to avoid the equitable bar of laches. AR 472-73;

(4) *Burkhart* and art. IX § 10 may be properly interpreted to support the "unavoidable" removal of a sworn official and the disenfranchisement of the electorate by way

of post-election mandamus. AR 465-72. Moreover, *Burkhart* and art. IX § 10 also represent an exception to the majority rule adhered to in West Virginia, which is that the runner-up is not entitled to the seat if the winner is later determined to be ineligible. *Id.*;

(5) The Legislature’s adopted method for the filling of “any vacancy” in the office of county commissioner, found in West Virginia Code § 3-10-7, would not apply if Commissioner Veltri were removed from office. AR 466. Finally;

(6) Even if all of the above conclusions are affirmed in the Respondents’ favor, it must then be decided whether the Constitutional residency impediment may be prospectively remedied or excused entirely under the principles in the *Kincaid*, *Winkler*, and *Martin* cases.

Assuming that all of these conclusions are affirmed in the Respondents’ favor, it first appears as though the Respondents cast Commissioner Veltri’s Motion to Amend as a tacit acknowledgement that there **was** a constitutional residency problem that was not fixed until January 2012. Resp. Br. at 23. The relevant portions of Commissioner Veltri’s filings that were left out by the Respondents, however, reveal that there was no such concession.<sup>10</sup> Again, the purpose for the Motion was merely to “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.” Petr’s. Br. at 37 (emphasis added).

The remainder of the Response to the Motion to Amend issues is practically verbatim from the one the Respondents filed below. *Compare* Resp. Br. at 23-26 *with* AR 513-17. Since Commissioner Veltri fully addressed these identical arguments in his Reply below, he will not do so again here. Commissioner Veltri incorporates his Reply here by reference. AR 529-36.

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<sup>10</sup> See AR 481 (“The constitutional and statutory violation alleged by Petitioners, **if any**, has been remedied ....”) (emphasis added); Petr’s. Br. at 37-38 (“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.”) (emphasis added).

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

The Respondents mistakenly argue that they should not have fees and costs awarded against them if Commissioner Veltri prevails because Commissioner Veltri cited no facts in the record and no supporting law. Resp. Br. at 22-23. Moreover, they again falsely claim that Commissioner Veltri takes issue with their “attempt to uphold the Constitution of this State.” *Id.*

It should first be noted that an award of fees and costs was but one alternative that Commissioner Veltri proposed, the first being an exception to the current law against indemnification in light of the extraordinary facts of this case. Petr’s Br. at 35-37. Secondly, and contrary to the Respondents’ claim, Commissioner Veltri cited West Virginia Code § 11-8-31a in support of his fee argument. Petr’s Br. at 36. This statute expressly authorizes an award of fees where a public official successfully defends against an action seeking his or her removal from office, **regardless** of the egregiousness of the non-prevailing party’s actions. *Id.* For purposes of a fee award, an analysis of whether the non-prevailing party acted vexatiously or in bad faith is only necessary where there is no statutory authorization.<sup>11</sup> But in this case, there is both express statutory authorization and vexation as previously illustrated. Petr’s Br. at 36-37.

Finally, even if there was no statutory authorization, Commissioner Veltri never argued that the Respondents were vexatious in merely attempting to uphold the Constitution as they read it.<sup>12</sup> Rather, the vexation here is that the Respondents, months after an electoral defeat by a wide

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<sup>11</sup> “There is authority in equity to award to the prevailing litigant his or her reasonable attorney’s fees ... **without** express statutory authorization [ ] when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons.” Syl. Pt. 3, *State ex rel. Hicks v. Bailey*, 227 W. Va. 448, 711 S.E.2d 270 (2011) (emphasis added) (quoting Syl. Pt. 3, in part, *Sally–Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (1986)).

<sup>12</sup> It is ironic that throughout their Brief, the Respondents frequently trumpet their attempts to uphold constitutional residency requirements for county commissioners; but if the Circuit Court’s unprecedented post-election mandamus rulings stand as the Respondents desire, thousands of citizens would be stripped of their constitutional voting rights because they voted for a candidate who no one, including the Respondents, knew at the time might not have been eligible. As this Court recently affirmed, “our government is founded upon the right of the people to elect their

margin, attempted to reverse their misfortune solely by alleging that procedural redistricting errors from almost thirty years ago technically place Commissioner Veltri in the Western District. The residency allegation in Western District is especially vexatious given that Respondent Parker obtained an earlier partisan benefit by asserting to the same Circuit Court in 2008 that Commissioner Veltri, who has lived in the same home since 1944 to this day, resided in Tygart District. *See* Petr's. Br. at 4-5 (citing AR 280, 309, 323-25). Contrary to the Respondents' argument, these are the facts in the record which Commissioner Veltri cited in support of his request for an award of fees. Petr's. Br. at 36-37.

The central point that the Respondents do not dispute is that no sane person would ever run for office knowing that he or she could have to personally pay thousands in legal fees to vicariously defend decades old procedural mistakes over which they had no control in order to retain the elected seat. Since it would be inequitable to require that kind of commitment from Commissioner Veltri here, and to remove this deterrent to attracting rational citizens to public service in the future, this Court should either consider an exception to the current law regarding indemnification if Commissioner Veltri prevails, or alternatively award that his fees and costs be paid by the Respondents in light of West Virginia Code § 11-8-31a and the facts of this case.

## **II. CONCLUSION**

The Circuit Court's Summary Judgment Order granting post-election mandamus should be reversed because the Respondents have not satisfied the prerequisites under West Virginia law. Moreover, even if this Court concludes that Commissioner Veltri resides in Western District and that the Respondents' prejudicial delay in challenging the procedural validity of

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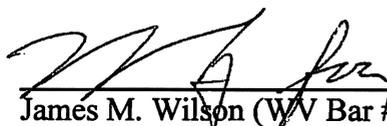
highest public officials. This right is enshrined in our Constitution which provides that "[t]he powers of government reside in all the citizens of the State, and can be rightfully exercised only in accordance with their will and appointment." W.Va. Const., Art. II, § 2." *State ex rel. Citizens Action Group v. Tomblin*, 227 W. Va. 687, 695, 715 S.E.2d 36, 44 (W. Va. 2011). Of course, this is not to say that one constitutional provision is more important than another. But it is interesting that neither the Circuit Court nor the Respondents appear to be even cognizant of, and much less sensitive to the fact that other important constitutional considerations are implicated in this case besides those outlined in art. IX § 10.

decades old redistricting actions is excusable, there is no applicable law or precedent that would require, and much less support the removal of a sworn official by post-election mandamus on the extraordinary facts of this case. The stark contrast between the total lack of support for the unprecedented grant of post-election mandamus on the one hand, and the ignored precedent against the ultimate exaltation of form over substance at the voters' expense on the other, is certainly worth highlighting – especially where thousands of Taylor County citizens face the risk of disenfranchisement solely due to decades old procedural redistricting errors.

WHEREFORE, for all of the reasons set forth in Commissioner Veltri's Brief and in this Reply, Judge Starcher's Order granting post-election mandamus should be reversed and mandamus denied. Commissioner Veltri also reincorporates his previous requests for relief and for oral argument here by reference. Petr's. Br. at 9, 38-39.

Respectfully submitted this 22<sup>nd</sup> day of October, 2012.

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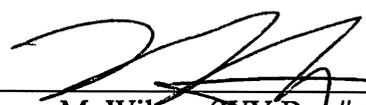
**CERTIFICATE OF SERVICE**

I hereby certify that on the 22<sup>nd</sup> day of October, 2012, I served the foregoing "***Reply Brief of Petitioner Anthony J. Veltri***" upon the following counsel of record via electronic mail and by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

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