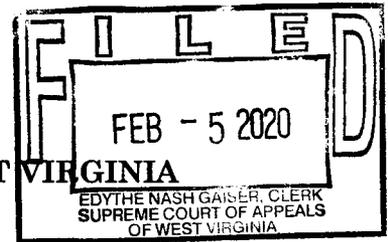


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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**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.*

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**PETITIONERS' REPLY**

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## INTRODUCTION

Strip away the rhetoric, and this case presents an uncomplicated question: Were the Trial Court's findings of fact "arbitrary, capricious, or clearly wrong"? Such questions rarely engender much debate, and trial courts' findings of fact, like jury verdicts, are routinely affirmed by this Court in memorandum decisions.

In this election contest, the Trial Court was asked to decide whether to count the ballots of four provisional voters. After hearing live testimony from six witnesses, the Trial Court found (1) that Respondents failed to adduce *any* competent evidence of Voter ██████ ██████ residency, especially in light of ██████ decision not to show up and testify, and (2) that Respondents failed to present sufficient evidence to support their blame-the-DMV-theory for alleged registration errors affecting the three others. Respondents have never met their burden to show that these findings were "arbitrary, capricious, or clearly wrong." Any challenge to the Trial Court's decision should end there.

Unfortunately, the Circuit Court (sitting by statute as an intermediate appellate court) allowed Respondents' emotional appeals to transform what ought to have been a straightforward appellate review into a new trial on a cold record. In doing so, the Circuit Court ignored this Court's clear instructions about the appropriate standard of review for election contest appeals and accepted Respondents' invitation to substitute its own view of the evidence for that of the Trial Court. Worse still, the Circuit Court expressly relied on "evidence" that was never introduced at the trial and inferences contrary to those drawn by the finder-of-fact. This intrusion into the Harpers Ferry Town Council's "original and exclusive

jurisdiction to hear and decide contested elections involving the selection of municipal officers” must be undone. 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).

But there’s more. While asking this Court to sustain the Circuit Court’s improper factfinding, Respondents simultaneously ask this Court to overturn two of the Circuit Court’s legal conclusions: (1) that Respondent Nancy Singleton Case lacks standing to contest the election; and (2) that certain members of the Town Council did not err by refusing to disqualify themselves as members of the Trial Court. On this score, however, not only did the Circuit Court exercise its proper authority but also, as explained below, got it right.

Respondents contend that this appeal is about the “fairness, purity, and freedom of elections.” They’re not wrong. But in our democratic system, the propriety of an election is *not* judged by any party’s (or court’s) subjective view of what the “fair” outcome should be. That is a dangerous road to go down. Instead, elections are fair and free when everyone simply follows the rule of law, regardless of the result. Within that framework, this Court need not concern itself with the uncomfortable political question of who should serve on the Harpers Ferry Town Council. The proper question is a purely legal one: were the Trial Court’s findings of fact clearly wrong? The answer is no, and so the Circuit Court’s decision must be reversed and the Trial Court’s decision should be affirmed.

## ARGUMENT

### I. The Trial Court's factual findings were not "arbitrary, capricious, or clearly wrong."

As Petitioners explained in the opening brief, Respondents failed to satisfy their evidentiary burden before the Trial Court. That is, Respondents did not present sufficient facts to demonstrate that each of the four disputed provisional voters satisfied the legal requirements to have their ballots counted. Having failed to present the needed proof to the finder-of-fact, Respondents attempted a do-over in the Circuit Court, but were only "successful" because the Circuit Court applied the wrong standard of review. *See State ex rel. Bowling v. Greenbrier Cnty. Comm'n*, 212 W. Va. 647, 649, 575 S.E.2d 257, 259 (2002). Now, Respondents are again vying for the improper review standard here. They implore this Court adopt *their view* of the evidence, including testimonial evidence that was heard live by the Trial Court, as well as the inferences drawn therefrom.

This Court must decline the invitation. To do otherwise would upset not only this Court's precedent, but the legislative judgment that vests *exclusive* decision-making authority in municipal election contests with municipal governing bodies.

### A. The Trial Court's finding that Respondents failed to present evidence of Voter [REDACTED] residency was not "arbitrary, capricious, or clearly wrong."

Starting with Voter [REDACTED] Petitioners have detailed how Respondents failed to satisfy their burden of proof to establish that Voter [REDACTED] met the residency requirement to have her provisional ballot be counted, and how the Circuit Court's

re-creation of the evidence presented at trial is unsupported by the record or the law. *See* Pet. Br. at 17–21.

In response, Respondents argue that the Circuit Court correctly found that “sufficient evidence” was presented to the Trial Court to “reasonably ascertain” that Voter ██████ provisional ballot should have been counted. *See* Resp. Br. at 12. Relying on claims *found nowhere in the trial record*—among other things, that Voter ██████ had been “certified” as a candidate for town council—Respondents contend that this Court should overlook the Trial Court’s factual finding based on the testimony of Nikki Painter. In making that contention, Respondents misapprehend the Trial Court’s factual finding and seek to inappropriately set it aside.

The Trial Court found that there was no competent evidence that supported that Voter ██████ met the residency requirement at the time of the municipal election. That is, the Trial Court determined that there was no evidence presented that Voter ██████ actually lived at the residence for which she was listed or, critically, that she intended to remain there. *See White v. Manchin*, 173 W. Va. 526, 538, 318 S.E.2d 470, 482 (1984) (equating, for purposes of election law, residence with domicile). Indeed, Voter ██████ failed to testify at all before the Trial Court. Without establishing the residency requirement for a valid, countable ballot, which Respondents had the burden of proving, Voter ██████ vote cannot be counted. *See State ex rel. Bumgardner v. Mills*, 132 W. Va. 580, 601, 53 S.E.2d 416, 430–31 (1949).

Instead of addressing the complete lack of evidence regarding Voter ██████ residence at the time of the municipal election, Respondents—like the Circuit Court—subtly change the focus, making it about whether Voter ██████ listed address fell within the city limits. That point, however, is immaterial. Even if ██████ address was in Harpers Ferry, the Trial Court correctly found that was no evidence at trial that Voter ██████ *actually lived at that address* either at the time of the election or, as required, for the 20 days preceding it. Indeed, Ms. Painter never testified regarding Voter ██████ residence—neither about whether Voter ██████ lived at the address nor whether she intended to remain. Nor could she have, given her lack of personal knowledge. *See* App. 47, 65–66. And again, Voter ██████ despite the opportunity to testify herself, chose not to show up.

Respondents can only prevail by substituting their own findings of fact for those of the Trial Court. That effort, as a matter of law, must be rejected, and the valid factual findings of the Trial Court must be restored. *See Bowling*, 212 W. Va. at 649, 575 S.E.2d at 259. This Court regularly reverses circuit courts that ignore a lower tribunal’s factual findings based on “irrelevant and speculative evidence,” under the clearly wrong standard. *See, e.g., Reed v. Pomeo*, 240 W. Va. 255, 262, 810 S.E.2d 66, 73 (2018). In this case, the Circuit Court did just that. It gave “undue weight” to Voter ██████ *withdrawn* candidacy forms and Ms. Painter’s inconclusive and speculative testimony. *See id.*; Suppl. App. 002. Indeed, the Circuit

Court acknowledged its reliance on speculative evidence, explaining that it based its *de novo* determinations on an uncited “presum[ption].” App. 328. This was error. <sup>1</sup>

**B. The Trial Court’s finding that Respondents failed to present competent or credible evidence to explain the alleged DMV error was not “arbitrary, capricious, or clearly wrong.”**

In the opening brief, Petitioners outlined the Trial Court’s finding that Respondents failed to present evidence concerning the source of the alleged registration errors—the DMV. That finding, which was attributable to Respondents’ insufficient evidentiary showing, is fatal to their legal theory for counting the four provisional votes. *See* Pet. Br. at 21–24. The Circuit Court was therefore wrong to reweigh the evidence based on Respondents’ failed theory, draw its own factual inferences, and reach its own findings, all contrary to the Trial Court’s own.

In response to Petitioners’ opening brief, Respondents again focus on the wrong factual issue and argue that Ms. Painter’s testimony conclusively establishes that the DMV caused the alleged registration error. *See* Resp. Br. at 10–12. But Ms. Painter explicitly testified that she did not know what happened. *See* App. 59–60. Ms. Painter admitted that she did not know whether the DMV or the voters themselves were responsible for the information in question. *See id.* Indeed,

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<sup>1</sup> Respondents, like the Circuit Court, fail to recognize the critical distinctions between the boundaries of the Corporation of Harpers Ferry and its precinct and the other indicators of one’s address, including postal codes, all of which are subject to judicial notice. Here, the Circuit Court erred by concluding that because the provisional voters were registered as living in the 25425 postal code and thus had a “Harpers Ferry” mailing address, their votes should have been permitted to count in the municipal election for the Corporation of Harpers Ferry. Not so. There are six precincts in the Harpers Ferry Magisterial District in Jefferson County. All of those precincts are within the 25425 postal code. Thus, having a 25425 postal code is not at all determinative of which precinct one lives in—but it is determinative of what street name and house number one is assigned. Further, the Corporation of Harpers Ferry is wholly in precinct 14. The Corporation of Bolivar, on the other hand, is wholly in precinct 15. And there is no such thing as a “Bolivar address” or “Bolivar postal code.”

nowhere within the record is there evidence supporting Respondents' DMV theory. At best, all that Respondents can point to is foundationless speculation—which the finder of fact was right to give no evidentiary weight. Therefore, by seeking a factual determination contrary to the Trial Court, the Respondents, and the Circuit Court below, inappropriately sought to make *de novo* credibility determinations and factual findings. *See Webb v. W. Va. Bd. of Medicine*, 212 W. Va. 149, 156, 569 S.E.2d 225, 232 (2002) (explaining that credibility determinations “are binding unless patently without basis in the record”). In so doing, Respondents and the Circuit Court contravened the clear standard of review governing an appeal of the Trial Court's election contest decision, as the *Bowling* decision illustrates.

In any event, applying the proper standard of appellate review, the Trial Court's finding concerning the DMV allegation was not “arbitrary, capricious or clearly wrong.” *See Bowling*, 212 W. Va. at 649, 575 S.E.2d at 259. The only testimony even suggesting that the DMV had committed the alleged error came from Ms. Painter's speculation. In fact, contrary to Respondents' DMV-causation theory, the evidence showed that some of the voters *knew* that their registered addresses were not listed to Harpers Ferry's precinct prior to the election in question. *See App. 4*, 68–70. As such, the Circuit Court erroneously relied on Ms. Painter's speculative testimony, *see Reed*, 240 W. Va. at 262, 810 S.E.2d at 73, and the Trial Court was amply justified in finding that there was insufficient evidence to support that the DMV committed the alleged error.

**C. The Amicus Brief raises legal issues that need not be reached.**

Finally, the amicus brief filed by the Secretary of State disputes some of the tertiary legal conclusions made by the Trial Court. More specifically, the Secretary's disagreement centers around whether longstanding decisions of this Court on voter registration requirements may have been silently overturned by subsequent legislative enactments, among other things. *See* Amicus Br. at 2–7.<sup>2</sup> This Court, however, need not wade into, or formulate new syllabus points for, those issues because this appeal can be resolved without doing so.

As Petitioners explained in their opening brief, the Circuit Court can and should be reversed on the same basis that this Court reversed the lower court in *Bowling*: it failed to apply the deferential standard of review to the factual findings of the only body chosen by the Legislature to be the exclusive “judge” of municipal election contests—the Trial Court here. This Court need not—indeed should not—reach the Secretary's potentially problematic legal questions, which involve statutory abrogation of this Court's well-established precedent.

If this Court feels compelled to address the merits of the Secretary's arguments, it will find them lacking. In the amicus brief, the Secretary wrongly

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<sup>2</sup> Similar to the Secretary's faulty argument, Respondents maintain that a 15-year-old change in the state's voter registration system nullified this Court's decades-old precedent that requires a voter to be “duly registered”—that is, listed among qualified voters—to the municipality where the voter seeks to cast a ballot. *See* Resp. Br. at 15–17. In so doing, Respondents misread this Court's decisions. Respondents seek to distinguish *Galloway v. Council of City of Kenova*, 133 W. Va. 445, 57 S.E.2d 881 (1949), based on the replacement of multiple, separate registration systems with the one, statewide system. But that replacement only changed *how* voters registered, *how* voter registration information was kept, and *who* kept it. *See* W. Va. Code § 3-2-4a(a). Unchanged, however, is the requirement that a voter must be *listed* among the voters of that municipality in order to be “duly registered.” Otherwise, the voter registration requirement is meaningless.

focuses on the form of voter registration records over the substance of the information actually contained in those records. The brief spends pages discussing irrelevant topics like who keeps the registration records and how those records are prepared in anticipation of an election. *See Amicus Br. at 3-5, 7.*

But the challenged ballots in this case are not invalid because of *who* maintains the voter registration records; they are invalid because of *what those records actually reflected*—that the challenged voters were not listed among the proper voters for Harpers Ferry’s municipal elections. The Secretary tries to overlook that invalidity, arguing that it does not matter for two reasons: (1) the Code’s “duly registered” mandate only requires that an individual be listed *anywhere* “in the single state[-wide] voter registration system;” and (2) not being among the list of properly registered voters for a municipal election is a mere “technical” omission. *See Amicus Br. at 4, 9.* Both of those rationales, however, are at odds with the very purpose and substance of our State’s longstanding voter registration requirements and raise potential concerns about the integrity of West Virginia’s municipal elections. Two points highlight the Secretary’s error.

*First*, under the Secretary’s reading of the statutory scheme, a voter need not be listed as a voter of—that is, be registered to—a municipality in order to vote in its elections. The Secretary maintains that in order to vote in a municipal election, a person need only reside in the municipality and be listed on the statewide voter registration database to *any place within the county*. *See Amicus Br. at 3–5.*

Reading the Code's "duly registered" requirement in this way, however, effectively eliminates the need for voter registration in municipal elections. In essence, the Secretary's reading would delete that statutory requirement with respect to municipal elections. Without accurate voter registration lists, municipalities would have *no way* of monitoring who is, and who is not, properly entitled to vote in a municipal election. In this way, post-election contests (and appeals therefrom) would be the norm, not the exception.

All told, the Secretary's interpretation directly contradicts the text and purpose behind West Virginia's constitutional and statutory voter registration requirements, as well as decades of caselaw confirming them. *Eg.*, *State ex rel. Daily Gazette Co. v. Bailey*, 152 W. Va. 521, 525, 164 S.E.2d 414, 417 (1968) ("The purpose of registration statutes is to protect the purity of the ballot box by determining before the vote is cast whether such person possesses the qualifications to vote."); *State ex rel. Lawhead v. Kanawha Cnty. Court*, 129 W. Va. 167, 171, 38 S.E.2d 897, 899 (1946) (concluding that the purpose of voter registration is "to prevent fraud . . . A person who is not registered is not entitled to vote, although qualified.").

Furthermore, the Secretary's unreasonable reading effectively nullifies other code sections, including the section dedicated to "[m]unicipal precinct registration records," in which the Legislature laid out how municipalities procure "the registration records necessary for the conduct of [a municipal] election." *See* W. Va. Code § 3-1-27; *see also* W. Va. Code § 3-1-28 (requiring an eligible official be "a registered voter of the municipality for elections held within the municipality"). The

Secretary's reading also creates an absurd result, whereby a voter's registration record must confirm eligibility to vote with respect to *each* election held in the State: statewide, congressional, legislative, and county—*except* for municipal elections. The Code cannot be construed in a way that “reach[es] an absurd result,” but the Secretary's reading here does just that. *See Vanderpool v. Hunt*, 241 W. Va. 254, 262, 823 S.E.2d 526, 534 (2019).

*Second*, the Secretary doubles down on his suspect reading of the Code, arguing that not being on the certified list of properly registered voters is merely a “technical” omission that should be overlooked. *See Amicus Br.* at 7–10. As the Secretary observes, Section 3-1-41 requires a Board of Canvassers to count a provisional ballot and “disregard technical errors . . . if it can reasonably be ascertained that the challenged voter was entitled to vote.” W. Va. Code § 3-1-41(e).<sup>3</sup> Under the guise of that statute, the Secretary argues that the Board was obliged to ignore the information contained in the registration records. *See Amicus Br.* at 8. Stated differently, the Secretary contends that a Board *must* affirmatively disregard registration information establishing that a voter is not listed among the permitted voters for a municipal election and therefore *must* count that person's vote. *See id.* That position, however, raises serious concerns about voter integrity in municipal elections. So too, that position is contrary to law and settled practice.<sup>4</sup>

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<sup>3</sup> The Code explains that a person is not “entitled to vote” if that person “has not been registered as a voter as required by law.” *See* W. Va. Code § 3-1-3.

<sup>4</sup> In any event, the argument that the provisional voters' knowing decision to register to vote in the neighboring municipality of Bolivar, outside the bounds of Harpers Ferry, should be excused as a mere technical error would set a regrettable precedent. Adopting this position would mean holding that what a voter knowingly does—here, registering with a knowingly false residency, under

In this case, the Board of Canvassers properly assessed the provisional voters' registration information and determined they were not entitled—that is, they were not listed voters of Harpers Ferry—to vote in its municipal elections. The Board based that determination *on the Secretary's own 2019 Best Practices Guide for Municipal Canvass* and the law holding that a Board of Canvassers is limited to reviewing intrinsic—not extrinsic—evidence.<sup>5</sup> See App. 2, 16.

Ultimately, if the Secretary wishes to have different registration laws applicable to municipalities (or indeed, no registration laws at all), his beef is with the Legislature, not the Judicial Branch.<sup>6</sup>

## **II. Respondent Case lacks standing, and her vote count remains as certified.**

If this Court were to affirm the Circuit Court's decision to count some or all of the four provisional ballots, Respondent Case's lack of standing means that none of

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oath—doesn't matter. For reasons explained in the opening brief and here, that is not the law. And to bend existing law to fit that position would make bad law.

<sup>5</sup> Syl. Pts. 4–5, *State ex rel. Ellis v. Cnty. Court of Cabell Cnty.*, 153 W. Va. 45, 45, 167 S.E.2d 284, 285 (1969) (delineating what evidence may be considered by a board of canvassers).

<sup>6</sup> The Secretary's footnoted request that this Court should defer to the Secretary's view of election law is unavailing. *First*, no deference is owed to an executive official's interpretation of a statute where the statutory text at issue is unambiguous, as here. See *Div. of Justice & Cmty. Servs. v. Fairmont State Univ.*, -- W. Va. --, --, 836 S.E.2d 456, 463 (2019). *Second*, even if ambiguous, deference is not owed to *unreasonable* interpretations of statutory text, and the Secretary's interpretations are unreasonable, for reasons explained. See *Appalachian Power Co. v. State Tax Dep't of W. Va.*, 195 W. Va. 573, 582, 466 S.E.2d 424, 433 (1995). *Third*, even if deference were owed to the Secretary in this area, the Court should defer to the Secretary's 2019 *Guide*, which the Board of Canvassers followed down to the letter in considering the provisional ballots, and not to made-for-litigation positions taken long after the fact and in the capacity as an amicus, no less. See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) (“Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate.”). Finally, under fundamental principles inherent in the structure of our state constitution—the separation of powers—the judiciary must not give up its power and duty “to say what the law is” to an executive branch official. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

those votes may be tallied for Case. As such, her tally must remain as certified. *See* Pet. Br. at 27–30.

**A. The Circuit Court correctly concluded that Respondent Case lacked standing to bring an election contest challenging her lost election.**

Respondents raise a cross-assignment of error, arguing that the Circuit Court wrongly concluded as a matter of law that Respondent Case lacked standing to bring this election contest in the first place. That cross-assignment is unavailing.

The Circuit Court properly affirmed the Trial Court’s decision that Respondent Case lacked standing to bring the election contest on her own behalf. Respondent Case failed to present evidence that she met the requirements for a properly requested recount of her vote tally—that is, made a formal recount request, accompanied by the mandatory bond, within 48 hours of the declaration of election by the Board of Canvassers.<sup>7</sup> Under the plain text of West Virginia Code, “[e]very candidate who demands a recount *shall* be required to furnish bond in a reasonable amount” and must do so within 48 hours after the declaration of the election. *See* W. Va. Code §§ 3-6-9(a)(8)(A) & (h) (emphases added). Indeed, Respondent Case admitted that she “personally did not” submit the required bond. App. 121. This Court has been clear that a failure to timely demand a recount “preclude[s] [a] contest of the election on the issue of the validity of the ballots under the provisions of West Virginia Code § 3-7-6.” *Miller v. Cnty. Comm’n of*

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<sup>7</sup> 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).

*Boone Cnty.*, 208 W. Va. 263, 270, 539 S.E.2d 770, 777 (2000).<sup>8</sup> The *Miller* decision is both the beginning and end of Case’s cross-assignment. There was no error on this point.

**B. If the Circuit Court’s order to count the provisional ballots is upheld in whole or in part, Respondent Case’s vote tally must remain unchanged.**

To allow, in effect, a *nonparty* to benefit from the relief obtained in this individual contest brought by Respondent Deborah McGee would upend the Legislature’s statutory mechanism for adjudicating election contests. See W. Va. Code § 3-7-6 (requiring that each contester give notice of “a list of the votes he will dispute, with the objections to each, and the votes rejected for which *he will contend*” (emphasis added)); Syl. Pt. 1, *Pridemore v. Fox*, 134 W. Va. 456, 462, 59 S.E.2d 899, 902 (1950) (explaining that where “the matter of the result of the election as between candidates” is at the center of an election contest, “a contest must be filed *on the part of each person who claims title to the office* for which he was a candidate”) (emphasis added).

In their brief, Respondents argue that this Court should simply excuse Respondent Case’s failure to follow the clear and required statutory steps for effectuating a recount of her vote tally. According to Respondents, this Court — instead of following the clear statutory text and structure enacted by the

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<sup>8</sup> In *Miller*, this Court 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 (“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.”).

Legislature—should read two statutory provisions together to divine some tenuous legislative intent that would absolve Respondent Case of her failure to follow the rules. *See* Resp. Br. at 20. Fearing that this Court might decline that invitation, Respondents also contend that Respondent Case’s failure should be excused because a town official supposedly did not ask her to post the required bond. *See id.* at 20-21.

Respondents are mistaken for several reasons. *First*, as explained in the opening brief, Section 3-6-9(h) requires “*every candidate* who demands a recount” to furnish a bond. W. Va. Code § 3-6-9(h) (emphasis on plain text). No exceptions. Respondent Case did not furnish that bond, and thereby failed to meet the clear statutory prerequisite for initiating either a recount or an election contest. *Second*, the Code provides that a contester’s right inures only to a *particular* candidate. *See id.* at § 3-7-6. This means that a candidate who failed to fulfill the statutory requirements cannot benefit from a proper contester’s challenge.<sup>9</sup> *Third*, Respondents curiously blame the Town Recorder—who refused to testify before the Trial Court—for not insisting that Respondent Case pay the mandatory bond. But Respondents fail to provide *any* citation that supports that assertion; instead, they rely on a similarly unsupported statement from the dissenting opinion of the Trial Court, which is not evidence. *See* Resp. Br. at 20 (citing App. 16). In short, no

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<sup>9</sup> Contrary to Respondents’ strawman argument, which it relegates to a footnote, *see* Resp. Br. at 21 n.6, a successful election contest would cause votes to be tallied with respect to the proper contestant and the named contestees. *See State ex rel. Peck v. City Council of City of Montgomery*, 150 W. Va. 580, 584, 148 S.E.2d 700, 704 (1966); *see also Pridemore v. Fox*, 134 W. Va. 456, 462, 59 S.E.2d 899, 902 (1950). But someone who did not meet the requirements for initiating a contest and who is not a contestee—Respondent Case is neither—would not be eligible of receiving a benefit from some other candidate’s contest.

evidence in the record supports Respondents' effort to excuse Respondent Case's failure by blaming someone else.

**III. The Circuit Court correctly declined to address Respondents' disqualification argument.**

The second and last cross-assignment of error raised by Respondents is that the Circuit Court erred by declining to address whether two Petitioners, Johnson and Thompson, should have disqualified themselves from the Town Council for the election contest. *See* Resp. Br. at 17–19. Respondents raised this selective disqualification argument three times before; it has failed on each occasion.<sup>10</sup> The fourth time should not be the charm.

**A. The Rule of Necessity *required* members of Town Council who would ordinarily be disqualified to participate in the election contest trial to ensure the contest could be heard and adjudicated.**

This Court's decisions that invoke the Rule of Necessity squarely apply here, affirmatively requiring Johnson and Thompson (among the other members) to participate as members of the Trial Court. According to the Legislature, the Harpers Ferry Town Council is *the only body* that could have adjudged Respondents' 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

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<sup>10</sup> Respondents raised this meritless challenge on three prior occasions. *First*, Case and McGee filed a preemptive mandamus action in Jefferson County Circuit Court and motion for preliminary injunction to force Johnson and Thompson's disqualification just days before the election contest trial; the Circuit Court refused it. *See* Order Denying Injunction, *Case v. Corporation of Harpers Ferry, et al.*, No. CC-19-2019-C-138 (Jefferson Cnty. Cir. Ct. Aug. 24, 2019). *Second*, Case and McGee moved the Trial Court as a tribunal to force Johnson and Thompson to be disqualified; it too was rejected. *See* App. 6, ¶ 38. *Third*, in their appeal from the election contest decision to Circuit Court—the proceedings below—Respondents again raised the point; the Circuit Court again declined the invitation. App. 322.

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 (1966) (“The municipal council has original and exclusive jurisdiction to hear and decide contested elections involving the selection of municipal officers.”).<sup>11</sup> “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 properly consisted of Mayor Wayne Bishop, Recorder Kevin Carden, and Councilmembers Barbara Humes, Hardwick Smith Johnson, Christian Pechuekonis,<sup>12</sup> 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. That is the precise holding of this Court, undisturbed for several decades. *See Peck*, 150 W. Va. at 591, 148 S.E.2d at 708. 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

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<sup>11</sup> 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, W. Va., Ordinances ch.3, art. 111, § 111.01 (2019); *id.* at 111.02. The Mayor and Recorder “have votes as members of the Town Council.” *Id.* at 111.09.

<sup>12</sup> Unfortunately, Councilmember Pechuekonis refused to participate in the Town Council’s hearing and decision of the election contest. Although the Town Council could not force him to participate, Pechuekonis’s 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 and so the election contest went on.

(1949); *Price*, 85 W. Va. 76, 100 S.E. at 872–74; *see also Stafford v. Mingo Cnty. Court*, 58 W. Va. 88, 51 S.E. 2, 3 (1905). The *Evans* Court discussed at length the unusual nature of the Rule of Necessity, yet nonetheless applied the rule and *required* otherwise interested council members to participate in deciding an election contest under the precise circumstances faced below. *See Evans*, 433 W. Va. at 471–73, 56 S.E.2d at 884–85.

Normally, Councilmembers Humes, Johnson, Pechuekonis, Premack, and Thompson would be disqualified because *Respondents named them as Contestees*. Recorder Carden would also be subject to a disqualifying interest because of his role as a material fact witness, as noted below. Regardless, the Town Council would have lacked a quorum to even *hear* Respondents' contest without the participation of those individuals, much less adjudicate it. (And the Legislature has provided for no substitute forum). Therefore, the Rule of Necessity mandated that the entire, existing Town Council participate as the governing body to decide the election contest to ensure it could be decided at all.

The policy of the Rule of Necessity is admittedly unusual. But it is 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. *See Evans*, 433 W. Va. at 472–73, 56 S.E.2d at 885 (“[The Rule of N]ecessity constitutes an exception to the general rule that a judge cannot act in his own case.”). That is the teaching of the *Evans* and *Peck* decisions. In short, this Court 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 only select contestees has no basis in law.**

Respondents' argument that only Councilmembers Johnson and Thompson should have disqualified themselves—instead of all councilmembers named as Contestees/defendants—lacks support of any law whatsoever. In making (up) that argument, Respondents contend that disqualification should be based upon how certain uncounted provisional votes *might* affect the outcome. But that contention amounts to nothing more than a tactical attempt (based on known political leanings) to disqualify only *some* members of Town Council in order to maintain a quorum with certain other members. If the political leanings were different, Respondents' stance would most certainly have been different. But such an ad hoc rationale is impermissible; no case or law supports this calculated and strategic remedy to fashion the Town Council of Respondents' selective choosing.

Respondents 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, councilmembers are either subject to a disqualifying interest or they are not; there is no mushy middle ground. As this Court's 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 hear and decide the election contest without the disqualified members named as contestees. Under binding decisional law of this Court, all of those members *must* participate under the Rule of Necessity. They were right to do so.

Respondents would have this Court create, out of whole cloth, an “impact rule,” apparently meaning that whenever a court decides that a possible election contest result would “impact” a candidate who also happens to be a sitting public officer, a court must intervene to order that official disqualified. *See* Resp. Br. at 18–19. Apart from having absolutely no legal support, this “impact rule” is without any meaningful limiting principle—Respondents propose none—and will surely lead to a multitude of lawsuits over disqualification every time an election contest is commenced. This Court would not escape the floodgates; emergency motions of all kind would become routine, given the haste with which these actions proceed.

But even if the “impact rule” was the law, Petitioner Johnson would not be “impacted” in this case. Assuming all four of the challenged votes are ultimately counted, with Johnson receiving no additional votes, *he would still be reelected.*<sup>13</sup>

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<sup>13</sup> Below are the certified election results for the five at-large councilmember seats, with the winners in bold, and the hypothetical results if the four challenged ballots voted for Case and McGee and no one else:

<u>Certified Election Results</u>		<u>Results if only Case &amp; McGee receive the four votes</u>	
<b>Humes</b>	<b>91 votes</b>	<b>Humes</b>	<b>91 votes</b>
<b>Premack</b>	<b>87 votes</b>	<b>Premack</b>	<b>87 votes</b>
<b>Johnson</b>	<b>85 votes</b>	<b>Case</b>	<b>86 votes</b>
<b>Thompson</b>	<b>85 votes</b>	<b>McGee</b>	<b>85 votes</b>

Thus, even if this Court were to adopt and apply Respondents' invented disqualification rule, only Respondent Thompson would be disqualified on remand for a new contest trial.

**C. If the Rule of Necessity does not apply, Recorder Kevin Carden must also be disqualified because he is a material witness.**

If this Court agrees with Respondents' cross-assignment of error, determines that the Rule of Necessity does not apply, and concludes that the currently serving councilmembers should have been disqualified from the election contest proceedings, Recorder Kevin Carden must also be disqualified because he is a critical material witness.<sup>14</sup> Absent the Rule of Necessity, a judge must recuse himself or herself where that 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 West Virginia Code of Judicial Conduct Canon 3E(1)); *see also Williams v. Pennsylvania*, 136 S. Ct. 1899, 1908 (2016) ("[R]ecusal 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))).

During the trial, witness testimony confirmed that Mr. Carden played a critical role in, and had material knowledge about, the events leading to the election

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<b>Pechukonis</b>	<b>84 votes</b>	<b>Johnson</b>	<b>85 votes</b>
Case	82 votes	Thompson	84 votes
McGee	81 votes	Pechuekonis	84 votes

*See* Suppl. App. 001.

<sup>14</sup> As Recorder, Mr. Carden had a vote in the Trial Court's adjudication of the election contest. *See supra* note 8.

contest. For example, Ms. Painter testified that Mr. Carden first brought the alleged voter registration errors to her attention, and that Mr. Carden had substantial extra-judicial conversations with Ms. Painter on that critical subject. *See App. 46, 50–51, 60–62, 65.* Perhaps more importantly, *Respondents' own testimony* at trial established that Mr. Carden has exclusive knowledge concerning when and how Respondents' requests for recount and required bond were received. *See id.* at 120–23, 128–31.

But despite being present at the trial and being called to testify by Petitioners, Mr. Carden patently refused to answer any questions. *See App. 132–40.* Mr. Carden's testimony would have been essential to determining whether Respondents even had standing to bring this contest. But by refusing to testify, Mr. Carden deprived Petitioners and the Trial Court of the ability to ascertain whether Respondents Case and McGee had standing. Of course, if this Court does not address Respondents' disqualification cross-assignment of error or resolves it against Respondents based on the applicable Rule of Necessity, this Court need not reach the issue of Mr. Carden's disqualification or refusal to testify.

### CONCLUSION

For these reasons and those explained in Petitioners' opening brief, this Court should reverse the Circuit Court's order and affirm the decision of the Trial Court, whose factual findings essential to its decision were not "arbitrary, capricious, or clearly wrong." In the interests of dispatch, this Court should enter an order reversing the Circuit Court, with a written decision to follow in due course, which is consistent with this Court's practice of resolving election contests with all

deliberate speed. *See, e.g., State ex rel. Bowling v. Greenbrier Cnty. Comm'n*, 212 W. Va. 647, 649, 575 S.E.2d 257, 259 (2002) (order reversing Circuit Court followed later by opinion).

Respectfully submitted,

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Dated: February 5, 2020

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 5, 2020, the **Petitioners'**

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