

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

**NANCY SINGLETON CASE, and
DEBORAH A. MCGEE,**

Individual Contestors Below, Petitioners,

v.

Case No.: 19-P-_____

**HARDWICK SMITH JOHNSON,
CHARLOTTE WARD THOMPSON,
CHRISTIAN PECHUEKONIS,
MARJORIE FLINN YOST,
BARBARA HUMES,
JAY PREMACK, and
CORPORATION OF HARPERS FERRY,**

Individual Contestees Below, Respondents.

PETITION FOR APPEAL

Petitioners, Nancy Singleton Case and Deborah A. McGee, by and through their counsel, Gregory A. Bailey, Esq., J. Daniel Kirkland, Esq., and the law firm of Arnold & Bailey, PLLC, and pursuant to W.Va. Code § 3-7-6, hereby appeal the Order of the Municipal Election Tribunal of the Corporation of Harpers Ferry, West Virginia, entered September 11, 2019. Petitioners request that this Court reverse the decision of the tribunal to reject four provisional ballots cast by four duly-registered Harpers Ferry residents for the reasons set forth herein.

INTRODUCTION

The sole issue for the tribunal hearing this election contest was whether four (4) provisional ballots cast by four Harpers Ferry citizens who were registered to vote on the day of the election should be counted. The fact that all four of the voters resided within the corporate boundaries of

Harpers Ferry on the day of the election is uncontroverted. The fact that all four of the voters had registered to vote prior to the election is uncontroverted. The fact that the Jefferson County Clerk's Office mistakenly placed all four of the voters in the Bolivar Poll Book rather than the Harpers Ferry Poll Book is uncontroverted. The fact that the poll book misassignment was a technical error, omission and oversight and not the fault of any of the four voters is uncontroverted. Despite these uncontroverted facts, the majority of this tribunal made up of council members who may lose their seats if the four (4) votes are counted, voted to disenfranchise these citizens by rejecting their provisional ballots.

The guiding principle behind our democratic election process is founded upon the enfranchisement of the voting citizens of our nation, states, counties, and municipalities. That guiding principle was completely ignored and disregarded by the majority below in an opinion permeated by bias and personal motivation. In a shocking move that served to disenfranchise voting members of its community, the majority allowed its personal motivations to serve as a basis to violate: (1) statutory law governing provisional ballots and elections; (2) common law instruction to enfranchise voters; and (3) the West Virginia Governmental Ethics Act, W.Va. Code § 6B-1-1, *et seq.*, by improperly participating and judging a matter in which two council members have a personal financial interest. Such corruption and abuse of power must not be allowed to continue at the expense of the voting citizens of Harpers Ferry, West Virginia.

The well-reasoned dissenting opinion correctly and accurately described the fundamental flaws, favoring disenfranchisement, in the majority decision when it opined the following:

This case is instead about the disenfranchisement and exclusion of registered voters from the municipal election process by a brute majority that has ignored this State's laws on the consideration of provisional ballots; ignored the law barring self-interested officials from sitting as the own judge and jury; ignored the admonitions of a Circuit Court judge to "do the right thing"; ignored the legal warnings of the West Virginia Ethics Commission regarding their conflicted participation; and

worst of all, ignored the calls of the citizens of Harpers Ferry with their shameful rejection of voters, who they know to be their town neighbors, just to keep their grip on power.

Pet. Appx. 002.

Instead of adhering to well-established law to enfranchise the votes of their duly-registered citizens, the majority worked tirelessly to craft an opinion that disenfranchised the votes cast by their neighbors and constituents. This Court must reverse the flawed decision of the tribunal to restore the integrity of the free democratic voting process in the municipality of Harpers Ferry, West Virginia.

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A municipal election was held in Harpers Ferry on June 11, 2019. Among the municipal offices subject of the election was for the five (5) seats on the Harpers Ferry Town Council. At the request of candidates Case and McGee, a recount of that vote was held on June 26, 2019 and the election results were certified on June 28, 2019. Based upon the certified votes the margin between the “winning” candidates and those who did win a seat on council was just several votes. Petitioner, Debbie McGee lost by three (3) votes and Petitioner, Nancy Singleton Case lost by only two (2) votes.

During the voting period, six provisional ballots were cast in the municipal election. The Board of Canvassers by a vote of 4-2 summarily refused to review, examine, or consider the any of the six provisional ballots. The Board of Canvassers based its decision to reject the provisional ballots based solely on the fact that the six provisional ballot voters’ names were not contained in the Harpers Ferry Poll Book.¹ The Board of Canvassers took no steps to consider the reason the

¹ The dissenting opinion reminds the majority that the same members accepted provisional ballots of voters not in the Harpers Ferry Poll Book in the past. P Appx. P. 021.

provisional ballot voters were not listed in the Harpers Ferry Poll Book despite the fact that one of the voters had been certified as a candidate and was on the ballot for a Town Council seat. No further explanation was provided for the denial of the provisional ballots from inclusion in the municipal election.

On July 8, 2019, Petitioners, McGee and Case filed a contest to the election alleging that during the June 12, 2019, municipal election, five (5) Harpers Ferry citizens were denied the right to vote based upon erroneous records that indicated they were not Harpers Ferry residents (hereinafter “Provisional Ballot Voters”). *Pet. Appx. 061*. The citizens who cast provisional ballots are: Linda McCarty, George McCarty, Leah Howell (who was also a candidate for town council), Adam Hutton and Jane Mumaw.² All four of the Provisional Ballot Voters live on Washington Street in Harpers Ferry. All four (4) of the Provisional Ballot Voters registered to vote through the West Virginia Department of Motor Vehicles (“DMV”). The DMV required all four (4) of these Harpers Ferry citizens to identify their street address as “West” Washington Street because that is the way their respective addresses showed up in their electronic system. Although the McCarty’s objected to the DMV worker while at the DMV, all of the citizens acquiesced to the DMV directive to identify their address as West Washington Street. None of the four citizens had any idea that doing so would cause the Jefferson County Clerk to list them in the Bolivar Poll Book rather than in the Harpers Ferry Poll Book where they actually reside.

During the trial, Nikki Painter, Chief Deputy Clerk of Elections for the Jefferson County Voter Registration and Election Office, testified that the technical errors that the four provisional

² Petitioners abandoned their claim that Jane Mumaw’s provisional ballot should be tallied after receiving information from the Jefferson County Clerk’s Office that brought into question whether Ms. Mumaw actually resided in Harpers Ferry on the date of the election. Accordingly, only four (4) provisional ballots are the subject of this election contest.

ballot voters to mistakenly be left out of the Harpers Ferry Poll Book was caused by the West Virginia Department of Motor Vehicles address identification mistake. *Pet. Appx. 092*. Ms. Painter testified that there are several ways an individual can register to vote, i.e. register online, register at the DMV, register in person, register through mail, etc. *Id.* at 090. Here, each Provisional Voter registered through the DMV when obtaining their respective West Virginia driver's license.

Upon learning of the voter registration errors, Ms. Painter contacted the West Virginia Secretary of State. Ms. Painter testified that she contacted the West Virginia Secretary of State because all DMV registrations come to her office through the West Virginia Secretary of State's office. *Pet. Appx. 102*. Subsequently, Ms. Painter conducted an investigation to determine the correct addresses of the Provisional Voters, which would in fact make them registered voters of Harpers Ferry. Following the election, the voter registration records of each Provisional Voter was amended to accurately reflect his or her Harpers Ferry voting precinct. *Id.* at 098-102; *see also 197-218*.

George and Linda McCarty registered to vote at the DMV when they acquired their West Virginia driver's license in July 2018. *Pet. Appx. 118-119; 138-139*. Due to DMV bureaucracy, the McCarty's made several trips to the DMV prior to obtaining their driver's license. *Id.* at 138-139. Although they provided 800 Washington Street, Harpers Ferry, West Virginia as their correct address, the DMV informed them that according to their records their address was actually 800 West Washington Street. *Id.* at 119;138-139. A brief discussion ensued on that issue, with the DMV worker being adamant that the correct address was 800 West Washington Street. Rather than continuing to argue, the McCarty's acquiesced and finally obtained their driver's license with an address listed as 800 West Washington Street. *Id.* The result of the address distinction caused the

Jefferson County Clerk's Office to assign the McCarty's to voting Precinct 15 (Bolivar) rather than Precinct 14 (Harpers Ferry).

The McCarty's did not grasp the implication of the address distinction until June 8, 2019, when they attempted to cast a vote in the Harpers Ferry municipal election. Although they voted in the November 2018 state and national elections, they did not become aware of the distinction and error because they voted early in the November 2018 election at the Jefferson County Courthouse and not at the local precinct. *Id.* at 140. On June 8, 2019, the McCarty's attempted to cast their vote during the municipal election early voting period. At that time, they were informed their names were not contained in the Harpers Ferry Poll Book and that they would they would be required to cast a provisional ballot. *Id.* at 140-141. They did so.

Similarly, Adam Hutton registered to vote when he acquired his West Virginia driver's license in April 2019. *Pet. Appx. 148.* Mr. Hutton testified that he used 900 West Washington Street when he registered because that was the address assigned by the U.S. Postal Service. *Id.* at 149. Mr. Hutton also became aware that he was registered in Precinct 15 (Bolivar) rather than Precinct 14 (Harpers Ferry) at the time he attempted to cast his ballot in the Harpers Ferry municipal election. *Id.* at 149. Mr. Hutton was required to cast a provisional ballot, which he did.

Finally, Leah Howell was a candidate for Town Council member in the 2019 Harpers Ferry municipal election. Ms. Howell resided at 887 Washington Street at the time of her notice of candidacy for Harper Ferry town council. *Pet. Appx. 030.* Ms. Howell was incorrectly listed in voting Precinct 15 (Bolivar) due to a mistaken address record of 887 West Washington Street at the time she voted and was required to cast a provisional ballot. *Id.* at 214. Nikki Painter testified that Leah Howell was found to be a Harpers Ferry resident at the time of the vote, and that the

official County voting records were changed to properly reflect her Harpers Ferry residency. Registration records indicate that her correct address was subsequently verified. *Pet. Appx. 101.*

All four of the Provisional Ballots voters were Harpers Ferry residents mistakenly classified by the Jefferson County Voter Registration Office as residents of Bolivar rather than Harpers Ferry. It is undeniable that the mistake in registration was the result of DMV error which designated each of them as living on “West Washington Street.” This error does not change the fact that George and Linda McCarty, Adam Hutton, and Leah Howell were, and are, residents of Harpers Ferry, West Virginia and were entitled to vote in the Harpers Ferry municipal election on June 11, 2019.

Taking into account of all these facts, Nikki Painter testified that in her professional opinion and experience, and based upon clear statutory law, it was her recommendation that the provisional ballots of the four Provisional Voters should have been counted in the Harpers Ferry municipal election. *Id.* at 095-096. Ms. Painter further testified that the county commission would consider the omissions of the Provisional voters, through no fault of their own, from the Harpers Ferry Poll Book to be a technical error, omission and oversight. *Id.* Ms. Painter’s opinion was based upon her experience with prior elections and West Virginia election law.

II. ARGUMENT

The West Virginia Supreme Court declared long ago that fairness, purity and freedom of elections are essential to free government. *Ralston v. Meyer*, 12 S.E. 783 (1891). That pronouncement which dates back to 1891 holds true today. W.Va. Code 3-1-3 provides that citizens of the state shall be entitled to vote at all elections held within the municipalities in which they respectively reside. An election that does not count all votes of its citizens fails to satisfy the criteria of fairness and is not a free election.

Moreover, the West Virginia Supreme Court of Appeals has correctly observed that when considering election contest proceedings, a court should “remain ever mindful of the paramount principle that election laws are to be construed in favor of enfranchisement, not disenfranchisement.” *See State ex rel. Sowards v. County Comm'n of Lincoln County*, 196 W.Va. 739, 750, 474 S.E.2d 919, 930 (1996). *See Afran v. County of Somerset*, 244 N.J.Super. 229, 232, 581 A.2d 1359, 1361 (1990) (“[E]lection laws must be liberally construed to effectuate the overriding public policy in favor of the enfranchisement of voters.”); *see also James Appeal*, 377 Pa. 405, 407, 105 A.2d 64, 65 (1954) (In construing election laws, while courts must strictly enforce all provisions to prevent fraud, an overriding concern must be to be flexible in order to favor the right to vote).

Here, the majority of the tribunal did the opposite. Rather than enfranchise its citizens’ right to vote, the majority performs an illogical and strained analysis to guarantee that the disenfranchisement of its own citizens who: (1) live in Harpers Ferry; (2) were registered to vote; and (3) who exercised their right to participate in the municipal election by casting their ballot. The decision to disenfranchise these duly-registered voters must, therefore, be reversed.

A. Standard of Review

This Court has plenary authority to decide this election contest on the merits. Specifically, W.Va. Code § 3–7–7 governs the contest of elections and their appeal to the circuit court. It provides, in pertinent part, the following procedural standard and standard of review for this Court to follow on appeal of this election contest:

When such appeal is taken to the circuit court, as hereinbefore provided, it shall be heard and determined upon the original papers, evidence, depositions and records filed before and considered by the county court [county commission], and the circuit court shall decide the contest upon the merits.

Further, in *State ex rel. Bowling v. Greenbrier County, Comm'n*, 212 W.Va. 647, 575 S.E.2d 257 (2002), the Court stated:

While the appellate court may examine the record in the review of election contests in order to reach an independent conclusion, it merely determines whether the conclusions of law are warranted by the findings of fact, and it will not, as a general rule, disturb findings of fact on conflicting evidence unless such findings are manifestly wrong or against the weight of the evidence.

With this standard in mind, Petitioner's submit the following and request that this Court reverse the tribunal majority decision to disenfranchise the provisional voters.

B. The Tribunal Erred By Refusing To Tally the Four Provisional Ballots Cast By Duly-Registered Harpers Ferry Residents.

1. Each of the Four Provisional Voters Was A Duly-Registered Harpers Ferry Resident.

West Virginia statutory law provides that provisional ballots that were not counted by election officials shall be counted if the challenged voter was entitled to vote. See W.Va. Code § 3-3-1; and 3-1-4. A voter is qualified if he/she was duly-registered to vote on the date of the election and is a resident of the municipality in which they seek to vote. *Id.* It is uncontroverted that each of these four voters lived on Washington Street in Harpers Ferry, West Virginia on the date of the election. It is also uncontroverted that each of the four voters was registered to vote. The sole reason the tribunal seeks to reject these provisional ballots is because of a technical error, omission and oversight that placed each of these four Harpers Ferry residents in the Bolivar Poll Book. W.Va. Code § 3-1-41(e), makes clear that when judging provisional ballots, such technical errors, omissions and oversights should be disregarded if it can reasonable be ascertained that the challenged voter was entitled to vote. Despite the fact that it was reasonably ascertainable that each of these voters was entitled to vote (because they all lived on Washington Street in Harpers Ferry), the Board of Canvassers and the majority of the tribunal hearing the election contest chose

to ignore the facts in an effort to disenfranchise these Harpers Ferry voters. In doing so, the majority of the tribunal rejects statutory law as well as the common law which instructs that such decisions should always seek to enfranchise voters.

2. The Fact That the Provisional Voters Were Left Out of the Harpers Ferry Poll Book Was Due to Technical Error, Omission and Oversight.

The polar star for guidance in construction of an election contest statute is that the statute should be liberally construed in order that the will of the people in the matter of choosing their public officers may not be defeated by merely technical objections. *State ex rel. Palumbo v. County Court of Kanawha County*, 150 S.E.2d 887, 151 W.Va. 61. (1961). W.Va. Code § 3-1-41(e) provides that:

Provisional ballots may not be counted by the election officials. The county commission shall, on its own motion, at the time of canvassing of the election returns, sit in session to determine the validity of any challenges according to the provisions of this chapter. If the county commission determines that the challenges are unfounded, each provisional ballot of each challenged voter, if otherwise valid, shall be counted and tallied together with the regular ballots cast in the election. The county commission, as the board of canvassers, shall protect the privacy of each provisional ballot cast. *The county commission shall disregard technical errors, omissions or oversights if it can reasonably be ascertained that the challenged voter was entitled to vote.* (emphasis added).

The sole reason that these voters were required to cast provisional ballots was due to uncontroverted technical errors, omissions and oversight that caused (through no fault of the voter) each to be placed in the Bolival Poll Book and omitted from the Harpers Ferry Poll Book. Contrary to the disingenuous findings of fact set forth in the majority opinion, the evidence makes clear that the Provisional Ballot Voters were duly-registered voters and citizens residing within the corporate boundaries of Harpers Ferry on the date of the Harpers Ferry municipal election. The Jefferson County Chief Deputy of Elections who is in charge of the voter registration, Nikki

Painter, testified and explained the technical error: how and why it occurred and how it was remedied as soon as it came to light. During the election contest hearing, Nikki Painter, testified that the flawed Bolivar designation of the Provisional Voters' registration records was caused by the DMV's erroneous designation that the voters lived on "West Washington Street." This seemingly insignificant distinction resulted in each Provisional Ballot Voter being placed in Precinct 15 (Bolivar) rather than Precinct 14 (Harpers Ferry) according to Ms. Painter. Importantly, the impact of the distinction was lost on the voters who were each completely unaware of the technical error, omission and oversight until the time they cast their ballots. There is no evidence to the contrary, yet the majority on the tribunal believes the votes cast by their citizens should not be tallied based on an obvious technical error. The majority reached this conclusion for political expediency.

Based upon the evidence presented during the election contest, it is clear that the improper registration of the Provisional Ballot Voters in Precinct 14 (Bolivar) was the result of a technical error, omission, or oversight caused by the DMV. The Board of Canvassers, and the election contest tribunal, could have easily ascertained that the challenged voters were Harpers Ferry residents who were registered to vote. They chose instead to disenfranchise these voters for their own political purpose. The provisional ballots should have been tallied. To find otherwise requires a complete disregard and misinterpretation of the law. Yet, that is exactly what a majority of the municipal court held in its September 11, 2019, "Order Declaring Election Results."³

³ The majority signed what is essentially a word for word proposed order submitted by personal counsel for Charlotte Ward-Thompson, Hardwick Johnson, and Barbara Humes, all members of the majority opinion, who considered evidence submitted by their personal counsel during the August 24, 2019, election trial. Despite this clear conflict of interest and admonition from the West Virginia Ethics Office, they maintained that their disqualification was unnecessary.

3. The Tribunal Erroneously Relied on the *Galloway* Case To Conclude the Provisional Voters Were Not Duly-Registered Because *Galloway* Predated the Federal and State Statutory Law Changes That Provide for a Single State-Wide Voter Registry.

In support of its self-serving opinion, the majority opinion erroneously relies on what it deems a failure of the Provisional Ballot Voters to be “duly registered.” The majority further opines that regardless of the incorrect address registration made by the DMV, “such registration errors to not constitute the type of technical error that be disregarded under the law.” *Pet. Appx. 010*. According to the majority, “this conclusion is compelled by the binding decision of the West Virginia Supreme Court of Appeal in *Galloway v. Common Council of City of Kenova*, 133 W.Va. 446, 57 S.E.2d 881 (1949).” *Id.* The municipal tribunal’s reliance on *Galloway* in the present case is erroneous. At the time *Galloway* was decided in 1949, two separate and distinct voter registration lists existed in West Virginia; one for county and state elections and one for municipal elections. That is no longer the case.⁴ Although the voters at issue in *Galloway* were registered

⁴ In 2004 West Virginia implemented its Help America Vote Again (“HAVA”) compliant voter registration system, known today as a Singular Voter Registration System. (“SVRS”). Voter registration information across the state is entered into this database at the county level. HAVA requires that state and local election officials maintain the list of voters in the database according to the provisions of the National Voter Registration Act of 1993. See also W. Va. Code § 3-2-4a(a) (passed March 7, 2003; last amended March 11, 2016), which provides:

(a) The Secretary of State shall implement and maintain a single, official, statewide, centralized, interactive computerized voter registration database of every legally registered voter in the state, as follows:

(1) The statewide voter registration database shall serve as the single system for storing and managing the official list of registered voters throughout the state.

...

(8) The statewide voter registration database shall serve as the official voter registration list for conducting all elections in the state.

(citations omitted)

for county and state elections, they were not registered to vote in the municipal records. It was the voter's failure to register in municipality, not a technical error, that that formed the basis of the conclusion of the *Galloway* court that the ballots should not be counted. The voter registration system has since been changed.

In the present case, each of the four (4) Provisional Ballot Voters was properly registered to vote in their respective municipalities by virtue of their voter registration. As the result of a technical error, omission and oversight by the DMV's address designation, they were each placed in the incorrect voting precinct by the County Clerk's Office. This fact does not eviscerate the fact that each was a duly-registered voter. It is uncontroverted that each and every Provisional Ballot Voter were verified residents of Harpers Ferry at the address to which they were registered on election day. It is further uncontroverted that each and every Provisional Ballot Voter was a Harpers Ferry resident for at least 30 days prior to the June 11, 2019, municipal election. Even the most cursory of considerations would have enabled the Board of Canvassers, and ultimately the election contest tribunal who heard both the sworn testimony of the voters and the explanation of the technical error, omission and oversight from the Chief Deputy Clerk in charge of voter registration to reasonably ascertain that, despite the technical error, omission and oversight caused by the DMV, each and every Provisional Ballot Voter was entitled to vote in the June 11, 2019, Harpers Ferry municipal election. As duly registered voters, they were each respectively entitled to cast a vote in the Harpers Ferry municipal election and have their vote count.

In *Greenbrier Cnty. Comm.*, the West Virginia Supreme Court of Appeals established an absolute standard of favoring enfranchisement over disenfranchisement in the counting of challenged ballots in elections. The *Greenbrier* Court pronounced,

Initially, we observe that we must in cases like the instant one remain ever mindful of the paramount principle that election laws are to be construed in favor of

enfranchisement, not disenfranchisement. *See State ex rel. Sowards v. County Comm'n of Lincoln County*, 196 W.Va. 739, 750, 474 S.E.2d 919, 930 (1996). *See Afran v. County of Somerset*, 244 N.J.Super. 229, 232, 581 A.2d 1359, 1361 (1990) (“[E]lection laws must be liberally construed to effectuate the overriding public policy in favor of the enfranchisement of voters.”); *see also James Appeal*, 377 Pa. 405, 407, 105 A.2d 64, 65 (1954) (In construing election laws, while courts must strictly enforce all provisions to prevent fraud, an overriding concern must be to be flexible in order to favor the right to vote). Thus, in the absence of evidence of patent error or of fraud, courts should be cautious about “monkeying” with the reasoned determinations of designated election officials—particularly when judicial intervention would result in the disenfranchising of voters.

The West Virginia Supreme Court of Appeals further emphasized that technical errors, omission, or oversights must be disregarded if it can be “reasonably ascertained” that the challenged voter was entitled to vote. *Greenbrier Cnty. Comm.*, 212 W.Va. at 653. Against all of these clear legal directives, in a self-serving move, the majority below completely shattered the confidence of Harpers Ferry residents in the sanctity of our democratic election process by disenfranchising voters under the guise of preventing voter fraud. The fraud perpetrated here is not by the voters but by the very elected officials charged with protecting the citizens they represent.

B. The Failure of Council Members Johnson and Thompson to Recuse Themselves Was An Abuse of Discretion and Constitutes Reversible Error.

From the outset, the underlying proceedings were tainted with personal motivation and bias by certain members of the decision-making tribunal. The participation of council members Charlotte Thompson and Hardwick Johnson ran afoul of common sense, logic, statutory law, and the West Virginia Ethics Code governing elected officials. Here, the statutory mandate of automatic disqualification of council members Johnson and Thompson could not be more clear. W.Va. Code § 3-7-6, provides:

In all cases of contested elections, the county commission shall be the judge of the election, qualifications and returns of their own member and of all county and district officers: Provided, That **a member of the county commission whose election is being contested may not participate in judging the election, qualifications and returns.**

(Emphasis added)⁵ See also, Syl. Pt. 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951) ([a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.)

Contesters election contest directly impacts Ms. Thompson's and Mr. Hardy's election to the town council. Ms. Thompson's margin of error is only 2 and 3 votes respectively. Mr. Hardy won his seat on the town council by three (3) votes over Contester Case and four (4) votes over Contester McGee. There are four (4) provisional ballots at issue. Accordingly, Ms. Thompson's and Mr. Hardy's election to the Town Council is clearly contested and clearly is at issue depending upon the tally of provisional ballots. Indeed, the other council member who was within the margin of error of five votes, Christian Pechuekonis, appropriately disqualified himself. Both Ms. Thompson and Mr. Hardy had a legal and ethical duty to disqualify themselves from participating in the tribunal. The West Virginia Ethics Commission agrees.

Heeding guidance from this Court, Council Member Jay Premack (who is not impacted by the four vote contest) contacted the West Virginia Ethics Commission for an opinion as to participation of Charlotte Thompson and Hardwick Johnson in the contested election proceedings. On August 29, 2019, five (5) days after the election contest proceeding, but prior to deliberations, the West Virginia Ethics Commission issued a staff opinion as follows:

It is the general opinion of Ethics Commission staff that there is a reasonable probability that the tribunal's decision on the election contest could impact whether

⁵ W.Va. Code § 3-7-6, applies equally to municipal elections as follows: "The provisions of this section apply to all elections, including municipal elections, except that the governing body of the municipality is the judge of any contest of a municipal election."

a council member, who is also a member of the tribunal, may keep his or her City Council seat, then that council member may not participate as a member of the tribunal because he or she has financial interest in holding the elected position in question.

P Appx. 032. The ethics opinion, however, did not deter Johnson and Thompson who cast the deciding votes with the majority of the tribunal.⁶

Accordingly, based upon clear statutory law in W.Va. Code § 3-7-6 and West Virginia Governmental Ethics Act, W.Va. Code § 6B-1-1, *et seq.*, any member of the tribunal empaneled to judge the election whose individual election is being contested should have been disqualified from participating in judging the election, qualifications and returns. Johnson and Thompson's participation in the August 24, 2019, election contest proceeding, and subsequent deliberations, not only violated West Virginia statutory law, it eroded the fundamental fairness of election review process as a whole.

The motive behind the majority tribunal's absolute disregard of statutory law is rather transparent given the additional votes may very likely change the election results. Indeed, the council members have offered no valid justification for their persistent refusal to follow West Virginia statutory law and the ethical obligations imposed upon them by the West Virginia Governmental Ethics Act, W.Va. Code § 6B-1-1, *et seq.* Along with Ms. Thompson and Mr. Johnson, certain factions of the town council were willing to perpetuate the taint of impropriety in the Harper's Ferry election to further the desired outcome of the winning candidates. If true, such motivation threatens the very foundation of our constitutionally founded election process and should not be permitted by this Court. This Court should reverse the Order of the tribunal based

⁶ Notably, neither council members Thompson or Johnson, or their counsel, made any effort to determine the potential ethical violations posed by their participation in the contested election proceedings and deliberations.

upon this violation alone. Ultimately, though this Court should determine the merits of this case and instruct that the four provisional ballots at issue be tallied as part of the Harpers Ferry municipal election results as a matter of law.

CONCLUSION

WHEREFORE, for the reasons contained herein, Petitioner's respectfully pray that this Honorable Court reverse the September 11, 2019, Order Declaring Election Results and mandate that the provisional ballots be tallied in a recount of the June 11, 2019, Harpers Ferry Municipal Election.

**NANCY SINGLETON CASE and
DEBORAH H. McGEE,
Contestors, By Counsel**

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Individual Contestees Below, Respondents.

CERTIFICATE OF SERVICE

I, Gregory A. Bailey, Esq. do hereby certify that I have served a true copy of the foregoing PETITION FOR APPEAL upon the following counsel via email through the WV E-Filing System and U.S. First Class Postal Service this 27th day of September, 2019:

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Jefferson County Circuit Clerk
Laura Storm

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

CIVIL CASE INFORMATION STATEMENT
(Civil Cases Other than Domestic Relations)

CASE STYLE: _____ **Case No.** 19-P

Plaintiff(s) _____ **Judge:** _____

PHY SINGLETON CASE, AND

MORAH A. MCGEE

Defendant(s) _____ **Days to Answer** _____ **Type of Service** _____

CORPORATION OF HARPERS FERRY 20 PRIVATE SERVICE

Name _____

1000 WASHINGTON STREET

Street Address _____

HARPERS FERRY, WV 25425

City, State, Zip Code _____

II. TYPE OF CASE:

- | | |
|--|--|
| <input type="checkbox"/> General Civil | <input type="checkbox"/> Adoption |
| <input type="checkbox"/> Mass Litigation [As defined in T.C.R. 26.04(a)] | <input type="checkbox"/> Administrative Agency Appeal |
| <input type="checkbox"/> Asbestos | <input type="checkbox"/> Civil Appeal from Magistrate Court |
| <input type="checkbox"/> FELA Asbestos | <input checked="" type="checkbox"/> Miscellaneous Civil Petition |
| <input type="checkbox"/> Other: _____ | <input type="checkbox"/> Mental Hygiene |
| <input type="checkbox"/> Habeas Corpus/Other Extraordinary Writ | <input type="checkbox"/> Guardianship |
| <input type="checkbox"/> Other: _____ | <input type="checkbox"/> Medical Malpractice |

III. JURY DEMAND: Yes No CASE WILL BE READY FOR TRIAL BY (Month/Year): _____ / _____

IV. DO YOU OR ANY OF YOUR CLIENTS OR WITNESSES IN THIS CASE REQUIRE SPECIAL ACCOMMODATIONS?

Yes No

IF YES, PLEASE SPECIFY:

- Wheelchair accessible hearing room and other facilities
- Reader or other auxiliary aid for the visually impaired
- Interpreter or other auxiliary aid for the deaf and hard of hearing
- Spokesperson or other auxiliary aid for the speech impaired
- Foreign language interpreter-specify language: _____
- Other: _____

Attorney Name: Gregory A. Bailey, Esquire

Firm: Arnold and Bailey, PLLC

Address: 208 North George Street, Charles Town, WV 25414

Telephone: (304) 725-2002

Representing:

Plaintiff Defendant

Cross-Defendant Cross-Complainant

3rd-Party Plaintiff 3rd-Party Defendant

Proceeding Without an Attorney

Original and _____ copies of complaint enclosed/attached.

Dated: 09 / 27 / 2019

Signature: 

Plaintiff: NANCY SINGLETON CASE, AND , et al Case Number: 19-P

vs.

Defendant: CORPORATION OF HARPERS FERRY , et al

**CIVIL CASE INFORMATION STATEMENT
DEFENDANT(S) CONTINUATION PAGE**

C/O HARDWICK SMITH JOHNSON

Defendant's Name

1000 WASHINGTON STREET

Street Address

Days to Answer: 20

HARPERS FERRY, WV 25425

City, State, Zip Code

Type of Service: PRIVATE PROCESS

C/O CHARLOTTE WARD THOMPSON

Defendant's Name

1000 WASHINGTON STREET

Street Address

Days to Answer: 20

HARPERS FERRY, WV 25425

City, State, Zip Code

Type of Service: PRIVATE PROCESS

C/O CHRISTIAN PECHUEKONIS

Defendant's Name

1000 WASHINGTON STREET

Street Address

Days to Answer: 20

HARPERS FERRY, WV 25425

City, State, Zip Code

Type of Service: PRIVATE PROCESS

C/O MARJORIE FLINN YOST

Defendant's Name

1000 WASHINGTON STREET

Street Address

Days to Answer: 20

HARPERS FERRY, WV 25425

City, State, Zip Code

Type of Service: PRIVATE PROCESS

C/O BARBARA HUMES

Defendant's Name

1000 WASHINGTON STREET

Street Address

Days to Answer: 20

HARPERS FERRY, WV 25425

City, State, Zip Code

Type of Service: PRIVATE PROCESS

C/O JAY PREMACK

Defendant's Name

1000 WASHINGTON STREET

Street Address

Days to Answer: 20

HARPERS FERRY, WV 25425

City, State, Zip Code

Type of Service: PRIVATE PROCESS

Defendant's Name

Street Address

Days to Answer: _____

City, State, Zip Code

Type of Service: _____