DO NOT REMOVE
FROM FILE

FILE COPY

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JAN - 6 2020

DOCKET NO. 19-1018

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

Individual Contestees-Respondents Below, Petitioners

v.

NANCY CASE SINGLETON and
DEBORAH A. MCGEE,

Individual Contestors-Petitioners Below, Respondents.

RESPONDENTS' BRIEF AND CROSS-ASSIGNMENTS OF ERROR

Gregory A. Bailey, Esq. (WVSB #7957)
J. Daniel Kirkland, Esq. (WVSB #12598)
Arnold & Bailey, PLLC
208 N. George Street
Charles Town, WV 25443
304.725-2002 (t)
304.725.0282 (f)
gbailey@arnoldandbailey.com
dkirkland@arnoldandbailey.com
Counsel for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 7

STATEMENT REGARDING ORAL ARGUMENT AND DECISION 8

STANDARD OF REVIEW 8

ARGUMENT OF LAW 8

A. The Circuit Court Correctly Held That Each of the Four Provisional Voters Was A Duly Registered Harpers Ferry Resident 10

1. The Circuit Court Correctly Held that the Provisional Voters Were Left Out of the Harpers Ferry Poll Book Was Due to Technical Error, Omission and Oversight 10

2. The Circuit Court Correctly Held That Sufficient Evidence of [redacted] Voter Registration Was Presented during the Election Contest Trial 12

3. The Circuit Court Correctly Held That the Trial Court 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 14

CROSS-ASSIGNMENTS OF ERROR 17

I. The Circuit Court Erred by Refusing to Reverse the Lower Tribunal's Failure to Disqualify Members from Participating in the Tribunal to Judge Their Own Election Contest 17

II. The Circuit Court Erred by Ruling That Nancy Case Lacked Standing to Challenge the Election Contest 19

CONCLUSION 22

CERTIFICATE OF SERVICE 23

TABLE OF AUTHORITIES

West Virginia Authority **Pg.**

Galloway v. Common Council of City of Kenova,
133 W.Va. 446, 57 S.E.2d 881 (1949) 15

Miller v. County Commission of Boone County,
208 W.Va. 263 (2000) 20

Ralston v. Meyer,
12 S.E. 783 (1891) 9

State v. Epperly,
135 W.Va. 877, 65 S.E.2d 488 (1951) 17

State ex rel. Bowling v. Greenbrier County Comm'm,
212 W.Va. 647, 575 S.E.2d 257 (2002) 8

State ex rel. Palumbo v. County Court of Kanawha County,
150 S.E.2d 887, 151 W.Va. 61. (1961) 10

State ex rel. Sowards v. County Comm'n of Lincoln County,
196 W.Va. 739, 750, 474 S.E.2d 919, 930 (1996) 9

Other Jurisdictions

Afran v. County of Somerset,
244 N.J.Super. 229, 232, 581 A.2d 1359, 1361 (1990) 9

James Appeal, 377 Pa. 405, 407, 105 A.2d 64, 65 (1954) 9

West Virginia Statutes

W.Va. Code §3-1-41(e) 10

W.Va. Code § 3-2-1(c) 16

W. Va. Code § 3-2-4a 1

W.Va. Code § 3-2-4a(a) 15

W. Va. Code § 3-2-4a(a)(5) 16

W. Va. Code § 3-2-4a(a)(8) 16

W. Va. Code § 3-2-4a(g) 16

W. Va. Code § 3-6-9 20

W.Va. Code § 3-6-9(f) 20

W.Va. Code § 3-6-9(h) 20

W.Va. Code § 3-7-6 17

W.Va. Code § 3-7-7 8

W.Va. Code § 6B-1-1, *et seq.* 19

West Virginia Rules

W. Va. R. App. P. 20 12

INTRODUCTION

The governing body of Harpers Ferry refused to count the provisional ballots cast by four of its duly registered citizens because their names were mistakenly placed in the incorrect poll book of the neighboring municipality by the Jefferson County Clerk's Office. Despite clear recognition of this technical error, the governing body has stubbornly refused to tally the four provisional ballots cast by its citizens in an effort to protect the seats of the current town council. Rather than protect the rights of its citizens, this governing body has bent over bent over backwards looking for a way to disenfranchise these voters. The West Virginia Secretary of State's General Counsel summed up the absurdity of the Harpers Ferry governing body's conduct in its plea to the circuit court to count the provisional ballots when he stated the following: there are 231 municipalities in West Virginia – 230 of them would have done this differently. JA – 316.

Petitioners have advanced every conceivable argument they can fathom to thwart the enfranchisement of the four provisional voters who cast ballots in Harpers Ferry municipal election for town council. Petitioners have done so because if the votes are counted it will very likely cost them their seats on town council. That fact alone should have disqualified them from participating in the election contest of their own seats. Amazingly, these same members now assert that the circuit court erred by not giving sufficient deference to the lower tribunal's findings of fact; findings which were clearly orchestrated to protect their current seat. The circuit court properly rejected the governing body's self-serving findings and applied the paramount principal in election contests to enfranchise voters. This Court should affirm the circuit court's decision to tally the provisional ballots.

Although the Circuit Court correctly rejected the transparent attempt to disenfranchise the votes cast by these four (4) Harpers Ferry citizens, it erred by: (1) refusing to consider whether

two council members should have disqualified themselves; and (2) finding that Nancy Case's failure to post a duplicative bond deprived her of standing. A second bond that the Town Recorder deemed was not required. JA – 16. These two errors must be reversed to settle the town council election results as Petitioners will undoubtedly use these erroneous rulings to improperly participate in future proceedings and to avoid tallying all of the votes in this election contest for town council. The citizens of Harpers Ferry deserve election results that reflect the will of all of the legal ballots cast. Unfortunately, the citizenry has been unable to rely upon their own elected officials to protect their interests in this regard and are in need of a clear ruling by this Honorable Court to resolve this election dispute once and for all.

STATEMENT OF THE CASE

I. Municipal Trial Court Proceedings

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. Based upon the certified votes the margin between the "winning" candidates and those who did not win a seat on council was just several votes. Respondent, Debbie McGee lost by three (3) votes and Respondent, Nancy Singleton Case lost by only two (2) votes. The Board of Canvassers set the bond to cover the costs and expenses of any recount to be $175.00. JA-015. On June 19, 2019, Candidates Case and McGee each filed separate petitions for a recount in the town council election. JA-016. Candidate McGee delivered the $175.00 bond, which the Town Recorder deemed sufficient to satisfy the statutory requirement to submit a bond to cover the costs of a recount. Id.

During the voting period, six provisional ballots were cast in the municipal election. The Board of Canvassers (made up of many of the current council members who were running for reelection) 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. The Board of Canvassers took no steps to consider the reason the provisional ballot voters were not listed in the Harpers Ferry Poll Book despite the fact that one of the provisional votes was cast by [redacted] who the Town had certified as a candidate and was on the ballot for a Town Council seat. No further explanation was provided for rejecting the provisional ballots from inclusion in the municipal election.

On July 8, 2019, Respondents, McGee and Case timely 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"). JA-047;202-210. The citizens who cast provisional ballots are: [redacted] (who was also a candidate for town council), [redacted] and [redacted][1] All four of the remaining Provisional Ballot Voters live on Washington Street in Harpers Ferry. JA-178-201. All four (4) of the Provisional Ballot Voters registered to vote through the West Virginia Department of Motor Vehicles ("DMV"). *Id.* The DMV required [redacted] and [redacted] to identify their street address as "West" Washington Street because that is the way their respective addresses showed up in the DMV's electronic system. JA-074; 094; Although the [redacted] 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. Id. Despite Petitioners' misguided assertions, none of the four citizens

[1] Contesters below abandoned their claim that [redacted] provisional ballot should be tallied after receiving information from the Jefferson County Clerk's Office that brought into question whether Ms. [redacted] actually resided in Harpers Ferry on the date of the election. Accordingly, only four (4) provisional ballots are the subject of this election contest.

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. JA-075.

During the trial before the governing body, Nikki Painter, Chief Deputy Clerk of Elections for the Jefferson County Voter Registration and Election Office, testified that technical errors caused the four provisional ballot voters to mistakenly be left out of the Harpers Ferry Poll Book JA-047-49. 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. JA-045. Here, each Provisional Voter registered through the DMV when obtaining their respective West Virginia driver's license. JA-047;064. Painter explained the DMV error led to these Harpers Ferry voters mistakenly being listed in the Bolivar, WV Poll Book.

[redacted] and [redacted] [redacted] registered to vote at the DMV when they acquired their West Virginia driver's license in July 2018. JA-073. Due to DMV bureaucracy, the [redacted] made several trips to the DMV prior to obtaining their driver's license. JA-075. 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. JA-074. A brief discussion ensued on that issue, with the DMV worker being adamant that the correct address was 800 West Washington Street. Id. Rather than continuing to argue, the [redacted] acquiesced and finally obtained their driver's license with an address listed as 800 West Washington Street. JA-074-75. The result of the address distinction caused the Jefferson County Clerk's Office to assign the [redacted] to voting Precinct 15 (Bolivar) rather than Precinct 14 (Harpers Ferry). JA-048.

The [redacted] 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. JA-075 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. JA-094. On June 8, 2019, the [redacted] 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. JA-095-096. They did so.

Similarly, [redacted] registered to vote when he acquired his West Virginia driver's license in April 2019. JA-103. Mr. [redacted] testified that he used 900 West Washington Street when he registered because that was the address assigned by the U.S. Postal Service. JA-103-104. Mr. [redacted] 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. JA-104-105;107. Mr. [redacted] was required to cast a provisional ballot, which he did.

Finally, [redacted] was a candidate for Town Council member in the 2019 Harpers Ferry municipal election. JA-019, para 20. Ms. [redacted] resided at 887 Washington Street at the time of her notice of candidacy for Harper Ferry town council. Id. Ms. [redacted] 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 [redacted] 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. JA-056-057.

Upon learning of the voter registration errors, Ms. Painter contacted the West Virginia Secretary of State. JA-060. 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. Id. 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. JA-065. Following the election, the voter registration records of each Provisional Voter was amended to accurately reflect his or her Harpers Ferry voting precinct. JA-053-058.

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. JA-051. 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. JA-058. Ms. Painter's opinion was based upon her experience with prior elections and West Virginia election law.

Throughout underlying proceedings and at the commencement of the election contest trial, Respondents repeatedly demanded that the councilmembers Thompson and Johnson disqualify themselves from judging their own election contest because their seats could be impacted by the four (4) provisional ballots. JA-035-037. Respondents' counsel noted that several members sitting to judge the election contest were represented by the attorneys who were arguing to keep the four (4) provisional ballots from be tallied. Id.

Despite the evidence and testimony presented during the election contest hearing, on September 11, 2019, the governing body acting at the tribunal to judge the election contest issued an order declining to count the provisional ballots and leaving intact the election certification. JA-001. A Dissenting Opinion was issued on September 16, 2019. JA-013.

II. Circuit Court Proceeding

Following the September 11, 2018, Order Declaring Election Result, Respondents timely filed an appeal in the Circuit Court of Jefferson County pursuant to W.Va. Code 3-7-7. The West Virginia Secretary of State Mac Warner, by counsel Donald Kersey and Curtis Capehart, filed an amicus brief in support of candidates, Nancy Case Singleton and Deborah McGee. JA-262-266. After an expedited briefing schedule, an oral argument was held before the circuit court. The parties each reaffirmed their respective positions as set forth in their briefs. JA-267-318.

Based upon the parties' briefs and the arguments presented, the circuit court reversed the ruling of the governing body below. JA-319. Petitioners then timely appealed the ruling of the circuit court to this Court.

SUMMARY OF THE ARGUMENT

In the present case the Jefferson County Circuit Court correctly held that each of the four (4) Provisional Ballot Voters was properly registered to vote in their respective municipalities by virtue of their voter registration and that a technical error, omission and oversight by the DMV's address designation caused each provisional ballot voter to be listed in the Bolivar Poll Book by the County Clerk's Office. It is uncontroverted that each of the four (4) Provisional Ballot Voters 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 governing body (acting as 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 the provisional voters absence from the Harpers

Ferry Poll Book was the result of a technical error, omission and oversight. Clear statutory law instructs each of the four provisional ballots therefore should be tallied. As duly registered voters, they were each respectively entitled to cast a vote in the Harpers Ferry municipal election and have their vote count. This governing body has improperly disenfranchised these voters by refusing to tally their votes.

STATEMENT REGARDING ORAL ARGUMENT

Respondents agree with Petitioners that this matter is under expedited review and that a timely ruling is necessary; however, Respondents disagree that the dispositive issues have been "authoritatively decided." Thus, if this Court, in its discretion, decides that this matter is proper for oral argument, Respondents respectfully submit that oral argument under Rule 20 of the West Virginia Rule of Appellate Procedure is proper because this case presents issues of fundamental public importance and matters of first impression following the enactment of the statewide single voter registration. W.Va. R. App. P. 20.

STANDARD OF REVIEW

This Circuit Court had 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.

Finally, this Court reviews rulings on matters of law *de novo. Id.*

ARGUMENT OF LAW

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).

A. The Circuit Court Correctly Held That Each of the Four Provisional Voters Was A Duly Registered Harpers Ferry Resident and That Their Votes Must be Tallied.

1. **The Circuit Court Correctly Held that the Provisional Voters Were Left Out of the Harpers Ferry Poll Book Due to Technical Error, Omission and Oversight.**

The polar star for guidance in an election contest related to a citizens right to vote in an election is that the election 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). This paramount principal is codified by statute in W.Va. Code § 3-1-41(e), which 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).

During the Circuit Court proceeding the following exchange took place between the Court and counsel for the Petitioners because the Court noted the governing body failed to make findings related to the actual residences of the voters:

> The Court: Let's not look at the issue of residence yet because one of the things that I think is lacking from this order is that they never make any findings of fact of or conclusions about residences other than Ms. [redacted] isn't that accurate? They don't make a specific finding as to any of the three other voters.
>
> Mr. Donovan: I think when they recited in the findings of fact the testimony of the other three voters as to residence and left that it was undisputed, I think that is a finding that they agreed with them, and I think the conclusions of law as to those three voters support that that was their finding.

JA. 295-296. Thus, if residency in Harpers Ferry was not in dispute, the sole reason that these registered 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 Bolivar Poll Book and omitted from the Harpers Ferry Poll Book. Contrary to the disingenuous findings cited by the Petitioners, the evidence makes clear that the Provisional Ballot Voters were all 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 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 affecting their voter registration until the time they attempted to cast their ballots. There is no evidence to the contrary, yet the majority on the lower tribunal concluded that the votes cast by their citizens should not be tallied based solely on their absence from the poll book, which was clearly the result of technical error. In further support of the misguided attempt to disenfranchise voters, the Petitioners now shockingly suggest that the Provisional Ballot Voters committed voter fraud by providing false information to the DMV *under oath. See* Pet. Brief, P. 24, Fn. 15. This assertion is incredulous, offensive, and further

serves to erode any legitimacy that still remains in the Petitioners' flawed attempt to disenfranchise the voting citizens of Harpers Ferry.[2]

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 expediency. As the Circuit Court correctly held, the provisional ballots should have been tallied. To find otherwise requires a complete disregard and misinterpretation of the law which seeks to enfranchise voters and instructs that technical errors, omissions and oversights should be ignored to allow for voter participation. Yet, the governing body of Harpers Ferry acting as the election tribunal did the opposite. Accordingly, the well-reasoned opinion of the Circuit Court reversing the lower tribunal should be affirmed by this Court and the provisional ballots should be counted forthwith.

2. The Circuit Court Correctly Held That Sufficient Evidence of [redacted] Voter Registration Was Presented during the Election Contest Trial.

As the Circuit Court correctly found, sufficient evidence of the voter registration and residency of [redacted] was established during the election contest trial to reasonably ascertain that her ballot cast in the June 11, 2019, should have been tallied. Contrary to the Petitioners' assertion, the Circuit Court did not rely on any *new* factual findings to make this finding.

Rather, based upon the record below, the Circuit Court held the following:

---

[2] In fact, during oral argument in the Circuit Court, counsel for Petitioner did not dispute that each and every Provisional Ballot Voter listed their city of residency as Harpers Ferry, not Bolivar. J.A. 299-300. The only error on their part was acquiescing to the inclusion of the word "West" in their proper street address. Now Petitioners suggest that such acquiescence is somehow voter fraud because as they repeatedly point out, it was done so "*under oath.*"

> The Tribunal erred when it concluded that because [redacted] did not testify that there was no competent evidence concerning Ms. [redacted] residency of the nature or source or error affecting her voter registration. The Tribunal ignored the testimony of Ms. Painter who testified that Ms. [redacted] was duly registered to vote and had done so at the DMV. This Court finds that Ms. Painter's testimony that Voter [redacted] did register 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 [redacted] 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.

It is undisputed that [redacted] was a candidate for Town Council member in the 2019 Harpers Ferry municipal election. Indeed, she was certified as receiving fifteen (15) votes by the Board of Canvassers, who simultaneously rejected her provisional ballot. Ms. [redacted] resided at 887 Washington Street at the time she registered to vote, at the time of her notice of candidacy for Harper Ferry town council, and at the time of the June 11, 2019, Harpers Ferry election. Ms. [redacted] 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 [redacted] 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.

In the face of this evidence, Petitioners' contend that the governing body correctly concluded that no competent evidence established [redacted] voter registration and residency. What more did the Petitioners' hope to ascertain if, in fact, [redacted] had testified? If the cross-examination were consistent with the cross-examination of the other provisional ballot voters, it presumably would have focused on her proper street address, as confirmed by Nicki Painter, or better yet, seek to challenge the current status of her social media accounts. None of this would have or should have disputed the sworn testimony of Nicki Painter. Moreover, the Trial Court, composed of the Town Council and a majority of the Board of Canvassers, was undeniably aware of Ms. [redacted] residency and her candidacy for the Town Council to reasonably ascertain that she was a duly registered voter in the town of Harpers Ferry.

Finally, Petitioner's gloss over the fact that not only did [redacted] remain on the ballot for Town Council, but more importantly, appeared on June 11, 2019, to exercise her right to vote in the town election. To Respondents' knowledge, no member of town council or the Petitioners have alleged a case of voter fraud against Ms. [redacted] by alleging she was not a Harpers Ferry resident. Because it is indisputable that she was.

The Circuit Court did not rely on new factual findings to determine the proper voter registration of [redacted] and further, did not commit reversible error by holding that "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." JA-327. Accordingly, this Honorable Court should affirm the ruling of the Circuit Court.

3. **The Circuit Court Correctly Held That the Trial Court 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.**

The Circuit Court was correct when it found that the Trial Court's reliance on *Galloway* in the present case was misplaced. In its order, the Trial Court opined that regardless of the incorrect address registration made by the DMV or mistake by the Clerk's Poll Book designation, "such registration errors are not the type of technical error that should be disregarded under the law." JA-010. This conclusion is without merit and flies in the face of statutory law. The governing body sought to rely on *Galloway* for the proposition that the four provisional voters were not registered to vote because they did not appear in the poll book. In doing so, the governing body ignored that the voter registration system in West Virginia is significantly different than it was when Galloway was decided in 1949.

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.[3] Although the voters at issue in *Galloway* were registered for county and

---

[3] 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)

state elections, they were not registered to vote in municipal elections. It was the voter's failure to even register in the municipality, not a mere technical error, that that formed the basis of the conclusion of the *Galloway* court that the ballots should not be counted. As noted by the Circuit Court, and confirmed by the West Virginia Secretary of State, the voter registration system has since been changed.

In that regard, the Circuit Court's Order provided the following:

> 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 authorized 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 Moto Vehicles to the extent required to enable each official to verify the accuracy of the information provided on applications for voter registration."

JA-329.

Applying current West Virginia election law, the Circuit Court correctly held that the facts in *Galloway* were distinguishable because unlike the circumstance in *Galloway* the provisional ballot voters did not fail to complete a separate municipal registration form (because one no longer exists); but rather; were left out of the Harpers Ferry poll book because the word "West" was added to their street address, which was a technical error. JA-331. Given the totality of the circumstances

and the testimony of the Chief Deputy Clerk of Elections, the Circuit Court correctly concluded this oversight was a technical error that should have been disregarded when considering the voter eligibility of the provisional ballot voters. JA-331-332.

Accordingly, this Honorable Court should affirm the circuit court decision to tally the four (4) provisional ballots cast in the town council election forthwith.

CROSS-ASSIGNMENTS OF ERROR

I. The Circuit Court Erred by Refusing to Reverse the Lower Tribunal's Failure to Disqualify Members from Participating in the Tribunal to Judge Their Own Election Contest.

From the outset, the underlying proceedings have been tainted with personal motivation and bias by certain members of the decision-making tribunal who seek to protect their seats on the town council. 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)[4] *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.)

[4] 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."

This election contest directly impacts Ms. Thompson's and Mr. Johnson's election to the town council. Ms. Thompson's margin of error is only 2 and 3 votes respectively. Mr. Johnson 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. Johnson'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. Johnson 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 the 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 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.

JA-009. The ethics opinion, however, did not deter Johnson and Thompson who cast the deciding votes with the majority of the tribunal.[5]

[5] 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.

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 the 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. Unfortunately, the circuit court chose not to directly address the failure to disqualify issue below. Respondents must do so here to protect the fundamental fairness of this election contest and to object to Petitioners' suggestion that deference should be given to findings made by this tainted governing body and the ensure they do not participate in future proceedings to judge this election contest.

II. The Circuit Court Erred by Ruling That Nancy Case Lacked Standing to Challenge the Election Contest.

The circuit court erroneously concluded that two identical bonds were required for a single recount despite the fact that the Board of Canvassers set the bond amount for any recount to be $175.00. It is undisputed that both Deborah McGee and Nancy Case timely requested a recount of the votes in the race for Town Council. A candidate requesting a recount is required to post a bond to cover the cost and expenses of the recount pursuant to W.Va. Code 3-6-9(h). In the present case, even before any candidate requested a recount, the Board of Canvassers set amount of the bond to cover any requested recount to be $175.00. JA-15 para. 4. The bond requirement for a recount was satisfied when Deborah McGee posted the bond for the recount. Indeed, the Town Recorder who is in charge of the municipal elections (and recounts) deemed that the recount bond was satisfied by Ms. McGee's payment of $175.00 to satisfy the cost of the recount. JA-16. The relevant statute governing recounts expressly states that there may be only a single recount: "Provided, however, that there shall be only one recount of each precinct, regardless of the number of requests for a recount of any precinct." *See* W.Va. Code 3-6-9(f). These two statutory provisions read together make clear that the purpose of the bond is to cover the cost of a recount. If there can be only one single recount, why would there be more than one bond payment required? A second bond payment was not required by statute nor did the town official in charge of the recount require a second bond payment to conduct the recount. The circuit court erroneously accepted the argument from Petitioners that both candidates had to post a separate identical bond for a single recount. The circuit court incorrectly concluded that the failure of candidate Case to post a separate identical bond deprived her of "standing" to file an election contest without providing any analysis of the standing issue.

Petitioners reliance upon *Miller v. County Commission of Boone County*, 208 W.Va. 263 (2000) is misplaced. In *Miller,* this Court read the relevant statutes related to recounts and election

contests to halt an election challenge where no recount was timely requested by any candidate in the election. The facts of this case are different. First, a recount was requested by both Nancy Case and Deborah McGee. In *Miller* the vote was certified before any candidate requested a recount and a recount was never performed. Here, a recount did in fact occur. This is a vital distinction because none of the concerns the *Miller* Court outlined for requiring a recount as a prerequisite to an election challenge exist in this case. The *Miller* Court explained that a recount is necessary to put the candidates on notice of the irregularities challenged and to identify the specific votes at issue. *Id.* at 269. That specific notice occurred in the present case. The candidates requested a recount to address the uncounted provisional ballots. When the Board of Canvassers voted to deny those ballots both candidates timely filed an election challenge. The fact that one of the two candidates failed to post a duplicative bond (that the Recorder did not require) is of no import because it did not prevent a recount. Had the Board of Canvassers refused to conduct a recount because a second duplicative bond was not posted that would have brought the holding in *Miller* into play to halt the election challenge. That simply is not what happened in the present case.[6]

The $175.00 bond requirement for a recount was satisfied prior to the recount by candidate McGee's payment. There was not statutory requirement to duplicate the bond payment by candidate Case. Any suggestion to the contrary defies notions of common sense and is contrary to the Town's own position that a second bond was unnecessary. Accordingly, Respondent Case has standing in this election challenge. Petitioners have advanced the standing argument to justify a

[6] Another important distinction is that the town council race challenged in the present case involved numerous candidates for five at-large seats as opposed to a race for a single office in *Miller*. Accordingly, any subsequent tally of the provisional ballots must apply to all of the candidates in the race. Each provisional ballot at issue in this case may contain up to five votes for candidates running for town council. Under Petitioners' strained theory, only the votes for Deborah McGee may be tallied and any other votes for other town council candidates must be ignored. That is not only patently unfair to all of the town council candidates, it serves to disenfranchise the provisional ballot voters. A consistent theme for this governing body.

scheme to disregard votes cast for Respondent Case in the provisional ballots. Accordingly, notwithstanding whether standing exists, this Court must make clear that all of the votes for Town Council candidates contained in the provisional ballots must be tallied to certify the final election results. The governing body may not pick and choose which votes contained in the provisional ballots to count. That is absolutely what this governing body will do if the circuit court order to tally the provisional ballots is appropriately affirmed by this Court.

CONCLUSION

Accordingly, for the reasons contained herein, this Honorable Court should affirm the well-reasoned Order of the Jefferson County Circuit Court as it relates to the voter registration of the four (4) provisional ballot voters and its directive that the provisional ballots be tallied. This Court should, however, reverse the Order of the Jefferson County Circuit Court as it relates to the disqualification of Petitioners Thompson and Johnson from acting in their official capacity in future election contest proceedings in this town council election matter. This Court should also reverse the circuit court's order related to standing of Candidate Nancy Case. Notwithstanding the standing issue, this Court should make clear that all of the votes for any Town Council candidate contained in the provisional ballots must be tallied when certifying the final election results.

Respectfully submitted,

Nancy Case Singleton and
Deborah A. McGee
Respondents, By Counsel

Gregory A. Bailey, Esq. (WVSB #7957)
J. Daniel Kirkland, Esq. (WVSB #12598)
Arnold & Bailey, PLLC
208 N. George Street
Charles Town, WV 25443
304.725-2002 (t)
304.725.0282 (f)
gbailey@arnoldandbailey.com
dkirkland@arnoldandbailey.com
Counsel for Respondents

CERTIFICATE OF SERVICE

I, Gregory A. Bailey, Esq., do hereby certify that I have served a true and accurate copy of the foregoing, ***Respondents' Brief and Cross Assignments of Error*** by U.S. Mail, First Class, postage prepaid, this 6th day of January 2020, on the following counsel of record:

Zak Ritchie, Esq.
Ryan Donovan, Esq.
Hissam Foreman Donovan Ritchie, PLLC
P.O. Box 3983
Charleston, WV 25339

Euphemia Kallas, Esq.
Corporation of Harpers Ferry
P.O. Box 1154
Shepherdstown, WV 25443
effiemou@comcast.net

Gregory A. Bailey, Esq.