

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 19-1018



HARDWICK SMITH JOHNSON,
CHARLOTTE WARD THOMPSON,
MARJORIE FLINN YOST,
BARBARA HUMES,

Individual Contestees-Respondents Below, Petitioners,

v.

NANCY SINGLETON CASE and
DEBORAH A. MCGEE,

Individual Contestors-Petitioners Below, Respondents.

JOINT APPENDIX

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CERTIFICATION

I hereby certify that the contents of this Joint Appendix are true and accurate copies of items contained in the record of the lower tribunal and that counsel for Petitioner has conferred in good faith with all parties in order to determine the contents of the appendix.



J. Zak Ritchie (WVSB #11705)

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Corporation of Harpers Ferry

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Harpers Ferry, West Virginia 25425

304-535-2208

Wayne Bishop,

Mayor

BARBARA HUMES, JAY PREMACK, HARDWICK S. JOHNSON, JR., CHRISTIAN PECHUEKONIS, CHARLOTTE THOMPSON, COUNCIL MEMBERS
KEVIN GARDEN, RECORDER

BEFORE THE HARPERS FERRY ELECTION CONTEST TRIBUNAL

IN RE: THE MATTER OF CONTESTED TOWN COUNCIL ELECTION

NANCY SINGLETON CASE, and
DEBORAH A. MCGEE,

Individual Contesters,

HARDWICK SMITH JOHNSON,
CHARLOTTE WARD THOMPSON,
CHRISTIAN PECHUEKONIS,
MARJORIE FLINN YOST,
BARBARA HUMES, and
JAY PREMACK,

Individual Contestees.

ORDER DECLARING ELECTION RESULTS

On August 24, 2019, the Town Council of the Corporation of Harpers Ferry (the "Town Council") heard testimony and received evidence in the trial of this election contest. Having considered the evidence submitted by the parties, the arguments presented by counsel, and other proper written submissions, the Town Council makes the following findings of fact and conclusions of law:

I.

FINDINGS OF FACT

Background and Procedural History

1. On June 11, 2019, the Corporation of Harpers Ferry (the "Town") held a municipal election for the offices of Mayor, Recorder, and five at-large council seats. Early voting began on May 29, 2019.

2. On June 17, 2019, the Board of Canvassers (the "Board") met to conduct a canvass of election returns and otherwise perform all acts as required by law. At this meeting, the Board declined to count certain provisional ballots that were cast by voters not registered in the Harpers Ferry poll book. The Board could not lawfully consider extrinsic evidence and otherwise followed the West Virginia Secretary of State's 2019 Best Practices Guide for Municipal Canvass. A representative of the Secretary of State's office was present and observed the canvass. Following the conclusion of the canvass, the Board formally declared the results of the election.

3. The Board met 48 hours later, on June 19, 2019 to certify the election results. At this meeting, Recorder Kevin Carden asserted that two losing candidates had made a recount request. Recorder Carden failed to produce to the Board any written evidence of any recount request at that time despite request to do so by another member of the Board. Nonetheless, based only on Recorder Carden's representations, the Board delayed certifying the election in order to conduct a recount.

4. The Board conducted the recount on June 26, 2019. The election results did not change.

5. On June 28, 2019, the Board formally certified the election results.

6. The newlyelected members of Town Council took office on June 29, 2019.

7. This election contest was commenced by Nancy Singleton Case and Deborah A. McGee, by counsel (the "Contesters"), on July 8, 2019, pursuant to West Virginia Code § 3-7-6, *et seq.*, by their filing with the Town a Notice of Intent to Contest Harpers Ferry Town Council Election ("Notice of Contest").

8. The Notice of Contest names Hardwick Smith Johnson, Charlotte Ward Thompson, Christian Pechuekonis, Marjorie Flinn Yost, Barbara Humes, and Jay Premack as "Individual Contestees" (the "Contestees").

9. The Notice of Contest claims that five specific provisional ballots rejected by the Board should have been counted. The Notice of Contest also made numerous other allegations concerning certain wrongly counted ballots and other insinuations of misconduct.

10. On July 18, 2019, Contestees Johnson, Thompson, Yost, and Humes, by counsel, jointly filed a responsive pleading, titled "Contestees' Notice Pursuant to West Virginia Code § 3-7-6."

11. Contestees Christian Pechuekonis and Jay Premack did not respond to the Notice of Contest.

12. The Contesters never filed or served an amended Notice of Contest.

13. The Town Council set the trial of this election contest for Saturday, August 24, 2019, at the Town Hall, beginning at 10:00 a.m.

The Election Contest Trial

14. On August 24, 2019, the trial of this election contest was held as scheduled and concluded the same day. The Town Council heard testimony and received evidence. All witnesses were duly sworn. The entirety of the trial was transcribed by a court reporter.

15. At the start of the trial, Contesters, by counsel, made a "motion" to the Town Council that Councilmembers Johnson and Thompson be disqualified from hearing and deciding this election contest.

16. With the exception of Councilmember Pechuekonis, who had previously voluntarily declined to participate in the election contest proceeding, all then-members of Town Council in their official capacity heard testimony and received evidence at the trial.

17. At the outset of the trial, the Contesters expressly abandoned all election contest claims and allegations except for their claims that the provisional ballots of Leah Howell, George McCarty, Linda McCarty, and Adam Hutton (the "Provisional Voters") should be counted.

18. The Contesters expressly stipulated that none of the names of the Provisional Voters were in the official registration record of the Corporation of Harpers Ferry (the "Poll Book") at the time each of them cast their ballots.

19. Nikki Painter, Chief Deputy Clerk of Elections for the Jefferson County Voter Registration and Election Office, testified first.

20. Ms. Painter testified that she did not become aware of any problem with the alleged voter registration errors affecting the official voter registration records of George McCarty, Linda McCarty, Adam Hutton, and Leah Howell until after the June 11, 2019 election.

21. Ms. Painter testified that she was first made aware of the alleged dispute over provisional ballots when Recorder Kevin Carden contacted her “to go over if [the provisional ballot voters] were registered in time and if [the Jefferson County Clerk’s office] had a record of them because they did not appear in the poll book.”

22. Ms. Painter further testified that she believed that the source of the alleged voter registration errors affecting the official voter registration records of George McCarty, Linda McCarty, Adam Hutton, and Leah Howell was the West Virginia Department of Motor Vehicles (the “DMV”).

23. Despite her suspicions, Ms. Painter testified that neither she nor anyone in her office ever spoke to any representative of the DMV to investigate the source of the alleged registration error.

24. George McCarty testified concerning his residency and registration. Mr. McCarty testified that his voter registration information wrongly identified him as a resident of the Town of Bolivar. Mr. McCarty testified that he has been aware of this alleged error in his voter registration since August 2018, approximately ten months before the election at issue in this proceeding. Mr. McCarty blamed the DMV for his alleged registration error.

25. Linda McCarty testified concerning her residency and registration. Mrs. McCarty testified that her voter registration information wrongly identified her as a resident of the Town of Bolivar. Mrs. McCarty testified that she was aware of this alleged error in her voter registration since August 2018, approximately ten months before the election at issue in this proceeding. Mrs. McCarty blamed the DMV for her alleged registration error.

26. Adam Hutton testified concerning his residency and registration.

27. The Contesters presented no competent evidence from the DMV concerning the nature, source, or cause of the alleged voter registration errors allegedly affecting the official voter registration records of George McCarty, Linda McCarty, Adam Hutton, and Leah Howell.

28. The Contesters did not present any testimony from Leah Howell. No competent evidence was presented concerning Ms. Howell's residency. Nor was any competent evidence presented concerning the nature or source of the alleged voter registration error affecting the official voter registration record of Ms. Howell.

29. The Contesters presented no evidence that Nancy Singleton Case provided any written request for a recount within 48 hours of the declaration of election. Nor did the Contesters present any evidence that Ms. Case paid the required bond concerning any recount request. Ms. Case's sworn allegations otherwise in the Notice of Contest leads the Town Council to find that Ms. Case's testimony is inconsistent and not credible.

30. Contesters Nancy Case and Deborah McGee were called by the Contestees and testified, among other things, about whether they fulfilled the necessary legal prerequisites to bring this election contest.

31. The Contestees called Kevin Carden as a witness, but Mr. Carden refused to testify.

32. Mr. Carden's anticipated testimony was relevant and necessary because evidence adduced from other witnesses established that Mr. Carden has first-hand knowledge and information about communications with the Jefferson County Clerk, including about the circumstances surrounding when, why, and how several allegedly erroneous registrations of the Provisional Voters were corrected on or after the day of the canvass. In fact, Mr. Carden is likely the only person who has much of that information.

33. Mr. Carden's testimony was also relevant and necessary because, as the testimony of the Contesters Ms. Case and Ms. McGee established, Mr. Carden is perhaps the only person who has critical first-hand knowledge about whether Ms. Case and Ms. McGee fulfilled the necessary legal prerequisites to bring this election contest. In short, Mr. Carden has personal knowledge of his communications with other witnesses who testified and his relationship to individuals, names, and witnesses in this case is relevant to the claims and defenses of the parties to the contest.

II.

CONCLUSIONS OF LAW

34. The Town Council is the only body that can hear and decide this election contest. Statute grants to “the governing body of the municipality” the sole power to “judge . . . any contest of a municipal election.” W. Va. Code § 3-7-6; *see also* Syl. Pt. 8, *State ex rel. Peck v. City Council of City of Montgomery*, 150 W. Va. 580, 582, 148 S.E.2d 700, 703 (1966) (“The municipal council has original and exclusive jurisdiction to hear and decide contested elections involving the selection of municipal officers.”).

35. Under the Ordinances of Harpers Ferry, the “Town Council” is defined as “the governing body of the town” and “consists of” five Councilmembers, plus the Mayor and the Recorder. Ordinance 11.01; *id.* at 11.02. The Mayor and Recorder “have votes as members of the Town Council.” *Id.* 111.09.

36. “The council of a city, town, or village to which one, whose seat is contested, is elected, is the proper tribunal to try such contest, and not the council in office at the time of the election.” Syl. Pt. 1, *Price v. Fitzpatrick*, 85 W. Va. 76, 100 S.E. 872 (1919). Therefore, the Town Council that sits in judgment of this election contest includes Mayor Wayne Bishop, Recorder Kevin Carden, and Councilmembers Barbara Humes, Hardy Johnson, Christian Pechuekonis, Jay Premack, and Charlotte Thompson. Councilmember Christian Pechuekonis voluntarily decided not to participate in this election contest.

37. Contestee Nancy Singleton Case lacks standing to bring or prosecute this election contest because she failed to present evidence that she made a formal request for a recount, accompanied by the required bond, within 48 hours of the declaration of election by the Board of Canvassers.

38. The motion made by the Contesters at the start of the trial of this election contest to disqualify Council members Johnson and Thompson is denied because the Town Council acting as a governing body has no legal authority to compel any one or more of its members to disqualify themselves from participating in any business that comes before Town Council. Disqualification is determined and undertaken on an individual basis.

39. The only issue presented for decision by the Contesters at the trial of this election contest is whether the ballots of the four Provisional Voters that were cast in the recent municipal election should be

counted. The Contesters bear the burden of proof and persuasion as the party who commenced this election contest.

40. Because Harpers Ferry has adopted a permanent voter registration system pursuant to Article 2 of Chapter 3 of the West Virginia Code, the provisions of that article apply to this election contest. *See State ex rel. Ellis v. Cnty. Court of Cabell Cnty.*, 153 W. Va. 45, 52 (1969) (applying provisions of permanent voter registration code to municipality that adopted it); *see also* Harpers Ferry, W. Va., Ordinances Ch. 1, Art. 103, § 103.04 (2019) (adopting permanent voter registration law of West Virginia).

41. Under the West Virginia Constitution and the West Virginia Code, a person must meet certain requirements in order to be able to cast a valid and countable ballot in an election. *See* W. Va. Const., Art. IV, § 1; W. Va. Code § 3-1-3.

42. Relevant to this contest, West Virginia law specifies that a person's ballot may not be counted unless he or she meets two requirements: (1) he or she is a "resident" of the municipality and (2) he or she is eligible and "duly registered to vote" in that municipality. *See* W. Va. Const., Art. IV, § 1; W. Va. Code § 3-2-1(c); *see also id.* § 3-2-2(a). If a person is either not a resident *or* is not properly registered in a municipality, then his or her vote cannot count in an election in that municipality.

43. In order to cast a valid and countable vote, a person must satisfy the residency requirement. Not only must a person be a resident of West Virginia, but that person must also be a "bona fide resident" of the county and "municipality in which he or she offers to vote." *See* W. Va. Code § 3-1-3; *see also* W. Va. Const., Art. IV, § 1. In addition, a person must establish residency at least thirty (30) days before he or she votes and remain a resident at the time that the vote is cast.

44. In order to be a resident of a municipality—for purposes of casting a vote—a person must have a physical presence in that municipality and intend to remain there for the foreseeable future. *See White v. Manchin*, 173 W. Va. 526, 538 (1984) (equating, for purposes of election law, residence with domicile, which has two elements "(1) [b]odily presence in a place [and] (2) [t]he intention of remaining in that place"); *see also* Syl. pt. 7, *State ex rel. Peck v. City Council of City of Montgomery*, 150 W. Va. 580 (1966) (explaining

residency requirement and applying domicile rule to municipal election); W. Va. Code § 3-1-3; *see also* W. Va. Const., Art. IV, §1 (requiring a permitted voter be a “resident”); W. Va. Code § 3-2-2 (mandating that a person must be “a legal resident” of location in order to register to vote).

45. A voter must be a resident of a municipality at the time of casting a ballot and for a 30-day period before casting a ballot. *See* W. Va. Const., Art. IV, § 1; *See Ellis*, 153 W. Va. at 51 (equating “offer[ing] a vote” with “cast[ing]” a ballot); W. Va. Code § 3-1-3.

46. Therefore, if someone was not a resident for the 30-day period immediately before casting a ballot or was not a resident at the time he or she cast a ballot, then that person’s vote cannot count under West Virginia law. *See Peck*, 150 W. Va. at 588 (concluding that residency requirement contained in Article IV, section 1 of West Virginia Constitution “applies to cities”).

47. In addition to being a resident of the municipality, a voter must also meet voter registration requirements in order for that person’s vote to count. *See* W. Va. Code § 3-2-1; *see also* W. Va. Const., Art. IV, § 12 (“The Legislature shall enact proper laws for the registration of all qualified voters in this state.”); *State ex rel. Willhide v. King*, 126 W. Va. 785, 789 (1944) (concluding that § 12 of Article IV of the Constitution was “sufficient to warrant” enactment of voter registration requirements).

48. There are three voter registration requirements relevant to this contest: (1) a person must be “eligible” to register to vote, *see* W. Va. Code § 3-2-1(c); (2) a person must be “duly registered” to vote, *see id.*; and, (3) a person must be properly registered not later than twenty-one (21) days before the election in question. *See id.* at § 3-2-6(a) (setting the deadline for voter registration). A voter must satisfy *each* of those three requirements in order for his or her vote to count.

49. The purpose of these registration requirements is to enable election officials to determine whether someone satisfies the constitutional and statutory qualifications before he or she actually casts a ballot. *See State ex rel. Daily Gazette Co. v. Bailey*, 152 W. Va. 521, 525 (1968) (explaining that registration statutes “protect . . . the ballot box”).

50. A person is only “duly registered” for a municipal election when his or her registration shows that he or she resides in the municipality.

51. Under the West Virginia Code, “duly registered” means that a person is registered to vote in the location holding the election. As applied to a municipality, the Supreme Court of Appeals of West Virginia has determined that a “duly registered” voter “must be registered and cast his [or her] ballot in the [municipal] precinct in which he [or she] resides.” *See Ellis*, 153 W. Va. at 52.

52. In other words, if a voter is not registered to a municipality—and in the corresponding municipal registration records—when he or she casts a ballot, then that person’s vote cannot count in an election of that municipality. *See Syl. pts. 2&3, Galloway v. Common Council of City of Kenova*, 133 W. Va. 446 (1949).

53. Because of the importance of such residency information, when a person fills out a voter registration application, he or she must identify the address, city, and county where he or she resides *under oath*. *See W. Va. Code § 3-2-5(c)(3)*.

54. A person must be duly registered to vote by the registration cutoff date, which is 21 days before the election. Under that cutoff date, voter registration “closes on the twenty-first (21) day before the election.” *Id.* at § 3-2-6(a).

55. Although a voter can register during the time between the cutoff date and the election, that voter would not be duly registered to cast a ballot in the next election (that is, the election less than 21 days away). *See Syl. pt. 1, State ex rel. Lawhead v. Kanawha Cnty. Court*, 129 W. Va. 167 (1946) (applying prior version of code that imposed thirty-day cutoff).

56. Therefore, if a voter had not registered as residing in a municipality at least twenty-one days before a municipal election, that person would not be duly registered to vote in that election. *See Ellis*, 153 W. Va. at 52 (explaining that ballots could not be counted in precinct that a voter moved to within the cutoff period before the election); *Lawhead*, 129 W. Va. at 172 (applying former version of code that contained 30-day cutoff period and concluding that “[i]t is plain that in order to vote at an election a person must be registered thirty

days or more prior to that election”). In other words, that person’s vote cannot not be counted in that municipal election.

57. Based on the Contesters’ stipulation that none of the names of the Provisional Voters were in fact in the official registration record of the Corporation of Harpers Ferry—the Poll Book—at the time each of them cast their ballots, the ballots cannot be counted in accordance with state law.

58. The alleged voter registration errors affecting the official voter registration records of George McCarty, Linda McCarty, Adam Hutton, and Leah Howell were allegedly caused by someone or some policy at the DMV. However, because the Contesters presented no evidence from the DMV, the Contesters failed to satisfy their burden of proof or persuasion as to the source, nature, or cause of the alleged voter registration errors at issue in this proceeding.

59. As a result, the Contesters presented insufficient evidence to allow the Town Council to conclude that such alleged registration errors affecting the votes of the Provisional Voters constituted the type of technical errors that may be disregarded under law.

60. Even assuming sufficient, competent evidence was presented at trial to allow the Town Council to conclude that the registration information of the Provisional Voters in fact contained incorrect address information caused by individuals or policy at the DMV that caused those voters not to appear in the Harpers Ferry Poll Book at the time of the election, such incorrect registration errors do not constitute the type of technical error that may be disregarded under law.

61. This conclusion is compelled by the binding decision of the West Virginia Supreme Court of Appeals in *Galloway v. Common Council of City of Kenova*, 133 W. Va. 446, 57 S.E.2d 881 (1949), which held that the persons whose names appeared on the voter registration records used in county and state elections but not on municipal registration records were not entitled to vote.

62. In that case, the Supreme Court of Appeals acknowledged the statutory provision stating that “errors, omissions or oversights” shall be “disregard[ed] . . . if it can reasonably be ascertained that the challenged voter was entitled to vote.” *Id.* at 453, 57 S.E.2d at 885 (citing the predecessor statute to current W.

Va. Code § 3-1-41(e)). However, the Supreme Court did not apply that provision to the facts of that case to count the challenged votes of voters whose names did not appear to be registered in the municipality of Kenova's poll book.

63. Instead, the upshot of the *Galloway* decision is that a voter's failure to be properly registered in a municipality, where that municipality has adopted a permanent registration system, is not a mere technical error that must be disregarded. *See id.* (holding that the "challenged ballots" were not "otherwise valid" and thus not countable "[b]ecause the voters who cast these ballots were not duly registered by reason of the absence of their names from the municipal registration list or record").

64. The Town Council cannot change statutory law or the law expounded by the Supreme Court of Appeals. The duty of the Town Council is only to apply the facts to the law.

III.

CONCLUSION

For all of the foregoing reasons, the Harpers Ferry Election Contest Tribunal hereby **DECIDES** that the four provisional ballots at issue in this election contest cannot be counted under West Virginia law. This election contest is hereby **DISMISSED WITH PREJUDICE**. Pursuant to WV Code § 3-7-7 the Tribunal hereby **DECLARES** that the true results of the June 11, 2019 Harpers Ferry Town Council Municipal Election is as certified on June 28, 2019 and remains unchanged.

The Town Clerk is directed to mail a copy of these Findings of Fact and Conclusions of Law to all counsel of record.

Entered this the 11th day of September, 2019.

Harpers Ferry Election Contest Tribunal

By Majority Opinion:

/s/ Wayne Bishop, Mayor

/s/ Barbara Humes, Councilmember

/s/ Hardwick Johnson, Councilmember

/s/ Charlotte Thompson, Councilmember

The Dissent reserves the right to file a dissenting opinion.

I certify that this is a true and accurate copy of the Order Declaring Election Results

By:

 Sept. 11, 2019

Wayne Bishop, Mayor

Historic District
Where The Shenandoah Meets The Potomac

Harpers Ferry Town Council, ex-officio, acting as the
MUNICIPAL ELECTION TRIBUNAL
OF THE CORPORATION OF HARPERS FERRY

No. 2019-HFTC-01

NANCY SINGLETON CASE, ET AL., CONTESTERS,

v.

HARDWICK SMITH JOHNSON, ET AL., CONTESTEES.

[SEPTEMBER 16, 2019]

KEVIN CARDEN and JAY PREMACK, dissenting.

We find ourselves in a unique situation. In the 156 years since the establishment of the State of West Virginia, no dispute has entered its judicial system which encompasses the exact qualities of this one. We therefore explore uncharted territory that will create precedent and a model for the future. It is incumbent upon the adjudicators of the germane case to make the correct decision based on the law and the indisputable facts that lie before us.

Although the Founding Fathers and other figures of great stature in the history of our nation wrote with great vigor on the democratic principle of deriving just powers from the consent of the governed through enfranchisement, *disenfranchisement* is not a new concept. Indeed, various demographics have fought tirelessly over the last two centuries for the *right* to vote that had previously been denied to them. Today, the Constitutions of the United States and

of the State of West Virginia ensure suffrage for almost all citizens upon the age of majority. Courts have upheld this right throughout the land, all the way up to the highest authority in our judicial system. The Supreme Court of the United States declared that the “political franchise of voting” is “a fundamental political right, because [it is] preservative of all rights.” *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 667 (1966) (quoting *Yick Wo v. Hopkins*, 118 U. S. 356, 370 (1886)). It is thus imperative that enfranchisement be protected and favored over the opposite.

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 State law barring self-interested officials from sitting as their 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.

On September 11, 2019, this slim Council majority issued an order rejecting the registered votes of their neighbors under false color of law by adopting, almost word-for-word, the order drafted by their privately-hired lawyers who joined with them at the August 24 “tribunal” – a judicial proceeding which lacked the impartiality that was required to issue a just order and worked to reinforce the fault of the Board of Canvassers. As elected public servants beholden only to the law and our fellow citizens, we must dissent from this craven and unfortunate decision. The consequences of denying enfranchisement to bona fide residents

within the Corporation of Harpers Ferry could be fundamental to the very future of this community.

I.

The majority's "Findings of Fact" are craftily skewed to favor a decision based not on legal judgment, but rather on will. That is unfortunate because it hides crucial details which should have led to a different outcome. We outline a more accurate summary of the facts in this case, refuting the many flagrant prejudices from the majority and providing other important points for consideration, many of which were simply and conveniently omitted.

1. On June 11, 2019, the Corporation of Harpers Ferry, West Virginia ("the Town") held a municipal election for the offices of Mayor, Recorder, and five Town Council seats. Early voting was conducted from May 29 through June 8, 2019.

2. The tally of votes for the nine Town Council candidates as recorded by the election day counting board was as follows: Barbara Humes, 90 votes; Jay Premack, 87 votes; Hardy Johnson, 84 votes; Christian Pechuekonis, 84 votes; Charlotte Thompson, 83 votes; Nancy Singleton Case, 82 votes; Debbie McGee, 81 votes; Midge Flinn Yost, 80 votes; and Leah Howell, 15 votes.

3. On June 17, 2019, the Harpers Ferry Town Council, in its ex-officio capacity as the Board of Canvassers ("the Board"), met to canvass the votes for the June 11 election.

4. At the outset of the Board's meeting, bond for recount was set at \$175.00.

5. One overseas absentee ballot, postmarked before June 11, was received after election day but before the Board met. The Board voted unanimously to accept this ballot.

6. Six provisional ballots were cast during the election. The West Virginia Secretary of State's "2019 Best Practices Guide for Municipal Canvass", which the Board referred to during canvassing, recommends at page 6, number 13 that the Board of Canvassers "[r]eview each provisional ballot" before determining whether it should be counted.

7. West Virginia Code § 3-1-41(e) directs that when considering whether provisional ballots should be accepted and counted, a board of canvassers "shall disregard technical errors, omissions or oversights if it can reasonably be ascertained that the challenged voter was entitled to vote."

8. By a vote of 4-2, a majority of the Board summarily refused to review, examine, or consider any of the six provisional ballots cast in the election, based solely on the fact that the six provisional ballot voters' names were not in the Harpers Ferry poll book.¹ Because none of the provisional ballots were considered on their own merits, no other information was examined before the Board made its decision.

9. On June 19, 2019, two candidates for election to the Harpers Ferry Town Council in the Town's 2019 municipal elections, Nancy Singleton Case and Deborah McGee, submitted to the Recorder by email separate petitions for a recount of the ballots for Town Council candidates. Mrs. Case was out of state due to a family medical emergency and was unable to submit payment for bond. Mrs. McGee, through her husband, subsequently delivered a written and signed copy of the petition and a check in the amount of \$175.00 for bond to the Recorder in person, thus fulfilling the statutory requirement to demand the recount be conducted. (Ex. 8; Dissent Ex. 1.)

¹ The four Board members voting in the majority were Barbara Humes, Hardwick "Hardy" S. Johnson, Jr., Charlotte Thompson, and Marjorie "Midge" Flinn Yost. The voters in the minority were Kevin Carden and Ed Wheelless. Mayor Wayne Bishop did not vote, as is customary when there is no tie.

10. The recount for Town Council members was conducted on June 26, 2019, with no change in the results. Only the ballots that had been previously accepted by the Board of Canvassers were recounted; no provisional ballots were counted at this meeting. The election results were certified on June 28, 2019.

11. Mrs. Case and Mrs. McGee (the “Contesters”), through counsel, filed a proper Notice of Contest on July 8, 2019, pursuant to West Virginia Code § 3-7-6, alleging that five Harpers Ferry citizens were denied the right to vote based upon erroneous records that indicated they were not residents of Harpers Ferry. (Ex. 6.) The citizens who cast provisional ballots are George McCarty, Linda McCarty, Adam Hutton, Leah Howell (who was also a candidate for the Town Council seat), and Jayne Mumaw (the “Provisional Voters”).^{2,3}

12. No provision in West Virginia law, as governed by Article 3, Chapter 7 of West Virginia Code regarding contested elections, requires an election contest to establish standing by way of their participation in the ballot recount that occurred earlier in the election process. West Virginia Code only requires that a recount be conducted before an election contest is filed.

13. The trial for this election contest was conducted on August 24, 2019. The trial was transcribed by a court reporter.

14. The Contesters motioned at the outset of the trial that because the results of the provisional ballots in question could affect the election of certain candidates, Council members Hardy Johnson and Charlotte Thompson should be disqualified from hearing and deciding this

² During the trial in this matter, the Contesters conceded that the provisional ballot of Jayne Mumaw should not be considered because at the time of the June 11, 2019 election, she was not a registered voter within the Corporation of Harpers Ferry. Although Ms. Mumaw was residing in Harpers Ferry part-time in anticipation of a permanent move to the town, at the time of this election she was registered to vote in Berkeley County, West Virginia.

³ A sixth provisional ballot was cast, but that individual was not residing within the municipal limits of Harpers Ferry on election day. Therefore, this provisional ballot was not in consideration.

election contest. (Council member Christian Pechuekonis previously declined to participate in the election contest proceeding.) Mr. Johnson and Mrs. Thompson refused to recuse themselves from the election contest tribunal.

15. Nikki Painter, Chief Deputy Clerk of Elections for the Jefferson County Voter Registration and Election Office (the “Voter Registration Office”), testified that she believed the source of the errors affecting the Provisional Voters’ registration records was the West Virginia Division of Motor Vehicles (the “DMV”).

16. Mrs. Painter testified that she did not contact anyone at the DMV to investigate the source of the voter registration errors. She instead contacted the Secretary of State’s office, since all “Motor Voter” registrations come to Mrs. Painter’s office through the Secretary of State’s office and “they usually handle our DMV issues”. (Tr. at 33:13-16.) In fact, Mrs. Painter said she *cannot* contact the DMV. (*Id.* at 20:17-18.)

17. Mrs. Painter explained during her testimony that she conducted a process of investigation and research with other agencies of the County government to verify the Provisional Voters’ correct addresses. (*Id.* at 28:11-29:19; 38:18-40:5.)

18. George and Linda McCarty registered to vote when they acquired their West Virginia driver licenses in July 2018. They were aware that the licenses incorrectly showed “West Washington Street” instead of simply “Washington Street”. However, they were *not* aware that would place them in Precinct 15 (Bolivar) instead of Precinct 14 (Harpers Ferry) in the County’s voter registration records. Even when Mr. and Mrs. McCarty voted early in the November 2018 elections, they did not become aware of this registration error, since early voting is conducted at the Jefferson County Courthouse and not at the local precinct. (*Id.* at 41:2-42:21; 67:17-68:1.) Mr. and Mrs. McCarty became aware that they were registered in the wrong

precinct only when they voted early in the Harpers Ferry municipal elections on June 8, 2019 at the Harpers Ferry Town Hall. (*Id.* at 48:12-49:16; 53:14-56:2; 68:2-10.)

19. Adam Hutton registered to vote when he acquired his West Virginia driver's license in April 2019. Mr. Hutton testified that he used "900 West Washington Street" when he registered because that is the address assigned by the U.S. Postal Service. (*Id.* at 77:1-7.)

Mr. Hutton became aware he was registered in the wrong precinct when he went to vote in the Harpers Ferry municipal elections. (*Id.* at 77:17-78:9; 80:6-22.)

20. Leah Howell was a candidate for Town Council member in the 2019 Harpers Ferry municipal elections. Ms. Howell filed her sworn and notarized Municipal Candidate's Certificate of Announcement with the Corporation of Harpers Ferry on January 25, 2019 with her address listed as "887 Washington Street" in Harpers Ferry. (Dissent Ex. 2.)

Because Ms. Howell was incorrectly listed in Precinct 15 at the time she voted (Ex. 4, p. 1), she was required to cast a provisional ballot. Mrs. Painter testified that Ms. Howell was found to have been a Harpers Ferry resident at the time of the vote, and that the official County voting records were changed to properly reflect that. (Tr. at 29:13-19.) Ms. Howell's voter registration record shows that her correct address was subsequently verified. (Ex. 4, p. 4.)

21. All four of these Harpers Ferry residents – George McCarty, Linda McCarty, Adam Hutton, and Leah Howell – were mistakenly classified by the Voter Registration Office as residents of Bolivar, West Virginia because of information received from the DMV which designated each of them as living on "West Washington Street", despite the fact that each was in fact a resident of Harpers Ferry, based on their house numbers. (Tr. at 21:7-11; 22:6-7; 39:8-11; Ex. 5.)

22. Based on Mrs. Painter's research, the voter registration records for all the Provisional Voters has been corrected. (Ex. 1, 2, 3, and 4.)

23. According to Mrs. Painter, the County would consider the omissions of these voters through no fault of their own from the Harpers Ferry poll book to be a technical error. (Tr. at 22:13-24.) Mrs. Painter based that opinion on experience with prior elections. (*Id.* at 23:1-24:9.)

24. Mrs. Painter testified that in her professional opinion and experience, based on West Virginia statutory law, it was her recommendation that the provisional ballots of the four Provisional Voters should be counted in the Harpers Ferry municipal election. (*Id.* at 30:24-31:6.)

25. Attorney for the Contestees, Ryan Donovan, attempted to call the Recorder, Kevin Carden, a member of the governing body and panel of adjudicators, as a witness without his prior knowledge. Mr. Carden declined to take the stand on demand of Contestees' attorneys upon advice from his own municipal counsel, Effie Kallas, who advised that any member of the Tribunal who took the stand would then need to recuse himself from the Tribunal. It would appear that Mr. Donovan did this in an attempt to disqualify Mr. Carden from participating as one of the adjudicators in this case, despite having been previously advised by the Circuit Court not to do so. (*Id.* at 109:1-7.)

II.

26. A conflict of interest exists for Council members Mr. Hardy and Mrs. Thompson to sit as judges in this election contest tribunal. On August 29, 2019, a staff opinion was received from the West Virginia Ethics Commission, which states:

“It is the general opinion of Ethics Commission staff that if there is a reasonable probability that the tribunal’s decision on the election contest could impact whether 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 a financial interest in holding the elected position in question.”

(Dissent Ex. 3.)

This staff opinion relied on several Advisory Opinions previously issued by the Ethics Commission, including AO 2010-08, AO 2014-10, and AO 2019-07. (Dissent Ex. 4, 5, and 6.)

27. The “2019 Best Practices Guide for Municipal Canvass” that was referred to by the Board of Canvassers on June 27, 2019 is, at best, a set of guidelines and recommendations designed to assist a board of canvassers in its proceedings. In all cases, West Virginia law is the ultimate authority concerning elections.

28. In four of the past seven Harpers Ferry municipal elections, provisional ballots were cast by residents who were not listed in the Town’s poll book but who were known by the Board of Canvassers at each of those elections to be residents within the corporate limits of Harpers Ferry, including two provisional ballots cast in 2013 for which the motion to accept those ballots was made by one of the Contestees in this election contest, Charlotte Thompson. (Tr. at 121:15-22; Dissent Ex. 7 and 8.)

29. While a board of canvassers may not consider extrinsic evidence during canvassing or a recount of election returns, such evidence “is properly cognizable in an election contest proceeding.” *See* Syl., pt. 7, *Maynard v. Hammond*, 139 W. Va. 230, 79 S.E.2d 295 (1953). The majority in this election contest tribunal failed to consider proper extrinsic evidence and other information during its decision-making process beyond the political.

30. Jefferson County Precinct 14 is contiguous with the municipal limits of the Corporation of Harpers Ferry. (Dissent Ex. 9.) Jefferson County Precinct 15 is contiguous with

the municipal limits of the Corporation of Bolivar. (Dissent Ex. 10.) The two municipalities adjoin one another. U.S. Alternate Route 340 (“Alt-340”) is the main thoroughfare through both towns.

31. There is no “Bolivar, West Virginia” post office. All addresses in Bolivar, as well as Harpers Ferry, are served by the Harpers Ferry post office.

32. The U.S. Postal Service (the “Postal Service”) assigns the name “West Washington Street” to *all* of Alt-340, except the easternmost portion (residence numbers below 270), where it is called High Street. (Dissent Ex. 11.)

33. The Jefferson County GIS / Addressing Office assigns addresses for the County’s Emergency 911 system. This Office assigns the name “Washington Street” to all of Alt-340 within the Corporation of Harpers Ferry and “West Washington Street” to all of Alt-340 within Bolivar.

34. Despite the slightly modified name, no residence or structure numbers overlap or repeat along Alt-340. Residences and other buildings all the way through Number 1000 are entirely within the Corporation of Harpers Ferry. (As an example, Harpers Ferry Town Hall is located at 1000 Washington Street according to the County, but 1000 West Washington Street according to the U.S. Postal Service.) Numbers 1053 and higher are all within the Corporation of Bolivar, whereas Numbers 1007 through 1050 may be in either municipality, with even numbers lying within Harpers Ferry and odd numbers lying within Bolivar. (Dissent Ex. 12, 13, and 14.)

35. Even online mapping services are inconsistent, with some showing “Washington Street” in Harpers Ferry and others showing “West Washington Street”. (Dissent Ex. 15, 16, and 17.)

36. As a unit of the County government, the Jefferson County Voter Registration and Election Office abides by the GIS / Addressing Office assignments.

37. When applicants solicit a driver's license with the DMV, at least two documents must be submitted as proof of residency, such as a utility bill or a "Letter from the US Post Office that shows a new, physical, WV address assigned by the Post Office for the applicant." (Dissent Ex. 18.) Each of these proofs of residency – including a valid "WV Voter's Registration card", which also requires its own proofs of residency, such as a utility bill – would establish that an applicant is a verified resident based on his or her *mailing address*.

38. Because the Postal Service assigns this mailing address, and all residences along Alt-340 are assigned a "West Washington Street" address, those applicants within the corporate limits of Harpers Ferry who register to vote as part of the driver's license application and issuance process are erroneously electronically transferred into the Voter Registration rolls as residents of Bolivar.

39. The incorrect registrations of the Provisional Voters as residents of Bolivar, instead of residents of Harpers Ferry, lies ultimately in a *technical* error due to conflicting address assignments between the Postal Service and the GIS / Addressing Office, through no fault of the voters in question or any other individual.

40. Despite the assignment to "West Washington Street" by the Postal Service, the residence numbers for the four Provisional Voters prove that they were "bona fide resident[s]" of the Corporation of Harpers Ferry on election day, June 11, 2019, and at least 30 days prior. *See* W. Va. Code § 3-1-3; W. Va. Const., art. IV, § 1; *State ex rel. Ellis v. County Court of Cabell County*, 153 W. Va. 45, 51.

41. The Provisional Voters were duly registered to vote in Jefferson County and, based on their residence numbers, in the Corporation of Harpers Ferry.

42. Since this addressing discrepancy has come to light, the Voter Registration Office has introduced measures to prevent the misregistration of Washington Street residents in Harpers Ferry as residents of Bolivar.

III.

43. The precise details of this election contest case are unique thus far in West Virginia. No applicable case law exists in the jurisprudence of this State addressing technical errors in a voter's registration due simply to a conflict in the naming of a road or street and not a fault of the voter or a clerical error committed by the Voter Registration Office.

44. At first glance, this election contest case may seem substantially similar to both *Dotson v. Gilbert*, 129 W. Va. 130 (1946), and *Galloway v. Common Council of Kenova*, 133 W. Va. 446 (1949). On further inspection, the situation we are faced with here is quite different.

45. In *Dotson*, the individuals who cast rejected provisional ballots were clearly not registered to vote. The Provisional Voters in this election contest were registered to vote.

46. In *Galloway*, individuals were registered within their correct precinct for participation in state and county elections but were not registered to vote in municipal elections *within the same precinct* due to a *clerical error* at the office of the county clerk. How this clerical error was able to occur becomes glaringly clear upon reading the applicable statutes in effect in 1949:

“The registration records to be used in county-state elections shall be kept in a separate file and arranged according to precinct, street and sequence of house, apartment or room numbers, where possible. A duplicate set of these registration records shall be made and kept in a separate file, and shall be

arranged in alphabetical order. Such file shall herein be referred to as the ‘alphabet file’. The registration records to be used in municipal elections shall be kept in a separate file and arranged, where possible, according to precinct, street, and sequence of house, apartment or room numbers.

“Each applicant shall fill only one registration form, except in those cases where separate record for municipal elections is required, in which case those registrants who are required to be listed in separate municipal record lists shall fill two forms...

In the event any municipal registration record is lost, destroyed, defaced, or worn in any way as to warrant replacement, it shall be the duty of the clerk of the county court to prepare a duplicate of such record and it shall be the duty of the municipality to pay for such replacement.”

Galloway v. Common Council of Kenova, 133 W. Va. 446, 450-451 (1949).

47. Under the laws of this State in effect at the time of *Galloway*, two separate and distinct lists existed: one for county-state elections and one for municipal elections, during an age when all records were kept on paper and were commonly subject to clerical errors. The misregistration of the Provisional Voters in this election contest was not due to a *clerical* error.

48. The Supreme Court’s decision in *State ex rel. Willhide v. King*, 126 W. Va. 785 (1944), is not relevant here either. The provisional ballot voters in that case changed residences from one precinct to another and updated their voter registration records within the prohibited period preceding election day. For that reason, they did not appear in the poll book for their new precincts. The fault lay in the actions of the voters themselves. The Provisional Voters in this election contest did not move or change their residences.

49. The majority opinion never provides evidence that the Provisional Voters did not live in Harpers Ferry at the time they registered or voted. In fact, it has been well-established and is uncontroverted that they were verified residents at the addresses to which they were registered on election day, June 11, 2019, and for at least 30 days prior.

50. The Supreme Court of the United States declared long ago that the exercise of the power of the ballot box cannot be suppressed simply because the officials who wield the ultimate decision whether or not to permit a citizen to vote suspect a certain outcome:

“‘Fencing out’ from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. The exercise of rights so vital to the maintenance of democratic institutions ... cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents.”

Carrington v. Rash, 380 U.S. 89, 94 (1965) (partially quoting *Schneider v. State*, 308 U.S. 147, 161 (1939)).

51. The Supreme Court of West Virginia has expressed, in its own opinions and citing others’, that courts and tribunals must be

“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. 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, ___ 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.”).

State ex rel. Bowling v. Greenbrier Cnty. Comm., 212 W. Va. 647, 649 (2002).

52. The Supreme Court of West Virginia further established a “reasonableness standard” and “principle of law favoring enfranchisement” in the counting of challenged ballots and emphasized that a board of canvassers must “disregard technical errors, omissions or oversights, if it can be *reasonably ascertained* that the challenged voter was entitled to vote.” (Emphasis in original.) *Id.* at 653. The majority in this election contest failed to apply reason in its decision to oppose enfranchisement, disregarding irrefutable proof that the Provisional Voters were entitled to vote.

CONCLUSION

No doubt should exist that the four Provisional Voters in the case before us were clearly entitled to vote as bona fide citizens and residents of the Corporation of Harpers Ferry, all of whom were disenfranchised as a result of a bureaucratic technical error existing between various agencies at the federal, state, county, and ultimately, municipal levels of government. The only impediment to these four individuals' legal right to express their opinions through the ballot box is a mockery of justice at the hands of four other individuals.

We strongly dissent and would hope that upon an appeal to the Circuit Court, justice will prevail where it has heretofore failed through conflict of interest and political gaming, that it would restore honor and dignity, and henceforth will guarantee equal protection under the law to all citizens of Harpers Ferry.

Kevin Carden

Jay Premack

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BEFORE THE HARPERS FERRY TOWN COUNCIL
IN RE: THE MATTER OF CONTESTED TOWN COUNCIL ELECTION

- - - - -
Nancy Singleton Case, and Deborah A. McGee,)
Individual Contesters,)
v.)
Hardwick Smith Johnson, Charlotte Ward Thompson,)
Christian Pechuekonis, Marjorie Flinn Yost,)
Barbara Humes, and Jay Premack,)
Individual Contestees.)
- - - - -

TOWN COUNCIL HEARING
Saturday, August 24, 2019

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Saturday, August 24th, 2019
(10:00 a.m.)

Town Council Hearing
Held at: Harpers Ferry Town Hall
1000 Washington Street
Harpers Ferry, West Virginia

Pursuant to Notice, before Jackie Smith, a Notary in and
for the State of West Virginia.

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A P P E A R A N C E S

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(EXHIBITS ATTACHED TO TRANSCRIPT)

P R O C E E D I N G S

- - - -

(10:00 a.m.)

MAYOR BISHOP: This proceeding is underway. Harpers Ferry Election Contest Tribunal is before you.

Procedural order: Greg Bailey, Arnold & Bailey, for the contesters.

Zak Ritchie, Ryan Donovan, Hissam, Forman, Donovan, Ritchie, PLLC, for the Contestees, the case, versus Johnson.

So, some general announcements:

As we get underway, by unanimous consent and concurrence of the Election Contest Tribunal in the above referenced matter, directs that a bond for appeal is set at \$300, payable to the Corporation of Harpers Ferry. Parties are to provide eight copies of all documents proffered into evidence.

Parties are to provide post trial findings of fact and conclusions of law via e-mail in both Pdf and Word format by close of business, Friday, August 30, 2019, to the Tribunal's attorney of record.

Cell phones, electronic devices are prohibited inside the venue during the hearing. And I would also

1 add that we are not taking -- there are no comments.

2 Outbursts will not be tolerated or you will be
3 removed from the chamber.

4 MR. COOK: I'd like to make a quick
5 statement.

6 MAYOR BISHOP: No, sir. No, sir,
7 please. We are underway.

8 Film streaming and video of the proceedings are
9 prohibited.

10 MR. COOK: I'd like to make a comment.
11 This is an open governmental meeting and this hearing
12 should be...

13 MAYOR BISHOP: Please be seated.
14 Please be seated. Sir, we are not going to take any
15 comments.

16 Is there an officer in the room? If this
17 gentleman will not be seated and accommodate this Court,
18 he is going to have to be removed.

19 Okay. Recordings of the proceedings, other than
20 a court reporter approved by the Tribunal, is prohibited.
21 Okay. What we're going to do is, for the contesters and
22 contestees, they will be ten minutes at the beginning of
23 the meeting for opening comments, and ten minutes at the
24 beginning of the meeting for opening comments, and then

1 they will be two minutes back. And also at the end of
2 the proceedings, they will be ten minutes for closing,
3 closing discussions, and then ten minutes back to the
4 contesters.

5 We are going to take a restroom break about
6 every hour, so everybody will be able to use the
7 facilities and get a drink, or whatever you need to. And
8 I think the intent is to work through lunch here today
9 because we've got a lot of work to do. So that's the
10 current plan, to do that. So, with that in mind, we'd
11 like to get underway.

12 MR. BAILEY: Okay, very good.

13 May it please the governing body, my name is
14 Greg Bailey and I represent the contesters.

15 Before I begin my time, Mayor, and my opening
16 remarks, I do want to, just to preserve the record, since
17 we have a court reporter here, I want to make sure there
18 is a motion that is before this Tribunal for the recusal
19 of Council Member Johnson and Council Member Thompson.

20 I understand the position, but I just want the
21 motion on the record to be preserved on appeal. And so
22 if they are on the record, I think by sitting there, they
23 are telling me, but if you are on the record, that you
24 are not going to recuse yourself from this by Tribunal

1 based on West Virginia Code 376, which provides that you
2 shall not sit to judge a contest where your election is
3 at issue.

4 As you are aware, we brought this issue to Judge
5 McLaughlin yesterday which she reviewed on whether or not
6 she should issue an injunction. I don't want anyone left
7 with the misperception that Judge McLaughlin ruled that
8 they should not be disqualified or that they should be
9 disqualified. She didn't say that. She had a lot of
10 question about it, and she suggested that maybe somebody
11 should contact the West Virginia Ethics, but she was got
12 going to issue an injunction, and that was her ruling.
13 And then she admonished, I hope everybody does the right
14 thing.

15 But with that said, I didn't want anybody left
16 with the perception that Judge McLaughlin -- and your
17 attorneys can give their position on it -- she did not
18 take the position of whether or not disqualification
19 should or should not occur. She just reserved ruling on
20 that at this time.

21 But for my purposes, I just want to make sure
22 the motion is preserved. If the council members are
23 going to continue and not recuse themselves, I just
24 wanted there to be a record of that.

1 MR. DONOVAN: And we note our
2 objection, for the record, to the extent that we have any
3 standing to make one.

4 MR. BAILEY: I guess I should ask you,
5 since you represent Mr. Johnson and Ms. Thompson, is it
6 their position that they are not going to disqualify
7 themselves and that they are going to sit on this
8 Tribunal today?

9 MR. DONOVAN: I am not testifying.

10 MR. BAILEY: Well, I would like to ask
11 your clients directly.

12 MR. DONOVAN: Sure. They are sitting.

13 MR. BAILEY: So we can stipulate by
14 their sitting, they are not disqualified; is that fair?

15 MAYOR BISHOP: That fair.

16 Mr. Thompson, is that fair?

17 MR. THOMPSON: (Nods head.)

18 MR. BAILEY: All right. Now, will be
19 my opening remarks:

20 First of all, I'd like to thank you all for
21 accommodating us on a Saturday, taking your time to deal
22 with this very important issue.

23 You all are sitting on this governing body and
24 have the responsibility to serve all of the citizens of

1 this town. And it's a real simple issue here today.
2 We're going to present evidence that there were four
3 citizens who you represent, who cast votes in the June
4 11th election, and who are being denied their vote. You
5 are going to have a choice at the end of this proceeding
6 and after hearing the testimony to decide whether you
7 want to protect the citizens you represent, whether you
8 want to protect their right to vote, or you want to
9 engage in some sort of analysis and use legal gymnastics
10 to somehow deny their right to cast a vote.

11 You're going to hear evidence from them, from
12 Leah Howell, the McCartys, and Adam Hutton, that there is
13 absolutely no doubt whatsoever that they all reside in
14 the corporate boundaries of Harpers Ferry, that they all
15 resided there on the day that they voted, and that they
16 were all registered voters.

17 You're going to hear from Nikki Painter who
18 works at the Clerk's Office, who is going to make clear
19 and will stipulate that their names did not appear in the
20 Harpers Ferry Poll Book on the day of election. You're
21 going to hear from Nikki Painter that, that fact is from
22 a technical error, omission, and oversight, that was
23 absolutely not the fault of any of those four voters. It
24 was an address technical error that caused them to be

1 placed in the poll book of Bolivar. This was not due to
2 their own negligence. They didn't do anything that
3 should disenfranchise their right to vote in the
4 election.

5 These are your citizens whom you represent. I
6 understand and I listened to the report of the Board of
7 Canvassers, and I understand that there was a great deal
8 of confusion that night about the flow chart that is
9 contained in this Municipal Canvass Guide. And I agree
10 with you that this guide is a little confusing, but it's
11 a guide, okay.

12 Your obligation to accept provisional ballots
13 are in the West Virginia Code. This is what governs your
14 decision on provisional ballots. And it says in
15 3-141(e), that you are to accept provisional ballots if
16 the voter was denied their vote because of a technical
17 error, omission, or oversight. That is exactly what
18 occurred with respect to these four voters.

19 West Virginia Code is also clear that code is
20 what governs. That manual means nothing, it's a guide.
21 That's all it is. You are required to follow West
22 Virginia law. West Virginia law is clear at the outset
23 that citizens of this state should be entitled to vote in
24 all elections held within the municipality in which they

1 reside. That's 3 1 b of the West Virginia Code.

2 As I said, there is no issue whatsoever about
3 where these four people resided. They live on Washington
4 Street. I am going to have them point out their
5 addresses. They are clearly within the corporate
6 boundaries. That's where they lived on the date they
7 tried to cast their vote. They had properly registered
8 to vote, but through clerical error, technical or
9 oversight, that is why they were placed in the wrong poll
10 book.

11 And I would like to think that as a governing
12 body, you would use your power to protect your citizens'
13 right to vote, rather than to use your power to
14 disenfranchise votes from your citizens. Because I think
15 if you do so, it's going to certainly appear to the
16 public as you are doing it for political expediency, and
17 that it's motivated by nothing else than we don't want
18 any more votes because we like where it stands. And I
19 think that would be the wrong message to send to the
20 citizens of the town that you serve.

21 So at the end of this proceeding, I'm going to
22 ask that you count the four votes. I'm going to ask that
23 you follow Judge McLaughlin's admonishment or
24 recommendation to do the right thing.

1 And we're doing the right thing. After
2 consulting or looking at the voting records and talking
3 to Ms. Painter, we are abandoning, just so it's clear, we
4 are abandoning the claim that the provisional ballot by
5 Ms. Newhoff be counted. It shouldn't. What we became
6 aware of is, whether she lived in Harpers Ferry might
7 have been an issue, but the bigger issue, on the date of
8 the election, she was registered to vote in Berkeley
9 County. So it would be wrong and disingenuous to say
10 that her vote should be counted.

11 We want to do the right thing, and we're asking
12 that this body do the right thing.

13 MR. RITCHIE: Ladies and gentlemen and
14 Town Council, my name is Zak Ritchie and I am joined here
15 today by my law partner, Ryan Donovan.

16 Doing the right thing, that's what Mr. Bailey
17 asked you to do. What we think that means is following
18 the law. I'll be brief, and frankly, so should this
19 hearing.

20 This election contest really comes down to a
21 simple question; were the five voters, not four, who cast
22 provisional ballots properly registered to vote in
23 Harpers Ferry.

24 For a ballot to count in a municipal election,

1 the voter must be duly registered. That is the word the
2 code used, to vote in the municipality at least 21 days
3 before the election and remain so at the time the vote is
4 cast. Properly registered, again, as the code said, duly
5 registered. It really is that simple. Not legal
6 gymnastics, not technicalities. We call that the law.
7 Harpers Ferry ordinances require it, the statutes require
8 it, and decisions of the Supreme Court of Appeals require
9 it.

10 You will learn today that the four provisional
11 ballots at issue in this case were cast by individuals
12 not properly registered in the Corporation of Harpers
13 Ferry. In short, their names did not appear in the
14 Harpers Ferry Poll Book.

15 That's the law. That's the beginning and the
16 end of this contest. Thank you.

17 MR. BAILEY: I will reiterate that they
18 were properly registered. Through clerical error,
19 technical oversight, they were placed in the wrong poll
20 book. These people registered to vote. They are not
21 people that showed up and said, I live here in Harpers
22 Ferry and I'd like to vote. They were all registered to
23 vote. One of the four voters was on the ballot. She ran
24 against you for Town Council. How can you possibly take

1 a woman who is on the ballot against you and say her vote
2 ought not count, she shouldn't be allowed to vote after
3 this town already qualified her as a bona fide candidate.

4 This was a clerical error. You can use your
5 position to protect your citizens or you can use your
6 position to disenfranchise them. It's going to be your
7 decision.

8 MAYOR BISHOP: Okay.

9 MR. BAILEY: We'll go ahead and call
10 our first witness is going to be Ms. Nikki Painter.

11 MAYOR BISHOP: Okay. If the office
12 coordinator or Clerk would secure her in.

13 MR. BAILEY: We actually made a
14 mistake. We didn't sequester the witnesses before the
15 beginning. Ms. Painter is already here. Mr. McCarty,
16 Mr. Hutton, we would have to ask you to go downstairs,
17 please.

18 And is Ms. Howell here? Thank you all.

19 Whereupon,

20 NIKKI PAINTER,

21 having been called and duly sworn, testified on oath as
22 follows:

23 DIRECT EXAMINATION

24 BY MR. BAILEY:

1 Q. Ma'am, state your name, please.

2 A. Nikki Painter.

3 Q. Ms. Painter, where are you employed?

4 A. The Jefferson County Voter Registration &
5 Elections Office.

6 Q. What is your position there?

7 A. I am the Chief Deputy Clerk of Elections.

8 Q. What are your duties in that position?

9 A. Well, I register voters. I handle every
10 aspect of the election from the Clerk's perspective,
11 including preparing poll books. I work with
12 municipalities to supply their poll books and to provide
13 whatever other supplies that they would need to borrow
14 from the county.

15 Q. How long have you done that?

16 A. I have been in that position for 14 years.

17 Q. In your position, do you also participate with
18 the county when they sit as board chancellors for
19 countywide elections?

20 A. I do.

21 Q. And have you been involved in that capacity in
22 election contests that came up before the County
23 Commission?

24 A. We have never had a contested election since I

1 have been there.

2 Q. Have you, in that position, sat when the
3 Commission sits as Board of Chancellors to review
4 provisional ballots?

5 A. Yes.

6 Q. I'm going to get back to that in a bit. Can
7 you just tell the governing body how the registration
8 process -- what are the different ways voters can become
9 registered in this county?

10 A. Okay. There are several ways. You can
11 register online, you can register at the DMV, you can
12 register in person, and you can register through mail or
13 at any motor voter agency, like a WIC office, DHHR,
14 anything like that.

15 Q. Did you prepare the poll book for the June
16 11th Harpers Ferry Municipal Election?

17 A. I did.

18 Q. Are you familiar with the four provisional
19 ballots that are being contested of Leah Howell, Mr. and
20 Mrs. McCarty, and Mr. Adam Hutton?

21 A. Yes, I am.

22 Q. Did you review their voting records and the
23 poll books after you became aware of the issue related to
24 their professional ballots?

1 A. I did.

2 Q. When were you first made aware that there was
3 a dispute about the professional ballots?

4 A. It was after, I believe, the canvass or before
5 the canvass, when Kevin contacted me to go over if they
6 were registered in time and if we had a record of them
7 because they did not appear in the poll book.

8 Q. And Kevin would be Mr. Carden, the town
9 recorder?

10 A. Yes.

11 Q. And he is also in charge of elections for the
12 municipality?

13 A. I believe so, yes.

14 Q. Did you review the voter registrations of
15 these four voters?

16 A. I did. It was brought to my attention about
17 the West Washington versus Washington.

18 Q. That's my question. First, let me say, you
19 will agree with me that those four voters did not appear
20 in the Harpers Ferry Poll Book that you provided to the
21 municipality, is that right?

22 A. They did not.

23 Q. Can you explain to the governing body, based
24 on your review of the records, how this happened?

1 A. Well, we pulled their record because we wanted
2 to see was it an error on our part. And all four of them
3 registered at the DMV. So the DMV records are sent to us
4 electronically. We keep a copy of that record. And that
5 record was sent to us as the West Washington Street
6 address, which is how they were assigned to the Bolivar
7 precinct.

8 Q. You are aware they live on Washington Street,
9 not West Washington?

10 A. I am now.

11 Q. Do you know how that occurred, how the mistake
12 was made that assigned them a West Washington Street
13 address?

14 A. I'm not sure because it came to us from the
15 DMV. I only know what one of the voters had said to me
16 and that was the only way that I know.

17 We can't contact the DMV to find out what
18 happened on their end.

19 Q. Were you aware that because of the DMV
20 software and IGF addresses they put in, that it assigns
21 people a West Washington Street if they are after a
22 certain number?

23 A. I have heard that, but I don't know that to be
24 a fact.

1 Q. With respect to these individuals not being in
2 the Harpers Ferry Poll Book, do you agree with me that,
3 that was a mistake?

4 MR. DONOVAN: Object to the form.

5 BY MR. BAILEY:

6 Q. You can answer.

7 A. Based on their address, they should have been
8 in the Harpers Ferry Poll Book.

9 Q. Would you agree with me that based on their
10 actual residence, they should have been contained in the
11 Harpers Ferry Poll Book?

12 MR. DONOVAN: Objection.

13 MR. BAILEY: What we have agreed to do
14 normally, the Judge would rule on it. Counsel and I have
15 agreed, if we make an objection, it's preserved. So we
16 are not going to make you guys vote on every objection.
17 When the record goes up, if it does, to the Circuit
18 Court, we will let that Judge decide whether that
19 evidence should have come in or not.

20 And if you need to make a proper, in addition,
21 objection, it's preserved. We are trying to make it
22 easier for you all.

23 And I agree with Counsel, I don't think
24 we are going to work through lunch. I hope we don't. I

1 think it's going to be much more streamlined than that.

2 - - - -

3 (Pending question read back by the Court Reporter.)

4 - - - -

5 BY MR. BAILEY:

6 Q. In any event, your answer to me, Ms. Painter?

7 A. Yes.

8 Q. And had their names appeared in the Harpers
9 Ferry Poll Book when they showed up to vote that day,
10 they would not have been required to cast their vote
11 through provisional ballot through?

12 A. True, if they were in the poll book.

13 Q. Would you agree with me that their mis --
14 assignment to West Washington Street, would you regard
15 that as what you would consider a technical error?

16 MR. DONOVAN: Objection. Calls for a
17 legal conclusion.

18 THE WITNESS: Yes, we would.

19 BY MR. BAILEY:

20 Q. Would it fall, in your view, on what you would
21 call an oversight?

22 A. Yes.

23 Q. And an omission?

24 A. Yes.

1 Q. Has this kind of thing occurred on the county
2 level when you have been with the Board of Canvassers?

3 A. It has.

4 Q. And has the County Commission, where somebody
5 was mistakenly left out of a poll book since you have
6 been working with the Board of Canvassers, can you
7 remember a time when they ever denied the voter the
8 provisional ballot?

9 A. If they were registered within the county,
10 within Jefferson County, and it was left out through an
11 error, clerical error, they have not denied that vote
12 since I have been there.

13 Q. Are you familiar with the 2019 Best Practices
14 Guide To Municipal Canvass?

15 A. Yes. It's very similar to our book. It's
16 actually the same. They just changed the wording from
17 municipal to county.

18 Q. Before I get to that, let me ask you this:
19 You mentioned that Recorder Carden contacted you prior to
20 the Board of Canvassers meeting.

21 After you reviewed the voting records of the
22 four provisional ballot holder voters that I have named,
23 did you advise Mr. Carden how it should be treated; did
24 you have an opinion?

1 A. I told him, based on what the County -- how
2 the County would handle that, it would be a
3 recommendation from me to the Council or to the
4 Commission to count that, but ultimately --

5 Q. It's their decision?

6 A. Right.

7 Q. But that would be your recommendation, to
8 count their vote?

9 A. Right.

10 Q. Did you confirm to Recorder Carden that these
11 four voters were properly registered prior to the
12 municipal election on June 11?

13 MR. DONOVAN: Objection again.

14 THE WITNESS: I did.

15 BY MR. BAILEY:

16 Q. Would you agree with me that whether or not a
17 provisional ballot should be counted by the Board of
18 Canvassers or this board today is a matter that should be
19 guided by the West Virginia Statute as opposed to the
20 guide?

21 A. Yes. That is what we go by, and that guide
22 actually has the code sections directly beside each
23 scenario.

24 MR. DONOVAN: I will object. Again, I

1 don't want to keep interrupting. So I'm going to object
2 to all these questions that call for a legal conclusion.

3 MR. BAILEY: Understood.

4 BY MR. BAILEY:

5 Q. You would agree with me that if there is a
6 disagreement or contradiction between this guide and the
7 West Virginia code, the West Virginia code should govern
8 that decision, right?

9 A. Yes. The County would ultimately refer back
10 to what the code says.

11 MR. BAILEY: I might be able to pass them
12 out. We have as a packet for everybody the voter records
13 of the provisional ballot holders. I think they actually
14 came because Ms. Callis requested, and I think Ms. Callis
15 will stipulate to them.

16 MR. DONOVAN: Sure. I'd like for them
17 to have them. It will make my life easier.

18 MR. BAILEY: The only other thing
19 attached to this is a shrinked down version of that.

20 MR. DONOVAN: We're not going to object
21 to that.

22 MR. BAILEY: I have seven. I was going
23 to use one for the witness, but I will give you that
24 after the witness reviews it. Everyone has one and we'll

1 make you another one. We have eight.

2 - - - -

3 (Whereupon, Contesters Exhibit Nos. 1 through 4 were
4 hereby marked for identification.)

5 - - - -

6 BY MR. BAILEY:

7 Q. I'm going to hand you what we will mark as
8 Petitioners or Contesters Exhibit 1 through 4. If you
9 can just take a minute and review those documents for me.

10 And I'm not going to ask you about the plan, but
11 Exhibits 1 through 4, do you recognize these documents?

12 A. I do.

13 Q. And what are those documents, Exhibits 1
14 through 4?

15 A. They are the printouts from our statewide
16 voter registration system of the entire voting records
17 for the four individuals.

18 Q. And these are -- Exhibit 1 is the voter
19 registration record for George McCarty, is that correct?

20 A. It is.

21 Q. And what address is he listed at for his
22 residence?

23 A. 800 Washington Street, Harpers Ferry.

24 Q. And can you tell by looking at this record if

1 Mr. McCarty was a registered voter prior to the June 11th
2 municipal election?

3 A. Yes.

4 Q. Okay. And this document indicates there was a
5 change to his voter registration?

6 A. Correct.

7 Q. And when was that done?

8 A. 6 18 2019.

9 Q. So is that a change that your office made?

10 A. This actually was not.

11 Q. Okay.

12 A. They went back to the DMV to get the correct
13 address.

14 Q. And this was after the election, presumably,
15 because they were asked to cast a provisional ballot, and
16 they wanted to know what was going on?

17 A. I do not know that.

18 Q. Mr. McCarty was registered with the address of
19 Washington County on June 11, 2019?

20 A. He was registered with West Washington Street.

21 Q. Exhibit 2 is Linda McCarty.

22 Same question: Was Linda McCarty a registered
23 voter on June 11, 2019 in Jefferson County?

24 A. Yes, she was.

1 Q. And she also made a change to her voter
2 registration just after the election, is that right?

3 A. Correct, on 6 18.

4 Q. And that was the correct address?

5 A. Correct.

6 Q. And so that was seven days after the election,
7 but before the Board of Canvassers meeting, correct?

8 A. I'm not sure what date the Board of Canvassers
9 met.

10 Q. It speaks for itself.

11 Next record is Mr. Adam Hutton. Was he a
12 registered voter on June 11, 2019 in Jefferson County?

13 A. He was.

14 Q. With an address of what?

15 A. 900 West Washington Street.

16 Q. And did he make a change eight days after the
17 election?

18 A. He did not. I actually changed the record
19 once we worked with our GIS office and found on it there
20 was a problem with the address.

21 Q. Tell me what you found out from your GIS -- I
22 called it GIF earlier. What did you find out?

23 A. We wanted to find out where the street numbers
24 stopped for Harpers Ferry and where they began for

1 Bolivar.

2 Q. In making that determination, did you review
3 the maps of Harpers Ferry?

4 A. We did.

5 Q. And did you determine that the McCartys
6 resided within the bounds of Harpers Ferry?

7 A. We didn't look at them directly, just because
8 they had already changed their address. We did look at
9 the rest of them, and there were several other voters
10 that we had to change.

11 Q. So you changed Mr. Hutton?

12 A. We did.

13 Q. And did you change Leah Howell?

14 A. I did.

15 Q. And Exhibit 4 is Leah Howell. Was she a
16 registered voter on June 11, 2019?

17 A. Yes, she was.

18 Q. In Jefferson County?

19 A. Yes.

20 Q. You testified there was a change made shortly
21 after the election to error of putting them in the
22 Bolivar Poll Book, is that correct?

23 A. Correct.

24 Q. So these technical errors, clerical errors,

1 omissions, oversights, whatever they were, these are all
2 corrected before the Board of Canvassers -- well, you
3 don't know that.

4 They were all made, the latest one was June 18th
5 or 19th, the latest of the four corrections?

6 A. It looks like the 19th.

7 Q. The 19th or earlier.

8 All of these errors were corrected so that they
9 should appear as Harpers Ferry in the Harpers Ferry
10 Municipal Poll Book?

11 A. Yes.

12 Q. Have you all taken steps at the county level
13 to try to intercept this if something like this happens
14 again, if people register at the DMV?

15 A. It made us more aware of the addresses that
16 are coming through from the DMV.

17 Q. If this is going to be fixed, it probably has
18 to come through on the DMV system?

19 A. We have the addresses they gave us at the
20 time, that is provided from the DMV in this case, but we
21 are aware of this issue, and have taken steps in our
22 office. We have the street numbers now of what side goes
23 to what municipality.

24 Q. In your view, their votes should have counted,

1 the provisional ballot should have been accepted?

2 MR. DONOVAN: Objection to the form.

3 THE WITNESS: I can say the only
4 thing I can say is if this situation would have happened
5 at the county level, we would have recommended to the
6 Commission to count the ballot.

7 MR. BAILEY: Okay. Give me one second.
8 All right. That's all the questions I have for
9 Ms. Painter.

10 CROSS-EXAMINATION

11 BY MR. DONOVAN:

12 Q. Good morning, Ms. Painter. Thank you for
13 being here. I know you are working off the clock.

14 Did you speak to anyone at the DMV about what
15 you have described as errors and omissions in the
16 registration of these provisional voters?

17 A. No. We do not have a contact with the DMV. I
18 only had I only spoke with the Secretary of State's
19 Office.

20 Q. What do you mean, you don't have a contact?

21 A. We would just call the regular 800 number that
22 the public calls.

23 Q. Is there a number available to reach the local
24 DMV where these people actually register?

1 A. No.

2 Q. It's your understanding that someone at the
3 local DMV would be the person who handles this?

4 A. We don't see which DMV sends us the record.
5 We just know that it comes from a DMV.

6 Q. So, as a result of that, you said you are not
7 sure what happened?

8 A. I can't speak to what happened at the DMV, no,
9 sir.

10 Q. You don't know who input the addresses in
11 error?

12 A. I would not.

13 Q. And you don't know whether the voters
14 themselves input the address in there?

15 A. I don't know.

16 Q. So how did you know that it was an error?

17 A. When we contacted our GIS office and found the
18 street numbers to verify what street numbers lied in what
19 part of the town.

20 Q. So you referred to this by an oversight by the
21 DMV; am I quoting you correctly?

22 A. It was an oversight from the address because
23 based on the street number, it should be Washington
24 Street.

1 Q. But we don't know by whom, do we?

2 A. I can only say that it came from the DMV.

3 Q. What came from the DMV?

4 A. The record came from the DMV.

5 Q. And you assume that there was an error, but
6 you don't know who committed the error, correct?

7 A. It was from the DMV. I can't tell you exactly
8 who committed the error, no.

9 Q. You don't know if it was a computer error, do
10 you?

11 A. I would assume not, but I can't say
12 definitely, no.

13 Q. Why didn't you try to talk to someone at the
14 local DMV when this came to your attention?

15 A. We contact the Secretary of State's Office,
16 and they usually handle our DMV issues.

17 Q. How did you come to know that there was an
18 error with these provisional ballots; who first brought
19 that to your attention? It was Mr. Carden, wasn't it?

20 A. I believe so, yes.

21 Q. And how did Mr. Carden bring this to your
22 attention?

23 A. When he contacted me regarding the provisional
24 ballots.

1 Q. And when was that?

2 A. I don't know the exact date.

3 Q. And why did Mr. Carden bring these to your
4 attention?

5 A. Municipalities typically contact us regarding
6 their provisional ballots. They have to verify if the
7 person is registered, not registered, if they were
8 registered in time.

9 Q. So it was Mr. Carden who told you that there
10 was a problem with the address, correct?

11 A. He is the first person who brought it to your
12 attention.

13 Q. It wasn't the DMV?

14 A. No.

15 Q. It wasn't the Secretary of State?

16 A. No.

17 Q. And it wasn't the voters themselves?

18 A. It wasn't until afterwards that one of the
19 voters contacted me.

20 Q. Prior to that, Mr. Carden brought that to your
21 attention?

22 A. Right.

23 Q. And it was your understanding Mr. Carden was
24 up for reelection, is that correct?

1 A. Correct.

2 Q. Did you find it interesting that Mr. Carden
3 brought this to your attention before the voters
4 themselves?

5 A. No.

6 Q. Because the voters knew they were voting
7 provisionally, correct?

8 A. I can only assume. I am not a part of that
9 process.

10 Q. Typically, a person would be informed at the
11 polls if they are voting provisionally or not?

12 A. Per code, yes, they are supposed to be told
13 they are, they are voting on provisional, including
14 contact information to track their votes. If they
15 actually did it, I can't say. I was not part of that
16 process.

17 Q. You are looking at Mr. Bailey for that?

18 MR. BAILEY: Objection.

19 BY MR. DONOVAN:

20 Q. Did you categorize that information?

21 A. Yes, I do.

22 Q. So the election was on June 11th.

23 And these people were told that they voted
24 provisionally, and yet no one came to you until, you

1 said, the earliest was the 18th?

2 A. Yes. We got that record on the 18th.

3 Q. And when was the first time that you actually
4 heard from one of the voters themselves?

5 A. I don't know the exact date. It was a phone
6 call.

7 Q. Was it after June the 19th?

8 A. I don't know the exact date, so I don't want
9 to assume a date.

10 Q. Okay. Would you have any record of that
11 communication that you could look at to figure out when
12 it happened, refresh your memory?

13 A. I did not keep a record of that phone call,
14 no.

15 Q. I would assume it was a phone call?

16 A. A phone call.

17 Q. And did it come into your office?

18 A. It did.

19 Q. And which voter was that?

20 A. Linda McCarty.

21 Q. Tell me what Ms. McCarty said to you?

22 A. She was concerned that she had to vote a
23 provisional ballot and that her address was incorrect.
24 And she was the voter that told us that the DMV required

1 her to register with the West Washington Street address.

2 Q. So now we have a little more information about
3 the DMV. Ms. McCarty told you that the DMV required her
4 to do so?

5 A. She did.

6 Q. So she went to them and said, my address is
7 Washington, and they said, no, it's not, it's West
8 Washington; is that what she told you?

9 A. That's what she told me.

10 Q. And do you have in front of you the date on
11 which Ms. McCarty originally registered to vote at that
12 address? I think it's Exhibit 2?

13 A. She registered on September 10, 2018.

14 Q. So, on September 10, 2018, the DMV told
15 Ms. McCarty that she was supposed to register to vote at
16 an address that she knew she didn't live at?

17 A. That is what she communicated to me.

18 Q. And, yet, the first time your office heard
19 anything about this problem was at least a week after the
20 election?

21 A. She indicated she didn't realize that her
22 drivers license would have an affect on her voter
23 registration.

24 Q. Now, you testified in response to Mr. Bailey's

1 questions that you knew where these individuals lived?

2 A. Based off of their address.

3 Q. Okay. So the basis for that knowledge is
4 what, what you had in your records said they lived on
5 West Washington Street?

6 A. Right, but based on the house number, they
7 would be considered on the Washington Street side.

8 Q. Did you know any of these provisional votes
9 before their contest?

10 A. I did not.

11 Q. And you had never been to any of their homes?

12 A. No.

13 Q. Is it fair to say that the way you came to
14 know where these people lived was Mr. Carden first?

15 A. He initiated the process that we went through.

16 Q. And you took Mr. Carden's word for it?

17 A. No, I did not.

18 Q. Did you conduct an investigation?

19 A. From our side of it, based off of the address
20 that we had for the voter, yes.

21 Q. And what was the nature of that investigation?

22 A. We contacted the GIS office, based off of the
23 address, and then for some of them, we were able to go in
24 and look to see if they owned property. And I don't know

1 who owned property. I don't remember, but that's
2 basically how we came to changing the record.

3 Q. So the GIS can tell you if an address exists?

4 A. Yes.

5 Q. The GIS does not tell you who resides at that
6 address?

7 A. It does not tell us who resides there, no.

8 Q. How did you gain information to allow you to
9 testify that you knew where these people lived?

10 A. We based it off of the address that was
11 provided, the street number that was provided.

12 Q. You never asked Mr. Hutton, for example, if he
13 lived there?

14 A. I have never spoken to Mr. Hutton, no.

15 Q. You have never asked Ms. Howell if she lived
16 there?

17 A. No.

18 Q. You said you looked at property records?

19 A. We looked at tax records.

20 Q. Is it your testimony that the McCartys own
21 property that they claim to reside at?

22 A. I don't remember.

23 Q. Is it your understanding that Ms. Howell owned
24 the property that she claimed to reside at?

1 A. As I stated, I don't remember -- remember who
2 had the record and who didn't.

3 Q. So it sounds like those records didn't have a
4 whole lot to do with the conclusion that you reached?

5 A. Well, it was part of the process.

6 Q. Some of these individuals voted before under
7 these registrations, is that correct?

8 A. I believe so, yes.

9 Q. You have Ms. Howell's records in front of you
10 right there, so we can start there. If you look at Page
11 5 of 5, I think if we have the same copy, the previous
12 election history?

13 A. Yes.

14 Q. That indicates that Ms. Howell voted in the
15 2016 general election, is that correct?

16 A. Correct.

17 Q. And it says there was a status that there had
18 been a challenge and that it had been removed?

19 A. Correct.

20 Q. At that point, at least, Ms. Howell would have
21 been notified that there was a problem with her voter
22 registration in the past, right?

23 A. At the time, she would have been given a
24 notice as to why she voted provisional and whether it was

1 counted or not counted.

2 Q. Okay. Let's look at Mr. McCarty, that's
3 Exhibit 1. Now, if you look at Mr. McCarty's, we're
4 going to have to connect a few dots here. If you look on
5 Page 1 of 5, you will see there at the bottom, it says
6 the voting district now is Harpers Ferry, and that's
7 Precinct No. 14. Am I reading that correctly?

8 A. Correct.

9 Q. And above that, it says there is a Precinct,
10 and that's 15?

11 A. Correct.

12 Q. And 15 is Bolivar?

13 A. Correct.

14 Q. And if you look on page -- it's difficult to
15 work with these because these are printouts of a computer
16 screen?

17 A. Correct.

18 Q. They are not really a natural piece of paper,
19 but if you'll look on Page 2 of 5, the first complete
20 row, it says "Voter Information," and there is previous
21 address, and there's a date change, 6 18 2019. The old
22 address was West Washington Street.

23 That reflects the date you changed Mr. McCarty?

24 A. That was the date we received the new record

1 from the DMV, yes.

2 Q. And if you look at this passage, I believe
3 it's Page 5 of 5, we'll look at Mr. McCarty's election
4 history. It indicates Mr. McCarty voted on the general
5 election held in November, 2018, correct?

6 A. Correct.

7 Q. And at that time, Mr. McCarty was registered
8 under the West Washington Street address?

9 A. Correct.

10 Q. And he voted at Precinct 15?

11 A. He did not. He voted at the courthouse.

12 Q. And put his Precinct was 15 at that time?

13 A. Yes.

14 Q. And his voter registration card would have
15 said Precinct 15, correct?

16 A. Correct.

17 Q. In 2018, Mr. McCarty voted under that
18 registration in Precinct 15, and he didn't have any
19 problem with it, did he?

20 A. He didn't vote in Precinct 15. He voted at
21 the courthouse.

22 Q. He went to Precinct 15 with a voter
23 registration?

24 A. I can only assume he had his voter

1 registration card.

2 Q. And that ballot wasn't challenged, was it?

3 A. No.

4 Q. Mr. McCarty didn't challenge it?

5 A. No.

6 Q. Nobody challenged it?

7 A. No.

8 Q. At the time of the election Mr. McCarty was
9 registered to vote and in the poll book in Precinct 15?

10 A. Correct.

11 Q. And that's how the law works, correct?

12 A. How you are registered; however, there are
13 provisions that allow you to change your address or for
14 clerical errors.

15 MR. DONOVAN: Thank you. No more
16 questions.

17 REDIRECT-EXAMINATION

18 BY MR. BAILEY:

19 Q. Ms. Painter, Mr. Carden, he is Recorder of
20 Harpers Ferry, correct?

21 A. Correct.

22 Q. And in that position, he is in charge of
23 managing the elections for Harpers Ferry. He is your
24 contact?

1 A. Correct.

2 Q. There is nothing nefarious about the fact that
3 the person identified as the representative for the town
4 would contact you regarding an election issue?

5 A. No, to my knowledge, from my side.

6 Q. And with respect to Mr. McCarty voting down at
7 the county, that was a countywide election?

8 A. Correct. It was a statewide election.

9 MR. BAILEY: I don't have any more
10 question. Are we done? May we excuse her?

11 THE WITNESS: I am here with the poll
12 book.

13 MR. DONOVAN: Are you going to get the
14 poll book admitted?

15 MR. BAILEY: Well, are you leaving the
16 poll book. I didn't think so.

17 MR. DONOVAN: She doesn't need to be
18 sequestered. I'm not going to recall her.

19 MR. BAILEY: We stipulate that the four
20 provisional ballot voters were not in the Harpers Ferry
21 Municipality Poll Book on the date of the election.

22 Are you guys okay with that? We can let this
23 witness leave.

24 MR. DONOVAN: We have no objection.

1 MR. BAILEY: Thank you, Ms. Painter,
2 very much.

3 MR. PREMACK: Could we take a quick
4 recess and reconvene in five minutes.

5 MAYOR BISHOP: Five minutes. Five of
6 11.

7 - - - -

8 (Short Recess.)

9 - - - -

10 MAYOR BISHOP: We're going to get back
11 in session. Okay. We are back in session.

12 MR. BAILEY: The contesters are going
13 to call Mr. George McCarty.

14 Whereupon,

15 GEORGE MCCARTY,

16 having been duly sworn, testified on oath as follows:

17 DIRECT EXAMINATION

18 BY MR. BAILEY:

19 Q. Good morning, Mr. McCarty. How are you?

20 A. Fine. Good morning.

21 Q. Would you state your name, please, your full
22 name, for the record.

23 A. George McCarty.

24 Q. Mr. McCarty, where do you currently reside,

1 what's your address?

2 A. 800 Washington Street.

3 Q. Are you a Harpers Ferry resident?

4 A. Yes.

5 Q. How long have you been a Harpers Ferry
6 resident?

7 A. I think we moved here a year ago this month.
8 August of last year.

9 Q. Did you live in the same residence since you
10 moved here last year through the date of the election in
11 Harpers Ferry this year on June 11th?

12 A. Yes.

13 Q. And that's where you were residing at the
14 time?

15 A. Yes.

16 Q. Do you recall when you registered to vote as a
17 Harpers Ferry resident?

18 A. Yes.

19 Q. When was that?

20 A. July.

21 Q. July of '18?

22 A. Yes.

23 Q. Where did you go to register to vote?

24 A. At the DMV.

1 Q. What do you remember about that process, how
2 do you register to vote at the DMV, do you fill out a
3 form, do you recall that?

4 A. No, I don't recall.

5 I remember that we went there just to get
6 drivers licenses, and I think the lady said, or it wasn't
7 the lady -- wanted to know if we wanted to register to
8 vote at the same time.

9 Q. Okay. So you took whatever steps they were,
10 you just don't remember what they were?

11 A. Yes. What they offered to us.

12 Q. Do you recall what address you gave them?

13 A. Well, we gave them the 800 Washington Street
14 and got in a discussion with her, with the woman there at
15 the DMV. And she came back and said, "Your address is
16 800 West Washington."

17 Q. So you gave her Washington Street. She comes
18 back and tell tells you, no, your address is West
19 Washington Street?

20 A. Yes.

21 Q. What happens then?

22 A. It went on. It wasn't a bad discussion or
23 anything. She was adamant that it was West Washington.
24 And we ended up like, okay, we live there, and if it

1 wasn't --

2 Q. It's a good decision not to get into a fight
3 with the DMV?

4 A. Well, we went to the DMV five times to change
5 our licenses and everything. It was always something.
6 We didn't own the house we were living in, so we couldn't
7 prove through our electrical bill that we lived there.

8 Q. Ultimately, you did, when they finally changed
9 your license, but they insisted that your address be West
10 Washington Street?

11 A. Yes.

12 Q. Did they tell you at that time that you were
13 in Bolivar because you used a West Washington?

14 A. No, that never came up.

15 Q. When did you first learn that you were in the
16 in the Harpers Ferry Poll Book?

17 A. When we went to vote. We went to vote early
18 because my sister had ALS, and they lived in Greenville,
19 South Carolina, and we were going to see her and my
20 brother-in-law. So we voted the Saturday before that
21 Tuesday, right here. No. Maybe it was downstairs, but
22 we went there to vote.

23 And one of the ladies said, "You're not on the
24 books." And that we could do a provisional vote because

1 -- I can't remember exactly what was said other than we
2 could vote provisionally.

3 Q. You were confused, you didn't have any idea
4 why you wouldn't have been in the poll book?

5 A. Not at that time, because during that
6 conversation, I think it was either the 14th or 15th, I
7 can't remember which one is Bolivar and which one is
8 Harpers Ferry, one of the ladies said that we were
9 registered in the precinct that was Bolivar.

10 Q. Did that make any sense to you?

11 A. No, not at that time because I still didn't
12 understand. I wasn't familiar with the West Washington
13 aspect of everything until my wife and I got in the car
14 and drove down the street and saw that West Washington
15 ends at Union Street. And from then on, it's just
16 Washington Street.

17 Q. And in your view, based on that, you live on
18 Washington Street, not West Washington, is that right?

19 A. Correct.

20 Q. Your address is 800 Washington Street?

21 A. Yes.

22 Q. I'm not going to make you stand up.

23 A. Our next door neighbor who lives west of us,
24 Ronnie -- I can't think of his last name -- who's lived

1 in that house all his life, is Washington Street. It's
2 not West.

3 Q. Did Ronnie vote in the election?

4 A. I have no idea.

5 - - - -

6 (Whereupon, Exhibit No. 5 marked for identification.)

7 - - - -

8 BY MR. BAILEY:

9 Q. On the day that you registered to vote -- I'm
10 just going to show it so he doesn't have to get up and
11 move around the table, I'm going to hand you what's
12 marked as Exhibit 5.

13 Take a minute to familiarize yourself with that
14 layout.

15 A. Okay.

16 Q. Do you see that house on your map or your lot,
17 I should say?

18 A. I do.

19 Q. Can you hold it up to the governing body here.
20 If you can hold the map up so they can see it and point
21 to which house is yours?

22 A. Right there.

23 Q. Does that have a lot designation on that
24 number?

1 A. Sixty.

2 Q. No. 60?

3 A. Um hum.

4 Q. What's your nearest cross street on that map?

5 A. Pardon me?

6 Q. What's the cross street on that map?

7 A. Jackson.

8 Q. And that's where you resided when you came in
9 to cast your ballot in this municipal election, is that
10 right?

11 A. That's correct.

12 Q. And that's the address that you resided at on
13 that day or that you thought you were?

14 A. Yes.

15 Q. And as a citizen of this town, you'd like this
16 governing body to count your vote, wouldn't you?

17 A. Absolutely.

18 MR. BAILEY: That's all the questions I
19 have for Mr. McCarty.

20 CROSS-EXAMINATION

21 BY MR. DONOVAN:

22 Q. Good morning, Mr. McCarty.

23 A. Good morning.

24 Q. Thanks for being here.

1 You told Mr. Bailey about a conversation you had
2 with someone at the DMV regarding your address at West
3 Washington Street; is that correct?

4 A. Um-hum.

5 Q. Do you remember who that conversation was
6 with?

7 A. No.

8 Q. Was it a man?

9 A. No. Both times we went there, it was a woman,
10 not the same, not the same woman.

11 Q. What did she look like?

12 A. A woman.

13 Q. Tall, short?

14 A. She was sitting behind a desk.

15 Q. Dark hair, light hair?

16 A. Dark hair, gray hair.

17 Q. You remember though clearly the conversation
18 you had with her about the address?

19 A. Yes. It went on for a while.

20 Q. And when was that?

21 A. What date was it?

22 Q. Yes, roughly?

23 A. I don't know.

24 Q. Was it in 2019, was it in 2014?

1 A. It was probably July of last year.

2 Q. July of 2018?

3 A. Pardon me?

4 Q. July of 2018?

5 A. Yes.

6 Q. And you registered to vote that day?

7 A. Yes.

8 Q. You knew you were registering to vote, you
9 understood that.

10 So, in July of 2018, you knew two things; that
11 you had attempted to register to vote, and that the DMV
12 did not have your address correct, is that right?

13 A. Would you repeat that?

14 Q. In July of 2018, you knew two things; No. 1,
15 you knew that you had registered to vote, right?

16 A. Um hum.

17 Q. And No. 2, and you may want to say yes or no
18 so the court reporter can hear you instead of shaking
19 your head?

20 A. Yes.

21 Q. But you knew you attempted to register to
22 vote, right?

23 A. Well, I went there to get a drivers license.
24 The thing to vote came up later.

1 Q. So you knew you were registering to vote,
2 right?

3 A. Um hum.

4 Q. And you knew also that the DMV didn't have
5 your correct address, correct?

6 A. No, I wouldn't say that. I didn't know if
7 they didn't have it or I didn't have it. And I thought
8 maybe, maybe it is West Washington. We had lived here a
9 couple of weeks.

10 Q. You knew there was some confusion about what
11 your address was; you would agree with that, wouldn't
12 you?

13 A. Yes.

14 Q. But at no point between July of 2018 and June,
15 2019 did you check to see if your registration was
16 correct and you were in the correct precinct, did you?

17 A. No.

18 Q. In fact, you didn't check that until after the
19 election, correct?

20 A. Correct.

21 Q. Because not only did you know, based on your
22 conversation at the DMV, that there was a problem with
23 your registration, but you also knew on the day that you
24 voted that there was a problem with your registration?

1 A. No, I didn't know there was a problem. I
2 thought I was misinformed.

3 Q. You were told that you were not going to vote
4 normally, that you would have to vote a provisional
5 ballot, correct?

6 A. On the day that we voted early?

7 Q. Yes.

8 A. Yes.

9 Q. And at that time, were you told it was because
10 you weren't in the poll book for Harpers Ferry, correct?

11 A. Correct.

12 Q. And, yet, you didn't go to the County Clerk
13 the next day, did you?

14 A. No. I went to see my sister who was dying
15 from ALS.

16 Q. And when did you get back from that trip?

17 A. Probably Friday of that week.

18 Q. When did you find out about the West
19 Washington, Washington issue? And you understand what I
20 am referring to when I say that, correct?

21 A. When did I find out what?

22 Q. When did you find out that the alleged problem
23 with your registration had to do with the West Washington
24 and Washington Street?

1 A. I saw a video on Facebook of the canvassing, I
2 think, is the first time I saw it or heard about it.

3 Q. And then did you speak to Mr. Carden about the
4 issue?

5 A. No.

6 Q. Never?

7 A. I didn't know that was even -- why would I do
8 that?

9 Q. I am just asking if you ever spoke to
10 Mr. Carden?

11 A. I never spoke to Mr. Carden until I saw him in
12 line, in the grocery store one night.

13 Q. When was that?

14 A. Pardon me?

15 Q. When was that?

16 A. Two months ago maybe, a month ago.

17 Q. So, during the pendency of this contest?

18 A. During the what?

19 Q. You have spoken with Mr. Carden since the
20 election?

21 A. I have spoken with Mr. Carden since the
22 election, yes, I have.

23 Q. And you have spoken with him about the
24 election, hadn't you?

1 A. No. We spoke about the house that was being
2 built next to where he lives.

3 Q. You never had any communication with
4 Mr. Carden, whatsoever, about your provisional ballot, or
5 the fact that your vote was part of this election
6 contest, or about whether you were actually registered in
7 Harpers Ferry?

8 A. No, I didn't. I didn't personally, when I saw
9 him at the grocery store.

10 Q. You did or you did not?

11 A. I did not.

12 Q. Have you ever had any e-mail communication
13 with Mr. Carden about this issue?

14 A. I have never e-mailed anybody.

15 Q. You testified that you live at 800 Washington
16 Street, is that correct?

17 A. Yes.

18 Q. 800 Washington Street is not a home though, is
19 it?

20 A. It depends on who you are, I guess. It's a
21 home for me.

22 Q. It's not a single family home, is it?

23 A. No.

24 Q. It's actually a business?

1 A. Yes.

2 Q. So you claim to reside at a business?

3 A. Yes, I claim to reside at a business.

4 Q. Do you work at that business?

5 A. I do.

6 Q. What's the name of the business?

7 A. Harpers Ferry Guesthouse.

8 Q. Okay. So when you are at 800 Washington
9 Street, you are working?

10 A. No. I am working if somebody is there. If
11 nobody is there, I am not working. I am just living.

12 Q. How often do you work there?

13 A. I would be working there today if I wasn't
14 here.

15 Q. I appreciate that, but my question is, how
16 often do you work there?

17 A. I can't say. It's a bed and breakfast.

18 Q. How often is it full?

19 A. Every weekend now. It depends on the season.

20 Q. Do you have guests during the week sometimes?

21 A. Pardon me?

22 Q. Do you have guests during the week sometimes?

23 A. Yes.

24 Q. When did you start working there?

1 A. September of last year.

2 Q. And who owns that property?

3 A. My son in law and daughter.

4 Q. Do you pay them rent?

5 A. No.

6 Q. And you get to stay there because you work for
7 them there, right?

8 A. I could probably stay there without working.

9 Q. But you don't, do you?

10 A. No.

11 Q. You get to stay there because you work for
12 them?

13 A. I work there because I don't want to stay
14 there without working.

15 Q. Does anyone else work there?

16 A. My wife does.

17 Q. And you and your wife are the only people that
18 work there?

19 A. Most of the time. Other people work there
20 sometimes.

21 Q. Such as who?

22 A. The owner and his wife.

23 Q. Who lives at 122 Rosedale Drive, Stephens
24 City, Virginia?

- 1 A. I have no idea.
- 2 Q. You don't live there?
- 3 A. No.
- 4 Q. Have you ever lived there?
- 5 A. I have.
- 6 Q. When did you stop living there?
- 7 A. July of last year.
- 8 Q. Did you sell it?
- 9 A. I did.
- 10 Q. Who did you sell it to?
- 11 A. I can't remember his name.
- 12 Q. Do you own any other property in Stephens
13 City?
- 14 A. No.
- 15 Q. Do you have any other family in Stephens City?
- 16 A. Yes.
- 17 Q. Who lives there?
- 18 A. My daughter lives there.
- 19 Q. Do you stay with her?
- 20 A. No.
- 21 Q. Never?
- 22 A. In Stephens City?
- 23 Q. Um-hum.
- 24 A. No.

1 Q. Do you go by Mack sometimes?

2 A. I do.

3 Q. Do you have a Facebook account?

4 A. Yes.

5 Q. Now, I didn't print this out because I wanted
6 to make sure we had the most up to date information
7 possible. I'm going to walk over and show you. I'll
8 have copies for the Counsel afterwards.

9 Is this your Facebook account, Mr. McCarty?

10 A. Yes, it is.

11 Q. I'm going to open up this little tab here
12 called, "About Mack." And it says right there under
13 places he's lived, tell me what that says?

14 A. Stephens City, Virginia.

15 Q. And what's it say under that?

16 A. Kingsport, Tennessee.

17 Q. What's it say under Stephens City, Virginia?

18 A. Current city.

19 Q. Did it say Harpers Ferry anywhere on there?

20 A. I didn't look.

21 Q. Does it say Harpers Ferry anywhere?

22 A. No, it doesn't.

23 Q. So you hold yourself out as living in Stephens
24 City sometimes?

1 A. Pardon me?

2 Q. Sometimes you hold yourself out as living in
3 Stephens City, correct?

4 A. That's incorrect.

5 Q. Mr. McCarty, are you registered to vote in any
6 other states?

7 A. No.

8 Q. Are you sure you don't remain registered to
9 vote in Virginia?

10 A. Yes.

11 Q. Do you pay personal property taxes here in
12 West Virginia?

13 A. No. Oh, wait. In West Virginia, personal
14 property taxes, sure.

15 Q. Is your vehicle registered here?

16 A. Pardon me?

17 Q. Is your vehicle registered here?

18 A. Yes.

19 MR. DONOVAN: No more questions.

20 REDIRECT-EXAMINATION

21 BY MR. BAILEY:

22 Q. So, Mr. McCarty, I think you said you are not
23 a regular user of the Facebook account, you don't update
24 it on a regular basis?

1 A. Never.

2 Q. Do you have your wallet with you today?

3 A. I do.

4 Q. Pull your drivers license out. What's it say
5 or show as the governing body; is that a West Virginia
6 drivers license?

7 A. It's a West Virginia drivers license.

8 Q. What's the address on that drivers license?

9 A. 800 Washington Street.

10 Q. Is that where you lay your head every night
11 when you go to bed?

12 A. Yes.

13 Q. Is that where your wife lays her head when she
14 goes to sleep?

15 A. Yes.

16 MR. BAILEY: I will excuse him, unless
17 you have got follow up.

18 MAYOR BISHOP: Is there any follow up?

19 MR. RITCHIE: I do, just one thing.

20 RE-CROSS-EXAMINATION

21 BY MR. DONOVAN:

22 Q. You are not a regular user of your Facebook
23 account, is that correct?

24 A. Not a regular, yes.

1 Q. How frequently do you use it?

2 A. Pardon me?

3 Q. How frequently do you use it?

4 A. I couldn't really answer that. Sometimes I
5 don't look at it for a couple of weeks, and sometimes I
6 look at it every day.

7 Q. When is the last time you posted something?

8 A. Probably yesterday. No. Posted something,
9 I'm not sure what that means. I have never posted
10 anything. I have liked stuff.

11 Q. When is the last time you liked something?

12 A. Yesterday.

13 Q. You have posted something, haven't you, on
14 your Facebook wall?

15 A. Do you mean in the years that I have had it?

16 Q. Yes.

17 A. Like yesterday.

18 Q. Well, you just said never, but I'm asking you
19 if you want to correct yourself?

20 A. Yes, I have probably posted something that
21 might have been over a year ago.

22 Q. Is this a post from December 6, 2018?

23 A. Yes, I believe I did that.

24 Q. And that's after you claimed you established

1 residency in Harpers Ferry, correct?

2 A. Yes.

3 Q. Yet, at that point, you are holding yourself
4 out publicly as being a resident of Stephens City,
5 Virginia?

6 MR. BAILEY: Objection to the form of
7 the question, but you can answer.

8 THE WITNESS: I never changed my I
9 never changed my Facebook thing.

10 MR. DONOVAN: I have nothing else.

11 MR. BAILEY: I am done with the
12 witness. As far as I am concerned, he can stay in the
13 room. You can stay present for the rest of the
14 proceeding. It's up to you.

15 I am going to go ahead and call Mr. McCarty, his
16 wife, Linda McCarty. She's going to swear you in as a
17 witness.

18 Whereupon,

19 LINDA MCCARTY,
20 having been duly sworn, testified on oath as follows:

21 DIRECT EXAMINATION

22 BY MR. BAILEY:

23 Q. Good morning.

24 A. Good morning.

1 Q. Can you state your name, please.

2 A. Linda S. McCarty.

3 Q. Ms. McCarty, where do you reside?

4 A. 800 Washington Street, Harpers Ferry.

5 Q. How long have you lived there?

6 A. We moved in, if I am correct on this, they
7 moved our furniture there the 16th of August 2018.

8 Q. Have you lived there consecutively from then
9 until today?

10 A. Yes, um-hum.

11 Q. And that's where you resided when you tried to
12 cast a vote in the municipal election of Harpers Ferry?

13 A. Yes.

14 Q. And you were denied, you were told that you
15 had to cast a provisional ballot when you tried to vote
16 in this election, is that correct?

17 A. Correct.

18 Q. Tell the governing body here when you
19 registered to vote in West Virginia?

20 A. Let's see, we moved here officially the 16th
21 of August.

22 Q. Of 2018?

23 A. Of 2018. And we went that next week to the
24 DMV to get our tags, and licenses, and our voter

1 registration. It took us five trips to get that done
2 because we didn't have the proper stuff to prove that we
3 lived there.

4 And so we finally got past the first one, and
5 then we got up to the magic window. The first thing she
6 said is, "Your address is wrong."

7 And I said, "No. We live at 800 Washington
8 Street."

9 She said, "No, you live at 800 West Washington
10 Street."

11 And I said, "No, we don't."

12 So this went back and forth, and back and forth,
13 and we just finally said whatever, not knowing anything
14 about it, except I was dealing with cancer, and I was
15 tired, and I wanted to go home. So we just did it, but
16 we didn't realize.

17 We voted that next fall in the national state
18 election, but we had to go to Charles Town to vote at the
19 courthouse. And that didn't ring a bell for me because I
20 thought, well, maybe they do things different in West
21 Virginia. I don't know. Maybe if you vote in a state or
22 national election, you do it at the county seat.

23 Q. So when you voted in the national election,
24 you did it in Charles Town?

1 A. We did it in Charles Town. Nobody said a
2 word. And then we came up this year to vote in the city
3 election for Town Council, and came to the courthouse
4 I mean, to the City Hall here. And we got upstairs and
5 they said, you aren't in the ballot book or poll book.
6 And I said, "We are bound to be. I have got my
7 registration right here."

8 And they said, "Oh, they have got you registered
9 for the 15th District." And I thought, well, isn't this
10 the 15th District. No, it's the 14th District.

11 Q. So it didn't say on your voter registration
12 card Bolivar?

13 A. Yes.

14 Q. And you didn't know where 15 was?

15 A. I had no idea. I was just about in tears
16 then. It was hard for me to get up those steps. My
17 sister in law was dying. We voted early because we had
18 to go to Greenville, South Carolina because she was
19 dying.

20 They said, "You can vote a provisional ballot."
21 And I said, "What is that?" And she explained it to me
22 and I thought, yes, okay.

23 And so we did. And she said, "I don't think you
24 can expect any problems. We have had provisional ballots

1 before. They always go through. Don't worry about it."

2 So, we did.

3 Then my daughter called us in Greenville, South
4 Carolina and said, "They threw out your vote."

5 I am 78 years old, and I have voted in every
6 election since I was 21 years old. And this has never
7 happened before, and it absolutely broke my heart. So we
8 got into this mess. And I'm ready to move. I just
9 thought, is this what we've got in Harpers Ferry.

10 I am not going to cry.

11 MR. BAILEY: I don't have any more
12 questions. Thank you, ma'am.

13 CROSS-EXAMINATION

14 BY MR. DONOVAN:

15 Q. Thank you for being here today, Ms. McCarty.
16 I don't have much.

17 You said your sister called you and told you?

18 A. My daughter.

19 Q. Your daughter called you and told you that
20 they had thrown out your ballot. What did you do next?

21 A. Well, we stayed down in Greenville, South
22 Carolina and we came home. To be honest, we didn't know
23 what to do. We didn't know what to do.

24 And some people called us from the town and said

1 they were going to have a meeting and see if there was
2 anything we could do about this. And we went to that,
3 and then we found out.

4 Then all this other stuff started happening of
5 people getting together and trying to get our ballots
6 read.

7 Q. Was one of the people from the town who called
8 you Mr. Carden?

9 A. Mr. Carden, no. No, I didn't know any of
10 these people. I didn't know who anybody was until we
11 went when they recounted the votes. And I was sitting
12 there, and there was a woman behind us. And I said, "Who
13 are these people sitting up at the table?" And she said,
14 "That's Barbara," and said, "That's the mayor."

15 I said, "That's the Mayor?" After the meeting,
16 I introduced myself. I didn't know who they were.

17 Q. So who was it from City Hall that called you?

18 A. I wasn't anybody from the City. It was just
19 another town citizen, and I didn't know them until we
20 went to that meeting.

21 Q. A moment ago, you said that some people from
22 the town called you. You just meant some fellow citizens
23 then, not people from the Town Council?

24 A. No. Just fellow citizens.

1 Q. When was the first time you ever had a
2 conversation with Mr. Carden about this?

3 A. You know, I don't know. We bumped into him
4 weeks and weeks and weeks later at Martin's one night,
5 and we introduced ourselves. I don't think we talked so
6 much about this as we did just living in Harpers Ferry.

7 Q. Did you talk about this contest at all?

8 A. I'm trying to think. I don't think it was
9 anything more than I've seen. After this happened, we
10 started coming to Town Council meetings, if we could. If
11 not, we watched it on TV.

12 And I told him -- I think I told him that I
13 remember seeing you at Town Council meetings. We talked
14 about where he lived, and where we lived, and that was
15 pretty much it.

16 Q. How is it that your motor vehicle registration
17 came to be changed to Washington Street instead of West
18 Washington Street?

19 A. Because we went there as soon as this happened
20 and we got home from South Carolina, we went immediately
21 to the DMV, and we told them that the address was wrong,
22 and we wanted our licenses changed and made right.

23 And she started arguing again. And I said, "No,
24 we do not live at West Washington Street." I said, "The

1 street signs in front of our house say Washington Street.
2 West Washington starts at Union Street."

3 And she final said, okay. And she just hit a
4 few buttons and that was it. And we have both got the
5 right address, and our drivers license now, and our voter
6 registration and everything. It got changed because we
7 just stood there and said no.

8 Q. So it's your testimony that you corrected your
9 voter registration at the DMV?

10 A. Yes. We went back to the same DMV on Route 9.

11 Q. Not with the County Clerk?

12 A. Uh-hum.

13 Q. Not with the County Clerk's Office?

14 A. No. This was at the magic window in front of
15 the DMV.

16 Q. Did anyone from the County Clerk's Office ever
17 contact you to determine whether lived at 800 Washington
18 Street?

19 A. No, no.

20 Q. Ms. Painter testified earlier this morning
21 that you had a conversation with her. Are you familiar
22 with Ms. Painter?

23 A. Ms. Who?

24 Q. Ms. Painter?

1 A. What's her first name?

2 Q. Her name is Nikki?

3 A. Yes. I called her one day when this was all
4 going on. And I said, "I have to hear this from you." I
5 said, "I'm just talking to people in town and I want to
6 know what's going on. And I want to know why."

7 And she said, she told me, she said, "Your Town
8 Council broke the law, and their integrity is seriously
9 compromised."

10 Q. Ms. Painter told you that?

11 A. Yes.

12 Q. Earlier, I had asked you if you had spoken
13 with anyone at the County Clerk, and you said, no?

14 A. That was the Election Commission Office. Is
15 that the Clerk?

16 Q. I thought you were confused. Ms. Painter is
17 an employer of the County Clerk?

18 A. It's called the Election Commission in Charles
19 Town. And that's the person -- I thought she said her
20 name was Mickie, but then I found out it was Nikki.

21 Q. And she told you that the town's integrity was
22 seriously compromised?

23 A. Yes.

24 Q. Did she tell you what that was based on?

1 A. No, because I felt the same way.

2 Q. Do you have a Facebook account, Ms. McCarty?

3 A. Do I have a Facebook account?

4 Q. Um-hum.

5 A. Yes.

6 Q. Is it fair to say that your current city on
7 Facebook is Stephens City, Virginia?

8 A. That my what?

9 Q. You indicate to people on your Facebook
10 account that you live in Stephens City, Virginia?

11 A. No.

12 When we moved, I told all of my friends on
13 Facebook that we had moved from Stephens City to Harpers
14 Ferry.

15 Q. How did you tell them that?

16 A. I just sent a message.

17 Q. Do you still have that message?

18 A. Oh, I don't know.

19 I mean, my friends on Facebook, I am very
20 selective. My friends on Facebook are my friends in
21 life, and they know where I am and what I am doing. If
22 somebody is on Facebook and I don't know them, I delete
23 them.

24 MR. DONOVAN: Thank you. I don't have

1 any more questions.

2 MR. BAILEY: I don't have any more
3 follow up. Ma'am, you are done testifying. You are able
4 to stay in the courtroom during the proceeding.

5 I call Mr. Adam Hutton.

6 Whereupon,

7 ADAM HUTTON,
8 having been duly sworn, testified on oath as follows:

9 DIRECT EXAMINATION

10 BY MR. BAILEY:

11 Q. State your name.

12 A. Adam Hutton.

13 Q. What is your address?

14 A. 900 Washington Street.

15 Q. How long have you resided there?

16 A. March 1st.

17 Q. Of 2019?

18 A. Yes.

19 Q. Where did you live before Harpers Ferry?

20 A. Washington, D.C.

21 Q. Did you register to vote in the state of West
22 Virginia?

23 A. Yes.

24 Q. When did you do that?

1 A. When I registered my drivers license? I think
2 it was April 20th, what's on my drivers license.

3 Q. So you went to the DMV to get your West
4 Virginia drivers license?

5 A. Yes.

6 Q. And at that time, you chose to go through them
7 to register to vote?

8 A. Yes.

9 Q. Tell me about that process, please?

10 A. From what I remember, it's when you register
11 your drivers license and you transfer from out of state,
12 there is a check box you check to register to vote. I
13 don't remember if I filled in anything in the-mail. I
14 don't think I did.

15 Q. Was there any discussion when you were at the
16 DMV at that time about using West Washington Street as
17 your address?

18 A. No.

19 Q. What did they put on your drivers license, as
20 far as your street?

21 A. West Washington.

22 Q. Did you call them into question about that or
23 did you just know where West Washington started, or
24 ended, or anything like that?

1 A. So I use the Post Office address for my house,
2 which is West Washington Street.

3 Q. And your physical address is what number on
4 Washington Street?

5 A. So, my physical address is 900 Washington
6 Street. If I type that into the Post Office, it gets
7 corrected to 900 West Washington Street.

8 Q. And that's just how they have decided, "they"
9 being the Government, has decided they are going to
10 characterize it, the U.S. Government?

11 A. I guess. I have no idea.

12 Q. You still get your mail?

13 A. I chose West Washington to get my mail.

14 Q. Did you register to vote because you want to
15 participate in free elections?

16 A. Yes.

17 Q. And when did you learn that you were denied
18 your right to choose a ballot during a municipal election
19 of Harpers Ferry?

20 A. So when I came here to vote, the folks that
21 were taking my ballot said that there may be some
22 discrepancy with the 900 West versus 900. I think they
23 mentioned that it's happened before, what the 900
24 Washington versus 900 West Washington, but then when I

1 found out it wasn't counted was over e-mail. I don't
2 remember from whom.

3 Q. So did they tell you the day you tried to
4 vote, that your name did not appear in the Harpers Ferry
5 Poll Book?

6 A. Yes.

7 Q. And then they gave you the option of casting a
8 provisional ballot, is that correct?

9 A. Yes.

10 Q. You are clearly a resident within the
11 corporate boundaries of Harpers Ferry?

12 A. I believe so.

13 Q. Let me show you a map. I'm going to show you
14 what's been marked as Contesters Exhibit 5. Orient
15 yourself with that, and let me know if you find your lot?

16 A. Yes.

17 Q. And can you hold that up to the governing body
18 here and point to where your lot is?

19 A. The No. 86, 900.

20 Q. Thank you. And that's where you were residing
21 on the day you tried to vote in this election?

22 A. Yes.

23 Q. That's where you resided on the date you
24 registered to vote?

1 A. Yes.

2 Q. And you believe that your ballot that you cast
3 should be counted, don't you?

4 A. I'll leave that to this group to decide.

5 Q. You want them to follow the law?

6 A. I would leave that to this group to decide.

7 MR. BAILEY: Okay. That's all the
8 questions I have.

9 CROSS-EXAMINATION

10 BY MR. DONOVAN:

11 Q. Good morning, Mr. Hutton. Thank you for being
12 here.

13 You don't really want to be here today, do you?

14 A. Not particularly.

15 Q. In fact, the only reason you are here today is
16 because you received a subpoena, isn't it?

17 A. Not entirely.

18 Q. You did receive a subpoena...

19 A. Yes.

20 Q. ...to be here.

21 When this issue came up, you told some of your
22 neighbors that you thought that you didn't really want to
23 be involved in this contest, didn't you?

24 A. Not that I didn't want to be involved. I

1 would say that I didn't expect this to be involved.

2 Q. You told them that you thought that the error
3 that it was your responsibility to make sure your
4 registration was correct, didn't you?

5 A. Yes.

6 Q. When did you first learn that you had a
7 problem with your registration? And forgive me if you
8 already answered that question. It was when you voted
9 provisionally?

10 A. Yes.

11 Q. And when did you learn that the problem was
12 this West Washington, Washington distinction?

13 A. So I learned of the West Washington versus
14 Washington distinction based on, actually, when I bought
15 the house, but it was not with regards to voting. It was
16 with regards to getting mail.

17 Q. When did you learn that, that was an issue
18 with your provisional ballot?

19 A. When I came here to vote.

20 Q. Someone told you at the polling place that it
21 was the West Washington?

22 A. Yes.

23 Q. At that time, did you take any steps to get it
24 fixed?

1 A. No.

2 Q. Did you ever talk to the County Clerk about
3 it?

4 A. No.

5 Q. Did you ever talk to the DMV about it?

6 A. No.

7 Q. Did you, at some point, receive an e-mail from
8 Mr. Carden about this? You said you couldn't recall who
9 you received an e-mail from.

10 Q. Could it have Kevin Carden?

11 A. I honestly don't remember.

12 Q. Did you receive an e-mail from Ms. Bainbridge?

13 A. Yes.

14 Q. What was the subject of the e-mail?

15 A. The subject of the e-mail was about this
16 ongoing well, this might be happening, it's about the
17 election. And that was about it.

18 Q. Do you have a copy of that e-mail?

19 A. I may.

20 Q. Would you be willing to provide it to the
21 Council?

22 A. If it's required.

23 MR. BAILEY: I'm going to object to any
24 evidence coming in after the close of evidence today, but

1 we'll just note my objection.

2 MR. DONOVAN: No one said that the
3 evidence is closing today.

4 BY MR. DONOVAN:

5 Q. Was Ms. Bainbridge requesting anything of you?

6 A. I don't believe so.

7 Q. Did she ask you -- you don't think she was
8 asking you to participate in the complaint relating to
9 the problems arising from this election?

10 A. I don't think she asked me to. I think she
11 informed me that it may be coming up.

12 Q. And did you respond to her?

13 A. I believe so, but I don't remember that I
14 commented on participating in this.

15 Q. You didn't respond that you wanted to be
16 involved?

17 A. As far as I know, no.

18 Q. But if you saw that e-mail, it might help you
19 remember?

20 A. It would, yes.

21 Q. Do you want to take a break, and do you have
22 your phone with you today?

23 A. Not on me.

24 Q. Did somebody take it from you?

1 A. Yes.

2 Q. Could you pull up that e-mail on that phone?

3 A. I may be able to, if I can find it.

4 MR. DONOVAN: I'd like to ask for a
5 brief recess to allow Mr. Hutton to pull up that e-mail.
6 You don't even have to submit it for the record. I just
7 want to ask you some questions about it.

8 Could we have a recess, five minutes?

9 MAYOR BISHOP: Five minutes.

10 MR. DONOVAN: Of course, we'd ask
11 Mr. Hutton not have any communication with any of the
12 lawyers. Thank you, so much.

13 MAYOR BISHOP: Five minutes.

14 - - - -

15 (Short Recess.)

16 - - - -

17 MAYOR BISHOP: Okay. We are back in
18 session. The same rules apply.

19 BY MR. DONOVAN:

20 Q. Thank you, Mr. Hutton. I am grateful for your
21 cooperation and this won't take much longer.

22 Did you have an opportunity to review that
23 e-mail?

24 A. Yes, I did.

1 Q. When was it sent?

2 A. Late June.

3 Q. You have it in front of you, right?

4 A. Yes. I can pull it up. June 19th.

5 Q. June 19th. And who was it sent to you?

6 A. Ms. Pechuekonis.

7 Q. Can you spell that, for the record?

8 A. P-E-C-H-U-E-K-O-N-I-S.

9 Q. And who else? Were people cc'd, were there
10 other recipients of this e-mail?

11 A. Betsy Bainbridge.

12 Q. Any others?

13 A. That's it.

14 Q. And having reviewed your e-mail, is your
15 recollection consistent with how you testified to it
16 earlier?

17 A. Yes.

18 Q. Would you be willing to read the substance of
19 it?

20 A. It's really long.

21 MR. BAILEY: Objection, on hearsay.

22 THE WITNESS: Okay. It's just long.

23 This is Lynn Pechuekonis at Rock Haven Bed and
24 Breakfast: I don't know if you have had heard this, that

1 your vote has been counted, but if you'd like to learn
2 more, see the invitation at the end of this. It's really
3 great down most of the time.

4 Q. And what was the invitation below?

5 A. The invitation is, "This is just a gathering
6 to educate residents and develop a plan of action." And
7 then there is more information regarding that.

8 Q. Were other recipients indicated on the
9 invitation?

10 A. Not that I see.

11 Q. When you say "invitation," do you mean like an
12 electronic outlet information or sort of like a little
13 flier?

14 A. No.

15 Actually, I never even opened it. I have to put
16 a roof on my head. It's a copy of the Virginia State
17 Election Municipal Canvass document.

18 Q. So you were so uninterested in that, you never
19 even zoned in on the invitation?

20 A. No. It's an invitation in an e-mail. I
21 didn't open the Pdf to read the canvass document.

22 Q. Mr. Hutton, I think you responded.

23 Mr. Bailey asked you whether you wanted your
24 vote counted or not, and I think you said it was up to

1 the Council; is that accurate?

2 A. Correct.

3 Q. And would it be fair to say that in making
4 that decision, that you would prefer that they follow the
5 law?

6 A. That's a philosophical question.

7 Q. You want them to follow the law, don't you?

8 A. I would agree that the spirit of the law is
9 something that should be followed.

10 MR. DONOVAN: Thank you. Nothing else.

11 REDIRECT-EXAMINATION

12 BY MR. BAILEY:

13 Q. Mr. Hutton, I can tell you don't want to get
14 involved. I can tell by your answers.

15 Is it fair to say, you made the effort to
16 register to vote; correct?

17 A. Um-hum.

18 Q. And you made the effort to come to town to
19 cast a ballot?

20 A. Yes.

21 Q. You wanted your vote to count?

22 A. Yes.

23 MR. BAILEY: We don't have any more
24 questions. You are free to stay or do whatever you'd

1 like. You are released as a witness.

2 And that is the end of my presentation of
3 evidence. I just rest on the testimony today, the Notice
4 of Election Contest, the pleadings that were filed
5 previously, and I am done.

6 MAYOR BISHOP: I think you asked at the
7 beginning that you have ten minutes at the end for
8 closing statements.

9 MR. DONOVAN: Typically, we would
10 defer.

11 I know we just took a recess to deal with that
12 issue, which was unanticipated. It would be normal to
13 take a break between the close of their evidence and the
14 start of ours so we can consider who, and if anyone, we'd
15 like to call in our case in chief. And we'd typically do
16 that before the closing statement for either side.

17 MAYOR BISHOP: Okay. So you are
18 suggesting a brief break?

19 MR. DONOVAN: Could we take ten
20 minutes?

21 MAYOR BISHOP: Okay, 10 after 12, Ladies and
22 Gentlemen.

23 - - - -

24 (Brief Recess.)

1 - - - -

2 MAYOR BISHOP: Okay. We are back in
3 session.

4 MR. DONOVAN: So the contesters have
5 rested their case; right?

6 MR. BAILEY: Unless it needs to be
7 continued from time-to-time during a three month period.

8 MR. DONOVAN: Contestees would call
9 Nancy Case.
10 Whereupon,

11 NANCY CASE,
12 having been duly sworn, testified on oath as follows:

13 DIRECT EXAMINATION

14 BY MR. DONOVAN:

15 Q. Good morning, Ms. Case. Thank you for being
16 here, although I guess you had to be here.

17 A. Yes. Good afternoon.

18 Q. Goodness, it is afternoon.

19 Ms. Case, you are one of the contestants in this
20 proceeding; is that correct?

21 A. I am, sir.

22 Q. And you are a candidate for City Council?

23 A. I was.

24 Q. Okay.

1 And, you are not certified by the Board of
2 Canvassers as one of the winners of that election, is
3 that correct?

4 A. That is correct.

5 Q. At what point did you decide to initiate this
6 election contest?

7 A. Either the tail end of June, or more
8 accurately, I would say the first week of July.

9 Q. Ms. Case, you were part of a group of
10 candidates in this election who ran on what's called a
11 platform of "Make It Happen," is that accurate?

12 A. That's inaccurate.

13 Q. Was that not something you supported?

14 A. I am not a member of that group called Make It
15 Happen, and to my knowledge, there was no one who was a
16 candidate for Town Council who was on a platform.

17 Q. Okay. Were you supported by that group?

18 A. I believe that I was. I wasn't here, sir.

19 Q. You don't know if they supported you or not?

20 A. I believe that they did.

21 MR. BAILEY: I'm going to object.

22 Kind of a standing objection to her testimony as
23 relevant to the issue of these provisional ballots, but
24 that's my objection that stands. I don't know how it's

1 relevant to this.

2 MR. DONOVAN: And while we're at it,
3 I'm going to lead the witness since she is an opposing
4 party, even though I called her on direct.

5 MR. BAILEY: Yes. No objection.

6 BY MR. DONOVAN:

7 Q. How did you come to the decision to initiate
8 this election contest?

9 MR. BAILEY: Objection, to the extent
10 it calls for any communication she had with counsel,
11 legal counsel.

12 BY MR. DONOVAN:

13 Q. And to be clear, that is something that you
14 should not answer, even notwithstanding our agreement to
15 preserve an objection.

16 Let me be clear, I am not asking you to divulge
17 any communication between you and any of your attorneys.

18 Aside from that, how did you come to the
19 decision to initiate this election contest?

20 A. After much thought, I'll say initially I was
21 reticent to it. It was my own decision to do it, to see
22 that these provisional votes were counted. I didn't like
23 what I witnessed.

24 Q. Did you communicate with any of the members of

1 the existing Town Council about your decision?

2 A. Not that I am aware of.

3 Q. Have you communicated with Mr. Carden, to the
4 extent that he is not a member of the Council, about
5 there?

6 A. Not that I recall, sir.

7 Q. At any point, have you had any communication
8 with Mr. Carden about the outcome of the election or the
9 nature of your ballot, the nature of the provisional
10 ballots, or about your challenge in this election
11 contest?

12 A. Not that I recall, sir.

13 Q. Is it possible that you have forgotten?

14 A. Certainly.

15 Q. It's only been a couple months, so it's odd
16 for you to say that you don't recall.

17 Have you or have you not had any communication
18 with Mr. Carden about this?

19 A. About this, not that I recall.

20 Q. Do you communicate with Mr. Carden about other
21 things?

22 A. Yes, sir.

23 Q. Are you friends?

24 A. He is a nice guy. I like him what.

1 Q. What sort of things do you communicate with
2 Mr. Carden about?

3 A. Well, I sent an e-mail about the fact that the
4 Planning Commission wouldn't be having meetings. I asked
5 him if he was ready to start talking about dark sky
6 lighting ordinances soon, things like that.

7 MR. DONOVAN: I don't have any
8 stickers. What exhibit are we up to?

9 MR. BAILEY: This will be six.

10 - - - -

11 (Whereupon, Exhibit No. 6 was hereby marked for
12 identification.)

13 - - - -

14 BY MR. DONOVAN:

15 Q. Ms. Case, do you recognize this document?

16 A. I believe this is our original Notice of
17 Election Contest.

18 Q. It's your original one. Is there an amended
19 one?

20 A. Oh, no. Sorry.

21 Q. That's okay. I just wanted to make sure I
22 didn't miss anything. It happens.

23 And this page is attached to the end of the
24 document, and it's called a Sworn Verification of

1 Contester Nancy Singleton Case.

2 Do you recognize that?

3 A. Yes.

4 Q. Is that your signature?

5 A. It is.

6 Q. And do you understand that by signing this,
7 you are verifying that all the allegations in this
8 document are true, to the best of your knowledge?

9 A. Yes.

10 Q. Paragraph 21 of this document says, "On June
11 19, 2019, Town Council Candidates Nancy Singleton Case
12 and Deborah A. McGee requested an official recount of the
13 June 11th municipal results and further urged the Board
14 of Canvassers to consider all provisional ballots." Is
15 that accurate?

16 A. That's accurate, and a perfect example of an
17 e-mail communication that I forgot whenever I officially
18 requested a recount of the election. My apologies.

19 Q. When did you make that official request?

20 A. Again, I don't recall. I'm sure you know.

21 Q. Actually, I don't know because I haven't seen
22 it.

23 Do you know if it was ever submitted to the Town
24 Council?

1 A. Well, I know I sent it to Mr. Carden. And I'm
2 sure he submitted it to the Town Council because we had a
3 recount on the 26th. So sometime prior to the 26th of
4 June, myself, well, I will just say for myself, submitted
5 a request for recount.

6 Q. And you think that was an e-mail?

7 A. Yes. I know that it was.

8 Q. And you think it was submitted on June 19th?

9 A. I don't know if it was submitted on June 19th.

10 Q. This here was submitted on June 19th?

11 A. I'll take your word for it. I'm sorry.

12 Q. Did you submit a check?

13 A. I did not.

14 Q. So you submitted an e-mail request for a
15 recount, but you did not submit the check that's required
16 by statute?

17 A. I personally did not.

18 Q. Did someone submit it on your behalf?

19 A. I believe that, yes, they did.

20 Q. And who is that person?

21 A. I am not 100 percent certain, but I believe it
22 might have been either Kurt or Debbie McGee, my
23 counterpart in contesting this election.

24 Q. So it's your understanding you didn't need to

1 submit your own check; as long as there was one check for
2 the entire recount, that was good enough?

3 A. Yes.

4 Q. I just want to be crystal clear about this.
5 You are not suggesting that Ms. McGee or her husband
6 submitted an additional check for you.

7 Your understanding is the check that they
8 submitted on their behalf was good enough for the both of
9 you?

10 A. The amount was the correct amount for bond, I
11 think it's called, and, yes, it was the dollar amount
12 required for bond, for both of us.

13 I may have gotten clarification, but I don't
14 recall who I got that clarification from. It might have
15 been -- I just don't know.

16 Q. So earlier when I asked you if you had, had
17 any communication with Mr. Carden, you said no.

18 You said no?

19 A. No, I don't think I said that. I said I don't
20 recall.

21 Q. You said you didn't recall. Now, you recall.
22 And having thought about it further, do you
23 recall any others?

24 A. I just said that I may have contacted someone

1 to get clarification on the bond amount, whether or not
2 it was an amount that needed to be two separate checks or
3 one to cover the total amount, but I don't recall who I
4 asked. It could have been Mr. Carden that I asked that
5 question.

6 As the election supervisor, he could have been
7 the person I asked, but it also could have been someone
8 else.

9 Q. Who is paying for this election contest?

10 MR. BAILEY: Objection, to the extent
11 are you saying who is paying for the filing or who is
12 paying for the attorneys fees?

13 MR. DONOVAN: Both.

14 MR. BAILEY: Well, I'm going to object
15 to disclosing my fee agreement.

16 MR. DONOVAN: I'm not asking what your
17 fee agreement is. I am just asking who is paying the
18 fees. That is not protected by the attorney/client
19 privilege.

20 MR. BAILEY: Well, I'm going to
21 instruct her, she is not to go into attorney fees, who's
22 attorney fees, who is paying, and how much. I'm going to
23 instruct her not to answer.

24 BY MR. DONOVAN:

1 Q. Is someone paying an attorney to represent you
2 in this case? You can answer that.

3 A. May I answer that?

4 MR. BAILEY: What's the question.

5 Q. Is someone paying an attorney to represent her
6 in this case?

7 MR. BAILEY: Yes, you can answer that.

8 A. An individual. Someone is not.

9 Q. Is an entity paying an attorney to represent
10 you in this case?

11 A. No, an entity is not paying for me.

12 Q. So if it's not someone and it's not an entity,
13 what is it?

14 A. May I answer that?

15 MR. BAILEY: Um-hum.

16 A. It's many someone's.

17 Q. And who are those many someone's?

18 A. I do not know.

19 Q. Is one of those many someone's a woman named
20 Karen Schaufeld?

21 A. I believe that, yes, she has made a
22 contribution.

23 - - - -

24 (Whereupon, Exhibit No. 7 was hereby marked for

1 identification.)

2 - - - -

3 Q. I'm going to hand you a letter.

4 MR. BAILEY: Preserve objection. I
5 have got an objection on hearsay.

6 BY MR. DONOVAN:

7 Q. I'm going to hand you what's been marked as
8 Exhibit 7, and you can take a look at that.

9 MR. BAILEY: Do you have a copy of it?

10 MR. DONOVAN: I think we do.

11 THE WITNESS: I am familiar with this.

12 MR. BAILEY: May I see it, please? I'm
13 not familiar with the letter, but I was present at a
14 meeting where it was read.

15 Q. Now, could I ask you to read -- I'm sorry.

16 Did I ask you if you are familiar with her?

17 A. I am familiar with the contents of the letter.

18 Q. Are you familiar with the author of the
19 letter?

20 A. Yes, I know who she is.

21 Q. And you said she is one of the people who's
22 contributed?

23 A. She is one of the persons that's contributed,
24 yes.

1 Q. Do you know what she does for a living?

2 A. I do not.

3 Q. Could you read the last paragraph of this
4 letter, starting with, "It is?"

5 A. "It is with all of this in mind and responding
6 to a call to our hearts and what we know to be right and
7 to the greatness of the ideas that have time and again
8 been proven here in Harpers Ferry that we have decided to
9 financially support, as individuals, the efforts to
10 restore confidence in the election process in Harpers
11 Ferry.

12 Regardless of what the outcome may be, it is
13 important that every legitimate vote is counted and that
14 the voice of the people is heard.

15 None of this is inconsistent with the many
16 efforts we have supported in the past in other states and
17 communities to assure that all persons in our great
18 democracy are informed and have an opportunity for
19 meaningful participation.

20 How much more appropriate is it then that we
21 support efforts to afford the same opportunity to the
22 residents of Harpers Ferry, a town that we have grown to
23 love for many years and to which we, like many of you,
24 have invested in its future."

1 MR. DONOVAN: You did a much better job
2 of reading that than I would have. Thank you.

3 That's all I have. I'm going to give this to
4 the Court Reporter.

5 MR. BAILEY: No questions.

6 MR. DONOVAN: We would call Debbie
7 McGee.

8 Whereupon,

9 DEBORAH MCGEE,
10 having been duly sworn, testified on oath as follows:

11 DIRECT EXAMINATION

12 BY MR. DONOVAN:

13 Q. Good morning, Ms. McGee.

14 A. Good afternoon.

15 Q. Good afternoon, my mistake again.

16 You were in the courtroom for Ms. Case's
17 testimony, weren't you?

18 A. I was.

19 Q. So I'm going to ask you some of the questions,
20 I want to make sure the record is clear.

21 Do you recognize what we admitted into evidence
22 as Exhibit 6?

23 A. I do.

24 Q. And like Ms. Case, you also verified, signed

1 your name to verify the allegations?

2 A. I did.

3 Q. Have you personally seen the written request
4 that Ms. Case allegedly sent requesting a recount on the
5 19th?

6 A. Actually, I wrote -- I believe I was the one
7 that actually submitted the letter or my husband actually
8 submitted it to Mr. Carden prior to the deadline. He was
9 at a Town Council meeting and he gave it with the check
10 to Mr. Carden, on behalf of Nancy and myself. I would
11 not be absolutely certain that the letter said both of
12 us. I'm not certain. Nancy had e-mailed it prior,
13 earlier in the day.

14 Q. Did you see that e-mail personally?

15 A. I did.

16 Q. Was it cc'd to you, were you copied on that
17 e-mail?

18 A. Yes. I know what a cc is. I think it
19 probably was. I was teaching during the day, so I don't
20 exactly remember.

21 - - - -

22 (Whereupon, Exhibit No. 8 was hereby marked for
23 identification.)

24 - - - -

1 Q. I do have a copy of this one and I have a few
2 copies for the Council.

3 We can provide additional ones later, Mr. Mayor.

4 Ms. McGee, this is marked as Exhibit 8. Do you
5 recognize this letter?

6 A. Yes. This is it, yes.

7 Q. Do you want to take a minute to look at it or
8 are you familiar with it?

9 A. Well, I am not familiar with it and I don't
10 write these kinds of letters very often.

11 Q. Well, let me ask you this, Ms. Case's name is
12 there at the top, and it's addressed to Mr. Carden, is
13 that correct?

14 A. Right, right.

15 Q. And down at the bottom, it's signed Deborah
16 McGee. Is that your signature?

17 A. Yes, it is.

18 Q. Did Ms. Case sign this?

19 A. She was out of town. Her sister had passed
20 away or was in her last days.

21 Q. Is Ms. Case's name in here at all on this
22 document?

23 A. No.

24 Q. I think you testified earlier that your

1 husband brought this to Mr. Carden. Why did he bring it
2 to Mr. Carden?

3 A. He is in charge. He is the town recorder, and
4 he is in charge of election. And he is the one that
5 would be -- documents that are sent to Town Council
6 should probably go through him.

7 Q. Is that your understanding of what the West
8 Virginia Code requires?

9 A. Absolutely not. I am not familiar with that.

10 Q. Was this document delivered to Mr. Carden via
11 e-mail?

12 A. No, no.

13 Q. Or by hand delivery?

14 A. No. It was hand delivered.

15 Q. Along with the check?

16 A. Along with the check.

17 Q. And it was in an envelope, is that what you
18 said?

19 A. That's a very good question. I don't know.
20 Perhaps it was. I honestly don't know.

21 Q. But not delivered by you personally?

22 A. It was not delivered by me personally.

23 Q. But it's your testimony you believe it was
24 delivered on June 19th?

1 A. If that's a Monday, that is the deadline that
2 it had to be in. That would be when it was delivered
3 because it was delivered within hours of the deadline.

4 Q. How do you know that it was delivered that
5 day?

6 A. Because I live with my husband and he verified
7 that, he told me.

8 Q. Did you have any other way to confirm that?

9 A. He did get a receipt, yes. We have a receipt
10 from Kevin that he received it.

11 Q. Okay. What kind of receipt?

12 A. I think it was -- I know, at least, that we
13 have the receipt for the check that was proffered for it,
14 and it says for the election recount. I am not certain
15 that I have a copy of the letter that says received. I
16 am not certain about that.

17 Q. You never got an e-mail or anything to confirm
18 it?

19 A. No, I don't think so.

20 Q. Do you have a copy of that receipt that you
21 received for the check?

22 A. Yes. It's on my desk.

23 Q. Would you be willing to provide that to the
24 Council?

1 A. Sure.

2 MR. DONOVAN: No more questions.

3 THE WITNESS: Thank you.

4 MR. PREMACK: What's the exhibit number
5 on the letter?

6 MAYOR BISHOP: Exhibit 8.

7 MR. DONOVAN: Contestees call Kevin
8 Carden.

9 MR. BAILEY: I've got a couple of
10 objections.

11 I've got an objection based on relevance that
12 this witness would have on the issue that you're going to
13 ask him about, the residence, and for provisional ballots
14 for the poll vote.

15 Anything he would say about is duplicative of
16 what's already presented.

17 And if you're calling him on the issue of bias,
18 I think we can establish three of your clients are
19 sitting on this governing body tribunal today. I don't
20 know how, based on the questions you're asking these
21 witnesses, like did you contact Mr. Carden, it seems like
22 you are setting up some sort of argument of bias or
23 improper communication.

24 This entire Tribunal is tainted by the people

1 who are sitting on it because they are the candidates in
2 the very election we are challenging. So that's my
3 standing objection to it.

4 MR. DONOVAN: In response, I would say
5 on the relevancy issue, the testimony of other witnesses
6 today has established that Mr. Carden has firsthand
7 information about communications with the County Clerk,
8 for example, and about the way by which those
9 registrations were corrected. In fact, he may be the
10 only one who has some of that information.

11 Mr. Bailey also neglected to recognize that
12 another issue in this case is the standing of the
13 contestants to bring it in the first place. And I think
14 the testimony of Ms. Case and Ms. McGee established,
15 again, that Mr. Carden is perhaps the only one who has
16 some of the critical evidence necessary to determine
17 whether they can even bring this in the first place.

18 Finally, as to bias, your point is taken. You
19 have, obviously, gone to the Circuit Court and lost in
20 the attempt to have these Council members recused. The
21 reason or the basis for their conflict is the contestants
22 have chosen to name them. The basis for Mr. Carden's
23 conflicts are different and regent.

24 They include his communications with witnesses

1 in this case, and they include his relationship to
2 individuals, names, and witnesses in this case, including
3 the fact, just by way of proffer to the Court, that one
4 of the ballots that was originally contested in this case
5 claims to have been registered to vote in Mr. Carden's
6 home.

7 I think those are, obviously, facts that are
8 relevant and need to be put on record at that time.

9 MR. BAILEY: Clearly, the provisional
10 ballot is not an issue today. This is what I predicted
11 to this Tribunal. It's a straightforward issue. There's
12 four provisional ballots. Were they property registered,
13 did they live here when they voted, that's the issue.

14 He is trying to make this a circus. You don't
15 have to allow him to do this, and you don't have to allow
16 him to do that. This is ridiculous. It's an insult to
17 the Tribunal. I didn't call Ms. Thompson as a witness.
18 I didn't call Mr. Johnson when I could have done that to
19 go through these things. I thought that would be
20 insulting. This is the Tribunal. And I don't think that
21 you all should allow it?

22 MR. PREMACK: There was a list that was
23 agreed upon beforehand.

24 MR. DONOVAN: Yes, it was. In fact, we

1 let Mr. Bailey know in advance that we would be calling
2 Mr. Carden today.

3 MR. PREMACK: And Mr. Carden
4 represented our interest in communicating with both to
5 try and mediate.

6 MR. BAILEY: The indication I had about
7 Mr. Carden was an e-mail last night, and I don't believe
8 Ms. Callis was copied on the e-mail. I don't know. I
9 was not privy to any conversation between them and
10 Ms. Callis about whether Mr. Carden would be required to
11 testify in this matter.

12 MR. PREMACK: Did you guys communicate
13 with Ms. Callis your intention?

14 MR. DONOVAN: Yes, we did communicate
15 with Ms. Callis our intention.

16 R. PREMACK: And she did not
17 communicate that to you?

18 MR. BAILEY: No.

19 MR. DONOVAN: I was under the
20 impression that she had. We have discussed this, by my
21 recollection, many times. My recollection could be
22 wrong. I am not accusing Mr. Bailey.

23 MR. BAILEY: No. I heard issues of
24 never have I heard issues of alleged bias.

1 In other words, we are trying to disqualify
2 certain members of the Council, that you were going to
3 try to, or whether Mr. Carden should be disqualified.
4 And I did yesterday, at a hearing, there was some mention
5 of calling members as witnesses. And Judge McLaughlin
6 said, well, calling them as a witness, you can't call
7 them as a witness to try to disqualify them.

8 MR. DONOVAN: Well, Judge McLaughlin
9 would have zero jurisdiction to that.

10 MR. BAILEY: I am not suggesting that
11 she did. I am saying that's was her communication about
12 certain witnesses on the Tribunal.

13 It was my intention to not call any of these
14 folks as witnesses because, frankly, I think it makes a
15 mockery of the entire Tribunal.

16 MR. DONOVAN: Ethical rules exist.
17 It's not a mockery. Ethical rules exist that
18 specifically address this circumstance in the judicial
19 cannons. In this case, there's special rules that
20 discusses the possibility of a Judge being called as fact
21 a witness in a case. It typically does require recusal
22 in those circumstances.

23 My understanding is that's how Ms. Callis
24 advised the Council, that if a person were called, then

1 the person would have to recuse themselves.

2 As you have heard ad nauseam, our legal position
3 is those recusals are superseded by the West Virginia
4 Supreme Court's ruling that the rule of equity requires a
5 quorum because no one else can.

6 That said, the bottom line is I can't force
7 Mr. Carden to testify today. I can ask him to. And if
8 he refuses, it would be appropriate under the law for the
9 finders of fact to draw inferences about why he refused
10 to testify today.

11 MR. PREMACK: Just to be clear, we have
12 been instructed by our attorney to allow any evidence,
13 noting objections, because none of us have legal training
14 but, again, my understanding, this was arranged.

15 MR. DONOVAN: That's correct. I'm just
16 saying I can't force him to testify if he doesn't want
17 to.

18 MR. BAILEY: And I agree with that. I
19 would just say that when you do your analysis about
20 whether or not -- I mean, because it would be
21 extraordinary to ask a judicial officer in a trial to
22 testify. And the analysis would be, he better have
23 really direct, relevant evidence that is critical to the
24 case. In a murder trial, he saw who shot the guy, that

1 kind of thing.

2 Of course, then he would be disqualified, but I
3 think that is a fishing expedition and I just think it's
4 improper, but I'll stand by my previous objection and
5 Mr. Carden can make a decision.

6 MR. CARDEN: I will say I was not
7 notified that I would be a witness today by any party,
8 including you. And we were advised by our general
9 counsel for the Corporation of Harpers Ferry that if we
10 were called as witnesses, we would need to recuse
11 ourselves. I don't believe that I have any information
12 that could be contributory to this case that has not
13 already been presented.

14 MR. DONOVAN: That's fine.

15 For the record, I wanted to proffer to the Court
16 in addition to what I have previously suggested, I
17 believe Mr. Carden could testify about, I do believe, his
18 role in investigating and acting as a liaison with the
19 County Clerk's Election Office creates the basis for
20 potential conflict. It makes him a fact witness, among
21 other things.

22 I do also believe that Mr. Carden has unique
23 testimony concerning when the requests for recount in
24 this case were received, how they were received, how they

1 were communicated to the Council, and those issues go
2 directly to the standing of the contestants to even be
3 here today, but I do understand Mr. Carden's decision.
4 I, obviously, can't force him to do it. I want to make
5 clear that, that some but not all of the testimony that
6 we believe would have been elicited today.

7 MR. PREMACK: I think by not declaring
8 a witness list beforehand puts us in a really difficult
9 position as a judicial body. I'm not sure if it would be
10 relevant or beneficial for us to recess to discuss it.

11 MR. BAILEY: The only thing that I
12 would add is that I could make the entire Board of
13 Canvassers fact witnesses, if that's the way we're going
14 to proceed. You are all witnesses because you all sat as
15 Board of Canvassers.

16 We could go through and take testimony from each
17 and every one of you on every issue. I just think it's
18 not helpful. It's not relevant to the issue that you
19 have before you, which is whether or not these four
20 provisional ballots should have been accepted.

21 That's your issue; were they residents, were
22 they registered. We know they weren't in the poll book.
23 And you are going to have to decide whether that
24 technical error should have been ignored and they should

1 have been accepted. All this other stuff is just stuff.

2 MR. DONOVAN: We have said all we're
3 going to say about this. We have, obviously preserved
4 our objection. We proffered to the Court what the
5 testimony would be, why it is necessary and relevant.
6 Given our objection and Mr. Carden's decision not to
7 testify, all we can do to move to closing at this point.

8 MR. CARDEN: I would also like to point
9 out that we do not have legal counsel representing us
10 today or advising us today, which I believe you had have,
11 but we don't.

12 MR. PREMACK: I think we should
13 continuing moving forward.

14 MR. DONOVAN: We are resting our case
15 in chief. However, we do want to note our request that
16 the record in this case remain open until such time as a
17 decision is rendered by the Court.

18 Obviously, this hearing is our opportunity to
19 present live testimony under oath, and with the Court's
20 ability to judge the credibility of that testimony in
21 person.

22 However, there may be additional documents which
23 would be admissible as records, public records, or
24 admissible under other rules or concepts. We are not

1 really dealing with the rules of evidence here.

2 So Mr. Bailey and I are trying to work it out
3 together, but the bottom line is, we do ask the Court to
4 keep the record open for the submission of such
5 additional evidence as may be necessary and appropriate.

6 MR. PREMACK: Mr. Bailey, do you have
7 any objection to that?

8 MR. BAILEY: Well, the statute allows
9 continuances from time to time to present evidence. I
10 would absolutely preserve my objection to additional
11 evidence coming in that I don't think is admissible, but
12 if it's public record stuff, if it's public record, it
13 probably is admissible.

14 But in other words, if there's e-mails from
15 somebody and we don't have a witness to say whether or
16 not that e-mail, whether they wrote it, I would object to
17 anything like that.

18 Our hands are tied because you are the Tribunal.
19 You decide what's admissible and what's not.

20 MR. PREMACK: Your bench memorandums
21 are due Friday, close of business.

22 MR. BAILEY: I thank you. Because
23 that's actually what I was going to follow-up on. I
24 intend to abide by that.

1 We have asked the Court Reporter to provide us a
2 transcript by Wednesday. I am certainly going to meet
3 that deadline. I'm going to present the evidence that
4 was presented today and give it to you.

5 MR. DONOVAN: My only response to that
6 is, just to clarify for everyone, our bench memorandums
7 were actually due yesterday. We did not receive one from
8 Mr. Bailey.

9 What's actually due next week is findings of
10 fact and conclusions of law.

11 MR. BAILEY: Yes. I choose not to.

12 MR. PREMACK: I would like us to be
13 able to reserve the right to confer with our Counsel and
14 determine if, or at which point, we would like to close
15 that window to submit additional evidence, and until such
16 time, leave it open.

17 That may be decided fairly soon that it be
18 closed, but I think it's in our interest to preserve that
19 right, but not to close the window, just because we don't
20 want to make any missteps, but not leave it open ended,
21 on the same token, not to make any mistakes.

22 MR. DONOVAN: With that, we do rest our
23 case.

24 MR. BAILEY: Proceed to closing?

1 MAYOR BISHOP: Yes.

2 MR. BAILEY: Again, thank you all for
3 your attention today on a Saturday.

4 This is a really critical issue. You know, the
5 right to free elections, fair elections these are
6 significant rights, and sitting here today, you are
7 judging whether or not to protect the rights of the
8 citizens that you represent.

9 These are folks you live with. This is Linda
10 and George McCarty who sat here and told you she has
11 voted in every election since from a very young age -- I
12 don't remember -- 21. Thank you.

13 You ought to use your position as governing body
14 members to protect your citizens' very important right to
15 vote, and you don't have to jump over a bunch of hurdles
16 or do back flips to do so. 3-141(e) tells you if a voter
17 isn't in your poll book due to a technical error,
18 omission, a mistake, you may disregard it and accept the
19 provisional ballot, if it's readily ascertainable.

20 These folks have shown you they live on
21 Washington Street. They clearly are residents in your
22 town. They are your neighbors. They did their civic
23 duty, and went and registered to vote. They did their
24 civic duty by showing up here to cast a vote. And the

1 reason they were denied is because of a bureaucratic
2 nightmare; DMV, Post Office addresses.

3 Are you going to deny your citizens the right to
4 vote based on these kind of bureaucracies or are you
5 going to protect them from those kind of governmental
6 impediments; what are you going to do? Do you want your
7 legacy to be that we care about our citizens and we
8 respect their rights, and we are going to do everything
9 we can to protect those rights or are you going to do
10 exactly what I predicted at the beginning of this case,
11 which is talk about Facebook accounts and where somebody
12 lived, stuff that is not even at issue.

13 You would have to twist the facts every which
14 way to come to the conclusion that they didn't live on
15 Washington Street the day they registered, and they
16 didn't live on Washington Street the day they came in
17 here to try to cast their vote. And to the extent that
18 you're going to blame Mr. and Mrs. McCarty that they
19 didn't back to the DMV and fight with them for the sixth
20 time to get it straight, in fact, they did. God bless
21 them, they actually went back and got it straight, but
22 they didn't do it before they cast their ballot, or they
23 should have known that when they get a precinct card that
24 says Precinct 15, that puts them on notice somehow that

1 they are not in the Harpers Ferry Poll Book is
2 ridiculous. I don't know that. I wouldn't be able to
3 tell you what a precinct number was. I suggest most
4 people in this room wouldn't know what that stands for.
5 This is a governmental nightmare, bureaucracy, and you
6 ought not penalize your own citizens and neighbor. You
7 ought to protect them from it and you have the right to
8 do it. The law is on your side. You don't have to twist
9 the law 15 different ways to grant their provisional
10 ballot. You do have to strain your interpretation and
11 really try to find, oh, we got you on this one. That's
12 what they do at the DMV. Don't be the DMV. Be the
13 governing body of Harpers Ferry. Protect your citizens
14 and make sure every vote counts. Count the votes. Thank
15 you.

16 MR. RITCHIE: Members of the Government
17 governing body, I appreciate and I understand
18 Mr. Bailey's energy and his emotion, but here, the law
19 does not require gymnastics. The law is straightforward.

20 A ballot cast in a municipal election shall not
21 be counted where the voter is not properly registered to
22 vote in the municipality.

23 Under the West Virginia Code, they use the
24 phrase "duly registered" and that is the location applied

1 to the Municipal Supreme Board of Appeals has determined
2 a duly registered voter, quote, "must be registered and
3 cast his or her ballot the municipal precinct in which he
4 or she resides."

5 As you have heard, evidence demonstrates that
6 the provisional voters -- that were not in the Harpers
7 Ferry Poll Book, that is the official voter registration
8 records under law for the Corporation of Harpers Ferry.
9 Of course, voter registration requirements exist for a
10 reason. They are critical safeguards to prevent fraud
11 and manipulation of elections.

12 Although not completely foolproof, a uniform
13 registration imposed by state law and adopted by this
14 town serves these purposes. Imagine if voter
15 registration requirements were not in force.

16 Imagine what could happen if people could swing
17 into town for a short time, sleep over at a friend of
18 family member's house, and show up to vote, knowing they
19 could assert these facts later in a contest, but you
20 won't need to imagine it.

21 We go along with how my friends at other's
22 houses blames bad registration, no problems. Mistaken
23 registration, it's okay. No registration, just vote
24 anyway. Maybe, just maybe, some outside interest will

1 pay to buy anyone who stands in your way.

2 And let's talk about the one vote, the one
3 ballot that was dropped today, Jamie Newhoff, from this
4 contest. Mr. Bailey is not trying to count this one
5 because, apparently, as Mr. Bailey indicated, she was
6 registered to vote in Berkeley County. He didn't say she
7 doesn't live here. He said she is registered over there.
8 What's the problem with that? Isn't that just a clerical
9 error, but that's a problem. Which is it?

10 We think the law is the law. Lucky for us,
11 we're a nation of laws. And under the facts presented
12 here today, the law, as it is, requires the Town Council
13 to reject the election contest challenge in full. Thank
14 you.

15 MR. BAILEY: Just briefly, rebuttal.

16 There is a difference between the Newhoff issue
17 and the other four voters are she didn't do what she was
18 supposed to do. She didn't re register in Jefferson
19 County. She was still registered in Berkeley. She
20 didn't change it, and that's why we dropped it. That's
21 why she is different than the other four voters, because
22 we do respect the law.

23 The law is there to protect your citizens. It's
24 definitely to stop voter fraud, but ask yourselves this

1 question, under the law, and you have the right to ignore
2 technical errors like this: Linda and George McCarty,
3 were they instigating voter fraud when they showed up
4 here to cast their ballot. Was Adam Hutton? Was Leah
5 Howell? She was a candidate, by the way. No, there was
6 no voter fraud.

7 You can follow the law. You should follow the
8 law. The laws are important, but they are there to
9 protect your citizens, not to use the law, turn it upside
10 down on its head so that you can deprive your citizens
11 and your neighbors of their right to vote.

12 It's your legacy that you're going to leave.
13 You are sending a message to the citizens that you
14 represent and I'll just leave you with this, as far as
15 consistency under the law. You may want to look at the
16 minutes from June 17, 2013, where the Town Council
17 sitting there considered two provisional ballots because
18 the names of the voters were not in the poll book. This
19 is in your minutes. Ms. Thompson made a motion to accept
20 both provisional ballots, even though their names weren't
21 in the poll book, probably because she knew they were
22 citizens and it was accepted.

23 Be consistent. Protect your citizens. Do the
24 right thing. Thank you.

1 MAYOR BISHOP: Mr. Bailey, were you the
2 attorney during that election that you just talked about?

3 MR. BAILEY: The Town Council, I was
4 probably a town attorney. I can tell you I have never,
5 as town attorney, been asked a question about an
6 election. I have never given legal advice on Councils'
7 elections.

8 MAYOR BISHOP: Anything else?

9 MR. BAILEY: No. I think that's it.
10 Thank you.

11 MAYOR BISHOP: Okay. This proceeding
12 is adjourned.

13 - - - -

14 (Whereupon, the hearing was hereby adjourned at
15 1:00 p.m.)

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COURT REPORTER'S CERTIFICATION

I, JACKIE SMITH, Court Reporter and Notary Public for the State of WEST VIRGINIA, do certify that the foregoing hearing testimony was duly taken by me stenographically at the time and place, and for the purpose therein mentioned and that same was accurately transcribed to the best of my ability, and I further certify that I am not interested in the result of said litigation, either directly or indirectly.

Given under my hand this 24th day of August, 2019.

JACKIE SMITH
Court Reporter and Notary Public

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anyway

A	
abandoning (14:3)(14:4)	(81:24)(87:21)(90:20)
abide (114:24)	afternoon (88:17)(88:18)(100:14)(100:15)
ability (113:20)(123:7)	afterwards (34:18)(61:8)
able (8:6)(25:11)(38:23)(75:3)(83:3)	again (15:4)(24:13)(24:24)(30:14)(71:23)
(115:13)(118:2)	(93:20)(99:7)(100:15)(106:15)(110:14)(116:2)
above (6:14)(41:9)	against (15:24)(16:1)
absolutely (11:13)(11:23)(51:17)(69:7)	age (116:11)
(101:11)(103:9)(114:10)	agency (18:13)
accept (12:12)(12:15)(116:18)(121:19)	ago (46:7)(56:16)(64:21)(70:21)
accepted (31:1)(112:20)(113:1)(121:22)	agree (12:9)(19:19)(21:2)(21:9)(21:23)
accommodate (7:17)	(22:13)(24:16)(25:5)(54:11)(86:8)(110:18)
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Inquiries » Voter Registration » View Details

CC19NP / JEFFERSON - (LOGOUT)

Voter Information:

Prefix Name:
Voter's Name: GEORGE FILLMORE MCCARTY III
Date of Birth: 10/19/1948
Voter ID: 100740630
Driver's License No.: [REDACTED]
Email:

Residence Address:

Address: 800 WASHINGTON ST
Unit:
City & County: HARPER'S FERRY JEFFERSON
State: WV
Zip: 25425

Miscellaneous:

Gender:
Absentee Ballot Type:
Registration Type: In Person With Verification
Type of Identification: Drivers License
Current Party: Democrat
Previous Precinct: 15

Mailing Address:

Street No.: 800
Address: WASHINGTON ST
Unit:
City: HARPER'S FERRY
State: WV
Country & Zip: US 25425

Status Information:

Reg. Effective Date: 09/10/2018
Current Status: Active
Last Active Date:
Rej/Can Date:
Rej/Can Reason:

Memo:

NO MEMOS FOR THIS VOTER

[Display Signature](#) [Previous](#)

Districts

Previous Precinct: 15

Congressional: 0002

Senatorial: 0016

Delegate: 0067

Voting Areas	District	Precinct	Ward	Polling Place
County Precinct:		14		CAMP HILL WESLEY UNITED METHOD
Municipal Precinct:				
Magisterial District:	HARPER'S FERRY	14		

Voter Information

Voter Name: GEORGE FILLMORE MCCARTY III
Date of Birth: 10/19/1948
Voter ID: 100740630

https://[REDACTED]



Previous Names:

Date Changed	Prefix	Last Name	First Name	Middle Name
		Previous		

Voter Information

Voter Name: GEORGE FILLMORE MCCARTY III
 Date of Birth: 10/19/1948
 Voter ID: 100740630

Previous Addresses:

Date Changed	Number	Street	Unit	City	State	Zip Code
06/18/2019	800	W WASHINGTON ST		HARPERS FERRY	WV	25425
		Previous				

Voter Information

Voter Name: GEORGE FILLMORE MCCARTY III
 Date of Birth: 10/19/1948
 Voter ID: 100740630

Previous Rejection/Cancellation History:

Rejection/Cancellation Date	Date Changed	Status	Reason for Rejection/Cancellation
		Previous	

Voter Information

Voter Name: GEORGE FILLMORE MCCARTY III
 Date of Birth: 10/19/1948
 Voter ID: 100740630

Correspondence History:

Date Sent / Received	Notice Type	Reprint
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06/19/2019

Disposition

Reprint

09/12/2018

Acceptance

Reprint

Previous

Voter Information

Voter Name: GEORGE FILLMORE MCCARTY III
Date of Birth: 10/19/1948
Voter ID: 100740630

Previous Parties:

Date Changed

Party Name

Previous

Voter Information

Voter Name: GEORGE FILLMORE MCCARTY III
Date of Birth: 10/19/1948
Voter ID: 100740630

Previous Petitions:

Election Date

Petitions

Previous

Voter Information

Voter Name: GEORGE FILLMORE MCCARTY III
Date of Birth: 10/19/1948
Voter ID: 100740630

Audit History:

Audit Date/Time

Type

Date Changed

Change Reason

Changed User ID

Type of Change

https://[REDACTED]

06/19/2019 3:05:05 PM	Change	06/18/2019	DMV	CC19NP	Address, Other
09/12/2018 12:13:41 PM	Add	09/10/2018		CC19SP	

[Previous](#)

Voter Information

Voter Name: GEORGE FILLMORE MCCARTY III
 Date of Birth: 10/19/1948
 Voter ID: 100740630

Previous Election History:

Election Date	Election Type	Category	Entry Type	Provisional Ballot	Id Produced	Reason	Status	Comments	County Voted	Precinct Voted	User ID
11/06/2018	General	StateWide	Early Voting						JEFFERSON	15	CC19SP

[Previous](#)

Voter Information

Voter Name: GEORGE FILLMORE MCCARTY III
 Date of Birth: 10/19/1948
 Voter ID: 100740630

Voter Registration Cards:

[Previous](#)

Voter Information

Voter Name: GEORGE FILLMORE MCCARTY III
 Date of Birth: 10/19/1948
 Voter ID: 100740630

Candidate History:

Previous

Note:Use Ctrl + Right/Left arrow in keyboard to navigate other tabs. *Corr.=Correspondence *Ele.=Election *Hist.=History *Reg.Cards=Registration Cards



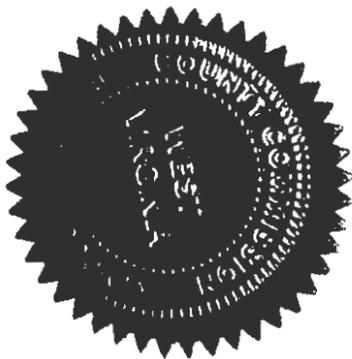
State of West Virginia, County of Jefferson, Sct.

Clerk's Office of the County Commission
of Jefferson County, at Charles Town,
in said State.

I, JACQUELINE C. SHADLE, Clerk of said Commission having by law the custody of the seal, and all papers, books, documents and papers of or pertaining to said Commission, hereby certify the paper hereto annexed to be a true copy appertaining to said Commission and on file and of record in said office, to-wit:

This five-page copy of the voter registration record for George Fillmore McCarty III printed from the Statewide Voter Registration System on August 20, 2019.

In attestation whereof I have hereunto
set my hand and affixed the seal of
said Commission 20th day of August,
2019.



Jacqueline C. Shadle

Clerk of said Commission

By: *Nikki Painter*
Chief Deputy Clerk

[Inquiries](#) » [Voter Registration](#) » [View Details](#)

CC19NP / JEFFERSON - (LOGOUT)

Voter Information:

Prefix Name:
 Voter's Name: LINDA S MCCARTY
 Date of Birth: **02/09/1941**
 Voter ID: 100740632
 Driver's License No.: XXXXXXXXXX
 Email:

Residence Address:

Address: 800 WASHINGTON ST
 Unit:
 City & County: HARPERS FERRY - JEFFERSON
 State: WV
 Zip: 25425

Miscellaneous:

Gender:
 Absentee Ballot Type:
 Registration Type: In Person With Verification
 Type of Identification: Drivers License
 Current Party: Democrat
 Previous Precinct: 15

Mailing Address:

Street No.: 800
 Address: WASHINGTON ST
 Unit:
 City: HARPERS FERRY
 State: WV
 Country & Zip: US 25425

Status Information:

Reg. Effective Date: 09/10/2018
 Current Status: Active
 Last Active Date:
 Rej/Can Date:
 Rej/Can Reason:

Memo:

NEW DMV REGISTRATION. SP - 09/12/2018

[Display Signature](#) [Previous](#)

Districts

Previous Precinct: 15

Congressional: 0002

Senatorial: 0016

Delegate: 0067

Voting Areas

County Precinct:
 Municipal Precinct:
 Magisterial District:

District	Precinct	Ward
	14	
HARPERS FERRY	14	

Polling Place
 CAMP HILL WESLEY UNITED METHOD

Voter Information

Voter Name: LINDA S MCCARTY
 Date of Birth: 02/09/1941
 Voter ID: 100740632

Previous Names:

<https://> XXXXXXXXXX



Date Changed Prefix Last Name First Name Middle Name

Previous

Voter Information

Voter Name: LINDA S MCCARTY
 Date of Birth: 02/09/1941
 Voter ID: 100740632

Previous Addresses:

Date Changed	Number	Street	Unit	City	State	Zip Code
06/18/2019	800	W WASHINGTON ST		HARPERS FERRY	WV	25425

Previous

Voter Information

Voter Name: LINDA S MCCARTY
 Date of Birth: 02/09/1941
 Voter ID: 100740632

Previous Rejection/Cancellation History:

Rejection/Cancellation Date	Date Changed	Status	Reason for Rejection/Cancellation
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Previous

Voter Information

Voter Name: LINDA S MCCARTY
 Date of Birth: 02/09/1941
 Voter ID: 100740632

Correspondence History:

Date Sent / Received	Notice Type
06/19/2019	Disposition

09/12/2018

Acceptance

[REDACTED]

[REDACTED]

Voter Information

Voter Name: LINDA S MCCARTY
Date of Birth: 02/09/1941
Voter ID: 100740632

Previous Parties:

Date Changed

Party Name

[REDACTED]

Voter Information

Voter Name: LINDA S MCCARTY
Date of Birth: 02/09/1941
Voter ID: 100740632

Previous Petitions:

Election Date

Petitions

[REDACTED]

Voter Information

Voter Name: LINDA S MCCARTY
Date of Birth: 02/09/1941
Voter ID: 100740632

Audit History:

Audit Date/Time	Type	Date Changed	Change Reason	Changed User ID	Type of Change
06/19/2019 3:06:17 PM	Change	06/18/2019	DMV	CC19NP	Address, Other

09/12/2018 12:14:43 PM

Add

09/10/2018

CC19SP

Previous

Voter Information

Voter Name: LINDA S MCCARTY
Date of Birth: 02/09/1941
Voter ID: 100740632

Previous Election History:

Election Date	Election Type	Category	Entry Type	Provisional Ballot	Id Produced	Reason	Status	Comments	County Voted	Precinct Voted	User ID
11/06/2018	General	StateWide	Early Voting						JEFFERSON	15	CC19SP

Previous

Voter Information

Voter Name: LINDA S MCCARTY
Date of Birth: 02/09/1941
Voter ID: 100740632

Voter Registration Cards:

Previous

Voter Information

Voter Name: LINDA S MCCARTY
Date of Birth: 02/09/1941
Voter ID: 100740632

Candidate History:

Previous

Note:Use Ctrl + Right/Left arrow in keyboard to navigate other tabs. *Corr.=Correspondence *Ele.=Election *Hist.=History *Reg.Cards=Registration Cards



State of West Virginia, County of Jefferson, Sct.

Clerk's Office of the County Commission
of Jefferson County, at Charles Town,
in said State,

I, JACQUELINE C. SHADLE, Clerk of said Commission having by law the custody of the seal, and all papers, books, documents and papers of or pertaining to said Commission, hereby certify the paper hereto annexed to be a true copy appertaining to said Commission and on file and of record in said office, to-wit:

This five-page copy of the voter registration record for Linda S McCarty printed from the Statewide Voter Registration System on August 20, 2019.

In attestation whereof I have hereunto
set my hand and affixed the seal of
said Commission 20th day of August,
2019.



Jacqueline C. Shadle

Clerk of said Commission

Nikki Painter

By:

Chief Deputy Clerk

Inquiries » Voter Registration » View Details

CC19NP / JEFFERSON - (LOGOUT)

Voter Information:

Prefix Name:
Voter's Name: ADAM DALE HUTTON
Date of Birth: **06/24/1982**
Voter ID: 100771212
Driver's License No.: [REDACTED]
Email:

Residence Address:

Address: 900 WASHINGTON ST
Unit:
City & County: HARPERS FERRY - JEFFERSON
State: WV
Zip: 25425

Miscellaneous:

Gender:
Absentee Ballot Type:
Registration Type: In Person With Verification
Type of Identification: Drivers License
Current Party: No Party Affiliation
Previous Precinct: 15

Mailing Address:

Street No.: 900
Address: WASHINGTON ST
Unit:
City: HARPERS FERRY
State: WV
Country & Zip: US 25425

Status Information:

Reg. Effective Date: 04/22/2019
Current Status: Active
Last Active Date:
Rej/Can Date:
Rej/Can Reason:

Memo:

NEW TIME REGISTERED ON 04/22/2019
CAMP HILL WESLEY UNITED METHOD
CHURCH

Display Signature Previous

Districts

Previous Precinct: 15

Congressional: 0002

Senatorial: 0016

Delegate: 0067

Voting Areas	District	Precinct	Ward	Polling Place
County Precinct:		14		CAMP HILL WESLEY UNITED METHOD
Municipal Precinct:				
Magisterial District:	HARPERS FERRY	14		

Voter Information

Voter Name: ADAM DALE HUTTON
Date of Birth: 06/24/1982
Voter ID: 100771212

Previous Names:

https:// [REDACTED]



Date Changed	Prefix	Last Name	First Name	Middle Name		
		Previous				
Voter Information						
		Voter Name:	ADAM DALE HUTTON			
		Date of Birth:	06/24/1982			
		Voter ID:	100771212			
Previous Addresses:						
Date Changed	Number	Street	Unit	City	State	Zip Code
06/19/2019	900	W WASHINGTON ST		HARPERS FERRY	WV	25425

		Previous		
Voter Information				
		Voter Name:	ADAM DALE HUTTON	
		Date of Birth:	06/24/1982	
		Voter ID:	100771212	

Previous Rejection/Cancellation History:				
Rejection/Cancellation Date	Date Changed	Status	Reason for Rejection/Cancellation	
		Previous		
Voter Information				
		Voter Name:	ADAM DALL HUTTON	
		Date of Birth:	06/24/1982	
		Voter ID:	100771212	

Correspondence History:			
Date Sent / Received	Notice Type	Reprint	
06/19/2019	Disposition	Reprint	

04/23/2019

Acceptance

Reprint

Previous

Voter Information

Voter Name: ADAM DALE HUTTON
Date of Birth: 06/24/1982
Voter ID: 100771212

Previous Parties:

Date Changed

Party Name

Previous

Voter Information

Voter Name: ADAM DALE HUTTON
Date of Birth: 06/24/1982
Voter ID: 100771212

Previous Petitions:

Election Date

Petitions

Previous

Voter Information

Voter Name: ADAM DALE HUTTON
Date of Birth: 06/24/1982
Voter ID: 100771212

Audit History:

Audit Date/Time	Type	Date Changed	Change Reason	Changed User ID	Type of Change
06/19/2019 3:22:18 PM	Change	06/19/2019	County Clerk	CC19NP	Address, Other

https://[REDACTED]

04/23/2019 2:31:01 PM

Add

04/22/2019

DMV

CC19SP

[Previous](#)

Voter Information

Voter Name: ADAM DALE HUTTON
Date of Birth: 06/24/1982
Voter ID: 100771212

Previous Election History:

[Previous](#)

Voter Information

Voter Name: ADAM DALE HUTTON
Date of Birth: 06/24/1982
Voter ID: 100771212

Voter Registration Cards:

[Previous](#)

Voter Information

Voter Name: ADAM DALE HUTTON
Date of Birth: 06/24/1982
Voter ID: 100771212

Candidate History:

[Previous](#)

Note:Use Ctrl + Right/Left arrow in keyboard to navigate other tabs. *Corr.=Correspondence *Ele.=Election *Hist.=History *Reg.Cards=Registration Cards



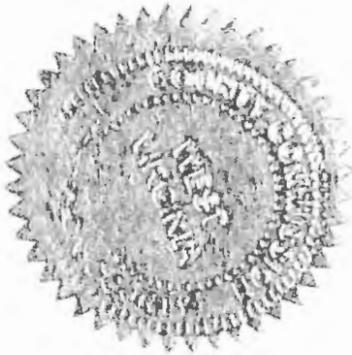
State of West Virginia, County of Jefferson, Sct.

Clerk's Office of the County Commission
of Jefferson County, at Charles Town,
in said State,

I, JACQUELINE C. SHADLE, Clerk of said Commission having by law the custody of the seal, and all papers, books, documents and papers of or pertaining to said Commission, hereby certify the paper hereto annexed to be a true copy appertaining to said Commission and on file and of record in said office, to-wit:

This four-page copy of the voter registration record for Adam Dale Hutton printed from the Statewide Voter Registration System on August 20, 2019.

In attestation whereof I have hereunto
set my hand and affixed the seal of
said Commission 20th day of August
2019.



Jacqueline C. Shadle

Clerk of said Commission

Nikki Painter

By

Chief Deputy Clerk

Inquiries » Voter Registration » View Details

CC19NP / JEFFERSON - (LOGOUT)

Voter Information:

Prefix Name:
 Voter's Name: LEAH HOWELL
 Date of Birth: **04/21/1982**
 Voter ID: 000230872
 Driver's License No.: [REDACTED]
 Email: [REDACTED]

Residence Address:

Address: 887 WASHINGTON ST
 Unit:
 City & County: HARPERS FERRY - JEFFERSON
 State: WV
 Zip: 25425

Miscellaneous:

Gender: Female
 Absentee Ballot Type:
 Registration Type: Mail in With Verification
 Type of Identification: Drivers License
 Current Party: Democrat
 Previous Precinct: 15

Mailing Address:

Street No.: 887
 Address: WASHINGTON ST
 Unit:
 City: HARPERS FERRY
 State: WV
 Country & Zip: US 25425

Status Information:

Reg. Effective Date: 02/01/2001
 Current Status: Active
 Last Active Date:
 Rej/Can Date:
 Rej/Can Reason:

Memo:

WARRANT RECEIVED FROM COUNTY SHERIFF, WE
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

Display Signature

Previous

Districts

Previous Precinct: 15

Congressional: 0002

Senatorial: 0016

Delegate: 0067

Voting Areas	District	Precinct	Ward	Polling Place
County Precinct:		14		CAMP HILL WESLEY UNITED METHOD
Municipal Precinct:				
Magisterial District:	HARPERS FERRY	14		

Voter Information

Voter Name: LEAH HOWELL
 Date of Birth: 04/21/1982
 Voter ID: 000230872

Previous Names:

https://[REDACTED]



Date Changed	Prefix	Last Name	First Name	Middle Name
06/09/2019		HOWELL	LEAH	GRACE
11/28/2016		RUFFNER	LEAH	GRACE
03/10/2010		DRIVER	LEAH	GRACE

Previous

Voter Information

Voter Name: LEAH HOWELL
 Date of Birth: 04/21/1982
 Voter ID: 000230872

Previous Addresses:

Date Changed	Number	Street	Unit	City	State	Zip Code
07/08/2019	887	W WASHINGTON ST		HARPERS FERRY	WV	25425
07/18/2018	106	DEER MOUNTAIN DR		HARPERS FERRY	WV	25425
06/14/2017	16	BRAMBLE DR		CHARLES TOWN	WV	25414
11/28/2016	224	MOUNTAINSIDE RD		HARPERS FERRY	WV	25425
03/10/2010		PO BOX		CHARLES TOWN	WV	25414 - 0000
06/10/2009	211	FINCH CT		CHARLES TOWN	WV	25414 - 0000
02/23/2009	211	FINCH COURT		CHARLES TOWN	WV	25414 - 0000

Previous

Voter Information

Voter Name: LEAH HOWELL
 Date of Birth: 04/21/1982
 Voter ID: 000230872

Previous Rejection/Cancellation History:

Rejection/Cancellation Date	Date Changed	Status	Reason for Rejection/Cancellation
06/10/2009	06/10/2009	Cancellation	Inactive 2 Federal Elections +

https://[REDACTED]

[Previous](#)

Voter Information

Voter Name: LEAH HOWELL
 Date of Birth: 04/21/1982
 Voter ID: 000230872

Correspondence History:

Date Sent / Received	Notice Type	Reprint
07/08/2019	Disposition	Reprint
06/10/2019	Disposition	Reprint
07/25/2018	Disposition	Reprint
06/19/2017	Disposition	Reprint
11/28/2016	Acceptance	Reprint
01/28/2015	Disposition	Reprint
04/08/2010	Acceptance	Reprint
06/10/2009	Cancellation	Reprint
02/23/2009	Disposition	Reprint
02/17/2001	Verification	Reprint

[Previous](#)

Voter Information

Voter Name: LEAH HOWELL
 Date of Birth: 04/21/1982
 Voter ID: 000230872

Previous Parties:

Date Changed	Party Name
--------------	------------

03/10/2010 No Party Affiliation

[Previous](#)

Voter Information

Voter Name: LEAH HOWELL
 Date of Birth: 04/21/1982
 Voter ID: 000230872

Previous Petitions:

Election Date

Petitions

[Previous](#)

Voter Information

Voter Name: LEAH HOWELL
 Date of Birth: 04/21/1982
 Voter ID: 000230872

Audit History:

Audit Date/Time	Type	Date Changed	Change Reason	Changed User ID	Type of Change
07/08/2019 3:31:49 PM	Change	07/08/2019	County Clerk	CC19NP	Address, Other
06/10/2019 3:14:30 PM	Change	06/09/2019	OVR	CC19SP	Name, Phone, Other
07/25/2018 1:32:53 PM	Change	07/18/2018	DMV	CC19SP	Address, Other
06/19/2017 2:00:35 PM	Change	06/14/2017	DMV	CC19NP	Address, Other
11/28/2016 11:32:09 AM	Change	11/28/2016	Voter	CC19NP	Name, Address, Status, Other
01/28/2015 10:32:28 AM	Change	01/28/2015	NCOA	CC19JH	Status
04/08/2010 11:22:24 AM	Change	03/10/2010	Voter	CC19WK	Name, Party, Address, Phone, Status, Other
06/10/2009 1:47:49 PM	Cancelled	06/10/2009	Inactive 2 Federal Elections +	CC19WK	Address, Status
02/23/2009 1:54:05 PM	Change	02/23/2009	County Clerk	CC19NP	Address, Other

[Previous](#)

Voter Information

Voter Name: LEAH HOWELL
 Date of Birth: 04/21/1982
 Voter ID: 000230872

Previous Election History:

Election Date	Election Type	Category	Entry Type	Provisional Ballot	Id Produced	Reason	Status	Comments	County Voted	Precinct Voted	User ID
11/08/2016	General	StateWide	Regular	Y		VOTING IN NEW PRECINCT	Challenge Removed				

[Previous](#)

Voter Information

Voter Name: LEAH HOWELL
 Date of Birth: 04/21/1982
 Voter ID: 000230872

Voter Registration Cards:

[Previous](#)

Voter Information

Voter Name: LEAH HOWELL
 Date of Birth: 04/21/1982
 Voter ID: 000230872

Candidate History:

[Previous](#)

Note:Use Ctrl + Right/Left arrow in keyboard to navigate other tabs. *Corr.=Correspondence *Ele.=Election *Hist.=History *Reg.Cards=Registration Cards



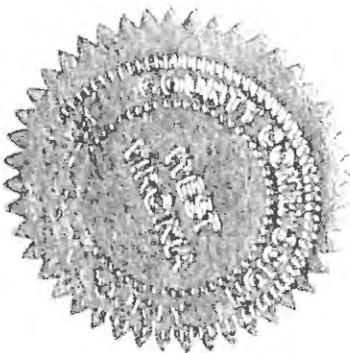
State of West Virginia, County of Jefferson, Sct.

Clerk's Office of the County Commission
of Jefferson County, at Charles Town,
in said State,

I, JACQUELINE C. SHADLE, Clerk of said Commission having by law the custody of the seal, and all papers, books, documents and papers of or pertaining to said Commission, hereby certify the paper hereto annexed to be a true copy appertaining to said Commission and on file and of record in said office, to-wit:

This five-page copy of the voter registration record for Leah Howell printed from the Statewide Voter Registration System on August 20, 2019.

In attestation whereof I have hereunto
set my hand and affixed the seal of
said Commission 20th day of August,
2019.



Jacqueline C. Shadle

Clerk of said Commission

Nikki Painter

By:

Chief Deputy Clerk

EXHIBIT 5
10-12-80
Tables





BEFORE THE HARPERS FERRY TOWN COUNCIL

IN RE: THE MATTER OF CONTESTED TOWN COUNCIL ELECTION

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

Individual Contesters,

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

Individual Contestees.

**NOTICE OF INTENT TO CONTEST
HARPERS FERRY TOWN COUNCIL ELECTION**

Comes now, Nancy Singleton Case and Deborah A. McGee, individual Contesters, by and through their counsel, Gregory A. Bailey, Esq., and the law firm of Arnold & Bailey, PLLC, and pursuant to W.Va. Code § 3-7-6 files the foregoing Notice of Intent to Contest the Harpers Ferry Town Council Election based upon the averments set forth herein:

Parties

1. Contester, Nancy Singleton Case, was a candidate who ran for the office of Town Council in the election held on June 11, 2019 and certified on June 28, 2019.
2. Contester, Deborah A. McGee, was a candidate who ran for the office of Town Council in the election held on June 11, 2019 and certified on June 28, 2019.

3. Contestee, Hardwick Smith Johnson was a candidate who ran for the office of Town Council in the election held on June 11, 2019 and certified on June 28, 2019.

4. Contestee, Charlotte Ward Thompson was a candidate who ran for the office of Town Council in the election held on June 11, 2019 and certified on June 28, 2019.

5. Contestee, Christian Pechuekonis, was a candidate who ran for the office of Town Council in the election held on June 11, 2019 and certified on June 28, 2019.

6. Contestee, Marjorie Flinn Yost was a candidate who ran for the office of Town Council in the election held on June 11, 2019 and certified on June 28, 2019.

7. Contestee, Barbara Humes was a candidate who ran for the office of Town Council in the election held on June 11, 2019 and certified on June 28, 2019.

8. Contestee, Jay Premack was a candidate who ran for the office of Town Council in the election held on June 11, 2019 and certified on June 28, 2019.

Jurisdiction and Venue

9. W.Va. Code § 3-7-6 provides that contests to municipal elections are to be brought before the governing body of the municipality of the offices contested.

Facts Supporting Election Contest

10. An election was held for seats on the Harpers Ferry Town Council during an early voting period, from May 29 through June 8, 2019, and on general election day June 11, 2019. The Board of Canvassers conducted the Canvass of Returns Meeting on June 17, 2019. A recount of that vote was held on June 26, 2019 and the election results were certified on June 28, 2019.

11. 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.

12. During the early voting period of the 2019 municipal elections, which occurred from May 29 through June 8, 2019, and on the general election day June 11, 2019, no fewer than five (5) Harpers Ferry citizens sought to vote, but Harpers Ferry poll workers required these voters to vote using provisional ballots, based upon erroneous records of the Jefferson County Clerk that indicated they were not Harpers Ferry residents.

13. Each of these citizens were Harpers Ferry residents and registered voters appropriately permitted to cast provisional ballots in the election.

14. 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.

15. Leah Howell was qualified to cast a ballot in the election as a duly registered voter who resides in the corporate limits of Harpers Ferry at 887 Washington Street, Harpers Ferry, West Virginia.

16. George McCarty was qualified to cast a ballot in the election as a duly registered voter who resides in the corporate limits of Harpers Ferry at 800 Washington Street, Harpers Ferry, West Virginia.

17. Linda McCarty was qualified to cast a ballot in the election as a duly registered voter who resides in the corporate limits of Harpers Ferry at 800 Washington Street, Harpers Ferry, West Virginia.

18. Adam Hutton was qualified to cast a ballot in the election as a duly registered voter who resides in the corporate limits of Harpers Ferry at 900 Washington Street, Harpers Ferry, West Virginia.

19. Jane Mumaw was qualified to cast a ballot in the election as a duly registered voter residing in the corporate limits of Harpers Ferry at 675 Cliff Street, Harpers Ferry, West Virginia.

20. The Board of Canvassers for the election conducted a Canvass Meeting to canvass the vote returns of the June 11 election on June 17, 2019 but, based upon information and belief, a majority of those Canvassers (Councilmember Johnson, Councilmember Thompson, Councilmember Humes and Councilmember Yost) refused to consider, or even examine, any of the provisional ballots cast by the voters named herein, thereby denying these five provisional voters the right to vote.

21. On June 19, 2019, Town Council candidates Nancy Singleton Case and Deborah A. McGee requested an official recount of the June 11, municipal election results, and further urged the Board of Canvassers to consider all provisional ballots. The official recount was conducted on June 26, 2019, wherein the Board of Canvassers recounted all early, absentee and election day ballots, but once again, the Board of Canvassers refused to consider any of the provisional ballots cast by the voters named herein.

22. The official election results were certified on June 28, 2019, without consideration of any of the provisional ballots cast by the voters herein.

23. Each of the provisional ballots should have been properly examined by the Board of Canvassers, thoughtfully reviewed and considered, and when found to be valid, should have been tallied together with the regular ballots.

24. Upon information and belief, if the provisional ballots had been counted it would change the outcome of the election.

25. 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.

26. An election that does not count all votes of its citizens fails to satisfy the criteria of fairness and is not a free election.

27. Equally damaging to a free election is counting ballots cast by persons not qualified to vote in an election.

28. In the present election, at least four ballots were counted despite the fact that they were cast by those who are not residents or proper voters of Harpers Ferry, WV.

29. Based upon information and belief, Tess Bishop, who resides in the state of Utah, cast a ballot in the town council election, in violation of W.Va. Code § 3-1-3 and W.Va. Code § 3-1-34.

30. Based upon information and belief, Taylor Bishop, who resides in the state of Utah, cast a ballot in the town council election, in violation of W.Va. Code § 3-1-3 and W.Va. Code § 3-1-34.

31. Based upon information and belief, Jacob Morse, who resides in the state of Illinois, cast a ballot in the town council election, in violation of W.Va. Code § 3-1-3 and W.Va. Code § 3-1-34.

32. Based upon information and belief, Craig Yost, who resides outside the corporation of Harpers Ferry, West Virginia, cast a ballot in the town council election, in violation of W.Va. Code § 3-1-3 and W.Va. Code § 3-1-34.

33. Upon information and belief, it is impossible to review these improperly cast ballots to remove the votes from candidates they voted for.

34. Upon information and belief, the West Virginia Secretary of State's Office has undertaken an investigation of the failure of the Board of Canvassers to consider provisional votes, and of the illegal votes that were cast in this subject election.

35. The totality of circumstances surrounding the failure to count ballots cast by duly registered Harpers Ferry citizens while allowing ballots to be cast by non-residents, along with other election irregularities, has tainted the fairness and reliability of the election and Contesters reserve the right to contest the legality of the election as a whole.

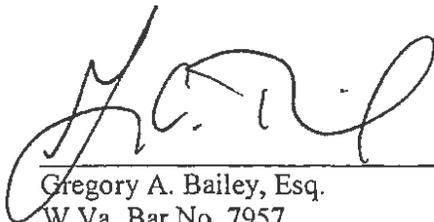
Based upon all of the foregoing, Contesters challenge the election results based upon the following contested votes by provisional ballots that should have been counted and contesting the votes by non-residents that should have been disallowed:

- a. Provisional ballot cast by Leah Howell, which should have been counted;
- b. Provisional ballot cast by George McCarty, which should have been counted;
- c. Provisional ballot cast by Linda McCarty, which should have been counted;
- d. Provisional ballot cast by Adam Hutton, which should have been counted;
- e. Provisional ballot cast by Jane Mumaw, which should have been counted;
- f. Ballot accepted from non-resident Tess Bishop, which should not have been cast nor counted;

- g. Ballot accepted from non-resident Taylor Bishop, which should not have been cast nor counted;
- h. Ballot accepted from non-resident Jacob Morse, which should not have been cast nor counted;
- i. Ballot accepted from non-resident Craig Yost, which should not have been cast nor counted;
- j. Fundamental unfairness calling into question the legality of the election; and
- k. Any other vote or basis discovered during the pendency of this election contest.

WHEREFORE, based upon the election contest procedures set forth in W.Va. Code 3-7-7, Contesters request that this matter be set down for trial within the earliest possible time but no later than August 12, 2019.

NANCY SINGLETON CASE and
DEBORAH H. McGEE,
Contesters,
By Counsel



Gregory A. Bailey, Esq.
W.Va. Bar No. 7957
Christopher P. Stroech, Esq.
W.Va. Bar No. 9387
Arnold & Bailey, PLLC
117 E. German Street
P.O. Box 69
Shepherdstown, WV 25443
304-876-1575
304-876-9186 Facsimile
gbailey@acbattorneys.com

BEFORE THE HARPERS FERRY TOWN COUNCIL

IN RE: THE MATTER OF CONTESTED TOWN COUNCIL ELECTION

NANCY SINGLETON CASE, and
DEBORAH A. McGEE,

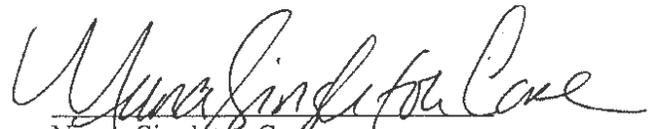
Individual Contesters,

HARDWICK SMITH JOHNSON,
CHARLOTTE WARD THOMPSON,
CHRISTIAN PECHUEKONIS,
MARJORIE FLINN YOST,
BARBARA HUME, and
JAY PREMACK,

Individual Contestees.

SWORN VERIFICATION OF CONTESTER NANCY SINGLETON CASE

Contester, Nancy Singleton Case, being first duly sworn, deposes and says that the averments contained in the Notice of Intent to Contest Harpers Ferry Town Council Election are true and correct insofar as they are therein stated to be upon information and belief, she believes them to be true.


Nancy Singleton Case

STATE OF WEST VIRGINIA

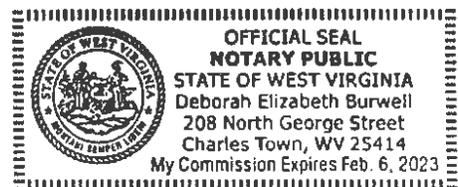
COUNTY OF JEFFERSON, to-wit;

Taken and subscribed and sworn by Nancy Singleton Case before me, in my said

State and County, this 8th day of July, 2019.


Notary Public

My commission expires: Feb. 6th, 2023



BEFORE THE HARPERS FERRY TOWN COUNCIL

IN RE: THE MATTER OF CONTESTED TOWN COUNCIL ELECTION

NANCY SINGLETON CASE, and
DEBORAH A. McGEE,

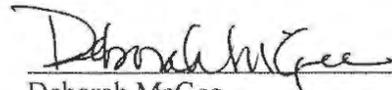
Individual Contesters,

HARDWICK SMITH JOHNSON,
CHARLOTTE WARD THOMPSON,
CHRISTIAN PECHUEKONIS,
MARJORIE FLINN YOST,
BARBARA HUME, and
JAY PREMACK,

Individual Contestees.

SWORN VERIFICATION OF CONTESTER DEBORAH MCGEE

Contester, Deborah McGee, being first duly sworn, deposes and says that the averments contained in the Notice of Intent to Contest Harpers Ferry Town Council Election are true and correct insofar as they are therein stated to be upon information and belief, she believes them to be true.


Deborah McGee

STATE OF WEST VIRGINIA

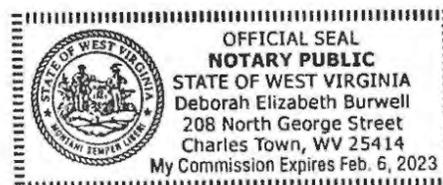
COUNTY OF JEFFERSON, to-wit;

Taken and subscribed and sworn by Deborah McGee before me, in my said

State and County, this 8th day of July, 2019.


Notary Public

My commission expires: Feb 6th, 2023



Support Harpers Ferry Hill Top House Hotel

July 13



A letter from Hill Top House Hotel property owner, Karen Schaufeld.

Dear Neighbors and Residents of Harpers Ferry, July 8, 2019

Thank you for the opportunity to speak. Fred and I have watched with interest and dismay the recent Town election and the decision not to count votes from citizens of Harpers Ferry, while including other votes for individuals residing in other towns or states. Despite statements I have personally heard, neither Fred nor I, nor SWaN, funded any candidates or candidate activity. We have a profound respect for the will of the residents of Harpers Ferry, and more importantly a respect for the sanctity of the democratic process.

I find it ironic that the timing of this discussion comes close to the heels of July 4th, a time when we most seriously consider the meaning of our democracy and the importance of the right to vote. Despite the many times we have been urged to stand on our private property rights and proceed ahead with our project, challenging the Town Council and its long procedural delays, we did not, choosing instead to respect the Town and its governmental structure. This deference was based on the belief that the Council, duly elected in a fair and free election, spoke for the residents of the Town, our neighbors.

We find ourselves at a crossroads. We can no longer stand idly by when the foundation of our deference to this Town Council has been shaken. The most basic unit reflecting direct democracy, the Town Council, has refused to recognize the votes of certain obvious residents on a technicality, in contravention to state code, while including other questionable votes. The great and grand experiment of our forefathers is failing at its most basic level right here in Harpers Ferry.

It is with all this in mind, and responding to a call to our hearts, and what we know to be right, and to the greatness of the ideals that have time and again been proven here in Harpers Ferry, that we have decided to financially support as individuals the efforts to restore confidence in the election process in Harpers Ferry. Regardless of what the outcome may be, it is important that every legitimate vote is counted and that the voice of the people is heard. None of this is inconsistent with the many efforts we have supported in the past in other states and communities to assure that all persons in our great democracy are informed and have an opportunity for meaningful participation. How much more appropriate is it then that we support efforts to afford that same opportunity to the residents of Harpers ferry, a town that we have grown to love for so many years, and into which we, like many of you, have invested in its future?

We look forward to seeing the results of a free and fair election.

Thank you.

Karen Schaufeld

June 19, 2019



Mr. Kevin Carden
Recorder
Corporation of Harpers Ferry
1000 Washington Street
PO Box 217
Harpers Ferry, WV 25415

Dear Mr. Carden,

As candidate for the office of Town Council, I Deborah Ann McGee, a resident, residing at 821 East Ridge Street, Harpers Ferry, WV 25425, hereby respectfully request a voter recount of the June 11, 2019, Municipal Elections of the Corporation of Harpers Ferry.

I request a recount of all ballots cast for the office of Town Council and specifically note those candidates, whose votes are within the margin of error, as being:

Hardwick Johnson
1091 W Ridge Street
Harpers Ferry, WV 25425

Charlotte Thompson
200 High Street
Harpers Ferry, WV 25425

Furthermore, I strongly urge the Town Council to reconsider and evaluate those six (6) provisional ballots that were given no consideration and, summarily rejected, during the June 17, 2019, Canvassing Meeting, and to allow the ballot votes of those found to be lawful residents of the Town of Harpers Ferry, to be counted.

Attached, is the required bond payment in the amount of \$175.00.

Sincerely,

A handwritten signature in black ink that reads "Deborah McGee".

Deborah Ann McGee

In the Circuit Court of Jefferson County, West Virginia

Nancy Singleton Case,)
Deborah A. McGee,)
Plaintiffs,)
)
vs.))
)
Corporation of Harpers Ferry,)
Harwick Smith Johnson,)
Charlotte Ward Thompson,)
Christian Pechuekonis,)
Marjorie Flinn Yost ET AL,)
Defendants)
)

Case No. CC-19-2019-P-136

ORDER SETTING HEARING AND BRIEFING SCHEDULE

This matter comes on this 2nd day of October 2019, upon the Petitioner's appeal from the September 11, 2019 Order of the Harpers Ferry Election Contest Tribunal. WV Code 3-7-7 permits either the contestant or contestee the right of appeal to this Court within thirty days from entry of the final order in such proceeding. This appeal will be heard upon the original papers, evidence, depositions and records filed before and considered by the Harpers Ferry Election Contest Tribunal and will be decided upon the merits. "The orderly conduct of public offices requires that the determination of those who have been lawfully elected should be made as promptly as possible in order that they can assume their official duties unfettered by the prospect of lengthy litigation". *State ex rel. Underwood v. Silverstein* 278 S.E.2d 886, 167 W.Va. 121 (1981) and WV Code 3-1-45.

Petitioner has filed with his/her appeal an appendix which appears to

include a transcript of the hearing held by the Tribunal and exhibits considered at said hearing. The parties to this appeal are encouraged to agree on the contents of the appendix. Any objections to the contents of the appendix or supplement to the appendix should be filed no later than 15 days from the entry of this Order.

ACCORDINGLY, this matter will come on for oral arguments on October 28, 2019 at 2:00 p.m. Any responsive pleadings shall be filed no later than October 22, 2019.

The Clerk shall send copies of this Order to all pro se parties by regular first class mail.

/s/ Debra McLaughlin
Circuit Court Judge
23rd Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtswv.gov/e-file/ for more details.

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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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.

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) JUDY SINGLETON CASE, AND **Judge:** _____

ROAH A. MCGEE

Plaintiff(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

Proceeding Without an Attorney

Representing:

Plaintiff Defendant

Cross-Defendant Cross-Complainant

3rd-Party Plaintiff 3rd-Party Defendant

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

HARPERS FERRY, WV 25425

City, State, Zip Code

Days to Answer: 20

Type of Service: PRIVATE PROCESS

C/O CHARLOTTE WARD THOMPSON

Defendant's Name

1000 WASHINGTON STREET

Street Address

HARPERS FERRY, WV 25425

City, State, Zip Code

Days to Answer: 20

Type of Service: PRIVATE PROCESS

C/O CHRISTIAN PECHUEKONIS

Defendant's Name

1000 WASHINGTON STREET

Street Address

HARPERS FERRY, WV 25425

City, State, Zip Code

Days to Answer: 20

Type of Service: PRIVATE PROCESS

C/O MARJORIE FLINN YOST

Defendant's Name

1000 WASHINGTON STREET

Street Address

HARPERS FERRY, WV 25425

City, State, Zip Code

Days to Answer: 20

Type of Service: PRIVATE PROCESS

C/O BARBARA HUMES

Defendant's Name

1000 WASHINGTON STREET

Street Address

HARPERS FERRY, WV 25425

City, State, Zip Code

Days to Answer: 20

Type of Service: PRIVATE PROCESS

C/O JAY PREMACK

Defendant's Name

1000 WASHINGTON STREET

Street Address

HARPERS FERRY, WV 25425

City, State, Zip Code

Days to Answer: 20

Type of Service: PRIVATE PROCESS

Defendant's Name

Street Address

City, State, Zip Code

Days to Answer: _____

Type of Service: _____

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

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

Individual Contestors Below, Petitioners,

v.

Civil Action No. 19-P-136

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

Individual Contestees Below, Respondents.

**RESPONDENTS HARDWICK SMITH JOHNSON, CHARLOTTE WARD THOMPSON,
MARJORIE FLINN YOST, AND BARBARA HUMES'
JOINT RESPONSE IN OPPOSITION TO THE PETITION FOR APPEAL**

The Petitioners ask a lot of this Court. Reverse the trial court's findings of fact. Rely on evidence not in the record. Ignore long-established Supreme Court precedent. Apply, instead, what one of the Petitioners' witnesses called "the spirit of the law."

The Respondents, on the other hand, ask only that the Court apply the law as it is written.

Looking past the rhetoric, the law compels a straightforward result. The trial court's findings of fact are well supported by the evidence (or lack thereof). They are certainly not arbitrary, capricious, or clearly wrong. This Court must therefore accept the trial court's findings that, among other things: (1) there was no competent evidence establishing Voter Howell's actual residence in Harpers Ferry with intent to remain indefinitely; (2) there was insufficient

evidence concerning the source, nature, or cause of the alleged “DMV error”; and (3) that none of the provisional voters were in the Harpers Ferry Poll Book on the day they cast their ballots.

Applying these facts, the trial court’s legal conclusions are well-grounded in established law. Without evidence of residency, Voter Howell’s ballot cannot be counted. Without evidence of the nature of the alleged registration error, nor can the Town count the ballots of any of the other provisional voters. And even if the registration error occurred exactly as the Petitioners speculate, the Supreme Court has already decided that such circumstances do not amount to a “technical error” that can be overlooked. Finally, the Respondents not only acted appropriately by rejecting the Petitioners’ attempts at strategic disqualification, but did only what the law required them to do.

For these reasons and those set forth more fully below, the trial court’s order should be affirmed.

BACKGROUND

This appeal from a statutory election contest trial pits two losing candidates for the Harpers Ferry Town Council—Nancy Singleton Case and Barbara McGee—against those who prevailed in the election—Hardwick Johnson, Charlotte Thompson, Christian Pechuekonis, Barbara Humes, and Jay Premack.¹ Their challenge is being financed by individuals affiliated with a special interest group devoted to developing a new resort on historic property within the Town of Harpers Ferry. Appx. 169–70 & 229 (Exhibit 7).²

Case and McGee lost the election by two and three votes, respectively. At the post-election canvas, the Town Council, sitting as a Board of Canvassers, considered six provisional

¹ The Petitioners also named Marjorie Flinn Yost, a fellow losing candidate, as a Contestee.

² References to “Appx.” are citations to the appendix filed by Petitioner in this matter.

ballots. Constrained by law to the evidence appearing on the face of the ballots, and guided by the Secretary of State's 2019 Best Practices manual, the Board voted to reject the provisional ballots because the voters' names did not appear in the Harpers Ferry Poll Book. Appx. 002.

On June 19, 2019, the Board of Canvassers met to certify the results of the election. At this meeting, Recorder Kevin Carden asserted that Case and McGee had requested a recount. Despite his assertion, Carden failed to produce any written evidence that the Petitioners had made such a request, or that they had posted the bond required by law. Nonetheless, based on Carden's representations, the Board delayed certifying the election in order to conduct a recount, which occurred on June 26. When the recount did not change the results, the Board formally certified the election results on June 28. Appx. 002.

The underlying election contest was filed on July 8, 2019. Initially, the Petitioners claimed not only that the provisional ballots should have been counted, but that a number of ballots that *were* counted should have been thrown out. Appx. 002, 061–66. Eventually, many of those (apparently unfounded) challenges were completely abandoned.

The election contest trial was held on August 24, 2019. Appx. 003. By then, the Petitioners' case had been whittled down to the claim that the Town Council should have counted the votes of five provisional voters: Linda McCarty, George McCarty, Adam Hutton, Leah Howell, and Jane Mumaw. Before the first witness was sworn, however, the Petitioners also dropped their claim as to Voter Mumaw (who happened to share an address with Recorder Carden). Appx. 083.

The Petitioners' opened their case by stipulating that none of the provisional voters' names appeared in the Harpers Ferry Poll Book on the day of the election. Appx. 083. They then turned to the testimony of Jefferson County's deputy county clerk, Nikki Painter. Ms. Painter

testified that she was first made aware of the dispute over the provisional ballots when she was contacted by Recorder Carden. Appx. 091. In their brief, the Petitioners rely on Ms. Painters' testimony to try to establish the nature of the so-called "technical error" that they believe caused the provisional voters' names to be omitted from the poll book. Ms. Painter's testimony on this front, however, was limited entirely to hearsay and speculation that the error was caused by some unspecified "mistake" on the part of the DMV. Appx. 092–93.³ And under cross-examination, she conceded that she had no idea what the "technical error" actually was, who caused it, when it occurred, or why it occurred. Appx. 104–05. Indeed, neither she nor anyone in her office ever even attempted to contact anyone at the DMV. Appx. 103. As a result, she "[could not] speak to what happened at the DMV," at all. Appx. 104.

The remainder of the Petitioners' case-in-chief consisted of the testimony of three of the four provisional voters. George and Linda McCarty each testified that they lived in Harpers Ferry and intended to stay there indefinitely. Appx. 118, 138. They also told the trial court about the difficulties they encountered while registering to vote in July of 2018. Though they blamed the DMV, they admitted to knowing all along that they had not registered using the correct address. Appx. 125, 139.

Next, provisional voter Adam Hutton (reluctantly)⁴ testified that he was a permanent resident of Harpers Ferry. Rather than blaming the DMV for his absence from the poll book, however, Mr. Hutton told the trial court that he felt that it was "his responsibility to make sure [his] registration was correct." Appx. 152.

³ Contrary to the Petitioners' suggestions otherwise, Pet. 7, Ms. Painter was never proffered much less accepted by the trial court as an expert witness on any subject.

⁴ According to Mr. Hutton, he was subpoenaed by the Petitioners and did "not particularly" want to testify. Appx. 151.

The Respondents then rested their case without calling Voter Leah Howell or adducing any evidence whatsoever about her eligibility to vote.

For their part, the Respondents called Petitioners Case and McGee, who testified, among other things, about whether they fulfilled the necessary legal prerequisites for filing an election contest. Appx. 160–76. The Respondents also attempted to call Recorder Carden. Appx. 177. When the Petitioners objected on the basis of relevancy, the Respondents’ counsel proffered that Painter’s testimony established Carden’s role as a fact witness to the process of “correcting” the registration errors, and that the testimony of Case and McGee revealed that Carden had unique knowledge necessary concerning the Petitioners’ standing to bring this election contest. Appx. 178–79. Nonetheless, Carden refused to take the stand or otherwise answer any questions.

The parties thereafter offered closing statements and the Town Council sitting as the trial court adjourned to deliberate. On September 11, 2019, the trial court entered findings of fact and conclusions of law deciding that the four provisional ballots could not be counted under West Virginia law. Appx. 001–12. This appeal follows.

STANDARD OF REVIEW

This Court is sitting as an appellate court to review of the decision of the Town Council for the Corporation of Harpers Ferry, which acted as the trial court in resolving the election contest initiated and tried by Petitioners under West Virginia Code § 3-7-6. *See* W. Va. Code § 3-7-7 (“When such appeal is taken to the circuit court, . . . it shall be heard and determined upon the original papers, evidence, depositions and records filed before and considered by the county court, and the circuit court shall decide the contest upon the merits.”).

On review under its appellate jurisdiction, this Court “must give the [Town Council’s] factual determinations the same sort of deference that appellate courts generally give to fact-

finder tribunals—disturbing such determinations only when they are arbitrary, capricious, or clearly wrong.” *State ex rel. Bowling v. Greenbrier Cty. Comm’n*, 212 W. Va. 647, 649, 575 S.E.2d 257, 259 (2002); *see also* Syl. Pt., *id.* (holding that a circuit court may not “disturb findings of fact on conflicting evidence unless such findings are manifestly wrong or against the weight of the evidence.”) (quoting Syl. Pt. 6, *Brooks v. Crum*, 158 W.Va. 882, 216 S.E.2d 220 (1975)). Questions of law are reviewed *de novo*. *See id.*, 212 W. Va. at 649, 575 S.E.2d at 259.

ARGUMENT

I. The Town Council correctly concluded that the four contested ballots could not be counted under governing law.

A. The Petitioners had the burden of proof.

As the parties challenging certified election results, the Petitioners bore the burden of proof and persuasion. *See State ex rel. Bumgardner v. Mills*, 132 W. Va. 580, 601, 53 S.E.2d 416, 430–31 (1949) (“Whatever is done by persons exercising a legal authority is presumed to be done rightly. The burden of overcoming this presumption of the regularity of all these ballots as indicated by the face of the election returns was upon the petitioner.”) (internal quotation marks and citations omitted); *see, e.g., Maynard v. Hammond*, 139 W. Va. 230, 238, 79 S.E.2d 295, 299 (1953) (“The burden was upon contestant to prove by a preponderance of the evidence that the election in Precinct No. 4 was so fraudulently conducted that the entire vote cast there should not be considered.”); *State ex rel. Staley v. Wayne Cty. Court*, 137 W. Va. 431, 437, 73 S.E.2d 827, 831 (1952) (“The rule just stated applies in this instance, and under the rule it will be presumed, in the absence of evidence to the contrary, that the county court sitting as a board of canvassers actually did ascertain and declare the results of the primary election.”).

B. The Petitioners did not satisfy their burden to prove that each of the four provisional voters satisfied the legal requirements to have their ballots counted.

West Virginia law specifies that a person’s ballot may not be counted unless he or she meets two requirements: (1) he or she is a “resident” of the municipality and (2) he or she is eligible and “duly registered” to vote in that municipality. *See* W. Va. Const., art. IV, § 1; W. Va. Code § 3-2-1(c); *see also id.* § 3-2-2(a). If a person is either not a resident *or* is not properly registered in a municipality, then his or her vote cannot count in an election in that municipality.⁵

1. Residency requirement. In order to cast a valid and countable vote, a person must satisfy the residency requirement. Not only must a person be a resident of West Virginia, but that person must also be a “bona fide resident” of the county and “municipality in which she or she offers to vote.” *See* W. Va. Code § 3-1-3; *see also* W. Va. Const., art. IV, § 1. In addition, a voter must be a resident of a municipality at the time of casting a ballot and for a 30-day period before casting a ballot. *See* W. Va. Const., art. IV, § 1; *Ellis*, 153 W. Va. at 51 (equating “offer[ing] a vote” with “cast[ing]” a ballot); W. Va. Code § 3-1-3.

In order to be a resident of a municipality—for purposes of casting a vote—a person must have a physical presence in that municipality and intend to remain there for the foreseeable future. *See White v. Manchin*, 173 W. Va. 526, 538 (1984) (equating, for purposes of election law, residence with domicile, which has two elements “(1) [b]odily presence in a place [and] (2) [t]he intention of remaining in that place”); *see also* Syl. pt. 7, *State ex rel. Peck v. City Council*

⁵ Because Harpers Ferry has adopted a permanent voter registration system pursuant to Article 2 of Chapter 3 of the West Virginia Code, the provisions of that article apply to this election contest. *See State ex rel. Ellis v. Cnty. Court of Cabell Cnty.*, 153 W. Va. 45, 52 (1969) (applying provisions of permanent voter registration code to municipality that adopted it); *see also* Harpers Ferry, W. Va., Ordinances ch. 1, art. 103, § 103.04 (2019) (adopting permanent voter registration law of West Virginia).

of *City of Montgomery*, 150 W. Va. 580 (1966) (explaining residency requirement and applying domicile rule to municipal election).⁶

Therefore, if someone was not a resident for the 30-day period immediately before casting a ballot or was not a resident at the time he or she cast a ballot, then that person’s vote cannot be counted under West Virginia law. *See Peck*, 150 W. Va. at 588 (concluding that residency requirement contained in Article IV, section 1 of West Virginia Constitution “applies to cities”).

2. Voter registration requirement. In addition to being a resident of the municipality, a voter must also meet voter registration requirements in order for that person’s vote to count. *See* W. Va. Code § 3-2-1; *see also* W. Va. Const., art. IV, § 12 (“The Legislature shall enact proper laws for the registration of all qualified voters in this state.”); *State ex rel. Willhide v. King*, 126 W. Va. 785, 789 (1944) (concluding that § 12 of Article IV of the Constitution was “sufficient to warrant” enactment of voter registration requirements).

There are three voter registration requirements relevant to this contest: (1) a person must be “eligible” to register to vote, *see* W. Va. Code § 3-2-1(c); (2) a person must be “duly registered” to vote, *see id.*; and (3) a person must be properly registered not later than twenty-one (21) days before the election in question. *See id.* at § 3-2-6(a) (setting the deadline for voter registration). A voter must satisfy *each* of those three requirements in order for his or her vote to count. The purpose of these registration requirements is to enable election officials to determine whether someone satisfies the constitutional and statutory qualifications before he or she actually casts a ballot. *See State ex rel. Daily Gazette Co. v. Bailey*, 152 W. Va. 521, 525 (1968) (explaining that registration statutes “protect . . . the ballot box”).

⁶ *See also* W. Va. Code § 3-1-3; W. Va. Const., art. IV, §1 (requiring a permitted voter be a “resident”); W. Va. Code § 3-2-2 (mandating that a person must be “a legal resident” of location in order to register to vote).

A person is only “duly registered” for a municipal election when his or her registration shows that he or she resides in the municipality. Under the West Virginia Code, “duly registered” means that a person is registered to vote in the location holding the election. As applied to a municipality, the Supreme Court of Appeals of West Virginia has determined that a “duly registered” voter “must be registered and cast his [or her] ballot in the [municipal] precinct in which he [or she] resides.” *See Ellis*, 153 W. Va. at 52.

In other words, if a voter is not registered to a municipality—and in the corresponding municipal registration records—when he or she casts a ballot, then that person’s vote cannot count in an election of that municipality. *See* Syl. pts. 2 & 3, *Galloway v. Common Council of City of Kenova*, 133 W. Va. 446 (1949). Because of the importance of such residency information, when a person fills out a voter registration application, he or she must identify the address, city, and county where he or she resides *under oath*. *See* W. Va. Code § 3-2-5(c)(3). A person must be duly registered to vote by the registration cutoff date, which is 21 days before the election. *Id.* § 3-2-6(a).

Therefore, if a voter had not registered as residing in a municipality at least twenty-one days before a municipal election, that person would not be duly registered to vote in that election. *See Ellis*, 153 W. Va. at 52 (explaining that ballots could not be counted in precinct that a voter moved to within the cutoff period before the election); *Lawhead*, 129 W. Va. at 172 (applying former version of code that contained 30-day cutoff period and concluding that “[i]t is plain that in order to vote at an election a person must be registered thirty days or more prior to

that election”). In other words, that person’s vote cannot not be counted in that municipal election.⁷

a. The Petitioners failed to present competent evidence to support their allegation that the provisional ballot of Voter Howell should be counted.

Above all else, this Court must sustain the Town Council’s decision not to count the ballot of Voter Leah Howell because the Petitioners failed to adduce any evidence at trial that she “resided” — as defined by statute and Supreme Court precedent — in Harpers Ferry at the time of the election.

⁷ The Secretary of State filed a motion to intervene or for leave to file an attached amicus brief. While Respondents have no objection to the filing of the proposed amicus brief, the Secretary’s motion fails to explain or even cite to the legal requirements for proper intervention as a party, and so that request should be denied.

On its merits, the Secretary’s two-page amicus brief lacks persuasive force. *First*, the Secretary takes the position that the 2004 rollout of the centralized state voter registration system silently displaced the need for registration to a certain municipality in order to vote there. The Secretary appears to argue that that system apparently altered the Code’s meaning of “duly registered,” without expressly doing so. *See* W. Va. Code § 3-2-1(c) (requiring that a person must be eligible to vote and “duly registered” in order to be permitted to vote in an election of a state subdivision). That is, the Secretary asserts that “a voter is duly registered to vote in their home municipality if they are duly registered in the single state voter registration system.” Br. at 2. In so asserting, the Secretary both misapprehends the statutory “duly registered” requirement and essentially reads that requirement out of the Code.

As explained, to be duly registered, a voter must be registered *to a municipality*. *See State ex rel. Ellis v. Cnty. Court of Cabell Cnty.*, 153 W. Va. 45, 52 (1969) (explaining that a “duly registered” voter “must be registered and cast his [or her] ballot in the [municipal] precinct in which he [or she] resides”). *That means that the registration must actually reflect that they reside in the municipality*. The Secretary, however, argues that a potential voter must only actually *reside* in a municipality and be registered to vote *anywhere* in the State of West Virginia. But that residency requirement goes to “eligibility,” which is a different and separate statutory requirement that a voter must meet in order to place a countable vote. *See* W. Va. Code § 3-2-1(c). The position advocated by the Secretary would, in essence, *delete* the “duly registered” requirement from Code. In so doing, the Secretary would make it such that, except for purposes of statewide elections, the voter registration system would be effectively meaningless. That is, the Secretary contends that as long as someone lives in the municipality and is registered in the State generally, their vote should count. Such a system would mean that people could jump from municipality to municipality and never change their registration, which would defeat the purpose of having a registration system. There would be no accurate listing of individuals who are entitled to cast a countable vote. The Secretary’s interpretation thus counters the plain text statutory requirements that a potential voter both actually resides in the municipality where he or she seeks to vote *and* that he or she is properly registered as a voter for that municipality.

Second, the Secretary simply asserts that “[t]he allegedly incorrect address of a voter’s home” is “clearly” a “technical issue.” Br. at 3. Again, the Secretary does not even attempt to grapple with any cases of the Supreme Court of Appeals addressing the statute in ways contrary to the Secretary’s position, which ultimately amounts to question-begging.

At the start of the trial, the Petitioners' attorney promised the Town Council that it was "going to hear evidence . . . from Leah Howell." *See* Appx. 083. But that never happened.

Unlike Voters Hutton, G. McCarty, and L. McCarty, Voter Howell was never called to the stand.

As a result, unlike the other voters, Voter Howell never testified that she had a physical presence in Harpers Ferry and intended to reside there for the foreseeable future. Nor did any other witness testify that Voter Howell had a physical presence in Harpers Ferry and intended to reside there permanently. Nor did the Petitioners introduce any affidavit, records, or other evidence that Voter Howell had a physical presence in Harpers Ferry and intended to reside there permanently.

The Petitioners' brief fails to acknowledge Voter Howell's absence from the trial and glosses over the lack of evidence with missing, imprecise, or unclear citations to the record.⁸ The closest the Petitioners actually come is the testimony of county employee Nikki Painter, who testified that, after becoming aware of problems with other voters' registrations, she "looked at" Howell's registration and "changed" Howell's voter registration from West Washington Street, which is in Bolivar, to Washington Street, which is in Harpers Ferry. But as Ms. Painter admitted, she never actually spoke to Voter Howell, and had no personal knowledge of Howell's actual residency. Appx. 111, 092. As a result, she was unable to offer any competent evidence about whether Voter Howell actually lived in Harpers Ferry on the day of the election and for 30 days before, or whether Voter Howell had any intent to do so for the foreseeable future.

⁸ Throughout their appeal brief, Petitioners rely on uncited "facts" and documents that were not proffered as evidence by the parties to the Town Council as the election contest tribunal. *See, e.g.*, Pet. at 4, 6–7 (assertions as to Voter Howell). This Court cannot consider or rely on them on appellate review. As the Town Council's objection to the contents of the appendix makes clear, quoting the applicable statute, the appeal "taken to the circuit court . . . shall be heard and determined upon the original papers, evidence, depositions and records filed before and considered by" the Town Council as tribunal. W. Va. Code § 3-7-7.

The best—and perhaps only—vehicle for that evidence was Voter Howell herself. The Petitioners knew that; that’s why she was on their witness list, and that’s why their lawyer told the Town Council she would testify. One can only speculate as to why Voter Howell did not appear at the trial, but regardless of the reason, trials have consequences. The consequence of Voter Howell’s absence from this one is that the Petitioners failed to carry their burden of establishing Howell’s residency, without which her vote could not legally be counted.

b. The Petitioners failed to present competent evidence to support their allegations that the provisional ballots of Voters Hutton, G. McCarty, and L. McCarty should be counted.

Even if Voter Howell had testified as to her residency, however, two other reasons support the Town Council’s conclusion that her provisional ballot could not be counted. These reasons are also why the tribunal was correct in declining to count the three remaining challenged ballots, cast by Voters Hutton, G. McCarty, and L. McCarty.

First, Petitioners failed to adduce any competent evidence concerning the alleged DMV error. Although it made for a good soundbite—blaming the DMV for the voter registration errors—*Petitioners remarkably failed to call any witness from the DMV or present any other competent evidence derived from the DMV.*

Here, Petitioners did not even *attempt* to call a single witness from the DMV to discuss the voter registration process at the DMV; how the DMV computer systems worked (or failed to work properly); how those systems integrated (or not) with the voter registration process; or how the alleged registration errors at issue in this case were actually made (or not made). *See Appx. 5.* Rather, the only evidence purporting to support the “DMV theory” was presented through a deputy clerk from the Jefferson County Clerk’s office, who blamed the incorrect registration errors on the DMV. *See Appx. 092.*

But what Petitioners failed to present was any evidence from the DMV concerning the actual source, nature, or cause of the alleged voter registration errors at issue in this contest. Accordingly, Respondents were not given an opportunity to evaluate or cross-examine any such evidence. Worse still, the tribunal was left without the evidence that it would have needed to evaluate and weigh in order to consider whether the disputed ballots could be counted under law.

Second, based on the Petitioners' stipulation that none of the names of the four provisional voters were in fact in the official registration record of the Corporation of Harpers Ferry—the Poll Book—at the time each of them cast their ballots, the ballots cannot be counted in accordance with state law.

The law on this matter is well-settled. As already noted, in order for a vote to count, a voter must be “duly registered” to vote, including at least 21 days before the election at issue. *See* W. Va. Code §§ 3-2-1(c) & 3-2-6(a). A person is only “duly registered” for a municipal election when his or her registration shows that he or she resides in the municipality. Under the West Virginia Code, “duly registered” means that a person is registered to vote in the location holding the election. As applied to a municipality, the Supreme Court of Appeals of West Virginia has squarely held that a “duly registered” voter “must be registered and cast his [or her] ballot in the [municipal] precinct in which he [or she] resides.” *See Ellis*, 153 W. Va. at 52. In other words, if a voter is not registered to a municipality—and in the corresponding municipal registration records (aka, the poll book)—when he or she casts a ballot, then that person’s vote *cannot* count in an election of that municipality. *See* Syl. pts. 2 & 3, *Galloway v. Common Council of City of Kenova*, 133 W. Va. 446 (1949).

Accordingly, if a voter had not properly registered as residing in a municipality at least twenty-one days before a municipal election, that person would not be “duly registered” to vote

in that election. *See Ellis*, 153 W. Va. at 52 (explaining that ballots could not be counted in precinct that a voter moved to within the cutoff period before the election). In other words, that person's vote cannot not be counted in that municipal election. Given Petitioners' stipulation that none of the four provisional voters' registrations were in the Harpers Ferry poll book at the time of the election, the tribunal was correct in concluding that those ballots cannot be counted.

Third and finally, even assuming sufficient, competent evidence was presented at trial to allow the tribunal to conclude that the registration information of the four provisional voters in fact contained incorrect address information caused by individuals or policy at the DMV that caused those voters not to appear in the Harpers Ferry Poll Book at the time of the election, such incorrect registration errors do not constitute the type of technical error that may be disregarded under law.

This conclusion is compelled by the binding decision of the West Virginia Supreme Court of Appeals in *Galloway v. Common Council of City of Kenova*, 133 W. Va. 446, 57 S.E.2d 881 (1949), which held that the persons whose names appeared on the voter registration records used in county and state elections but not on municipal registration records were not entitled to vote. In that case, the Supreme Court of Appeals *expressly acknowledged* the statutory provision stating that "errors, omissions or oversights" shall be "disregard[ed] . . . if it can reasonably be ascertained that the challenged voter was entitled to vote." *Id.* at 453, 57 S.E.2d at 885 (citing the predecessor statute to current W. Va. Code § 3-1-41(e)). Critically, however, the Supreme Court did *not* apply that provision to the facts of that case to count the challenged votes of voters whose names did not appear to be registered in the municipality of Kenova's poll book.

Instead, the upshot of the *Galloway* decision is that a voter's failure to be properly registered in a municipality, where that municipality has adopted a permanent registration

system, is not a mere technical error that must be disregarded. *See id.* (holding that the “challenged ballots” were not “otherwise valid” and thus not countable “[b]ecause the voters who cast these ballots were not duly registered by reason of the absence of their names from the municipal registration list or record”).⁹

As the trial court below acknowledged, Appx. 011 ¶ 64, it was powerless to change the Supreme Court of Appeals’ decision in the *Galloway* case, among others, that squarely apply in this contest. Of course, this Court is also bound by the decisions of the Supreme Court of Appeals, for better or worse. Only *that court* can overturn its own precedent, which control in this proceeding. *See State v. McKinley*, 234 W. Va. 143, 149, 764 S.E.2d 303, 309 (2014) (“Our decisions . . . are ‘binding authority upon any court’ if concurred in by a majority of the justices.”) (quoting W. Va. const. art. VIII, § 4).

II. The Rule of Necessity *required* members of Town Council who would ordinarily be disqualified to participate in the election contest hearing to ensure the contest could be heard and adjudicated.

A. The Rule of Necessity is binding law and applies here.

The Harpers Ferry Town Council is the only body that could have judged the Petitioners’ election contest. *See* W. Va. Code § 3-7-6 (granting to “the governing body of the municipality” the sole power to “judge . . . any contest of a municipal election”); *see also* Syl. Pt. 8, *State ex rel. Peck v. City Council of City of Montgomery*, 150 W. Va. 580, 582, 148 S.E.2d 700, 703

⁹ *See also Brooks v. Crum*, 158 W. Va. 882, 890, 216 S.E.2d 220, 225 (1975) (“It was held in *State ex rel. Willhide v. King* that where persons duly qualified to vote failed to comply with requirements of the statutes concerning registration, which were enacted to prevent fraud in elections, they forfeited their right to the franchise.”) (citation omitted).

(1966) (“The municipal council has original and exclusive jurisdiction to hear and decide contested elections involving the selection of municipal officers.”).¹⁰

“The council of a city, town, or village to which one, whose seat is contested, is elected, is the proper tribunal to try such contest, and not the council in office at the time of the election.” Syl. Pt. 1, *Price v. Fitzpatrick*, 85 W. Va. 76, 100 S.E. 872 (1919). Therefore, the Town Council that sat in judgment of this election contest included Mayor Wayne Bishop, Recorder Kevin Carden, and Councilmembers Barbara Humes, Hardwick Smith Johnson, Christian Pechuekonis,¹¹ Jay Premack, and Charlotte Ward Thompson.

In an election contest, individual members of a municipal council that would otherwise be disqualified *must serve* where a quorum is not possible without them. *See State ex rel. Peck v. City Council of City of Montgomery*, 150 W. Va. 580, 591, 148 S.E.2d 700, 708 (1966). That is because “there is no other body to act as a contest board in such cases, and the statute provides that all contested municipal elections shall be heard and decided by the council.” *Id.* This is known as the Rule of Necessity. *See Evans v. Charles*, 133 W. Va. 463, 471, 56 S.E.2d 880, 884 (1949); *Price v. Fitzpatrick*, 85 W. Va. 76, 100 S.E. 872, 872–74 (1919); *see also Stafford v. Mingo Cty. Court*, 58 W. Va. 88, 51 S.E. 2, 3 (1905). The *Evans* decision has a lengthy discussion concerning the unusual nature of the Rule of Necessity, but nonetheless requiring it under the precise circumstances faced here.

¹⁰ Under governing ordinances, the “Town Council” is defined as “the governing body of the town” and “consists of” five Councilmembers, plus the Mayor and the Recorder. Harpers Ferry Ordinance 11.01; *id.* at 11.02. The Mayor and Recorder “have votes as members of the Town Council.” *Id.* 111.09.

¹¹ Unfortunately, Councilmember Pechuekonis refused to participate in the Town Council’s hearing and decision of the election contest. Although disqualification is an individual decision in this context, his refusal to participate is contrary to law because the Rule of Necessity required performance of his official duty. Regardless, a quorum still existed without his participation.

Normally, Councilmembers Humes, Johnson, Pechuekonis, Premack, and Thompson would be disqualified because *Petitioners named them as Contestees*. Recorder Carden would also be subject to a disqualifying interest because of his role as a fact witness, as discussed below. Regardless, the Town Council would have lacked a quorum to even *hear* Petitioners’ contest without the participation of those individuals. Therefore, the Rule of Necessity mandated that the entire, existing Town Council participate as the governing body to decide the election contest.

The policy of the Rule of Necessity is admittedly unusual. But it is only a rule of last resort, applied so that a body is able to conduct business with all its disqualified members lest no business be done at all. In short, the Supreme Court of Appeals has made the choice that it is better for election contest challengers to be able to have their election contest heard by potentially interested members *than never heard at all*. (Since the Legislature has not yet created an alternative forum to hear such proceedings).

B. Cherry-picked disqualification of contestees has no basis in the law.

Petitioners’ argument that only Councilmembers Johnson and Thompson should have disqualified themselves—instead of all councilmembers named as Contestees/defendants—based upon how certain uncounted provisional votes *might* affect the outcome is not supported by any law or case. Instead, it amounts to a tactical attempt to disqualify only *some* members of Town Council in order to maintain a quorum. Again, no case or law supports this calculated and strategic remedy to fashion the Town Council of Petitioners’ selective choosing.

Petitioners sometimes rely on and sometimes ignore the statute that provides that *all* named contestees—not just a cherrypicked few—are subject to a disqualifying interest. *See W. Va. Code § 3-7-6* (a council member “whose election is being contested may not participate in

judging the election, qualifications and returns”). To be blunt, a councilmember is either subject to a disqualifying interest or he or she is not; there is no mushy middle ground. As Supreme Court of Appeals decisions, including those cited above, make clear, if a current member of the governing body is *named* as a contestee in an election contest, disqualification is ordinarily required. That would have been true here, except, as already mentioned, the Town Council would have lacked the power to proceed without the disqualified members, so under binding Supreme Court caselaw, they all *must* participate under the Rule of Necessity.

C. The emailed Ethics Commission staff “opinion” is not inconsistent with Respondents’ position.

Petitioners repeatedly invoke the West Virginia Ethics Commission in their attempt to avoid binding precedent of the Supreme Court of Appeals on the Rule of Necessity. This argument is without merit for several reasons.

First, Petitioners’ assertion that the “West Virginia Ethics Commission agrees” with their position is misleading. Pet. 15. The Ethics Commission has said no such thing. Rather, a dissenting councilmember contacted a Commission staff person just days before the trial, provided his version of factual information to that staff member, and then received informal advice by email in response. *See* Appx. 032 (“The staff advice rendered herein is based upon the facts provided.”). It is undisputed that the Commission itself has not addressed or rendered any actual opinion on this issue. *See id.* (“The Ethics Commission does not have a formal Advisory Opinion which directly addresses this scenario.”).

Second, the “staff advice” is not at all inconsistent with Respondents’ position. Appx. 032. Respondents *agree* that, ordinarily, any sitting councilmember who is named as a contestee in the election contest—in other words, their election is being challenged—should be disqualified from hearing and deciding that contest. *But* because Petitioners named five sitting

councilmembers as contestees, their disqualifications would have shut down the election contest before it could even begin, since the remaining three members of Town Council would not constitute a quorum to hear and decide the contest. Thus, under binding legal authority, the otherwise interested councilmembers *must* sit in order for a quorum to be available. *See State ex rel. Peck v. City Council of City of Montgomery*, 150 W. Va. 580, 591, 148 S.E.2d 700, 708 (1966). This Court wouldn't know it from Petitioners' appeal brief, but the "staff advice" expressly recognized this very possibility, stating, "I am unable to opine whether a Court may find that *other laws governing municipal elections require council members to serve as a member of an election contest.*" Appx. 032 (emphasis added).

Third, even if the staff advice provided to the dissenting councilmember were contrary to Respondents' view (and it is not), the staff advice is neither controlling or persuasive here, because the Commission (and its staff) are limited to interpreting and applying *the Ethics Act only*. They have no authority or specialty over election statutes or the decisions of the Supreme Court of Appeals applying those laws, including the Rule of Necessity. The staff advice properly acknowledges this fact. *See* Appx. 032–33 (emphasis added) (the staff opinion is "limited to the analysis of whether *the Ethics Act* would be violated by the proposed conduct" and that the "Commission is without authority to determine whether *other laws or rules . . .* prohibit or otherwise restrict the proposed conduct.").

C. If the Rule of Necessity does not apply, Recorder Kevin Carden must also be disqualified because he is a fact witness.

In the event that this Court determines that the Rule of Necessity does not apply, and that the currently serving councilmembers named as contestees must be disqualified, Recorder Kevin Carden must also be disqualified from participating in the election contest because he is an

essential fact witness. Indeed, Respondents called Mr. Carden to testify during the election contest, but despite being present, he refused to answer any questions. *See* Appx. 177–85.

Under longstanding judicial rules of disqualification, now codified in the West Virginia Code of Judicial Conduct, a judge “shall disqualify himself . . . in a proceeding in which the judge’s impartiality might reasonably be questioned, including . . . where” the judge is “likely to be a material witness in the proceeding.” *State ex rel. E.I. Dupont De Nemours & Co. v. Hill*, 214 W. Va. 760, 764 n.6, 591 S.E.2d 318, 322 n.6 (2003) (quoting Canon 3E(1)); *see also Williams v. Pennsylvania*, 136 S. Ct. 1899, 1908 (2016) (“recusal required where judge ‘has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding’”) (quoting 28 U.S.C. § 455(b)(3)).

The Respondents sought Mr. Carden’s testimony on a number of relevant issues about which he had unique, first-hand knowledge. *See* Appx. 178–79, 183–84. For example, Nikki Painter testified that it was Mr. Carden who first brought the alleged voter registration errors to her attention, and that Mr. Carden had substantial extra-judicial conversations with Ms. Painter on this critical subject. *See* Appx. 091, 095–96. Perhaps more importantly, the Petitioners’ own testimony at trial established that Mr. Carden has unique knowledge concerning when and how the Petitioners’ requests for recount and required bond were received, matters essential to determining whether the Petitioners even have standing to bring this contest, *infra* Part III. Appx. 165–68, 173–76. Mr. Carden’s refusal to testify concerning these issues deprived Respondents of the ability to ascertain whether in addition to Ms. Case, Ms. McGee had standing to bring this contest in the first place.

III. Petitioner Nancy Case lacks standing.

Petitioner Case lacked standing to bring and prosecute this election contest, and now lacks standing to appeal it, because she failed to present evidence that she made a formal request for a recount, accompanied by the required bond, within 48 hours of the declaration of election by the Board of Canvassers. Under the plain text of West Virginia Code § 3-6-9, the demand for a recount must be made within 48 hours after the declaration of election. *Id.* § 3-6-9(a)(8)(A). In addition, “[e]very candidate who demands a recount shall be requested to furnish bond in a reasonable amount. . . .” *Id.* § 3-6-9(h). It is well-settled that “[t]he burden for establishing standing is on the plaintiff.” *State ex rel. Healthport Techs., LLC v. Stucky*, 239 W. Va. 239, 243, 800 S.E.2d 506, 510 (2017).

A proper request for a recount is a strict legal prerequisite for filing and prosecuting an election contest under West Virginia Code § 3-7-6. *See* Syl. Pt. 5, in part, *Miller v. Cty. Comm’n of Boone Cty.*, 208 W. Va. 263, 265, 539 S.E.2d 770, 772 (2000) (“Where a candidate seeks to contest specific ballots cast in an election pursuant to the provisions of West Virginia Code § 3-7-6 (1999), [s]he must first demand that the Board of Canvassers conduct a recount of the ballots pursuant to the provisions of West Virginia Code § 3-6-9 (1999).”). In *Miller*, the Supreme Court of Appeals affirmed the circuit court’s decision to issue a writ of prohibition halting the County Commission from hearing an election contest where the contester had failed to timely request a recount in accordance with West Virginia Code § 3-6-9. *See Miller*, 208 W. Va. at 269-70, 539 S.E.2d at 776-77; *see also id.* (“The Appellant’s failure to demand a recount in a timely fashion precluded his contest of the election on the issue of the validity of the ballots under the provisions of West Virginia Code § 3-7-6.”).

Here, there is no evidence in the record that Petitioner Case either submitted a proper request for recount or furnished the required bond—both of which are legal requirements for bringing an election contest. Those are the factual findings of the trial court and nothing in the record suggests that they are “clearly wrong.” *See* Appx. 005. Indeed, Petitioner Case herself admitted that she “personally did not” submit the bond as required by statute. *See* Appx. 166; W. Va. Code § 3-6-9(h) (“*Every candidate* who demands a recount shall be requested to furnish bond in a reasonable amount. . . .”) (emphasis added). That admission, combined with the lack of any evidence from Petitioner Case that she actually made a recount demand and her otherwise evasive testimony, is enough to support the trial court’s decision concluding that Petitioner Case lacks standing in this election contest proceeding.

Accordingly, Petitioner Case is not entitled to any relief in this election contest, regardless of the decision on whether any of the provisional ballots should hereafter be counted. *See Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 95, 576 S.E.2d 807, 822 (2002) (“[S]tanding to sue—the real party in interest requirement—goes to the existence of a cause of action, i.e., whether the plaintiff has a right to relief.”) (citation omitted).

CONCLUSION

The decision of the Town Council for the Corporation of Harpers Ferry, sitting as the duly authorized election contest trial court, should be affirmed.

Respectfully submitted,

**HARDWICK SMITH JOHNSON,
CHARLOTTE WARD THOMPSON,
MARJORIE FLINN YOST, and
BARBARA HUMES,**

By counsel:

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IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

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

Individual Contestors Below, Petitioners,

v.

Civil Action No. 19-P-136

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

Individual Contestees Below, Respondents.

CERTIFICATE OF SERVICE

I, J. Zak Ritchie, do hereby certify that on October 22, 2019, a true and correct copy of the foregoing was served through the electronic filing system on all registered users.

/s/ J. Zak Ritchie
J. Zak Ritchie (WVSB #11705)

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

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

Individual Contestors Below, Petitioners,

v.

**Case No.: 19-2019-P-136
(Honorable Debra McLaughlin)**

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

Individual Contestees Below, Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Mac Warner, Secretary of State of the State of West Virginia, in his official capacity (the “Secretary”), by and through counsel, respectfully moves for any necessary leave to submit a brief as *amicus curiae* in support of the relief sought by Petitioners, Nancy Singleton Case and Deborah A. McGee. The Secretary has interest in the matter presented in this case in his capacity as the state’s chief election officer.

The brief of the Secretary, as the State’s chief election official, presents desirable, relevant information for the Court’s consideration. The Secretary seeks to ensure uniform application of West Virginia election laws and to promote the franchise of eligible voters.

For these reasons, this motion should be granted. In the alternative, if the Court is unwilling to accept the Secretary’s brief as *amicus curiae*, then the Secretary moves to intervene as an

additional party, consistent with West Virginia Rule of Civil Procedure 2(b), as the statutes at issue in this action are “administered by” the Secretary as a “state governmental officer.”

Respectfully submitted,

MAC WARNER, SECRETARY OF STATE
OF THE STATE OF WEST VIRGINIA

By Counsel,

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ATTORNEY GENERAL

/s/ Curtis R. A. Capehart

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*Counsel for Mac Warner, Secretary of State of the
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DATE: October 17, 2019

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

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

Individual Contestors Below, Petitioners,

v.

**Case No.: 19-2019-P-136
(Honorable Debra McLaughlin)**

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MARJORIE FLINN YOST,
BARBARA HUMES,
JAY PREMACK, and
CORPORATION OF HARPERS FERRY,**

Individual Contestees Below, Respondents.

CERTIFICATE OF SERVICE

I caused a true copy of the foregoing “*Motion for Leave to File Brief as Amicus Curiae*” to be served on the following counsel electronically via the West Virginia E-Filing system and by depositing in the United States Postal Service a copy this 17th day of October:

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**PATRICK MORRISEY
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Curtis R. A. Capehart

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

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BARBARA HUMES,
JAY PREMACK, and
CORPORATION OF HARPERS FERRY,**

Individual Contestees Below, Respondents.

BRIEF AS AMICUS CURIAE SUPPORTING PETITIONER

Mac Warner, Secretary of State of the State of West Virginia, in his official capacity (the “Secretary”), by and through counsel, respectfully submits this brief as amicus curiae in support of the relief sought by Petitioners, Nancy Singleton Case and Deborah A. McGee. The Secretary, in his capacity as the State’s chief election officer, has interest in the matters presented in this case.

The Petition for Appeal (the “Petition”) relates the factual circumstances relevant to the Court’s consideration as more fully developed in the Petitioners’ Appendix. In short, due to a physical home address issue that stemmed from registering to vote via the Division of Motor Vehicles and that agency’s identification of town of residence, properly registered voters purportedly resident within the town of Harpers Ferry, West Virginia, were listed within a precinct outside the municipality and were required to complete provisional ballots for a Harpers Ferry municipal election – ballots that the Harpers Ferry Board of Canvassers decided not to count and

that the Harpers Ferry Town Council later voted to leave uncounted following an election contest on the matter.

The Secretary's principal concern in bringing this brief is the uniform application of the election Code throughout the state. Since 2004, the Office of the Secretary of State (the "Secretary's Office") has maintained the "single, official, statewide, centralized, interactive computerized voter registration database of every legally registered voter in the state" that serves as "the single system for storing and managing the official list of registered voters throughout the state" and "the official voter registration list for conducting **all elections** in the state." *See* W. Va. Code § 3-2-4a(a) (emphasis added). This statute's creation of a unitary database maintained by the Secretary's Office streamlined voter registration, replacing the prior regime of separate voter registration books for county and municipal voting and, consequently, obviating holdings interpreting the requirements of the old system. Under the current system, there is no registration in municipalities compared to state or county registrations – a single registration in the statewide system renders a citizen duly registered for any elections in which the citizen is otherwise eligible to vote.¹ In other words, a voter is duly registered to vote in their home municipality if they are duly registered in the single state voter registration system. Any interpretation or holding that seeks to inject back into this system any distinction regarding municipal versus state or county registration is counter to the language of the Code and would create confusion where none presently exists.

Regarding the issue of technical errors and oversights, the Code strongly favors counting ballots. Section 3-1-41(e) directs that voters not be disenfranchised for technical errors, omissions, or oversights "if it can reasonably be ascertained that the challenged voter was entitled to vote."

¹ Other eligibility requirements, such as time of registration prior to an election, would still apply.

The allegedly incorrect address of a voter's home is clearly a technical issue, particularly where the entry of a voter's municipal precinct into the system was the result of another state agency's recordkeeping apparatus, and a citizen's knowledge or lack of knowledge of the error prior to an election is immaterial under the Code. Consistent with this statute, the Secretary's office has and will continue to advise that, on a question of residency alone, the provisional ballots of voters that can be reasonably discerned to live within a municipality would be valid votes. If this Court finds that the homes of the citizens whose votes are at issue here were truly within the bounds of Harpers Ferry at all relevant times, then the proper course consistent with the Code and its application statewide would be to correct for this technical oversight by ordering that the ballots of these citizens be counted.

Finally, the Secretary notes that this matter, as with all matters involving elections, is one where time is of the essence. The election at issue in this matter occurred on June 11, 2019, and its outcome will not be truly decided until this matter is concluded.

The Secretary seeks to emphasize that a ruling against Petitioners would be inconsistent with relevant statutes and that the position of Respondents, if adopted by this Court, would present inconsistent interpretation and enforcement of relevant statutes. For these reasons, the Petition should be granted.

Respectfully submitted,

MAC WARNER, SECRETARY OF STATE
OF THE STATE OF WEST VIRGINIA

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL

/s/ Curtis R. A. Capehart

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*Counsel for Mac Warner, Secretary of State of the
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DATE: October 17, 2019

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

**NANCY SINGLETON CASE, and
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BARBARA HUMES,
JAY PREMACK, and
CORPORATION OF HARPERS FERRY,**

Individual Contestees Below, Respondents.

CERTIFICATE OF SERVICE

I caused a true copy of the foregoing “*Brief as Amicus Curiae Supporting Petitioner*” to be served on the following counsel electronically via the West Virginia E-Filing system and by depositing in the United States Postal Service a copy this 17th day of October:

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Christian Pechuekonis, Marjorie Flinn Yost,
Barbara Humes, Jay Premack*

**PATRICK MORRISEY
ATTORNEY GENERAL**

/s/ Curtis R. A. Capehart

Curtis R. A. Capehart

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Shepherdstown, West Virginia

On Behalf of West Virginia Secretary of State's
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DONALD KERSEY, ESQUIRE
Charleston, West Virginia

On Behalf of Office of the West Virginia Attorney
General:

CURTIS R.A. CAPEHART, ESQUIRE
Charleston, West Virginia

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I N D E X

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P R O C E E D I N G S

(In open court.)

THE COURT: Good afternoon.

MR. BAILEY: Good afternoon.

THE COURT: We are here in the matter of Case and McGee versus Corporation of Harpers Ferry, et al. I'm going to have all the attorneys introduce themselves and tell us who you represent.

MR. BAILEY: Your Honor, Greg Bailey for the petitioners Nancy Case and Deborah McGee.

MR. DONOVAN: Your Honor, Ryan Donovan and Zak Ritchie on behalf of the respondents.

MS. KALLAS: Effie Kallas for the Corporation.

MR. CAPEHART: Curtis Capehart on behalf of the Secretary of State.

MR. KERSEY: Donald Kersey, general counsel with the Secretary of State's Office.

THE COURT: Your last name was?

MR. KERSEY: Kersey.

THE COURT: I think preliminarily I had issued kind of my thoughts on the amicus brief and I believe I heard from the respondents that there was no objection probably based on their reading of Rule 30 as well.

MR. DONOVAN: That's correct, Your Honor. No

1 objection to the filing of the amicus brief.

2 THE COURT: All right. So I guess second on the list
3 would be the appendix. Mr. Bailey, you saw the objection
4 to what you included as part of the appendix?

5 MR. BAILEY: Your Honor, I think the primary
6 objection, I won't speak to their objection, but I think
7 it was with respect to documents that were attached to the
8 dissent opinion. My position on that is that the dissent
9 was part of the tribunal and if they relied on information
10 in reaching their conclusion, it ought to be part of the
11 record.

12 I will admit that some of the information,
13 documentation that is attached to the dissent was not
14 introduced as evidence before this tribunal; however, I
15 will tell you because it is such an unusual proceeding
16 below, the tribunal was all armed with facts and they were
17 part of the Board of Canvassers' meeting so they had
18 discussed things below that weren't necessarily presented
19 to them that day.

20 THE COURT: So as I recall reading the transcript,
21 there was some discussion that the record was going to be
22 left open for the addition of certain documents.

23 MR. BAILEY: Correct, Your Honor, and we did that, I
24 think, because we were trying to be true and compliant

1 with the statute that provided that additional evidence
2 could be considered from time to time going forward. I
3 will state the petitioner submitted no additional evidence
4 and I don't believe the respondents did as well. I think
5 this was evidence that -- and I don't know what the
6 tribunal considered when they met for this decision
7 because it was done in executive session, but my position
8 is if they considered evidence on their own and it was
9 part of their decision making then it's part of the
10 record.

11 THE COURT: Ms. Kallas, I think that puts it in your
12 court.

13 MS. KALLAS: It most certainly does, and the tribunal
14 did comply with only those eight documents that were
15 entered into evidence at the tribunal by both the
16 respondents' and the plaintiffs' counsel. Nothing else
17 was brought into that room.

18 THE COURT: Okay. So at the time of the vote those
19 documents that were attached to the dissent opinion did
20 not -- were not considered by the --

21 MS. KALLAS: No.

22 THE COURT: -- tribunal?

23 MS. KALLAS: By the tribunal, no, ma'am.

24 THE COURT: And that would have been just the actions

1 of the dissenters alone to go out and obtain those
2 additional documents. All right.

3 MR. BAILEY: At the end of the day, Judge, I guess we
4 don't know what they considered and when they considered
5 it. I imagine I can take Ms. Kallas at her word that they
6 didn't consider it in their deliberation. At the end of
7 the day I think those documents are not necessary for this
8 Court to reach a decision on the merits.

9 THE COURT: I don't think that they are part of the
10 record in terms of what this Court could consider in terms
11 of determining any facts from this case if they were not
12 admitted by the parties during the course of the
13 proceedings or following the proceedings pursuant to the
14 agreements that had been reached so I think it was 1
15 through 60.

16 MR. BAILEY: Are you talking about the appendix
17 citations --

18 THE COURT: Right. Thirteen through 60.

19 MR. BAILEY: It looks, Judge, like the dissenting
20 opinion was 13 to 27 -- or 28, I stand corrected, and the
21 attached exhibits were petitioners' appendix 29 to 60.

22 THE COURT: Is there an objection to the dissenting
23 opinion in and of itself?

24 MS. KALLAS: Not on the Corporation's behalf, no.

1 MR. DONOVAN: Not on our behalf either, Your Honor.

2 MS. KALLAS: -- reliance upon the exhibits.

3 THE COURT: Exactly. So, I mean, obviously, we would
4 strike the attachments that were made to those so the
5 dissent then ends at which page, Mr. Bailey?

6 MR. BAILEY: The dissent ends at petitioners' appendix
7 Page 28.

8 THE COURT: So then --

9 MR. BAILEY: The exhibits are Page 29 to 60.

10 THE COURT: So 29 to 60 would be stricken from
11 consideration as far as --

12 MS. KALLAS: 28 through 60. The exhibit list is on
13 28.

14 THE COURT: Okay. So 28 through 60 by agreement are
15 not part of the record. Other than that, do we have an
16 agreement that the rest of the appendix accurately
17 includes all documentation for the appendix of this case
18 and the Court's review, Mr. Bailey?

19 MR. BAILEY: It was my appendix so I agree.

20 MR. DONOVAN: Yes, we agree.

21 THE COURT: Mr. Donovan, yes.

22 So I think it's your petition, Mr. Bailey, so I will
23 allow you to address the Court first. I may interrupt and
24 ask some questions because I have read the memos, the

1 briefs, the petitions of both sides, and I have my own
2 questions on certain things but --

3 MR. BAILEY: May I use the podium?

4 THE COURT: You may. Make sure that microphone gets
5 turned on.

6 MR. BAILEY: Am I on?

7 THE COURT: You are. You may need to tilt it up.

8 MR. BAILEY: That's not usual.

9 Your Honor, may it please the Court. I'm here on
10 behalf of the petitioners Deborah McGee and Nancy Case,
11 and we are asking this Court to reverse the inclusions of
12 the lower tribunal in their decision to reject four
13 provisional ballots that were cast by duly registered
14 residents of Harpers Ferry in the municipal election that
15 occurred on June 11th.

16 Your Honor, state law is clear. Under 3-1-3 that
17 citizens of this state are entitled to vote in all
18 elections within the municipality in which they reside.
19 As the Court is well aware, these citizens -- four
20 citizens were asked to cast provisional ballots because
21 there was a mistake made.

22 There's a statute on provisional ballots which the
23 Court is well aware and it's 3-1-41(e) that makes clear
24 that when you are to consider provisional ballots that

1 when doing so the municipality shall disregard technical
2 errors, omissions or oversights.

3 The West Virginia Supreme Court has made clear to us
4 that when construing election law the paramount principle
5 is that these election laws should be construed in favor
6 of enfranchising voters, not disenfranchising voters.

7 I submit to the Court that what this voter tribunal
8 did was engage in -- they took what was a very simple
9 straightforward issue which is whether or not these four
10 citizens lived in Harpers Ferry and whether they were
11 registered to vote at the time and they engaged in legal
12 gymnastics and machinations to try to disenfranchise these
13 voters rather than construe the statute in favor of
14 enfranchising the voters which they're called on to do.

15 THE COURT: So, if you would, tell me as it relates to
16 Voter Howell what evidence you put on regarding residency.

17 MR. BAILEY: Ms. Howell did not testify. She did not
18 appear at the trial. Wasn't an issue and this is why.
19 The chief deputy clerk for Jefferson County, Nikki
20 Painter, who was there and who admitted the records of all
21 the voters -- all the four voters involved testified that
22 she determined that Ms. Howell was a registered voter on
23 the day of the election and then she was a citizen of
24 Harpers Ferry based upon her election records.

1 Moreover, Judge, the Town has -- should be estopped
2 from ever even asserting that Leah Howell was not entitled
3 to cast a ballot for two reasons. One, they -- the Town
4 certified her as a candidate in the very election at
5 issue. She ran for town council. Further, they certified
6 the election results which gave her, and I might have the
7 number wrong, approximately 15 votes as a council member,
8 so for them to come back later and say this candidate who
9 we certified to run for town council and who received 15
10 votes is somehow not qualified to vote in the very
11 election she was running in is disingenuous and it's done
12 for the sole purpose of disenfranchising her vote.

13 THE COURT: The other argument that I questioned as I
14 look at the respondents' response has to do with I think
15 it was the *Ellis* case in which the respondents say that
16 basically what -- in denying these votes, they're doing
17 nothing different than what the law tells you to do when
18 somebody votes in the wrong precinct.

19 MR. BAILEY: All of the cases cited are either
20 completely factually distinguishable or the other thing
21 those cases were before the Single Voter Registration Act.

22 THE COURT: *Ellis* wasn't before the Single Voter
23 Registration Act, was it?

24 MR. BAILEY: If *Ellis* was not then -- here is the

1 distinction in this particular case. This was a technical
2 error made. This wasn't a failure to register. These
3 voters were duly registered. They went to DMV to
4 register. Nikki Painter who was the author of the poll
5 book, she put the poll book together, she came and
6 testified under oath I can tell you exactly how these
7 mistakes happened. They seem to put a lot of weight on
8 the fact that I didn't call somebody from the DMV. How
9 the error occurred is immaterial. The fact of the matter
10 is the author of the poll book sat under oath and said had
11 I had the information available to me that I should have
12 had, these four people should have been in the poll book
13 and if they were in the poll book they would have been
14 able to vote that day.

15 THE COURT: She said if she looked at the house
16 numbers they would have been included but she didn't look
17 at the house numbers; she looked at the word west.

18 MR. BAILEY: Right. This is the type of technical
19 error that is readily ascertainable to the Board of
20 Canvassers. They know who these -- well, it's not in the
21 record. These are four neighbors. They all live -- I
22 mean, it's a small village, Harpers Ferry is. People know
23 each other. It's not fair for me to add that because it's
24 not really in the record but all of these voters were

1 registered.

2 Ms. McCarty testified that she has voted in every
3 single election since she was of age appropriate to do so
4 and for them to disenfranchise her vote based on this
5 technical error is -- it's wrong.

6 THE COURT: So tell me why they're wrong to rely upon
7 *Galloway*.

8 MR. BAILEY: The *Galloway* decision does predate. I
9 got that one right, I think, Judge. 1949, I believe.
10 That case absolutely predates the Single Voter
11 Registration System. I'm sure that the other attorneys
12 here can -- Mr. Capehart and Mr. Kersey are far more
13 qualified to talk about how the system was set up, but the
14 statute 3-2-4(a) as set up states that the statewide voter
15 registration database is a single system for managing a
16 list of all the registered voters.

17 I believe Ms. Painter talked about this a little bit
18 in her testimony. There used to be a time where there was
19 separate registrations. That's not the case. When you
20 register at the DMV, which is, by the way, a state agency,
21 of course, you are a registered voter and you are duly
22 registered. If there's a mistake made and you're put in
23 the wrong poll book, that doesn't make you not duly
24 registered. That makes you the victim of a bureaucratic

1 error and it's readily ascertainable and it's easily
2 correctable by casting a provisional ballot and the
3 acceptance of that provisional ballot.

4 THE COURT: I think -- well, there's one other issue I
5 think that respondents address and I don't know that I saw
6 it addressed in your petition, and that was that they
7 argue that I think it was Ms. Case was not even a --
8 lacked standing to file a challenge because she failed to
9 ask for a recount.

10 MR. BAILEY: This is another example of the strained
11 analysis and the way to try to disenfranchise these voters
12 but I will answer that directly. Here is how we know that
13 there was -- and you are required to request a recount in
14 order for there to be an election contest. We know there
15 was a request for a recount made because they held a
16 recount. Ms. Case requested in writing as did Ms. McGee.
17 Ms. McGee wrote the check for the bond to pay for the
18 recount and Ms. Case did not write a separate check. I
19 think they shared the bond amount. The Town never
20 objected to this. The Town never raised this as an issue,
21 hey, we can't do a recount because you didn't ask for it.
22 In fact, the Town, and this is not in the record, but the
23 Town actually served Ms. Case and Ms. McGee through a
24 police officer with service of process stating this is

1 your notice to tell you when the recount is going to be.
2 It is going to be on I believe it was June 19th or
3 whatever date it was. They actually went to the --

4 THE COURT: Didn't they get served that because they
5 were candidates? Did they get served it because they were
6 the ones asking for it?

7 MR. BAILEY: I believe they were served with that
8 because they requested the recount and --

9 THE COURT: Or did every candidate --

10 MR. BAILEY: I don't know the answer to that question,
11 Judge. The fact that they held the recount, if they want
12 to come back later and say, oh, gee, you never officially
13 requested the recount so somehow you don't get the relief,
14 first of all, it is not a standing issue. It might be an
15 administrative prerequisite. They waived that by holding
16 a recount, by allowing for the notice --

17 THE COURT: Well, they acknowledged there was a
18 recount by McGee.

19 MR. BAILEY: Yes. And I also don't understand the
20 argument that if somehow even one candidate asked for the
21 recount that only that candidate can then benefit from the
22 change in the election results.

23 THE COURT: I don't know that they've taken that
24 position. All they indicated is is that she didn't have

1 standing and they didn't assert --

2 MR. BAILEY: If it's anything else, then, you know, no
3 harm, no foul, but in this case Ms. Case did actually
4 request the recount, but the issue in this case is not the
5 candidates. I mean, the issue in this case is these four
6 voters who were disenfranchised and that's precisely what
7 the West Virginia Supreme Court of Appeals tells us we
8 don't do when construing election laws. We enfranchise
9 voters; we don't disenfranchise them. The tribunal --
10 this governing body just went to great lengths to
11 disenfranchise these voters.

12 The other issue, Judge, that I presented, and it may
13 or may not be moot depending on the Court's position, is
14 this issue of disqualification. I mean, the respondents
15 asked you to rely on the factual finding --

16 THE COURT: I will be asking them about that because
17 the order seems to totally look past the statute, West
18 Virginia Code 3-7-6 that says that if --

19 MR. BAILEY: If your election is in contest you can't
20 sit in judgment which makes perfect sense.

21 THE COURT: They just said that they couldn't
22 disqualify each other, that there had to be a personal --

23 MR. BAILEY: Based on that, wouldn't be doing their
24 duty as elected officers.

1 THE COURT: I'm not sure why they didn't look to the
2 case law or to the statute for that authority or cite to
3 that authority in --

4 MR. BAILEY: I think they -- in fairness, I think they
5 looked at it and rejected it under this notion of rule and
6 necessity and the reason the rule and necessity --

7 THE COURT: Well, we'll let them --

8 MR. BAILEY: Okay.

9 THE COURT: I will ask you this though, one of their
10 last arguments or one of their arguments that I read
11 seemed to suggest that you have to actually still be
12 residing in that residence on that date of the election
13 and that that somehow is something that you did not prove
14 as it related to Ms. Howell by not calling her, that she
15 was still a resident on was it June 11th?

16 MR. BAILEY: Well, there wasn't evidence because
17 Ms. Howell wasn't there on that, but Nikki Painter
18 testified that she was. I think there was actually a
19 change by Ms. Painter after that fact in the voting record
20 that would have reflected that she was still there after
21 the vote. Here is what I say to that. If they're going
22 to take that position, why in the world did they grant her
23 15 votes? If she was not a bona fide candidate and would
24 have to be a resident, they certified her, they certified

1 votes for her. They can't come back now and say you
2 didn't prove she was a resident. I put on prima facie
3 evidence that she was a resident. If they wanted to rebut
4 it with evidence they should have put evidence on of that
5 and they didn't do it. They did not rebut any prima facie
6 evidence that all four of these individuals resided in the
7 Town of Harpers Ferry.

8 THE COURT: Thank you. Who's going to address the
9 Court over here?

10 MR. DONOVAN: My turn today, Your Honor. Would it be
11 okay if I remained here? Is that all right?

12 THE COURT: I think everybody is going to hear you
13 better if you come up to the podium.

14 MR. DONOVAN: Okay.

15 THE COURT: If you're not --

16 MR. DONOVAN: Usually being heard is not a problem for
17 me.

18 THE COURT: Everybody always says that but --

19 MR. DONOVAN: I understand.

20 THE COURT: Especially with a room full of people I
21 find it helpful to use the podium.

22 MR. DONOVAN: Your Honor, I think that there's some
23 fundamental issues here that came up. One of them
24 repeatedly is what's in the record, and Mr. Bailey, with

1 all due respect, said probably half a dozen times, "I know
2 this isn't in the record but." What the circuit court is
3 reviewing here today is a verdict from a trial and trials
4 have consequences, and the evidence that goes in at a
5 trial has consequences and how the Court views that
6 evidence, what inferences it accepts, what inferences it
7 rejects have consequences, and that leads me to what was
8 sort of the first point in our brief and I think the Court
9 honed in on it which is above all else, above everything
10 else in this case, and I will concede there are some
11 tricky legal issues, there is simply no evidence in the
12 record upon which the circuit court could reverse the
13 trial court's findings of fact that there was no evidence
14 as to Leah Howell's eligibility to vote in this election.
15 Mr. Bailey referred to --

16 THE COURT: Well, did you look at the statute as far
17 as what does a person have to certify when they register
18 to vote? Don't they certify under oath their eligibility,
19 their residency in order to register to vote?

20 MR. DONOVAN: They do, but as the Court pointed out
21 they have to remain eligible through the day of the
22 election --

23 THE COURT: Actually, I didn't say -- I didn't say I
24 agreed with you on that.

1 MR. DONOVAN: Sure.

2 THE COURT: I said you argued that and I asked if he
3 agreed with that, but I've yet to see in the Code where it
4 specifically says you have to still be there. I'm not
5 sure what happens in those last 30 days.

6 MR. DONOVAN: At the time that you vote you have to be
7 a resident. You can't move away. And the issue is --

8 THE COURT: Well, doesn't it say that if you move away
9 you can still vote in your last precinct if you move in
10 those 30 days?

11 MR. DONOVAN: I don't think so. I don't think that's
12 the way that I interpret that part of the statute. I will
13 take a closer look at it. I don't think you want me to
14 look at it right now. I think -- I don't read the statute
15 that way, and the problem is --

16 THE COURT: So if you move 30 days before an election,
17 you can't vote anywhere?

18 MR. DONOVAN: I don't think there's evidence that Leah
19 Howell -- let me back up and say --

20 THE COURT: Well, answer me that question first.

21 MR. DONOVAN: I don't know the answer to that
22 question.

23 THE COURT: Basically nobody better move 30 days
24 before an election; otherwise, they have lost their right

1 to vote.

2 MR. DONOVAN: Well, they no longer live in the place
3 where they want to vote. That seems pretty consistent
4 with what everyone is arguing here today. I don't know
5 the answer to that question, Your Honor, but I think more
6 importantly, you have to go back at least 30 days and
7 there's no evidence of Leah Howell's residency which as we
8 point out is the domicile, fancy legal term we use for
9 that. There was no evidence that -- there was no evidence
10 put on as to Leah Howell's domicile.

11 THE COURT: What about the certification of your vote?

12 MR. DONOVAN: I'm glad you brought that up. The
13 estoppel argument, there are a couple problems with that.
14 First of all, traditionally, estoppel requires some actual
15 conscious decision making, not just sort of estopped by
16 implication as Mr. Bailey seems to be arguing for, but
17 more fundamentally, and this resolves it, we are not the
18 Town. I do not represent the Town. Effie Kallas
19 represents the Town. I represent the contestees. The
20 contestees cannot be estopped by a position that the Town
21 took.

22 THE COURT: But how can the Town make a finding that
23 she's not --

24 MR. DONOVAN: I think the Town was probably incorrect.

1 THE COURT: What?

2 MR. DONOVAN: The Town was probably incorrect. I
3 can't speak for the Town on that on why they made that
4 finding or whatever --

5 THE COURT: Isn't that what I'm supposed to do is look
6 at this order?

7 MR. DONOVAN: Yes, Your Honor.

8 THE COURT: So wouldn't that be a clear error within
9 this order for them to make that conclusion?

10 MR. DONOVAN: No, absolutely not, because that's what
11 I'm saying about the Town, estoppel by implication. The
12 fundamental problem here with --

13 THE COURT: You just told me that the Town made a
14 mistake.

15 MR. DONOVAN: I said the Town may have made a mistake.
16 I don't know if they did or not. I don't represent them.
17 I don't know what they considered. I wasn't in the room
18 either when it was being certified or when they issued
19 that opinion, Your Honor.

20 In any event, the lack of evidence had a substantial
21 impact on my client's ability to contest that at the
22 hearing. Had Leah Howell been there to provide the prima
23 facie evidence that she needed to provide that we believe
24 wasn't provided, she would have been just like everyone

1 else, subject to cross-examination. I was prepared to
2 cross-examine her.

3 THE COURT: On her Facebook records?

4 MR. DONOVAN: Not on her Facebook records, Your Honor.
5 I was prepared to cross-examine her on the fact that our
6 records indicated that she shared several different
7 addresses, that she had moved about quite a bit, that she
8 had apparently abandoned her run for town council because
9 of her change of residency. These are all things that are
10 not in the record. I'm not asking the Court to rely on
11 them.

12 THE COURT: Couldn't you have subpoenaed her?

13 MR. DONOVAN: I would have subpoenaed her if -- my
14 position was I didn't need to subpoena her because the
15 burden of proof rested with the petitioners in this case.

16 THE COURT: Didn't they present evidence that she was
17 duly registered?

18 MR. DONOVAN: They presented --

19 THE COURT: She was a duly registered voter.

20 MR. DONOVAN: We would disagree that she was duly
21 registered based on our --

22 THE COURT: Well, you dispute that she was duly
23 registered in Harpers Ferry.

24 MR. DONOVAN: That's correct.

1 THE COURT: But she was a duly registered voter under
2 the state of West Virginia -- or with the state of West
3 Virginia. If it had been a county election or a statewide
4 election, you're not challenging all the information that
5 was contained therein, do you?

6 MR. DONOVAN: I think duly registered can only be
7 answered with reference to the vote that you're looking
8 at. Was she duly registered to run for some other office?
9 Perhaps. I don't know the answer to that. Was she duly
10 registered to vote in Harpers Ferry? Our position is no.
11 I didn't subpoena her because it's not -- the burden did
12 not rest with me in this case. My belief was as it is
13 today that without her there to provide some evidence of
14 her intent of her domicile, of where she intended to
15 reside, which we believe is very much an actual real issue
16 and not just some legal gymnastics, I would have cross-
17 examined her about that. I didn't --

18 THE COURT: Do we ask people that when they go to the
19 polls to vote?

20 MR. DONOVAN: We don't have to.

21 THE COURT: We don't. So when she went to the polls
22 to vote, doesn't that answer your question the same as it
23 does for any other voter that went to those polls?

24 MR. DONOVAN: No. The reason -- because she -- I'm

1 glad that you brought that up because that is sort of
2 verging off here into the Secretary of State's argument,
3 but that very reason is why this duly registered
4 requirement is important and existing why someone has to
5 be registered or ought to be registered in the town where
6 they want to vote so that --

7 THE COURT: How do you do that? How do you register
8 in the town where you vote?

9 MR. DONOVAN: When you register to vote you tell them
10 what your address is.

11 THE COURT: Okay. And what was her address?

12 MR. DONOVAN: The record is bereft with the
13 information as to what her address was.

14 THE COURT: You didn't see the documents that Nikki
15 Painter brought to as an exhibit?

16 MR. DONOVAN: Those were based on -- my understanding
17 is that Nikki Painter made those changes based on her own
18 judgment but did not actually discuss Ms. Howell's
19 residency with her. I may be mistaken about that but
20 that's part of the failure of records in this case.

21 THE COURT: Wasn't that the voter registration
22 information?

23 MR. DONOVAN: Which had her registered in Bolivar.

24 THE COURT: No. I believe that she listed her address

1 as Harpers Ferry, didn't she?

2 MR. DONOVAN: Well, it's a Harpers Ferry zip code but
3 it's not -- the address that she was registered in --

4 THE COURT: When you go to register, what do they ask
5 you for by statute? They ask you for your house number,
6 your street name, your city, your county, and your state;
7 correct? That's what you're required by Code to provide
8 in order to register.

9 MR. DONOVAN: I haven't registered to vote since I was
10 18.

11 THE COURT: You've been reading these Codes, haven't
12 you?

13 MR. DONOVAN: That's correct, yes.

14 THE COURT: So when she gives that information,
15 doesn't she give Harpers Ferry, West Virginia?

16 MR. DONOVAN: Yes, but I think that's -- the way the
17 post office addresses work, you may have an address that
18 says Harpers Ferry. That doesn't mean you actually live
19 in Harpers Ferry.

20 THE COURT: But isn't that all the information that
21 she is required to give in order to be duly registered?

22 MR. DONOVAN: Yes, and based on that information she
23 was registered in Bolivar.

24 THE COURT: Whose fault was that?

1 MR. DONOVAN: We don't know, Your Honor. That's
2 another important part of this record.

3 THE COURT: You don't know or are you ignoring the
4 testimony of Nikki Painter?

5 MR. DONOVAN: No, I'm not ignoring it. I'm relying on
6 it expressly. I'm --

7 THE COURT: I'm saying did the Town ignore it though?

8 MR. DONOVAN: Well, the Town just as Your Honor did
9 and is restricted in any other case is not allowed to rely
10 on its own knowledge of facts. The Town can only render
11 its verdict based on the evidence in front of it and the
12 evidence in front of it from Ms. Painter was that she
13 didn't know that -- the source of this. I mean, if the
14 Court was going to rely on a technical error, I think you
15 should ask what was the nature of the error, who committed
16 the error, when was it committed, how was it committed.
17 We don't know the answers to any of those questions
18 because Ms. Painter admitted on cross-examination that she
19 was merely speculating and she was not, despite
20 Mr. Bailey's best efforts to buttress her testimony, she
21 was not proffered as an expert, her opinions were not put
22 forth as someone who is an expert on elections. She was
23 called as a fact witness and she admitted she didn't know
24 any of that information and that she was only speculating.

1 They could have easily called someone who did know the
2 answer.

3 THE COURT: Isn't circumstantial evidence just as good
4 as direct evidence?

5 MR. DONOVAN: Absolutely, Your Honor, but there was no
6 circumstantial evidence. She just speculated --

7 THE COURT: The fact that every single one of these
8 went to DMV?

9 MR. DONOVAN: And we don't know how many people also
10 went to the DMV whose records -- who gave addresses and
11 weren't subject to that.

12 THE COURT: Didn't Ms. Painter even make reference to
13 the fact that when she went back and she looked at these
14 records she saw others who had -- that she had to correct
15 and take the word west out of their address?

16 MR. DONOVAN: I don't know about that, Your Honor, but
17 I do know -- do understand if what you're asking is what
18 is the value of circumstantial evidence, I would not argue
19 with you that there is value to circumstantial evidence.
20 I would, however, point out that whatever the
21 circumstantial evidence that was put on at the trial was
22 and whatever inferences could be drawn from it were drawn
23 and rejected by the trial court whose findings are subject
24 only to reversal if they're clearly erroneous.

1 THE COURT: Correct. So what did Ms. Painter say
2 about those house numbers, do you recall?

3 MR. DONOVAN: She said she looked at a map, she used a
4 couple different acronyms that were not explained. She
5 said based upon her opinion and her knowledge she thought
6 that those houses were in Harpers Ferry and that was why
7 she made the change. What she didn't say was that she had
8 any knowledge whatsoever, personal knowledge, firsthand
9 knowledge, of whether these voters actually resided at
10 those addresses. There was a real question --

11 THE COURT: Let's not look at the issue of residence
12 yet because one of the things that I think is lacking from
13 this order is that they never make any findings of or
14 conclusions about residences of any of the voters other
15 than Ms. Howell; isn't that accurate? They don't make a
16 specific finding as to any of the three other voters.

17 MR. DONOVAN: I think when they recited in the
18 findings of fact the testimony of the other three voters
19 as to residence and left that it was undisputed, I think
20 that is a finding that they agreed with them, and I think
21 the conclusions of law as to those three voters support
22 that that was their finding.

23 THE COURT: I'm sure Ms. Kallas if she can find it
24 will point that out or whatnot, but I don't recall seeing

1 that within their conclusions of law that these three
2 individuals were, in fact, residents. I don't see where
3 they ever made that conclusion.

4 MR. DONOVAN: I'm not sure that it matters though
5 because I think the Court was probably trying to avoid
6 having to make factual findings that weren't necessary for
7 its conclusions of law.

8 THE COURT: Okay. Well, then let's not look at the
9 residence issue and let's stick to whether or not she was
10 duly registered and what caused this confusion. My
11 concern is that Ms. Painter testified that she prepared
12 that poll book; correct?

13 MR. DONOVAN: Yes.

14 THE COURT: And that Ms. Painter testified that she
15 left these names out because their address was listed as
16 West Washington instead of straight Washington; correct?

17 MR. DONOVAN: Correct.

18 THE COURT: And she testified that when she looked at
19 these house numbers that those house numbers should have
20 been in Harpers Ferry and, therefore, she should have
21 included them; correct?

22 MR. DONOVAN: Correct.

23 THE COURT: So it sounds like a mistake made by
24 Ms. Painter, doesn't it, as opposed to DMV or anybody

1 else?

2 MR. DONOVAN: Well, I wouldn't disagree with that, but
3 I think that was contrary to her testimony. She placed
4 the blame squarely on the DMV but she admitted that that's
5 speculation.

6 THE COURT: She said DMV made them include the word
7 west but she relied on that word west.

8 MR. DONOVAN: Right.

9 THE COURT: And she kind of wishes she had relied on
10 their house numbers which is what she went back to do.

11 MR. DONOVAN: I want to be clear when I'm making --
12 Your Honor is getting a lot of concessions out of me,
13 which is good, but I do want to be clear that I'm
14 conceding what the house number is and whether that should
15 have been in Harpers Ferry is a different issue than
16 conceding that there was an actual residence there which
17 is what is important to us under the Howell argument.

18 THE COURT: Okay. Well, I thought we were talking
19 about the technical error issue.

20 MR. DONOVAN: And we are, and while we're talking
21 about that, I will say, and Your Honor is aware our
22 argument on the technical error question was two-fold.
23 Number one, we believe there was not enough evidence in
24 the record to convince the town council that it knew

1 enough about what this alleged technical error was to
2 conclude that it should be used to change the Board of
3 Canvassers' decision on these votes.

4 More importantly though, we believe that even if the
5 technical error were as Ms. Painter says it was, even if
6 we accepted for argument sake, her speculation about the
7 nature of the error, legally, we believe it's not the type
8 of error that qualifies as a technical error or omission
9 that must be overlooked and the reason we believe that is
10 because the Supreme Court of the State of West Virginia
11 has looked at a very similar error in the past and said
12 this is not a technical error that can be overlooked.

13 THE COURT: What was the similar error in the past?

14 MR. DONOVAN: The error in the *Galloway* case was
15 failure to be registered in the town where you're voting.
16 Again, we were dealing with two different poll books at
17 that time, but that is a distinction without a difference.

18 THE COURT: Is it --

19 MR. DONOVAN: The difference is are you in the poll
20 book, are you registered as a voter in the town where you
21 are trying to vote.

22 THE COURT: Wasn't the fact back then though that if
23 you wanted to be registered in your municipality you had
24 to fill out a whole other page of your application to

1 vote? Isn't that the Section 22 that they cite within
2 that?

3 MR. DONOVAN: That is correct, yes. There was a
4 separate --

5 THE COURT: They didn't fill out that separate page to
6 get themselves into that poll book.

7 MR. DONOVAN: But when you register now, Your Honor,
8 you still have to tell the Secretary of State what city
9 you reside in, what municipality you reside in --

10 THE COURT: Correct your statement. You have to tell
11 them what city, not what municipality. Read the Code.
12 The Code says city which means that they tell them Harpers
13 Ferry and you just told me whereas it's Harpers Ferry but
14 it's Bolivar. They never told them Bolivar. They told
15 them Harpers Ferry.

16 MR. DONOVAN: I think in fairness, Your Honor, that's
17 an interesting distinction, but I'm not sure it is a
18 distinction that the legislature would have actually
19 intended. I think they used city and municipality fairly
20 interchangeably throughout the Code, certainly throughout
21 our Supreme Court's --

22 THE COURT: Well, do you dispute that these
23 individuals listed their home city as Harpers Ferry?

24 MR. DONOVAN: No, but they did not list their address

1 as being within the city of Harpers Ferry.

2 THE COURT: What part of that house number didn't list
3 them as being in Harpers Ferry?

4 MR. DONOVAN: I suppose the part where it was West
5 Washington instead of Washington, but I don't think that's
6 material. The types of technical errors -- there's a case
7 that I don't think was -- I think we cited it. I don't
8 think that the petitioners cited it. It was *Butcher v.*
9 *Witten*. I know it well because it was an election trial
10 in Logan County that I also tried. That case involved
11 technical errors and omissions and I think it's important
12 to look at how those were different from the ones in the
13 *Galloway* case.

14 In that case the technical errors were failure to sign
15 a poll book after voting and the fact that one of the
16 commissioners of a particular precinct had put up the no
17 electioneering sign about 285 feet away from the entrance
18 instead of 300 feet. Those were kind of technical errors
19 that in that case the supreme court said you can overlook.

20 Failing to be properly registered is a horse of
21 different color. It goes to the fundamental way that we
22 protect the ballot box and that we prevent, as Your Honor
23 said, this idea of not knowing and we question everyone
24 and subject them to interrogation when they show up to

1 cast their ballot. We expect them -- the legislature has
2 decided that you need to be duly registered, you need to
3 have the right city on your voter registration card so
4 that we don't have to have a little mini trial before we
5 let people go in and punch their ballots.

6 THE COURT: If these people were not properly
7 registered, which is what you want me to find, why was it
8 that Nikki Painter was able to make the correction without
9 them having to go in and make any changes to their
10 registration information at all?

11 MR. DONOVAN: I don't know, Your Honor. That's an
12 area of the law that I don't think you can fault me for
13 not knowing, but I have thought all along it was a little
14 bit odd that in some of these cases we had people coming
15 to the county clerk's office and saying, hey, there's a
16 problem here, and some of these cases the changes were
17 just made without ever consulting them. I do think --

18 THE COURT: Actually, didn't they testify that they
19 went to DMV? They didn't go to the county --

20 MR. DONOVAN: That's right. I do believe there was
21 some testimony that at some point Ms. Painter may have
22 spoken to one of them.

23 THE COURT: Yes. I think the McCartys went to the DMV
24 and got it fixed, but Ms. Painter said she fixed the other

1 ones and found some where those people didn't vote at all
2 and somehow or another they were included in the poll
3 book, but nevertheless, she made those corrections to take
4 that word west out of anywhere where she found the house
5 numbers to be inapplicable.

6 MR. DONOVAN: All she's doing is dealing with the duly
7 registered part. The separate requirement of residency
8 she's making no judgements about and she did not put any
9 evidence on and that's what is important. I don't know if
10 it was appropriate or inappropriate for her to do that. I
11 certainly wouldn't want to accuse anyone of something
12 inappropriate without having any idea --

13 THE COURT: Well, if it was a technical error it would
14 be very appropriate for her to fix it; right?

15 MR. DONOVAN: I don't know. I don't know the answer
16 to that. I don't know what guides her in that
17 decision making process.

18 THE COURT: So the only candidate -- or the only
19 voters that you say did not establish the residency
20 component is the Howells -- or Howell; correct?

21 MR. DONOVAN: That's correct. That was my reading of
22 the town council's opinion and that is certainly my
23 clients' position, yes.

24 THE COURT: But you're not sure if they're estopped

1 from making that argument themselves or not based upon the
2 fact that they certified her as a candidate and counted
3 votes for her?

4 MR. DONOVAN: Again, that was the town council.

5 THE COURT: It's the same tribunal, isn't it?

6 MR. DONOVAN: Actually, I don't know if it is the same
7 tribunal. I think the tribunal is a separate body
8 established by the 3-7-6. I know we're dealing with a
9 statute from 1963 that actually refers to the county court
10 and doesn't refer to the town council at all so it gets a
11 little confusing.

12 THE COURT: What about your arguments regarding the
13 standing of Ms. Case?

14 MR. DONOVAN: Absolutely. Standing is a
15 jurisdictional prerequisite and the burden falls on the
16 petitioners to establish it. It fell on them at trial to
17 establish it. There was testimony and evidence submitted
18 suggesting that Ms. McGee submitted a letter and a bond.
19 There was some question about the timing of that, I think
20 the transcript reflects. There was also testimony that
21 Ms. Case did not submit the required bond. Whether or not
22 she submitted a timely request doesn't really matter to us
23 because it's undisputed that she didn't submit the bond.
24 The way we read the statute anyone who wants a recount has

1 to submit a request and a bond in accordance with the
2 statute.

3 THE COURT: What effect, if any, does that have on
4 this case?

5 MR. DONOVAN: We think it would deprive Ms. Case the
6 ability to obtain the relief requested. We believe only
7 Ms. McGee would --

8 THE COURT: So --

9 MR. DONOVAN: -- take a seat on the Harpers Ferry Town
10 Council as a result of the election process.

11 THE COURT: So we count the votes but we don't apply
12 the votes equally across the board?

13 MR. DONOVAN: I will concede that it is an open
14 question. It hasn't been addressed squarely. There have
15 been -- you can kind of comb back through the long history
16 of supreme court opinions on it and see it applied
17 inconsistently. In times the supreme court has looked at
18 election challenges and changed the entire outcome,
19 different positions on the ballot based on the results,
20 and at other times they've only changed the outcomes as to
21 the individuals involved in the contest. Again, it's an
22 open question. I don't have much more for you on that
23 except to say that it's something that if this case makes
24 its way to the supreme court I think they should

1 address --

2 THE COURT: Lastly is the question about whether or
3 not these two individuals should have participated in the
4 trial in light of the fact that their election was in
5 contest.

6 MR. DONOVAN: Yes, Your Honor. This one is an easy
7 one. If they hadn't participated there wouldn't have
8 been -- we wouldn't be here today.

9 THE COURT: That's not a true statement.

10 MR. DONOVAN: Why is that, Your Honor? I don't
11 understand. If they had not -- if everyone had -- if all
12 the contestees had recused themselves, which is what the
13 statute requires, then --

14 THE COURT: If those two had --

15 MR. DONOVAN: -- there would be no quorum.

16 THE COURT: -- if the ones whose election was in
17 contest, which are the two, you would have been left with
18 four. The vote would have been two-two and the mayor
19 would have been the tie breaker.

20 MR. DONOVAN: Your Honor, I'm looking at the -- first
21 of all, I don't think that's correct. I think the math on
22 that is wrong. I think there was a third election. I
23 think Premack or --

24 THE COURT: Somebody recused themselves.

1 MR. DONOVAN: That's --

2 THE COURT: Which left the vote count was four in
3 favor and two against. Two dissented, right, and four
4 voted so if we took out your two and it would have been a
5 two-two tie and the mayor would have been casting a vote
6 for tie vote. No?

7 MR. BAILEY: Mayor was one of the votes.

8 MR. DONOVAN: Mayor was one of the votes. So it would
9 have been a two-two tie.

10 THE COURT: It would have been one-two. He should
11 have held out until --

12 MR. DONOVAN: He votes always. He votes --

13 MS. KALLAS: He votes always.

14 MR. DONOVAN: It's odd. It's unusual.

15 THE COURT: Okay.

16 MR. DONOVAN: So, first of all, Your Honor, I would
17 say to that I disagree respectfully with the
18 interpretation of who a contestee is. I mean, I was
19 looking at the election contest that was filed by
20 Mr. Bailey on behalf of his -- on behalf of his clients --

21 THE COURT: We talked about it when you guys were here
22 before; right? That argument a little bit.

23 MR. DONOVAN: That's right.

24 THE COURT: I declined to rule on it, but by the time

1 this case started, right, before the first evidence was
2 taken, you had whittled down what the issues would be, had
3 you not?

4 MR. DONOVAN: Yes, but --

5 THE COURT: So at that point in time prior to the
6 taking of evidence you then only had three individuals who
7 were in conflict with this case.

8 MR. DONOVAN: There were three individuals whose
9 election was at issue, but the statute 3-7-6 expressly
10 provides for the petitioners or the contestors, whatever
11 we want to call them below, to amend their notice of
12 contest from time to time as the evidence changes. They
13 never did that. They could have done that. We did not
14 whittle down a single challenge. We as contestees.

15 THE COURT: I understand.

16 MR. DONOVAN: Everything that was done was done by the
17 contestors. They had complete control over all the claims
18 that they have handled. At no time even after we became
19 before this Court and had an argument about who the
20 contestees were did they ever amend the petition to change
21 that. I don't know why. I don't know if there was some
22 strategic reason why that was not done. I probably would
23 have done it had I been in their shoes, but it wasn't done
24 so we're left with applying the plain language of the

1 statute.

2 I see Nancy Singleton Case and Deborah McGee on one
3 side of the "V" and I see Hardwick Smith Johnson,
4 Charlotte Ward Thompson, Christian Pechuekonis, Marjorie
5 Flinn Yost, Barbara Humes and Jay Premack all listed as
6 the petitioner says as contestees. All I can do is look
7 at the statute and say these are the people whose
8 elections are being contested.

9 If that seems like an overly technical or a legally
10 gymnastic approach to this, look at it this way, when they
11 are the only ones who had control over who was listed as
12 contestees we could have been in this dance for weeks.
13 Someone recuses themselves, then more challenges get
14 thrown out, someone --

15 THE COURT: But my question is is once the issues were
16 whittled down right before taking the evidence, you knew
17 what the issues were, you knew at that point in time it
18 would only affect those three candidates.

19 MR. DONOVAN: And because of the position that -- yes,
20 that's correct.

21 THE COURT: Which would -- even with all three
22 stepping aside you would still have a quorum left.

23 MR. DONOVAN: That's correct, but because of the
24 position I was put in by the legal decisions of the

1 contestors and their counsel, they could only -- they
2 could go no more than look at whose election is being
3 contested on the face of the document. That's the only
4 thing they could rely on. It would have been foolish to
5 rely on anything else not knowing what claims might come
6 back out or come back up at some point during the trial.
7 I mean, it would have -- it's something I wouldn't have
8 advised them to do because I don't think it would have
9 been in their legal interest to ignore what the
10 petitioners were saying about whose election was being
11 contested. Thank you.

12 THE COURT: I will be basically taking it under
13 advisement. I will be drafting my own order here within
14 the next couple of days. This case I tried to get it done
15 rather quickly. I'm not sure how that addressed your
16 motion for preliminary injunction. I didn't get a
17 specific request for setting it for a hearing. It was my
18 hope that by having expedited the briefing schedule and
19 setting this that it would negate any need to have a
20 separate hearing on that preliminary injunction matter.
21 Do we have a certain timetable in front of us on that?

22 MR. BAILEY: No. That's exactly the way I looked at
23 it when the Court set this for oral argument so quickly I
24 backed off on the injunction relief. If the Court

1 anticipates a decision in the next couple of weeks I think
2 maybe we're okay, but my clients are concerned that there
3 could be actions by the governing body taken to more or
4 less stack different commissions and things like that with
5 politically like-minded folks when this isn't really the
6 governing body. If it changes --

7 THE COURT: Well --

8 MR. BAILEY: -- that would be my argument added for an
9 injunction, but of course, we're not here for that today,
10 Your Honor.

11 THE COURT: Well, should a need arise, file a motion
12 requesting a hearing and we will take it up then.

13 Ms. Kallas, I didn't mean to totally exclude you.

14 MR. BAILEY: I was going to say the same for --

15 THE COURT: So if either side has anything in addition
16 that they want to add that they don't think that either
17 Mr. Bailey or Mr. Donovan addressed with the Court -- if
18 you have anything, Ms. Kallas, you wish to -- I mean, I
19 did ask that question about the residency because it
20 didn't appear to me that the Town addressed the residency
21 issue for any of the voters other than Ms. Howell.

22 MS. KALLAS: I can't speak to -- obviously, the
23 Corporation gave their order and that's where it stands.
24 There will be no interpretation from me.

1 The only thing that caught my attention in going
2 through all of the materials in preparation for today is
3 the constant reference by both counsel and by those who
4 testified about the 2019 election guide. I'm sure you saw
5 that all over. I don't know if the Court --

6 THE COURT: The canvassing guide?

7 MS. KALLAS: Exactly. I don't know if the Court
8 received one. If the Court wants, I certainly have that
9 for your pleasure because it's all over -- referenced.
10 That's the only thing that --

11 THE COURT: I don't see myself relying upon that. I
12 don't think Mr. Bailey cited it as any authority. I mean,
13 I think there was one, but somebody then argued that the
14 statute would trump that and I would agree that the
15 statute is going to control over a guide.

16 MS. KALLAS: Yes. It's just a constant reference to
17 it and I thought that's the only thing that seems to be
18 missing because it was relied upon but I'm not going to
19 make any assertions as to how, when, where or why. Just
20 that that's the guide that's presented and that's the
21 guide that was used.

22 THE COURT: Mr. Kersey or Mr. -- I flipped my page. I
23 think it was Capehart.

24 MR. DONOVAN: Your Honor, respectfully, we didn't

1 object to the motion to file the amicus brief. We would
2 object to the motion to intervene, and inasmuch as either
3 the secretary or the attorney general are parties in this
4 case and have not been granted leave to intervene, we
5 would object to their argument here today.

6 THE COURT: Well, and let me go back -- I didn't bring
7 out my rule book because I just brought those three code
8 books and not my rule book. I know I was looking at the
9 appellate rules and if we have -- my recollection of
10 reading the Rules of Appellate Procedure, and that's
11 essentially how this Court is functioning, is that if it
12 was a -- and I'm not going to use the rights words here,
13 but if it's a novel issue such that the Court was
14 permitting 20 minutes on each side other than one where
15 there wasn't really a question of law where the supreme
16 court limits parties to ten minutes, when there's
17 ten-minute arguments they don't let them argue, but when
18 there's a 20-minute full-fledged situation they're allowed
19 to argue.

20 MR. DONOVAN: Just preserving the objection. I don't
21 mind hearing from them.

22 THE COURT: Looks like it is going to be Mr. Kersey.

23 MR. KERSEY: Thank you, Your Honor. Donald Kersey,
24 general counsel for the Secretary of State's Office. So

1 to avoid any concern by the respondents here, I will just
2 talk about a little bit of the statutory structure and how
3 it came about, how the Statewide Voter Registration System
4 itself works as far as Single Statewide Voter Registration
5 System itself so I won't get into the merits unless you
6 ask me a question.

7 In 2003 the legislature passed a law that became
8 consistent with the Help America Vote Act which amended
9 the National Voter Registration Act of 1994. Essentially
10 what that law did was it made the Secretary of State the
11 single repository for voter registrations in the state so
12 if you go to the DMV, you go to WIC -- or DHHR or your
13 county clerk's office or voter registration after high
14 school, all those records are sent to a single place,
15 Statewide Voter Registration System, where they're housed
16 electronically and the information is in and of itself
17 public record. They're self-authenticated because when
18 you sign a voter registration you're affirming that you
19 are, in fact, a duly registered voter in the state, and
20 once that registration is accepted by the county clerk's
21 office you are a registered voter so to become a
22 registered voter in a municipality in 1949 or 1950 as we
23 discussed you had to actually fill out a different form.
24 That's different. It's been different since 2003. We've

1 had the new system since 2003. Actually, it might have
2 been built at the end of 2003 and then started in 2004
3 before the presidential election.

4 Before that in 2002 West Virginia Code Section 8-5-13
5 was amended. This essentially makes the duly registered
6 argument in *Ellis* moot. The reason is and this is for
7 uniform application of the laws, not the merits, uniform
8 application of the laws throughout the state. The reason
9 is it changed the language which used to read, and I will
10 read it if that's all right. Notwithstanding any charter
11 provision to the contrary, it shall be the duty of each
12 city by charter provision or each municipality by
13 ordinance to make provision for integrating the conduct of
14 all municipal elections with the system of, quote,
15 permanent registration of voters, period. Such chart
16 provisional ordinance shall to the extent reasonably --
17 parallel the provisions of Chapter 3 of this code which
18 integrate county and state elections with the permanent
19 registration system.

20 The legislature removed that language and they amended
21 it to say this and this is the still the law today.
22 Notwithstanding any charter provision to the contrary, it
23 is the duty of each city by charter provision or each
24 municipality by ordinance to make provision for

1 integrating the conduct of all municipal elections with
2 the system of, quote, permanent registration of voters as
3 provided in Article 2 Chapter 3 of this Code.

4 THE COURT: That's why they go to Ms. Painter to get
5 their poll book; correct?

6 MR. KERSEY: That's exactly why they go to Ms. Painter
7 to get the poll book. So the way the process works is the
8 recorder will call up the county and say we have an
9 election coming up, we need a poll book printed. They're
10 already in physical format -- they print them from the
11 system which is more realtime. The purpose is to increase
12 the franchise, to make sure our records are very accurate,
13 as up to date as possible. So, uniformly, whether you're
14 in a municipality or county or state election, the record
15 that's on file in our office is, until it's proven
16 otherwise, is the record and the county clerk's duty is to
17 make sure that when they change the record it's accurate.
18 That's their constitutional duty.

19 I will mention one thing about the standard of review.
20 West Virginia Code Section 3-1-41, this is by the
21 tribunal. 3-1-41(e) says reasonably ascertained. You
22 don't have to come in with deeds and your neighbors and
23 your vehicle records. Those are helpful pieces of
24 evidence but the Code doesn't require it. What if, and

1 this is what we're most concerned about, what if you're a
2 homeless person and you live on the streets, the law lets
3 you register to vote at a homeless shelter or a place near
4 there.

5 THE COURT: I've assisted somebody in doing that once.

6 MR. KERSEY: I mean, you have to have a provision for
7 these kinds of people. A ruling that you have to come in
8 and somehow prove I've lived here, here is all my
9 paperwork, here is people, there are people in our state
10 that don't have the resources to do that. They lose the
11 opportunity to vote and their ballot won't count. We have
12 municipalities like Harpers Ferry or anywhere else -- we
13 have 231 in the state. 230 other municipalities would
14 have done this differently. So we're concerned with
15 consistent application, uniform application of the laws
16 under Chapter 3 Article 2 which the city is --

17 THE COURT: Thank you.

18 MR. KERSEY: Thank you.

19 THE COURT: Any response to anything he had to say,
20 Mr. Donovan?

21 MR. DONOVAN: Thank you, Your Honor. I think we
22 addressed it in our brief.

23 THE COURT: Thank you, folks. I appreciate all of the
24 information and I was up until midnight making sure I had

1 freshly reviewed everything anticipating it so I will
2 diligently get an order out. If I don't get it out during
3 the week because that's when my docket is the busiest I
4 will get it out over the weekend because that's what we do
5 when we need to get it done. Thank you.

6 (Proceeding concluded.)

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1 STATE OF WEST VIRGINIA,
2 COUNTY OF JEFFERSON, TO WIT:

3
4 I, Tracy P. Rice, Official Court Reporter for the
5 Circuit Court of Jefferson County, West Virginia, and
6 Registered Professional Reporter, do hereby certify that
7 the foregoing is a true and correct transcript of the
8 proceedings had and testimony taken in the action of Nancy
9 Singleton Case and Deborah A. McGee, Petitioners, v.
10 Hardwick Smith Johnson, Charlotte Ward Thompson, Christian
11 Pechuekonis, Marjorie Flinn Yost, Barbara Humes, Jay
12 Premack and Corporation of Harpers Ferry, Respondents,
13 19-P-136, held on the 28th day of October 2019.

14 I hereby certify that the transcript within meets the
15 requirements of the Code of the State of West Virginia,
16 51-7-4, and all rules pertaining thereto as promulgated by
17 the Supreme Court of Appeals.

18 Given under my hand this 1st day of November 2019.

19
20 

21 _____
22 Official Reporter, Circuit Court of
23 Jefferson County, West Virginia
24

In the Circuit Court of Jefferson County, West Virginia

Nancy Singleton Case,)	
Deborah A. McGee,)	
Plaintiffs,)	
)	
vs.))	Case No. CC-19-2019-P-136
)	
Corporation of Harpers Ferry,)	
Harwick Smith Johnson,)	
Charlotte Ward Thompson,)	
Christian Pechuekonis,)	
Marjorie Flinn Yost ET AL,)	
Defendants)	
)	

ORDER REVERSING SEPTEMBER 11 ORDER DECLARING ELECTION RESULTS

This is an appeal from an Order Declaring Election Results by the Harpers Ferry Election Contest Tribunal, wherein the Tribunal refused to count four provisional ballots. Contesters assert that these four voters were duly registered voters in the State of West Virginia and in the municipality of Harpers Ferry, were residents and therefore, their votes should be counted. Upon review of this matter, this Court does reverse the Order of the Harpers Ferry Election Contest Tribunal for the reasons stated below:

BACKGROUND:

This matter comes before the Court on appeal, pursuant to WV Code 3-7-6, of the Order of the Municipal Election Tribunal of the Corporation of Harpers Ferry which was entered on

September 11, 2019. Contesters filed this appeal on September 27, 2019, at which time an Appendix of the Record was attached. An Objection to the contents of the Appendix was filed by the Corporation of Harpers Ferry, challenging documents contained in the proposed Appendix at pp. 13 – 60; this Objection was later joined by Contestees. On October 17, 2019, the Secretary of State filed a Motion for Leave of Court to file a Brief as Amicus Curiae. A response was filed to the Petition for Appeal by Contestees on October 22, 2019. On October 23, 2019, Contestees filed a Response to the Motion for Leave of Court, indicating they had no objection to the filing of the Brief as Amicus Curiae by the Secretary of State. On October 28, 2019, this Court heard oral arguments from counsel for Contesters, counsel for Contestees and counsel for the Secretary of State for West Virginia.

Without objection, all parties agreed that the exhibits attached to the dissenting opinion had not been considered by the Tribunal and should not be included in the record.

ACCORDINGLY, it is Ordered that Appendix 028-060 will not be considered by this Court.

The Tribunal made the following findings of fact which this Court does adopt based upon its review of the record: On June 11, 2019, the Corporation of Harpers Ferry (the “Town”) held a municipal election for the offices of Mayor, Recorder, and five at-large council seats. (Appx. 002, Para. 1) On June 17, 2019, the Board of Canvasser (the “Board”) met to conduct a canvass of election returns. At this meeting, the Board declined to count certain provisional ballots cast by voters whose names were not contained in the Harpers Ferry poll book. Following conclusion of the canvass, the Board formally declared the results of the election. (Appx. 002, Para. 2) The Board conducted a recount on June 26, 2019, and certified the results on June 28, 2019. (Appx. 002, Para 4 and 5) On July 8, Contesters filed their Notice of Intent to Contest. (Appx. 002, Para. 7) On July 18, 2019, Contestees filed a responsive pleading titled

“Contestees’ Notice Pursuant to West Virginia Code 3-7-6”. (Appx. 003, Para. 10.) On August 24, 2019, the Town Council of the Corporation of Harpers Ferry (the “Tribunal”) heard testimony and received evidence in the trial of this election contest. (Appx. 003, Para. 13.)

Although not contained in the record, the Tribunal makes a finding of fact regarding the request for a recount, “The Board met 48 hours later, on June 19, 2019 to certify the election results. At this meeting, Recorder Kevin Carden asserted that two losing candidates had made a recount request. Recorder Carden failed to produce to the Board any written evidence of any recount request at the time despite request to do so by another member of the Board. Nonetheless, based only on Recorder Carden’s representations, the Board delayed certifying the election in order to conduct a recount.” (Appx. 002, Para. 3)

MAKEUP OF TRIBUNAL:

WV Code 3-7-6 states, “In all cases of contested elections, the county commission shall be the judge of the election, qualifications and returns of their own members 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) W. Va. Code § 8-5-17 states, in pertinent part: “All elections ordered and held by a municipality under the provisions of this chapter shall be canvassed by the governing body of such municipality.” The Court in *State ex. rel. Peck v. City of Council of City of Montgomery*, Id. and *Evans v. Charles*, 133 W.Va. 463, 56 S.E.2d 880, has held that “a municipal council has original and exclusive jurisdiction to hear and decide contested elections involving the selection of municipal officers.”

The parties do not dispute that the “The council of a city, town or village to which one,

whose seat is contested, is elected, is the proper tribunal to try such contest, and not the council in office at the time of the election. “ Syl. pt. 1, *Price v. Fitzpatrick*, 85 W.Va. 76, 100 S.E.872, (1919). What is contested is whether WV code 3-7-6 would prohibit Council members Johnson and Thompson from serving on the Tribunal based upon WV Code 3-7-6 which prohibits a member . . . whose election is being contested, from participating in judging the election, qualifications and returns.

The Tribunal concluded that it “has no legal authority to compel any one or more of its members to disqualify themselves from participating in any business that comes before the Town Council. Disqualification is determined and undertaken on an individual basis.” This Court declined to make a ruling on this very issue when the Contesters filed a Writ of Prohibition; at the time, ruling that a Writ of Prohibition was not an applicable remedy available to the Contesters at the time of filing.

At the start of the evidentiary hearing held on August 24, 2019, Contesters renewed their motion to disqualify council members Johnson and Thompson from serving on the Tribunal. The Tribunal denied the request stating only that they had no legal authority to disqualify any of its members. The Tribunal seems to ignore WV Code 3-7-6 which prohibits a member whose election is being contested, from participating in judging the election, qualifications and returns. Contestees previously had argued that because all seats on the council were up for election, and the law requires the Town Council to serve as the Tribunal, that the Rule of Necessity required all Contestees to serve on the Tribunal. The Tribunal makes no conclusions of law as it relates to their decision to deny Contesters’ motion. This Court will not address this specific issue any further as the present makeup of the Tribunal is not relevant to the findings of this Court and conclusions reached on the merits of the case.

STANDARD OF REVIEW

WV Code 3-7-7 permits either the Contester or the Contestee to “appeal to the Circuit Court of the county from the final order or decision of the county court [Municipal Tribunal] in such proceeding, upon the filing of a bond 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, and the circuit court shall decide the contest upon the merits.”

Syl. Pt. 6, *Brooks v. Crum*, 158 W. Va. 882, 216 S.E.2d 220 (1975), 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.

STANDING OF NANCY SINGLETON CASE

This Court will first address the issue of Contester Nancy Singleton Case’s standing to bring or prosecute this election contest. The Tribunal concluded that Nancy Singleton Case failed to present evidence that she made a formal request for a recount, accompanied by the required bond, within 48 hours of the declaration of the election by the Board of Canvassers. (Appx. 006, Para. 37) The order never makes any findings of fact or conclusions of law regarding Deborah McGee’s standing. Paragraph 30 of the order states that “Contesters Nancy Case and Deborah McGee were called by the Contestees and testified, among other things, about whether they fulfilled the necessary legal prerequisites to bring this election contest. (Appx.

005, Para. 30) The Tribunal’s conclusion that Nancy Singleton Case lacks standing was based solely on her failure “to present evidence that she made a formal request for a recount, accompanied by the required bond, within 48 hours of the declaration of election by the Board of Canvassers.” (Appx. 006, Para. 37) The Tribunal ignores the testimony of Nancy Singleton Case that she submitted her request for recount by email (Appx. 165, ln. 16-18) and the testimony of Deborah McGee who testified that she saw the email sent by Ms. Case to the Town requesting the Recount. (Appx. 173, ln. 14-15)

The Tribunal also ignores its own finding on this same fact at Paragraph 3 of its Order in which the Tribunal acknowledges that within 48 hours of the Canvass, Mr. Carden had informed the Town Council that two individuals were requesting a Recount.

LAW RELATING TO STANDING

Standing is defined as “[a] party’s right to make a legal claim or seek judicial enforcement of a duty or right.” *Findley v. State Farm Mut. Auto Ins. Co.* 213 W.Va. 80, 94, 576 S.E.2d 807, 821 (2002) (quoting Black’s Law Dictionary)

WV Code 3-6-9 addresses recounts and regarding the same states the following:

(f) If a recount has been demanded, the board shall have forty-eight hours in which to send notice to all candidates who filed for the office in which a recount has been demanded of the date, time and place where the board will convene to commence the recount. The notice shall be served under the provisions of subsection (g) of this section. The recount shall be set for no sooner than three days after the serving of the notice: Provided, That after the notice is served, candidates so served shall have an additional twenty-four hours in which to notify the board, in writing, of their intention to preserve their right to demand a recount of precincts not requested to be recounted by the candidate originally requesting a recount of ballots cast: Provided, however, That there shall be only one recount of each precinct, regardless of the number of requests for a recount of any precinct. A demand for the recount of ballots cast at any precinct may be made during the recount proceedings only by the candidate originally requesting the recount and

those candidates who notify the board, pursuant to this subdivision, of their intention to preserve their right to demand a recount of additional precincts.

(g) Any sheriff of the county in which the recount is to occur shall deliver a copy thereof in writing to the candidate in person; or if the candidate is not found, by delivering the copy at the usual place of abode of the candidate and giving information of its purport, to the spouse of the candidate or any other person found there who is a member of his or her family and above the age of sixteen years; or if neither the spouse of the candidate nor any other person be found there and the candidate is not found, by leaving the copy posted at the front door of the place of abode. Any sheriff, thereto required, shall serve a notice within his or her county and make return of the manner and time of service; for a failure so to do, he or she shall forfeit \$20. The return shall be evidence of the manner and time of service.

In the instant case, Nancy Singleton Case requested the recount by contacting Mr. Carden. The Tribunal acknowledged this at Para. 3 of its Order. Nothing in WV Code 3-6-9 sets forth a format for how the request for recount must appear (i.e. in writing, email, or verbal). However, the 2018 Best Practices Guide, issued by the Secretary of State, sets forth the procedure for requesting a recount. The Guide states that the request must be made in writing within 48 hours and accompanied by the required bond. It would appear that Ms. Case's email to Mr. Carden would satisfy the requirement of a written request, however, it does not appear Ms. Case posted the required bond. Ms. Case testified that she did not submit her own bond. She further testified that she believed the bond posted by Ms. McGee would satisfy her requirement to post bond. (Appx. 166 and 167)

ACCORDINGLY, this Court does affirm the Tribunal's decision that Nancy Singleton Case does not have Standing to Contest the election for the reason that she failed to submit the required bond within 48 hours.

THE FOUR PROVISIONAL BALLOTS:

The Tribunal noted at paragraph 17 of its Order that "At the outset of the trial, the Contesters expressly abandoned all election contest claims and allegations except for their claims

that the provisional ballots of Leah Howell, George McCarty, Linda McCarty, and Adam Hutton (the “Provisional Voters”) should be counted. The Tribunal went on to state, “The only issue presented for decision by the Contesters at the trial of this election contest is whether the ballots of the four Provisional Voters that were cast in the recent municipal election should be counted.” (Appx. 006, Para. 39)

In the instant case, this Court has reviewed the record filed with the Court as an Appendix (less pp. 23 to 60). The Court then reviewed the Findings of Fact set forth in the Order Declaring Election Results. The Tribunal appeared to focus on the lack of any evidence from the DMV concerning the nature, source or cause of the alleged voter registration errors. The Tribunal failed to credit any of the information provided by Nikki Painter as evidence of whether or not a technical error resulted in her having left the names of these four voters out of the Harpers Ferry Poll Book.

Ms. Painter testified that she was the person responsible for preparing the Harpers Ferry Poll Book. (Appx. 90, lns 15-17) Ms. Painter testified that she reviewed the voter registrations of these four voters. (Appx. 91, lns 14-16) Ms. Painter testified that she pulled their record to see if her office had made a mistake, and was able to see that all four voters registered at the DMV. (Appx. 92, lns 1-3) The record that was sent to the Jefferson County Clerk’s Office reported that the address of these four voters was “West Washington Street.” (Appx. 92, lns 4-6) Ms. Painter testified that based on the address of all four voters, that those residences should have been contained in the Harpers Ferry Poll Book. (Appx. 93 and 94, lns 9-11, ln 7) Ms. Painter testified that had the names of these four voters been put in the poll book, they would have been allowed to vote without having to cast a provisional ballot. (Appx. 94, lns 8-12) Ms. Painter testified that these four voters

were all properly registered prior to the municipal election on June 11. (Appx. 96, lns 10-14) Ms. Painter testified that after discovering the problems related to the Harpers Ferry Election, she researched where the street numbers stopped for Harpers Ferry and where they began for Bolivar. (Appx. 100, lns 23-24) When asked about how the County Clerk's Office would make sure this mistake would not happen again, Ms. Painter testified that she now has the street numbers for what side goes to what municipality. (Appx. 102, lns 22-23) Ms. Painter testified that she has corrected the information related to both Voter Howell and Voter Hutton to which now correctly places them in the Harpers Ferry municipality. (Appx. 100 -101) She did not correct Voter McCarty's information because they had gone to DMV to get the correct address. (Appx. 99, lns 12-13) Ms. Painter explained that had she gone by the voters' house numbers, she would have included their names in the Harpers Ferry Poll Book; however, she had looked at the street name which included "West" in front of Washington Street and based on the word "West" had listed them in Bolivar. (Appx. 92, lns 4-7 and Appx. 93, lns 7-8) The evidence presented by Ms. Painter was clear and undisputed that Voter G. McCarty, Voter L. McCarty, Voter Howell and Voter Hutton were each duly registered voters in the State of West Virginia. It was clearly against the weight of the evidence and manifestly wrong for the Tribunal to have listened to the undisputed testimony of the Chief Deputy Clerk of Elections and not to have reached this conclusion.

The Tribunal mistakenly focused on a need to hear from a DMV representative as to the cause of having included the word "West" in these voters' addresses. The Tribunal ignored the totality of the circumstances, that all four voters registered to vote while at the DMV and all three of the four voters testified that DMV added the word "West" to their

address. There was no evidence presented to contradict the testimony of Ms. Painter or the three voters who testified.

The Tribunal erred when it concluded that because Leah Howell did not testify, that there was no competent evidence concerning Ms. Howell's residency or the nature or source of error affecting her voter registration. The Tribunal ignored the testimony of Ms. Painter who testified that Ms. Howell was duly registered to vote and had done so at the DMV. (Appx. 92, Appx 101-102) This Court finds that Ms. Painter's testimony that Voter Howell did register to vote through the DMV, in addition to the fact that she appeared in Harpers Ferry on June 11, 2019, to vote and had been certified by the Town Council to be included as a candidate in the election for Town Council in the June 11, 2019, election and was certified in the same election as having received votes as a candidate, is sufficient evidence on which the Tribunal could have and should have concluded Voter Howell was a resident of Harpers Ferry at the time she cast her vote on June 11, 2019. While this Court does find sufficient evidence in the record to conclude that all four voters were residents of Harpers Ferry, this Court does believe that the Tribunal erred in concluding that the Contesters must prove both that the voters were "duly registered" and that they resided in the municipality at the time of the election. In fact, once the Contesters proved that the voters were "duly registered" at the time of the election, they were presumed to be an eligible voter until proven otherwise. That is (presumably) why a person who is "duly registered," and appears to offer his vote, is not asked any continuing questions about residency at the time the vote is cast or required to show any proof of residency.

This Court notes that the Tribunal did not make any specific findings of fact related to the residency of Voters G. McCarty, L. McCarty or Hutton. Each of these voters testified that they reside in Harpers Ferry within the municipality and that they intend to reside there in the foreseeable future. Accordingly, this Court will find that these three Voters met all residency requirements to have voted on June 11, 2019.

CONCLUSIONS OF LAW:

Because Harpers Ferry has adopted a permanent voter registration system pursuant to Article 2 of Chapter 3 of the West Virginia Code, the provisions of that article apply to

this election contest. *Harpers Ferry, W.Va., Ordinances* Ch. 1, Art. 103, §103.04 (2019) adopting Permanent Voter Registration law of West Virginia.

Pursuant to the Permanent Voter Registration law, WV Code §3-2-1 (c) states, “A person who is not eligible or not duly registered to vote shall not be permitted to vote at any election in any subdivision of the state, except that such voter may cast a “provisional” or “challenged” ballot as provided in this chapter if the voter’s eligibility or registration is in question and such “provisional” or “challenged” ballot may be counted only if a positive determination of the voter’s eligibility and proper registration can be ascertained.”

WV Code §3-2-4a authorizes and mandates the Secretary of State implement a single, official statewide, centralized, interactive computerized voter registration database of every legally registered voter in the state. WV Code §3-2-4a (a) (5) gives the authorized designee of the clerk of the county commission immediate electronic access to the information contained in the statewide voter registration database. WV Code §3-2-4a (a) (8) states, “The statewide voter registration database shall serve as the official voter registration list for conducting all elections in the state.” WV Code §3-2-4a (g) states, “The Secretary of State and the Commissioner of the Division of Motor Vehicles shall enter into an agreement to match and transfer applicable information in the statewide voter registration database with information in the database of the Division of Motor Vehicles to the extent required to enable each official to verify the accuracy of the information provided on applications for voter registration.”

WV Code §3-2-5 (c) requires that an application for registration shall be under oath and include the following:

- (1) The applicant's legal name, including the first name, middle or premarital name, if any, and last name;
- (2) The month, day and year of the applicant's birth;
- (3) The applicant's residence address including the number and street or route and city and county of residence . . .;
- (4) The applicant's signature, under penalty of perjury as provided in section thirty-six of this article, to the attestation of eligibility to register to vote and to the truth of the information given. . .

WV Constitution Art. 4, §1 states, "The citizens of the state shall be entitled to vote at all elections held within the counties in which they respectively reside . . . or who has not been a resident of the state and of the county in which he offers to vote, for thirty dates next preceding such offer. . ."

WV Code §3-2-6 requires that a voter be registered by the twenty-first day before an election to be eligible to vote in that election.

W. Va. Code § 3-7-8 (1963) (Repl. Vol. 2011) provides:

Though illegal votes be received, or legal votes be rejected, at any place of voting, the returns of the votes taken at such place shall not be set aside for that cause, but it may be shown, by proper evidence before the tribunal authorized by law to hear and determine contested elections, for whom such illegal votes or any of them were cast, or for whom the legal votes which were rejected would have been given, and the returns shall be corrected only to the extent that it is so shown.

Under Conclusions of Law, within its Order, the Tribunal correctly notes that the only issue is whether the ballots of the four Provisional Voters should be counted. The Contesters bear the burden of proof as the party who commenced the contest. (Appx. 6-7, para. 39) The Tribunal proceeds to cite the WV Constitution and WV Code regarding various election laws as listed above. At paragraphs 48 and 49 of the Order (Appx. 008), the Tribunal correctly notes that the voter registration requirements enable election officials to determine whether someone satisfies the constitutional and statutory

qualifications before he or she actually casts a ballot.

While the Tribunal correctly cited statutory and constitutional law within its Order, the Tribunal erred when it relied upon the WV Supreme Court's analysis of "duly registered" voter and "technical error" in the case of *Galloway v. Common Council of City of Kenova*, 133 W.Va. 446 (1949). The *Galloway* decision predates the Permanent Voter Registration System. The Court noted in *Galloway* that there was a separate registration requirement for a voter to be included in the Municipal poll book. In *Galloway*, the voter failed to complete the registration requirements to be included in the Municipal poll book. This separate registration requirement for municipal voter registrations is no longer the law. WV law now has a single voter registration system that covers all elections, state, county and municipal. 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. Cod and *State ex. Rel. Roter O. Ellis v. County Court of Cabell County*, 153 W.Va. 45, 167 S.E.2d 284 (1969)3-2-4a

Unlike the facts in *Galloway*, where the voter failed to complete the separate voter registration form to be included in the Municipal poll book, in the instant case, these voters' names were left out of the Harpers Ferry Poll Book because of the word "West" added to their street name.

The Tribunal improperly concludes that because the names of these four voters were not in the poll book at the time the votes were cast, that the ballots cannot be counted. (Appx. 010, Para. 57) WV Code §3-1-41 discusses how to handle a provisional ballot. WV Code §3-1-41(e) addresses provisional voter procedures and requires ". . . The county commission [Town Council] shall disregard technical errors, omissions or oversights if it can reasonably be ascertained that the challenged voter was entitled to vote." The Tribunal wrongly concluded that this type of error was similar to that in *Galloway*.

It is necessary for this Court to look at the totality of the evidence presented on August 24, 2019, both direct and circumstantial evidence to determine (if possible) why

these names were omitted from the Harpers Ferry Poll Book. Upon review of the testimony of Nikki Painter, who testified in this matter as the Chief Deputy Clerk of Elections; the person responsible for maintaining the voter registration database, it is not difficult to determine how or why these names were left out of the Harpers Ferry Poll Book. She also gave clear and uncontroverted testimony that all four of the voters who cast a provisional ballot, were “duly registered” under the laws of the State of West Virginia and as such were eligible voters in the June 11, 2019, election. She did not include these names because she was misled by the word “West” in the street address, rather than relying on the house numbers that were included. The voters provided all required information required under the voter registration laws of the State of West Virginia. This was a technical error whether caused by DMV or a Mapping system. It was an error that could have been corrected had Ms. Painter known to rely upon the house numbers listed in the address.

CONCLUSION

ACCORDINGLY, this Court concludes the names of these four voters were left out of the poll book due to a technical error and that WV Code §3-1-41(e) requires that under these circumstances the Town Council should count the four provisional ballots of Voters L. McCarty, G. McCarty, Howell and Hutton. The WV Constitution and WV Code, both require this outcome.

For all the foregoing reasons, this Court does REVERSE the decision of the Harpers Ferry Contest Tribunal Order Declaring Election Results and ORDERS that the Harpers Ferry Town Council count the provisional ballots of L. McCarty, G. McCarty, Howell and

Hutton and that those votes be included in a recount.

/s/ Debra McLaughlin
Circuit Court Judge
23rd Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtswv.gov/e-file/ for more details.