STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
November 2, 2026
C. CASEY FORBES, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

David C. Tabb,
Petitioner,

v.) No. 26-551 (Circuit Court of Jefferson County CC-19-2026-C-189)

John A. Cline, The Jefferson County Board of Ballot Commissioners, Jacqueline C. Shadle, Gary Dungan, and Jim Mickie,
Respondents

MEMORANDUM DECISION

Petitioner David C. Tabb appeals the September 10, 2026, order of the Circuit Court of Jefferson County that removed his name from the November 2026 general election ballot as a candidate for the office of Commissioner of the Jefferson County Commission.[1] Upon our review, we determine that oral argument is unnecessary and that a memorandum decision summarily affirming the circuit court's order is appropriate. *See* W. Va. R. App. 21(c) (2026) ("Summary affirmance by memorandum decision constitutes a decision on the merits affirming the lower tribunal's outcome but not necessarily the lower tribunal's reasoning.").

In January 2026, Mr. Tabb filed to be the Mountain Party candidate for the office of Jefferson County Commissioner representing the Harpers Ferry Magisterial District. However, it is undisputed that Mr. Tabb resides in the Charles Town Magisterial District, not the Harpers Ferry Magisterial District. West Virginia Code § 7-1-1b(b)(1) (2009) mandates that "[a] candidate for the office of county commissioner shall be a resident from the magisterial district for which he or she is seeking election" by the last day to file a certificate of announcement. The record reflects that an employee of the Jefferson County Clerk's Office advised Mr. Tabb that he was filing for the wrong district, and Mr. Tabb has twice before sought this office in the Charles Town Magisterial District—but he nonetheless chose to run for the Harpers Ferry Magisterial District seat.

A complaint challenging Mr. Tabb's eligibility to serve as the Commissioner in the Harpers Ferry Magisterial District seat was filed with the State Elections Commission. However, by order of August 11, 2026, the State Elections Commission concluded that it did not have jurisdiction to consider the matter. West Virginia Code § 7-1-15 (2009) provides that the sole method of

[1] Mr. Tabb is represented by counsel Daniel M. Casto, James P. Campbell, Matthew L. Clark, and Jason L. Grace. Mr. Cline is represented by counsel J. Mark Adkins, Brittany O'Saile, and Charles F. Printz Jr. The Jefferson County Clerk and Jefferson County Board of Ballot Commissioners appear by counsel Cameron T. LeFevere. West Virginia Secretary of State Kris Warner filed an amicus curiae brief by counsel David P. Cook Jr.

challenging the qualifications of a candidate for county commission prior to the election is by filing a petition in circuit court.

On August 27, 2026, John A. Cline, a resident of Jefferson County, filed a verified petition in circuit court challenging Mr. Tabb's eligibility for the seat. Mr. Tabb argued that the challenge was untimely because West Virginia Code § 7-1-15(a)(1) required the petition to be filed in circuit court "not later than thirty days after the date of the primary election[,]" in other words, by June 11, 2026. However, Mr. Cline argued that the filing deadline was extended because of the exception in West Virginia Code § 7-1-15(a)(2):

> The court may permit a petition to be filed after the thirtieth day after the primary election upon a finding that the petitioner was unable to discover the grounds for challenging the qualifications of the candidate prior to the thirtieth [day] after the primary election despite the exercise of reasonable diligence.

In its September 10, 2026, order, the circuit court found that there are sufficient reasons to permit Mr. Cline to file this challenge after the deadline. The court ordered that Mr. Tabb's name be removed from the ballot because, due to his residence, he is not eligible to hold the office he seeks.

On September 11, 2026, Mr. Tabb filed a notice of appeal in our Court.[2] Mr. Tabb disputes, inter alia, the circuit court's findings of fact to support the late filing in circuit court. When reviewing findings and conclusions of a circuit court, we "review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard." Syl. Pt. 2, in part, *Walker v. W. Va. Ethics Comm'n*, 201 W. Va. 108, 492 S.E.2d 167 (1997). Upon our review, we find that the petitioner has not established clear error or abuse of discretion. Accordingly, we summarily affirm.

ISSUED: November 2, 2026

CONCURRED IN BY:

Justice William R. Wooton
Justice Charles S. Trump IV
Justice H. L. Kirkpatrick
Justice James W. Flanigan

DISSENTING:

Chief Justice C. Haley Bunn

[2] Mr. Tabb also filed a motion asking our Court to stay the circuit court's order removing his name from the ballot. However, in light of our decision today, we refuse the motion for stay as moot.

BUNN, Chief Justice, dissenting:

Mr. Tabb appeals from an order of the Circuit Court of Jefferson County removing him from the ballot on the basis of a pre-election qualification challenge pursuant to West Virginia Code § 7-1-15. That provision permits pre-election challenges "not later than thirty days after the date of the primary election." W. Va. Code § 7-1-15(a)(1). However, a court "may" permit a filing after that thirty-day limit "upon a finding that the petitioner was unable to discover the grounds for challenging the qualifications of the candidate" within those allotted thirty days, "despite the exercise of reasonable diligence." W. Va. Code § 7-1-15(a)(2). Notably, subsection (a)(2) does not provide a backstop to when a court's discretion to hear a late challenge ends vis a vis the election it impacts.

Here, the circuit court entertained the extraordinarily late challenge to Mr. Tabb's residency and granted the Respondents relief by removing Mr. Tabb from the ballot despite uncontroverted evidence that (a)(2) had not been satisfied. The majority, in affirming the circuit court's order, commits the same offense as the circuit court by ignoring the statute's substantive requirements in favor of reaching the outcome it perceives as correct on the merits. But even recognition that the circuit court committed glaring errors in not requiring Mr. Cline to raise his challenge through *post*-election means cannot give Mr. Tabb the relief he seeks under this pre-election mechanism because it cannot, at this juncture, place him *back* on the ballot without disenfranchising those who have already cast their votes. According to the supplemental briefing submitted by the Jefferson County Clerk and Chair of the Jefferson County Board of Ballot Commissioners, as of October 28, 2026, 5,249 voters had already cast their ballots during early voting, and 466 absentee ballots had been mailed—none of which included Mr. Tabb's name.

Given the dilatory nature by which Mr. Cline pursued his qualifications challenge and the circuit court's divulgence in it, there was a very narrow window for this Court to correct errors. The circuit court ordered a ballot change on September 10 and denied Mr. Tabb's request for a stay on September 11, with full awareness that absentee ballots would be printed and mailed by September 18 and that military and overseas voter ballots were subject to the same transmission deadline having heard testimony to that effect. West Virginia Code § 7-1-15 provides for a shortened appeal timeframe: five days from the entry of judgment. Mr. Tabb quickly filed his appeal the day after the order was entered and filed his appeal of the circuit court's denial of his motion for stay on September 14.

The motion for stay was generically labeled as an "emergency" motion for stay relating to his omission "from the November 3, 2026 general-election ballot," and the appeal noticed for expedited treatment on the merits under West Virginia Code § 7-1-15 ahead of the November 3 general election. The buried references to September 18 are on pages five and twelve of Mr. Tabb's fifty-three-page filing for his stay, and neither purport to give any indication that the motion for stay needed taken up and answered within four days of its filing.

Indeed, there is a specific mechanism to alert the Court to such time-sensitive issues found in Rule 29(c). The commentary to that rule demonstrates that it exists to avoid this very issue:

> Under current practice, such requests [for expedited relief] may be made informally, or merely set forth in passing as part of the relief requested. By requiring a request for expedited relief to be set forth in a separate motion with adequate detail, this provisions is intended to give the parties clear guidance on the method for seeking expedited relief, *to give court staff information necessary for case management*, and to give the Court an adequate basis to decide the issue. . . .

(emphasis added). The request for a stay was premised on merely seeking to maintain the status quo: keep Mr. Tabb on the ballot for the election. But maintaining the status quo here *is* a decision on the merits where the error on appeal is propriety of a late *pre-election* challenge mooted by the fact of the election. Accordingly, to be able to afford Mr. Tabb the relief he seeks, the Court needed to grant the stay *and* give a decision on the merits before September 18, which, of course, requires the petitioner's brief, the responsive brief, and reply brief to be submitted before it is considered mature for resolution under Rule 5(h) of the Rules of Appellate Procedure.

Because Mr. Tabb seeks reinstatement on the ballot where voting is already well underway, I would find the matter moot insofar as it alleges error in the application of a statute designed for *pre-election* challenges, and that error is no longer capable of correction by this Court *before* the election without disenfranchising voters. "Courts will not ordinarily decide a moot question." Syl. Pt. 1, *Tynes v. Shore*, 117 W. Va. 355, 185 S.E. 845 (1936). " '[T]his Court sits to redress wrongs and not to settle moot questions; and whenever it is made to appear that by time or other cause the matter in controversy has been extinguished pending the appeal, the appeal will be dismissed.' Syllabus point 4, in part, *Whyel v. Jane Lew Coal & Coke Co.*, 67 W. Va. 651, 69 S.E. 192 (1910)" Syl. Pt. 2, *W. Va. Secondary Sch. Activities Comm'n v. David D.*, 251 W. Va. 102, 909 S.E.2d 137 (2024). Even Mr. Tabb concedes in his supplemental briefing that the matter is technically moot, and this Court cannot unring the bell. Accordingly, while I expressly disapprove of the gamesmanship that has led to the result, I would find the matter moot as to the challenge under West Virginia Code § 7-1-15 rather than endorse such an erroneous application of the statute and would have taken up the remaining issues of Mr. Tabb's appeal in due course.