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September 22, 1993

HAND DELIVERY

The Honorable Ken Hechler
Secretary of State
Building 1, Suite 157-K
Capitol Complex
Charleston, West Virginia 25305

Dear Secretary Hechler:

On September 9, 1993 this Office received an opinion request from you regarding whether or not by virtue of obtaining 7.4 percent of the total votes cast for governor in the general election of 1992, the Pritt for Governor Committee has earned ballot status for the 1994 elections. Our response is that it has earned ballot status for the 1994 elections.

West Virginia Code section 3-1-8 provides in pertinent part as follows:

Any affiliation of voters representing any principle or organization which, at the last preceding general election, polled for its candidate for governor at least one percent of the total number of votes cast for all candidates for that office in the state, shall be a political party, within the meaning and for the purpose of this chapter. . . .

W. Va. Code § 3-1-8 (1990 Repl. Vol. & 1993 Cum. Supp.).

This particular matter appears quite clear to us and requires no real interpretation of the statute. Rather, what is required is an application of the plain meaning of the words of the statutes.

The facts, as you have provided them to us, are as follows:

1. Charlotte Pritt was a write-in candidate for governor in 1992.
2. The Pritt for Governor Committee is an organization that asserts that it is a statewide affiliation of voters in support of economic, social and political justice.
3. The Pritt for Governor Committee's candidate for governor, Charlotte Pritt, received about 49,000 votes or 7.4 percent of the total votes cast for governor in the general election of November, 1992.

Plainly, because at the last preceding general election, this affiliation of voters representing the principle of economic, social and political justice polled for its candidate for governor far in excess of the minimum percent of the total number of votes cast for all candidates for office of governor in West Virginia, it "shall be a political party within the meaning and for the purpose of this chapter. . . ." W. Va. Code S 3-1-8 (1990 Repl. Vol. & 1993 Cum. Supp.). It is our opinion that as applied to the facts outlined above, the statute is mandatory and nondiscretionary by virtue of the use of the term "shall."

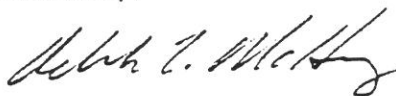
Our opinion is in accord with the general principles outlined by the United States Supreme Court that voters have the right under the First and Fourteenth Amendments to cast their ballots effectively and that "the right to form a party . . . means little if it can be kept off an election ballot and thus denied an equal opportunity to win votes." Williams v. Rhodes, 393 U.S. 23, 31 (1968). The West Virginia Supreme Court has also held that the right to candidacy is a fundamental right under the West Virginia Constitution. State v. City of Follansbee, 233 S.E.2d 419 (W. Va. 1977); Brewer v. Wilson, 150 S.E.2d 592 (W. Va. 1966). The fundamental right to form a party to further political ideas is empty if the party can be kept off the ballot. Likewise, the right to vote is empty if votes may be cast for only one of two parties.

Nevertheless, states have a legitimate interest and "undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates." Anderson v. Celebrezze, 460 U.S. 780, 788 n.9 (1983). West Virginia Code section 3-1-8 is one mechanism of requiring such a showing of support. It cannot be denied that the achievement by the Pritt for Governor Committee of 7.4 percent of the total votes cast for governor in the general election of 1992 was such a showing inasmuch as write-in campaigns are rarely undertaken because of the inherent disadvantage when competing against the printed names of candidates of the two major parties on the ballot.

We are compelled to caution that this is a highly charged political issue. Accordingly, it is not possible to predict with certainty the result of litigation.

We appreciate the opportunity to offer our Opinion on this matter.

Sincerely,



DEBORAH L. McHENRY
MANAGING DEPUTY ATTORNEY GENERAL