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August 14, 2012

Rory L. Perry II, Clerk of Court
State Capitol Rm E-317
1900 Kanawha Blvd. East
Charleston WV 25305

Re: ***State of West Virginia, ex rel, Allen H. Loughry II, candidate for the Supreme Court of Appeals of West Virginia v. Natalie E. Tennant, et al.***
No. 12-0899

Dear Clerk Perry:

Enclosed please find the ***"Petitioner Allen H. Loughry's Response to Movant Michael Callaghan's Motion to Intervene"*** and ***"Certificate of Service,"*** for filing in the above referenced matter.

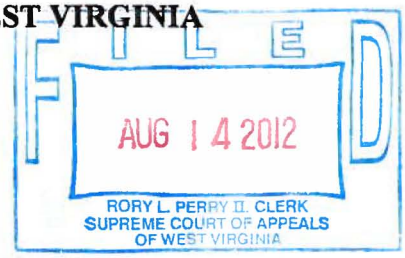
If you have any questions or comments, please do not hesitate to call me.

Very truly yours,

Randall L. Saunders
RLS/lab
Enclosures
cc: The Honorable Darrell McGraw
Silas Taylor, Esq.
Lisa A. Hopkins, Esq.
Diana Stout, Esq.
Anthony J. Majestro, Esq.
Anthony J. Delligatti

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-0899



STATE OF WEST VIRGINIA, ex rel, ALLEN H. LOUGHRY II,
candidate for the Supreme Court of Appeals of West Virginia,

Petitioner,

v.

NATALIE E. TENNANT, in her official capacity as West Virginia Secretary of State; NATALIE E. TENNANT, GARY A. COLLIAS, WILLIAM N. RENZELLI, and ROBERT RUPP, in their official capacities as members of the West Virginia State Election Commission; GLENN B. GAINER, III, in his official capacity as the West Virginia State Auditor; and JOHN PERDUE, in his official capacity as the West Virginia State Treasurer,

Respondents.

PETITIONER ALLEN H. LOUGHRY'S RESPONSE TO MOVANT MICHAEL CALLAGHAN'S MOTION TO INTERVENE

Pursuant to W. Va. Rev. R. App. P. 32 and this Court's Order of August 10, 2012, Petitioner Allen H. Loughry II respectfully submits this Response to Movant Michael Callaghan's Motion to Intervene.

This mandamus proceeding involves a straightforward, narrow question: whether Petitioner is entitled to public campaign funds because a non-participating candidate has met the statutory conditions that prompt the disbursement of such funds under the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program (the "Pilot Program"). Movant claims a right to intervene because, he asserts, no existing party "will stand in defense of

[his] constitutional rights." (Motion ¶ 7.) But Movant has no constitutional rights that could be affected here. He is not a candidate for a seat on the Supreme Court of Appeals of West Virginia, and as such, no actions Movant has taken or could take implicate the specific statutory provision at issue. No candidate purporting to be unconstitutionally burdened by the statute seeks to intervene here. Nor, on Petitioner's information and belief, has any such candidate expressed the intent to do so.

Movant lacks the peculiarized, substantial interest in this proceeding that is necessary to warrant intervention. Because Movant has at most a collateral or incidental interest in the subject matter of this dispute, this Court should deny the motion to intervene.

I. PARTIES LACKING A SUBSTANTIAL AND PECULIAR INTEREST IN A MANDAMUS PROCEEDING MAY NOT INTERVENE.

The standard for intervention in a mandamus proceeding is clear. A party may be permitted to intervene in a mandamus action in only two circumstances, when either "(1) a statute of this State confers an unconditional right to intervene;" or "(2) the representation of the applicant's interest by existing parties is or may be inadequate, and the applicant is or may be bound by judgment in the action." W. Va. Rev. R. App. P. 32. Movant does not—and cannot—point to any statute conferring a right to intervene. Accordingly, intervention would be appropriate only if Movant could demonstrate both an adequate interest in the proceeding and that the interest is not sufficiently represented. He cannot.

This Court has explained that a generalized interest in the subject matter of a mandamus proceeding is insufficient to justify intervention. Rather, there must "be a proper showing of *substantial interest* in the subject matter to authorize an intervention" and one "who has no substantial and peculiar interest in the subject matter of the litigation or whose interest will not be affected by a judgment awarding the writ cannot intervene as a party." *State ex rel. Evans v.*

Kennedy, 145 W. Va. 208, 215-16, 115 S.E.2d 73, 78 (1960) (citations omitted) (emphasis added). This is true because "it is inconsistent with the nature of the [mandamus] remedy to bring in as defendants parties only collaterally or incidentally interested in the subject matter of the controversy." *Id.*

As demonstrated below, any interest Movant could have in this matter is, at most, a collateral or incidental interest. The only statutory duties at issue here are those triggered by expenditures by a non-participating candidate for the Supreme Court of Appeals of West Virginia. Movant has not made and can never make such expenditures. Those candidates who have done so have not claimed any injury to their constitutional rights. Any generalized interest Movant could have in protecting the putative constitutional rights of traditionally funded candidates is insufficient to justify his intervention here.

II. MOVANT LACKS AN INTEREST IN THIS PROCEEDING SUFFICIENT TO WARRANT INTERVENTION.

Petitioner seeks an order compelling Respondents to disburse the public campaign funds he is entitled to under W. Va. Code § 3-12-11(e), which calls for the release of supplemental funds when "a nonparticipating candidate's campaign expenditures or obligations . . . have exceeded by twenty percent the initial funding available" under the Pilot Program. It is axiomatic that a writ of mandamus is appropriate only where the Petitioner has a clear legal right to the relief sought. *See, e.g.*, Syl. Pt. 1, *State ex rel. McGraw v. W. Va. Ethics Comm'n*, 200 W. Va. 723, 490 S.E.2d 812 (1997). Here, the legal right relied upon by Petitioner is one that flows directly and exclusively from Section 3-12-11(e), which is solely concerned with spending by candidates for the Supreme Court of Appeals of West Virginia who have chosen not to participate in the Pilot Program. Movant has not—and cannot—show that any constitutional rights he alleges could be affected by an order enforcing Section 3-12-11(e).

A. Movant lacks a sufficient interest in West Virginia Code § 3-12-11(e) to justify intervention.

Movant lacks a sufficient interest in the subject of this proceeding to justify his intervention, because the operation of Section 3-12-11(e) cannot cause Movant any injury—whether of constitutional magnitude or otherwise.

First, and most obviously, Movant is not a candidate for the Supreme Court of Appeals of West Virginia. Section 3-12-11(e) is implicated only by the spending of a candidate for a seat on this Court who chooses not to participate in the Pilot Program. Because, by definition, Movant cannot engage in the conduct implicated by the only statutory provision at issue here, he can suffer no direct injury and therefore lacks an interest in this proceeding sufficient to justify intervention.

The fact that Movant alleges a desire to make campaign contributions to one or more non-participating candidates does not lead to a different conclusion. Movant states that he wishes to donate to the two candidates nominated by the Democratic Party for seats on this Court and suggests that making such donations will cause him injury because "the contributions would trigger matching funds to" Petitioner. (Movant's Response at 7.) But this is wrong. Under Section 3-12-11(e), it is the decision of a non-participating candidate to make certain *expenditures*—not a donor's decision to make campaign *contributions*—that triggers the disbursement of supplemental public funds. W.Va. Code § 3-12-11(e) (referring only to "a nonparticipating candidate's campaign expenditures or obligations").

Because only an intervening decision by a non-participating candidate to make campaign expenditures can implicate Section 3-12-11(e), and no contribution from Movant (or any other supporter) can do so, Movant's stated desire to contribute does not give rise to an interest in this action sufficient to authorize intervention. In short, it is the decision of a separate actor to

spend—and not the contribution—that necessitates disbursement of funds. This intervening decision breaks the chain of causation between the contribution and the disbursement of supplemental funds.

Put differently, even if Movant made the contributions he alleges a desire to make, Section 3-12-11(e) would not be implicated. The candidate receiving the contribution could decide not to spend it based on the conclusion that the marginal benefits of additional campaign expenditures would be minimal. Or, perhaps more realistically, in a campaign that Movant concedes has been largely self-financed by personal loans from a candidate to her campaign (*see* Response at 11), the candidate receiving Movant's contribution could simply retain the contributed funds; refrain from using them before the election; and ultimately use them to repay her personal loan at some time after Election Day. Under such circumstances, Movant's contribution would not be used to finance any "campaign expenditures or obligations" of the sort that cause disbursement of supplemental funds under Section 3-12-11(e), and he would suffer no injury sufficient to warrant intervention. Under no circumstances would the act of contributing trigger operation of the law at issue here. That alone is sufficient reason to deny the motion to intervene.

More importantly, however, even if a political contribution by Movant *would* trigger the clear legal duty at issue here—and it does not—any alleged burdens on his right to contribute would be of insufficient constitutional magnitude to justify intervention. It is clearly established that any First Amendment right to make *political contributions* is of less constitutional magnitude than the First Amendment right to make *political expenditures* that is implicated in the cases on which Movant relies.

The United States Supreme Court laid out the fundamental distinction between expenditures and contributions in its landmark opinion in *Buckley v. Valeo*, 424 U.S. 1 (1976). "[E]xpenditure limitations . . . represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech," the *Buckley* Court explained, and are therefore entitled to substantial constitutional protection. *Id.* at 19. In contrast with limitations on expenditures, however:

> a limitation upon the amount that any one person or group may *contribute* to a candidate or political committee entails *only a marginal restriction* upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support.

Id. at 20-21 (emphasis added).

Because the *Buckley* Court held that the expressive content of a political contribution is much less than the expressive content of political expenditures, it made clear that the constitutional scrutiny of limitations on contributions is far less searching than that which applies to limits on expenditures. *See id.* at 20-21, 23. Thus, even if the Movant's act of contributing were related to the distribution of funds Petitioner seeks to compel—and it is not—it would not justify Movant's intervention in this case because the act of contributing receives limited First Amendment protection.

The cases Movant relies upon in alleging an injury flowing from his desire to contribute, in fact, deal not with contributions but with burdens or bans on political expenditures. In *Davis v. FEC*, 554 U.S. 724 (2008), for example, the constitutional injury alleged was not that of a donor whose right to contribute was constrained. Rather, the case concerned alleged burdens on the right of a wealthy candidate to use his or her own personal funds for expenditures. *Id.* at 738. Similarly, in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, the constitutional

injuries relied on by the Court concerned the ability of privately financed candidates or independent spenders to make political expenditures, not alleged injuries to political supporters seeking to make contributions. *See, e.g.*, *Bennett*, 131 S. Ct. at 2818.[1]

Nor does Movant's reference to *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) or *Citizens United v. FEC*, 130 S. Ct. 876 (2010), support any argument that he could suffer a legally cognizable burden on his right to contribute. Those cases dealt with bans of particular types of speech, not burdens on contributions, *see White*, 536 U.S. at 768 (striking down ban on certain judicial candidate speech); *Citizens United*, 130 S. Ct. at 887-88 (striking down corporate electioneering communication ban), and are inapposite here.

In short, whatever interests Movant may have in making political contributions to candidates opposing Petitioner's election, they do not give him a sufficient interest in this case to warrant intervention.

B. Movant's ideological opposition to the Pilot Program does not give him an interest in this action sufficient to warrant intervention.

Movant's asserted ideological opposition to the Pilot Program does not provide him an interest sufficient to warrant intervention in this proceeding. It may well be that Movant "opposes the use of taxpayer money to finance elections." (Response at 7.) But a mere belief that a law duly enacted by the State of West Virginia is misguided or undesirable as a matter of policy does not grant the holder of that belief the right to intervene in a proceeding seeking

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[1] While *Bennett* focused on the injuries to non-participating candidates and independent spenders, and not on contributors, it is true that the Arizona law at issue in *Bennett* did tie matching funds to the contributions a non-participating candidate received in the general election. 131 S. Ct. at 2814. But this merely underscores the difference between the law at issue in *Bennett* and that in question here. This Court need not decide whether a putative donor in Movant's shoes might possess an adequate interest to intervene if West Virginia had enacted a law like Arizona's—which tied supplemental funds to political contributions—because West Virginia did not do so. West Virginia enacted Section 3-12-11(e). Section 3-12-11(e) is concerned solely with expenditures and does not even include the word "contribution."

enforcement of that law. Arguments that a law represents bad policy are appropriately directed to the State Legislature, not to this Court.

In any event, Movant's ideological opposition to public financing cannot give rise to any constitutional injury: the United States Supreme Court has unambiguously held that public financing is constitutional. Thus, in *Buckley v. Valeo*, the Court noted that the use of public campaign funds does not constitute an attempt "to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." 424 U.S. at 92-93. Even in *Bennett*, when the Supreme Court struck down the triggered matching funds provisions of Arizona's public financing law for executive and legislative elections, the Court affirmed the constitutionality of public financing as a whole. The Court stated that it did not "call into question the wisdom of public financing as a means of funding political candidacy," noting that policy arguments about public financing are the business of the political branches, not the courts. 131 S. Ct. at 2828.

Simply put, whatever Movant's philosophical objections to the use of public funding in judicial campaigns, they do not justify his intervention here.

C. Movant's intent to make independent campaign expenditures does not warrant intervention because Petitioner does not seek enforcement of any statutory provisions dealing with independent expenditures.

Here, Petitioner does not contest that Movant "wishes to conduct independent expenditures in favor of candidates who oppose public financing and/or in opposition to candidates who accept public funds to support their campaigns." (Response at 7.) But to the extent that Movant's desire to engage in independent campaign spending could give him any interest at all in this action, it would be at most a collateral, incidental interest. The role that independent expenditures play in the operation of the Pilot Program is defined by a provision of

the statute—Section 3-12-11(f)—that is not at issue here. The provision of the law that *is* at issue here, Section 3-12-11(e), has nothing to do with independent campaign expenditures and includes no language even referencing independent expenditures. Whatever interests Movant has in any provisions of the West Virginia Code not in question here cannot, by definition, give him an interest in this proceeding sufficiently substantial to warrant intervention.

This Court need not assess whether Movant's interest in the operation of Section 3-12-11(f) would be sufficiently peculiarized to justify his intervention in a mandamus proceeding involving that law. That question is irrelevant to the current inquiry, and has no bearing on whether Movant can claim an interest sufficient to justify intervention when Petitioner does not seek to enforce Section 3-12-11(f). And while Movant's assertions regarding the Pilot Program's provisions on independent expenditures are wrong—Section 3-12-11(f) is in fact an appropriately tailored response to state interests of the highest order, and does not unconstitutionally burden the speech rights of Movant or anyone else—they are irrelevant to resolving the instant question.

Questions regarding the Pilot Program's provisions on independent expenditures would be appropriately considered in an action in which questions about their legality were legitimately joined. This is not that proceeding. Accordingly, because "Interveners may not broaden the scope or function of mandamus proceedings by urging claims or contentions that have their proper forum elsewhere," 55 C.J.S. Mandamus § 346 (footnote omitted), Movant cannot intervene here on the basis of any allegations regarding Section 3-12-11(f).

D. There is no "citizen, taxpayer, or voter" exception to the rule that a party who lacks a peculiar, specific interest cannot intervene.

Perhaps because Movant recognizes that he would suffer no legally cognizable injury were this Court to grant the relief Petitioner seeks—and therefore lacks a sufficient interest to

allow intervention—he grasps for one last, final argument: that even though he lacks any actual, particularized interest in this proceeding, intervention should nonetheless be permitted because of an unbounded, generalized public interest in the integrity of elections. Thus, he asserts that "any citizen, taxpayer, or voter has standing in an election mandamus case because the rights involved are public rights." (Response at 17).

Movant's argument is that the importance of elections vests any member of the public with a limitless right to intervene in any mandamus action involving a legal duty related to elections. The argument is as wrong as a matter of logic as it is wrong as a matter of law.

If there actually were an exception granting a blanket right to intervene in an election mandamus action, it would entirely swallow the rule that one seeking to intervene must claim a substantial, peculiarized interest in a proceeding to warrant intervention. Given that Movant's argument cannot be reconciled with the well-established law governing intervention, it is perhaps unsurprising that the case he cites to support his sweeping theory, in fact, has nothing to do with intervention in a mandamus proceeding. Indeed, the words "intervene," "intervenor," and "intervention" do not appear even once in the case Movant relies on, *Rogers v. Hechler*, 176 W. Va. 713, 348 S.E.2d 299 (1986).

Rogers involved the question whether a citizen, taxpayer, or voter had *standing to petition* for a writ of mandamus, not whether a citizen had *the right to intervene* in an existing mandamus proceeding. The distinction makes all the difference. It may be that when a state official has failed to carry out a non-discretionary election duty that affects the public as a whole, any interested citizen may petition to compel that official to exercise his or her duty. That is an entirely separate question from whether a member of the public who himself has no cognizable interest in an official's exercise of his or her duties may nonetheless intervene in an action

brought by a party who possesses a clear legal right to have the official discharge his or her legal obligations. If Movant's theory were the law, it would have disastrous consequences for this Court's ability to efficiently resolve the pressing matters presented in election mandamus proceedings because a never-ending parade of citizens, taxpayers, and voters could routinely intervene in such cases, regardless of their specific interests in the outcome. This could severely delay this Court's just resolution of these matters, to say nothing of the impact that such an inefficient and uncertain judicial process would have on election administration.

Accordingly, it is unsurprising that, contrary to Movant's asserted principle of at-will intervention by members of the public at large, this Court has routinely denied intervention to parties lacking a sufficiently peculiarized interest in an ongoing election mandamus proceeding. For example, in *State ex rel. Thompson v. Fry*, 137 W. Va. 321, 71 S.E.2d 449 (1952), this Court denied a request to intervene by a candidate for sheriff in a procedural dispute regarding ballot counting. The case involved a dispute over the custody of certain ballots between precinct election officials and the board of canvassers. 137 W. Va. at 323-25, 71 S.E.2d at 450-52. While the candidate plainly had a general interest in the outcome of the election, this Court denied his motion to intervene. Explaining that there "must be a proper showing of substantial interest in the subject matter of the litigation in order to authorize an intervention," this Court held that the candidate lacked an interest in the ballot custody question sufficient to make intervention appropriate. 137 W. Va. at 328-29, 71 S.E.2d at 453.

Similarly, in *State ex rel. Alexander v. County Court of Kanawha County*, 147 W. Va. 693, 130 S.E.2d 200 (1963), this Court denied a citizen group's motion to intervene in a mandamus proceeding concerning the results of an annexation election. In *Alexander*, the mayor of Nitro petitioned for a writ of mandamus to compel the county court to certify the results of the

annexation vote. Even though the voters seeking to intervene were "residents, citizens and taxpayers in the area sought to be annexed," this Court denied their motion to intervene. 147 W. Va. at 694-95, 130 S.E.2d at 201.[2] *Thompson* and *Alexander* prove that that Movant's argument for an unbounded public right to intervene in election mandamus cases is specious.

CONCLUSION

Movant has not, and indeed cannot, be injured in any way by the disbursement of funds that Petitioner seeks here. Whatever concerns Movant has about provisions of West Virginia law that Petitioner has not sought to enforce are irrelevant to the instant proceeding. Any collateral or incidental interest Movant could possibly have in this action would not give him an adequately substantial interest to justify intervention here.

This Court should deny the motion to intervene.

ALLEN H. LOUGHRY II

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[2] Although the Court denied the request to intervene in *Alexander*, it did grant the citizen group's leave to participate in the case as *amicus curiae*, and to file an *amicus* brief "stating the position of certain parties in connection with this proceeding." *Id.* If this Court determined that, despite Movant's lack of an interest sufficient to authorize intervention, his perspective would nevertheless be useful in resolving this matter, leave to participate as *amicus curiae* should be granted. Permission to intervene should not.

J. Adam Skaggs (Admitted *Pro Hac Vice*)
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 12-0899

ALLEN H. LOUGHRY II, candidate for West Virginia Supreme Court of Appeals,
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NATALIE E. TENNANT, in her official capacity as West Virginia Secretary of State; NATALIE E. TENNANT, GARY A. COLLIAS, WILLIAM N. RENZELLI, and ROBERT RUPP, in their official capacities as members of the West Virginia State Election Commission; GLENN B. GAINER III, in his official capacity as West Virginia State Auditor; and JOHN PERDUE, in his official capacity as West Virginia State Treasurer,
Respondents.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served the foregoing **Petitioner Allen H. Loughry's Response to Movant Michael Callaghan's Motion to Intervene** upon the following individuals via hand delivery, on the 14th day of August, 2012 to:

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