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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioners,

v.

Case No.: 19-1018

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

Respondents.

BRIEF AS AMICUS CURIAE SUPPORTING RESPONDENT

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INTRODUCTION

The Petition for Appeal (the “Petition”) and the Respondents’ brief relate the factual circumstances relevant to the Court’s consideration as fully detailed in the Appendix. As for those facts relating most directly to the concerns of Mac Warner, Secretary of State of the State of West Virginia, in his official capacity (the “Secretary”), properly registered voters who purportedly reside within the town of Harpers Ferry, West Virginia, were listed in the voting records as residing within a precinct abutting, but outside the municipality. This was due to an error with their home address information, which appeared to have been the result of the Division of Motor Vehicles’ misidentification of these voters’ physical home addresses when they registered to vote via that agency. Consequently, these voters were required to complete provisional ballots when they appeared to vote for a Harpers Ferry municipal election – ballots that the Harpers Ferry Board of Canvassers (the “Board of Canvassers”) decided not to count and that the Harpers Ferry Town Council (“Town Council”) later voted to leave uncounted following an election contest on the matter. *See* Appendix Record (“A.R.”) 11.

The Jefferson County Circuit Court (the “Circuit Court”), sitting in an appellate posture, effectively overturned the Town Council’s election contest decision. *See* A.R. 319. Among other holdings, the Circuit Court stated that the Town Council’s determinations regarding “duly registered” and “technical error” as applied to relevant code was erroneous. *Id.* at. 331-32. The Circuit Court explained that the Town Council’s reliance on *Galloway v. Common Council*, 133 W. Va. 446, 57 S.E.2d 881 (1949), was misplaced given changes to West Virginia’s voter registration statutes that occurred many years later. A.R. at 331.

STATEMENT OF AMICUS CURIAE

The Secretary, by and through counsel, respectfully submits this brief as amicus curiae in support of the Respondents, Nancy Singleton Case and Deborah A. McGee pursuant to West Virginia Rule of Appellate Procedure 30(a). The Secretary, in his capacity as the State's chief election officer, has interest in the matters presented in this case as they bear on the interpretation and application of the election code throughout the state.

ARGUMENT

Petitioners criticize the Circuit Court's understanding of *Galloway*, as well as other decisions, and advocate for holdings inconsistent with the current Code and the Secretary's understanding and application of the election code relative to (i) voter registration and (ii) technical errors, omissions, and oversights relevant when determining whether to count provisional ballots. Because the Circuit Court's properly applied the language of the election provisions of the current Code in overturning the Town Council's decision, the Secretary requests this Court uphold the Circuit Court's decision.

I. The Circuit Court correctly found that Respondents were "duly registered" to vote because they were registered in the statewide unitary database.

West Virginia Code section 3-1-3 reflects the West Virginia Constitution, Article IV, section 1, and is the foundational statute undergirding the West Virginia election code, W. Va. Code § 3-1-1 *et seq.* It further reflects the breadth of the franchise, stating, "Citizens of the state shall be entitled to vote at all elections held within the precincts of the counties and municipalities in which they respectively reside." After establishing this broad baseline, certain limitations are delineated. Most relevant for the instant case, the Code dictates that a person shall not be permitted to vote at an election if not "registered as a voter as required by law" or if not "a bona fide resident of the state, county or municipality in which he or she offers to vote." *See* W. Va. Code § 3-1-3.

The Permanent Voter Registration Law, Article 2, Chapter 3 of the West Virginia Code, controls questions of registration. *See* W. Va. Code § 3-2-1 *et seq.* It requires that “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,” but provides for a “provisional” or “challenged” ballot if eligibility or registration of an individual voter is in question on the day of an election. *See* W. Va. Code § 3-2-1. Eligibility is a function of constitutional qualifications for voting, which include (i) being a citizen of the United States, (ii) being a legal resident of West Virginia and of the county where applying to register, (iii) being at least eighteen years of age, with allowance for those seventeen years of age to register if reaching eighteen by the next general election after registration, and (iv) not being otherwise legally disqualified. *See* W. Va. Code § 3-2-2(a). The phrase “duly registered” is not defined in the election code.¹ The Secretary, as the chief elections official for West Virginia, *cf.* W. Va. Code § 3-1A-6, has interpreted that term, consistent with the Constitution, existing statutory authority, and related processes, to describe an individual that has applied to be registered to vote and has had that application accepted and entered into the statewide voter registration database (described hereafter).²

¹ Petitioners’ brief incorrectly asserts that, “Under the West Virginia Code, ‘duly registered’ means that a person is registered to vote in the location holding the election.” Pet’rs’ Br. at 16.

² This Court has stated that “the interpretation of a statute by the agency charged with its administration should ordinarily be afforded deference.” *Hodge v. Ginsburg*, 172 W. Va. 17, 22, 303 S.E.2d 245, 250 (1983); *see also Murray Energy Corp. v. Steager*, 241 W. Va. 629, 636, 827 S.E.2d 417, 424 (2019) (“[E]ven a court empowered to conduct *de novo* review [] must examine a regulatory interpretation of a statute by standards that include appropriate deference to agency expertise and discretion.” (internal quotation marks omitted)). This principle applies even where, as here, the agency’s interpretative pronouncement is “set forth in the relative informal medium of an amicus brief.” *Cookman Realty Grp., Inc. v. Taylor*, 211 W. Va. 407, 415, 566 S.E.2d 294, 302 (2002) (citing *Auer v. Robbins*, 519 U.S. 452, 462 (1997)); *see also Marsh v. Alexander’s LLC*, 905 F.3d 610, 627 (9th Cir. 2018) (“It is well-settled law that courts may afford an agency’s interpretation . . . deference if the interpretation is advanced through an amicus brief.”).

As noted by the Circuit Court, there was a critical change to the means of voter registration in 2004 as “West Virginia implemented its Help America Vote [Act] (“HAVA”) compliant voter registration system.”³ *See* A.R. 331. Since that time, the Office of the Secretary of State (the “Secretary’s Office”) has maintained the “single, official, statewide, centralized, interactive computerized voter registration database of every legally registered voter in the state” that serves as “the single system for storing and managing the official list of registered voters throughout the state” and “the official voter registration list for conducting **all elections** in the state.” *See* W. Va. Code § 3-2-4a(a) (emphasis added). This statute’s creation of a unitary database maintained by the Secretary’s Office streamlined voter registration, replacing the prior regime of separate voter registration records for county and municipal voting. Under the current system, there are no registrations for or in municipalities as compared to state or county registrations—a single registration in the statewide system renders a citizen duly registered for any elections in which the citizen is otherwise eligible to vote.⁴ In other words, a voter is duly registered to vote in their home municipality if they are duly registered in the single state voter registration system. Consequently, the adoption of a “single, official, statewide, centralized, interactive computerized voter registration database of every legally registered voter in the state” obviated the precedential effect of holdings dependent on or interpreting and applying the requirements of the past system. *Galloway* is one such example.

In *Galloway*, ballots cast by voters who were registered in the county’s state-county records but who had **not** completed a required additional procedure for registering in the municipal voting

³ Section 3-2-4(a) was actually passed in 2003 in order for the required single, statewide, centralized database to be operational prior to the 2004 general election.

⁴ Other eligibility requirements, such as time of registration prior to an election, *see* W. Va. Code § 3-2-6(a), still apply.

records were not counted. *See Galloway*, 133 W. Va. at 447-48, 57 S.E.2d. at 881-82. The *Galloway* Court observed that the then-current “statutory provisions plainly indicate that the two [state-county and municipality] registration records are separate and distinct, and that one shall be used in county and state elections and that the other, when the conduct of a municipal election has been integrated with the system of permanent registration of voters by appropriate action of the municipality, shall be used as the official registration list or record for such election.” *Id.* at 451-52, 57 S.E.2d. at 884. However, this conclusion is clearly no longer valid in light of the enactment of section 3-2-4a in 2003, which provides that “[t]he statewide voter registration database shall serve as the single system for storing and managing the **official list of registered voters throughout the state**” and that “[t]he statewide voter registration database shall serve as the official voter registration list for conducting **all elections in the state.**” *See* W. Va. Code § 3-2-4a(a)(1), (8) (emphasis added).⁵ Under the present single statewide registration system required by the Code, no additional steps are required for voters to register relative to a municipal election; registration in the statewide database renders the citizen duly registered for purposes of the election code. This is also consistent with the statutory requirement that, “No voter so registered [via the permanent voter registration system] shall be required to register again for any election while continuing to reside within the same county, unless the voter’s registration is canceled as provided in this article.” *See* W. Va. Code § 3-2-1(b). This statute was enacted in 1994, many years after

⁵ To be clear, the holding from *Galloway* and other similar holdings have been rendered inapplicable by the structural changes of section 3-2-4a. Petitioners suggest that this has not occurred and could not have occurred without specific express reference in the statute delineating the abrogation of such holdings by the statute. There is no such requirement, however; statutory changes routinely undo existing caselaw without any reference to the affected decisions in the body of the statute. *See, e.g., Williams v. Leslie*, 28 F. App’x 387, 390 (6th Cir. 2002) (noting that the Ohio legislature enacted a new version of a statute seemingly, but not explicitly, in response to a district court holding).

Galloway and other decisions cited by the Town Council and Petitioners.⁶ As such, this prior case law is no longer applicable.

The sum outcome of these statutory modifications is a system with features that inure to the benefit of voters by making registration easier, more comprehensive, and more certain. Any interpretation or holding that seeks to inject back into this system any distinction regarding municipal versus state or county registration is counter to the language of the Code and would create confusion where none presently exists. *Cf. Witten v. Butcher*, 238 W. Va. 323, 325-26, 794 S.E.2d 587, 589-90 (2016) (stating that this Court “must ‘remain ever mindful of the paramount principle that election laws are to be construed in favor of enfranchisement, not disenfranchisement’” (quoting *State ex rel. Bowling v. Greenbrier Cty. Comm’n*, 212 W. Va. 647, 649, 575 S.E.2d 257, 259 (2002))); *see also Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004)

⁶ Petitioners’ brief footnotes that “this Court recently cited *Ellis* [*v. County Court of Cabell Cty.*, 153 W. Va. 45, 167 S.E.2d 284 (1969)] favorably,” pointing to *Miller v. Cty. Comm’n of Boone Cty.*, 208 W. Va. 263, 258, 539 S.E.2d 770, 775 (2000). Pet’rs’ Br. 16. This occurrence predates the statutory revision wrought by section 3-2-4a by 3 years and, more notably, this Court cited *Ellis* relative to a discussion of the “proper subjects for review and determination” by a board of canvassers, not relative to the issue of “duly registered.” *See Miller*, 208 W. Va. 258, 539 S.E.2d 770.

Further, while the Town Council and Petitioners’ briefs invoke *Ellis* as supporting their proposed definition of “duly registered,” that decision does not stand for that proposition. Therein, the Court was addressing the propriety of counting or not counting several categories of ballots. The portion of that decision cited in Petitioners’ brief (at page 16) does not provide a definition of “duly registered.” Rather, it presents one element of statute at that time (1969) within a broader discussion of a category of votes, which discussion goes on to discuss the need to correct a registration record when moving one’s “residence from one place to another within the same county” anytime until a 30-day period prior to the election and the consequences of moving one’s residence within that 30-day period. The Court goes on to state that election records did not show “that any of the voters of the foregoing 15 ballots moved from the precinct in which he was registered more than thirty days before the election and extrinsic evidence of those facts can not [sic] be considered by the board of canvassers on a recount of votes cast at an election.” *Ellis*, 153 W. Va. at 52, 167 S.E.2d at 289.

(“Thus, although election laws must be strictly construed to prevent fraud, they ordinarily will be construed liberally in favor of the right to vote.” (internal quotation marks omitted)).

II. The Circuit Court correctly found that the technical mistake in Respondents’ address in their voter registration did not invalidate Respondents’ votes.

Regarding the issue of technical errors and oversights, the Circuit Court properly applied the relevant statutes that guide the handling of situations such as the one presented here. Section 3-1-41 (“Challenged and provisional voter procedures; counting of provisional ballots; ballots of election officials”) sets forth the procedures for handling circumstances where a citizen seeks to cast ballots on election day and there is a valid basis to challenge that citizen’s vote. The outcome of this process tilts strongly toward counting votes unless there are concerns beyond merely technical ones.

The relevant statute is more readily applied with a brief review of the preparatory efforts preceding the actual voting process. The county clerk’s office will prepare a poll book for each precinct in the county in anticipation of an election. These books are not extant at all times; they are prepared only on an as-needed basis. Since the old system of physical voter registration records in each county was replaced by the single state database in 2004, there are no actual poll books (or physical municipal files) present in a clerk’s office as previously existed. Rather, a county clerk now accesses the single state database to download and print the records for each precinct on a precinct-by-precinct basis. These printouts of registration records for voters in a precinct then become the physical “poll book” that is used in each precinct.

Section 3-1-41 establishes the circumstances when a voter shall be challenged and the process for evaluating and counting the ballot cast by a challenged voter. The members of a

receiving board⁷ are duty-bound to challenge a person requesting a ballot when, among other reasons, “the person’s registration record is not available at the time of the election.” W. Va. Code § 3-1-41(a). However, even when a person’s registration record is not present in the precinct records (or poll book), that person “shall nevertheless be permitted to vote in the election” by means of a provisional ballot. *See* W. Va. Code § 3-1-41(b). Provisional ballots may be counted only at the time of canvass by the appropriate board of canvassers (i.e. county commission for state and county elections and municipal council for municipal elections). Importantly, section 3-1-41(e) directs that voters not be disenfranchised for “technical errors, omissions, or oversights if it can reasonably be ascertained that the challenged voter was entitled to vote.” In other words, because citizens “shall be entitled to vote at all elections held within the precincts of the counties and **municipalities in which they respectively reside**,”⁸ then a provisional ballot must be counted (i) if it can be reasonably ascertained that the challenged voter had established residency within the county or municipal precinct at issue and (ii) the reason for the challenge was the result of a technical error, omission, or oversight.⁹

⁷ A “receiving board” is the group of “election officials charged with conducting the process of voting within a precinct” including “at least one team of poll clerks, one team of election commissioners for the ballot box and one additional election commissioner.” W. Va. Code § 3-1-29.

⁸ *See* W. Va. Const. art. IV, § 1; W. Va. Code § 3-1-1.

⁹ The language of this section displays a parallel to section 3-1-3, which directs that a person shall not be permitted to vote at an election if not “registered as a voter as required by law” or if not “a bona fide resident of the state, county or municipality in which he or she offers to vote.” By comparison, the language of section 3-1-41(e) directing that challenges on technical grounds shall be disregarded includes a residency-related element (i.e. “challenged voter was entitled to vote”). The Secretary’s interpretation of the remainder of that sentence (addressing technical issues to be disregarded) is that it necessarily includes numerous technical errors, omissions, or oversights that could potentially arise during an election, including but not limited to technical issues relating to a voter’s registration.

It should be noted that the process created under section 3-1-41 acts to make every effort to ensure that citizens eligible to vote not be disenfranchised because of a technical irregularity that could occur, for example, during the registration process. The Code does not deny a challenged voter the opportunity to cast a ballot; it permits a ballot to be cast as part of an ongoing election with the allowance for the basis of the challenge to be evaluated later under more relaxed circumstances. Moreover, the Code specifically directs that the canvassers “shall disregard technical errors, omissions, or oversights if it can reasonably be ascertained that the challenged voter was entitled to vote.” W. Va. Code § 3-1-41(e). The Code strongly favors voting by eligible voters as reflected by this safety valve created by section 3-1-41(e). Consistent with this statute, the Secretary’s office has advised and will continue to advise that the provisional ballot of a registered voter that can be reasonably discerned to live within a municipality is a valid vote.

Here, the Circuit Court found that the voters in question could be reasonably discerned to live within the municipality of Harper Ferry. The Circuit Court clearly disagreed with the Town Council’s findings on sufficiency and credibility of evidence on these points in its recounting of the evidence presented at the election contest hearing, including but not limited to the testimony of Jefferson County’s Chief Deputy Clerk of Elections, Nikki Painter. The Circuit Court considered the totality of evidence to ascertain why certain voters’ names were excluded from the records of the precinct where they lived. Ultimately, the Circuit Court concluded that the evidence indicated that these voters had provided the requisite information and followed the proper procedures to be registered and that their names were omitted from the precinct book, stating, “This was a technical error whether caused by DMV or a Mapping system.” Again, these types of technical issues are possible, which is the reason the Legislature saw fit to include section 3-1-

41(e)'s direction to ignore such issues. The Circuit Court properly followed the strictures of the election code in this matter.

The Circuit Court did not err in determining that the Town Council incorrectly concluded that the omission of names of persons truly resident within the bounds of Harpers Ferry at all relevant times and in holding that the proper course consistent with the Code and its application statewide was to correct for this technical oversight by ordering that the ballots of these citizens be counted by the Town Council. The incorrect address of a voter's home is clearly a technical issue, especially where the only incorrect element of the address was, as here, the inclusion of "W." or "West" in the street address. This is even more certain where the assignment of a voter's municipal precinct into the system was the result of other aspects of the voter registration process, whether by the operation of another state agency's recordkeeping apparatus or mapping functions. Further, a citizen's knowledge or lack of knowledge of such technical error—let alone how such a seemingly minor address issue could impact that citizen's voting precinct—prior to an election is immaterial under the Code. A ruling against the voters here would be inconsistent with relevant statutes. *See, e.g., Bowling*, 212 W. Va. at 263, 575 S.E.2d at 653 (affirming a county commission's decision to not check 75 challenged ballots against original voter registration books in light of the "reasonably ascertained" standard, "and the foregoing-referenced principle of law favoring enfranchisement, and the fact that no suggestion of fraud has been made").

CONCLUSION

For the foregoing reasons, the Secretary requests that this Court uphold the Circuit Court's decision.

Respectfully submitted,

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