

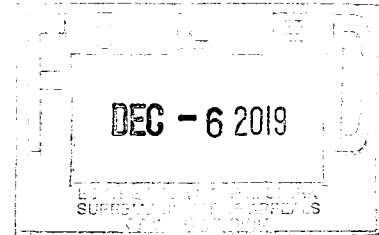
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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' BRIEF

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## INTRODUCTION

This is an appeal from an order of the Jefferson County Circuit Court reversing the result of an election contest trial conducted by the Harpers Ferry Town Council (the “Trial Court”) concerning certain votes cast in a recent municipal election.<sup>1</sup> In doing so, the Circuit Court broadly ignored or rejected the Trial Court’s key factual findings by displacing credibility determinations and reweighing testimony from a cold transcript, and cast aside binding precedent of this Court. As a result, the Circuit Court itself must now be reversed.

As is often the case in small towns, the June 11, 2019 municipal election in Harpers Ferry was hotly contested—and close. Nonetheless, the results were immediately ascertained. In accordance with the Secretary of State’s *2019 Best Practices Guide for Municipal Canvass*,<sup>2</sup> the Board of Canvassers conducted the canvass and declared the results. Respondent McGee, a losing candidate for a council seat, sought a recount. The results didn’t change. The Board then formally certified the election.

On the last possible day to do so, Respondents Case and McGee commenced this election contest under the unusual provisions of West Virginia Code § 3-7-6. In their notice of contest (essentially, a complaint), Respondents demanded that five provisional ballots cast by specific persons should be counted, and that four other

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<sup>1</sup> W. Va. Code § 3-7-6 (“[T]he governing body of the municipality is the judge of any contest of a municipal election.”).

<sup>2</sup> This public document may be accessed at the following link:  
<https://sos.wv.gov/FormSearch/Elections/Informational/Municipal%20Canvassing%20Manual.pdf>

ballots, also cast by specific persons, were wrongly counted and should be thrown out. Respondents' allegations were based on the residency status of those specific voters. By the morning of the contest trial, however, Respondents abandoned everything but their claim that four of the provisional ballots should be counted.

At trial, Respondents—who bore the burden of proof to overturn a certified election—presented testimony from only three of the four voters whose provisional ballots Respondents sought to count, as well as an employee of the Jefferson County Clerk. Petitioners' counsel cross-examined the witnesses and called some of their own. Both sides introduced a handful of exhibits. As it turned out, each of the provisional voters who testified admitted that they *knew* they had registered in a neighboring municipality—that is, *not* in Harpers Ferry—and so registered *under oath*. A few weeks after the trial, the Trial Court entered its findings of fact and conclusions of law, which addressed the record presented to them, made evidentiary weight and credibility determinations, and ultimately affirmed the decision of the Board of Canvassers by declining to count the four disputed provisional ballots.

Respondents thereafter invoked their statutory right to appeal the Trial Court's decision to the local Circuit Court—an appeal that this Court's precedent makes clear is circumscribed, especially as to the factual findings of the Trial Court. However, following briefing and oral argument, the Circuit Court got the standard of review backwards—effectively adopting *Respondents' perspective* on the evidence as to the four disputed ballots—and issued an order reversing the Trial Court's decision not to count them.

Now, this Court should restore the well-supported decision of the Trial Court, which—unlike the Circuit Court—“ha[d] original and *exclusive* jurisdiction to hear and decide contested elections involving the selection of municipal officers.”<sup>3</sup> This is not a case that requires this Court to create new syllabus points or decide which result most advances “democratic values.” Rather, this is simply a case about whether the Circuit Court correctly applied the deferential standard of review that this Court has reaffirmed time and again. It is enough that this Court hold that the Circuit Court, acting as the intermediate appellate court, failed to “give the [Trial Court’s] factual determinations the same sort of deference that appellate courts generally give to fact-finder tribunals—disturbing such determinations *only* when they are arbitrary, capricious, or clearly wrong.”<sup>4</sup> This, in short, is a standard of review case. And the outcome here should not be close.

For these reasons and those that follow, this Court should reverse the Circuit Court’s decision and restore the decision of the Trial Court, whose factual findings underlying its decision were definitely not “arbitrary, capricious, or clearly wrong.”

### QUESTIONS PRESENTED

1. Unlike the other provisional voters in this case, provisional Voter [REDACTED] failed to appear before the Trial Court to testify. Based on her absence and the lack of any other competent evidence concerning her actual residency, the Trial

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<sup>3</sup> 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) (emphasis added).

<sup>4</sup> *State ex rel. Bowling v. Greenbrier Cty. Comm’n*, 212 W. Va. 647, 649, 575 S.E.2d 257, 259 (2002) (emphasis added)

Court found that Respondents failed to present competent, credible evidence that Voter ██████ had a “physical presence in [Harpers Ferry] and intend[ed] to remain there for the foreseeable future”—a legal requirement to count her provisional ballot. Did the Circuit Court err by holding that the Trial Court’s factual determination was “arbitrary, capricious, or clearly wrong”? **Yes.**

2. Respondents conveniently blamed the West Virginia Department of Motor Vehicles for the alleged errors in the voter registration of the four voters who cast the disputed provisional ballots. But Respondents relied entirely on the admitted speculation of a single county clerk employee and failed to call *any witnesses* from the DMV or present other competent testimony to support this allegation. As a result, the Trial Court made the factual determination that Respondents failed to carry their burden to show the nature, source, or cause of the alleged registration errors, which showed the provisional voters were registered in another municipality and precinct beyond the borders of Harpers Ferry. Did the Circuit Court err by holding that the Trial Court’s factual determination on this score was “arbitrary, capricious, or clearly wrong”? **Yes.**

3. A person is “duly registered” for a municipal election only when his or her registration shows that he or she resides in that municipality. Before the Trial Court, Respondents stipulated that none of the four challenged voters were, in fact, registered to vote within the Corporation of Harpers Ferry at the appropriate time. Relying on binding opinions from this Court, the Trial Court concluded that knowingly registering to vote in the wrong municipality—under oath, no less—is no



mere “technical error” that may be disregarded. Did the Circuit Court err in not applying this Court’s precedent and concluding that knowingly registering to vote in the wrong municipality and precinct is an excusable error? **Yes.**

## STATEMENT OF THE CASE

### I. The election and contest trial.

On June 11, 2019, the Corporation of Harpers Ferry held a municipal election for, among other offices, five at-large council seats. App. 002. Petitioners Johnson, Thompson, and Humes won reelection to the council. Respondents Case and McGee lost.<sup>5</sup> At Respondent McGee’s request, the Board of Canvassers conducted a recount, which confirmed the results of the municipal election as previously declared. *Id.* Thereafter, the Board formally certified the election results on June 28. On June 29, the incoming members of the Town Council were sworn in. *Id.* Those members, including Petitioners Johnson, Thompson, and Humes, still hold their offices.

On July 8, Respondents Case and McGee filed a notice of election contest under W. Va. Code § 3-7-6, challenging their lost elections. App. 002, 202. In the notice, Respondents alleged that five uncounted provisional ballots should have been counted and four counted ballots should not have been counted at all. *Id.* at 207–08. By the morning of the election contest trial, however, Respondents abandoned all of their original requests for relief except as to four provisional ballots they say should have been counted: those of voters [REDACTED] G. [REDACTED] L.

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<sup>5</sup> Petitioner Yost also lost, but she did not file an election contest. She was, however, named as a contestee, or election contest party-defendant, by Respondents Case and McGee in this proceeding. *See* App. 203.

██████████ and ██████████ *Id.* at 038. Indeed, it was only in opening statements for the trial that Respondents conceded they were no longer seeking to count the provisional ballot of Voter ██████████ *See id.*

**The Election Contest Trial.** The election contest trial took place on August 24, before the Town Council acting as Trial Court. *See* W. Va. Code § 3-7-6 (“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.”); 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>6</sup> Counsel for the parties presented evidence for the record, took sworn testimony from live witnesses, made arguments, and thereafter submitted proposed orders.<sup>7</sup> *See generally* App. 028–177.

Respondents called four witnesses: Nikki Painter, an employee of the Jefferson County Clerk’s Office for elections, and Voters G. ██████████ L. ██████████ and ██████████ Petitioners’ counsel cross-examined each. Although Respondents told the Trial Court in opening statements that they would hear testimony from Voter

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<sup>6</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 Ordinance 11.01; *id.* at 11.02. The Mayor and Recorder “have votes as members of the Town Council.” *Id.* 111.09. Thus, when all officials take part, a majority of Town Council requires at least four votes.

<sup>7</sup> At the contest trial, counsel for both sides agreed to preserve objections without requiring the lay judges on the Trial Court to rule on each by vote of the tribunal and to otherwise streamline the proceedings. *See* App. 048.

██████ she did not show up to vouch for her ballot. After Respondents rested, Petitioners' counsel called Respondents themselves to elicit testimony as to their (lack of) standing to bring the contest in the first place. App. 115–32. Petitioners' counsel also called Kevin Carden, the Town Recorder, to testify as a fact witness given his role as the municipality's election supervisor. *Id.* 132–40. Although present, Mr. Carden refused to be sworn or testify. *Id.* 138–40.

**The Trial Court's Decision.** A little over two weeks later, the Trial Court issued its findings of fact and conclusions of law resolving the election contest. *See* App. 001–012. After making credibility determinations and weighing the evidence, the Trial Court concluded that, under governing law, the Board of Canvassers was correct in declining to count the four disputed provisional ballots. *See id.*

As to whether Voter ██████ provisional ballot should have been counted, the Trial Court found as follows: “The Contesters did not present any testimony from ██████ ██████ No competent evidence was presented concerning Ms. ██████ residency. Nor was any competent evidence presented concerning the nature or source of the alleged voter registration error affecting the official voter registration record of Ms. ██████ App. 005.

Although some evidence about the residency of three of the provisional voters was presented through their testimony, the Trial Court made several findings concerning the alleged DMV registration errors affecting those persons. The Trial Court found that “[d]espite the suspicions” of Respondents' first witness, “Ms. Painter testified that neither she nor anyone else in her office ever spoke to any

representative of the DMV to investigate the source of the alleged registration error.” App. 004. And since Respondents (without explanation) failed to call anyone with personal knowledge of the alleged registration error, including anyone from the DMV, the Trial Court found that Respondents “presented no competent evidence from the DMV concerning the nature, source, or cause of the alleged voter registration errors allegedly affecting the official voter registration records of G[.] [REDACTED] L[.] [REDACTED] [REDACTED] and [REDACTED] App. 005.

Applying these findings, the Trial Court concluded that under state law, the Board of Canvassers was right not to count Voter [REDACTED] ballot because there was no evidence presented that she was domiciled or properly registered in Harpers Ferry at the proper time. App. 005, 007. The Trial Court also concluded that the Board of Canvassers correctly declined to count the provisional ballots of Voters G. [REDACTED] L. [REDACTED] and [REDACTED] because, like Voter [REDACTED] their registrations reflected residence in the neighboring municipality of Bolivar. *Id.* 010. Not only that, but these voters had long *known* that their registrations showed a Bolivar residence and ability to vote in the Bolivar, but not Harpers Ferry. *See id.* 004. Yet they did nothing to fix the allegedly wrong registration until *after* the election that is the subject of this challenge—just in time for this election contest. *See id.* 054-56.

In light of Respondents’ failure to provide any competent evidence concerning why these voters had registered in the neighboring municipality, the Trial Court was compelled by the record and the law to affirm the Board of Canvassers’ decision as to all four disputed provisional ballots. App. 010.

Finally, the Trial Court made findings as to standing: “The Contesters presented no evidence that Nancy Singleton Case provided any written request for a recount within 48 hours of the declaration of election. Nor did the Contesters present any evidence that Ms. Case paid the required bond concerning any recount request. Ms. Case’s sworn allegations otherwise in the Notice of Contest leads the Town Council to find that Ms. Case’s testimony is inconsistent and not credible.” App. 005. As a result, the Trial Court concluded—again based on binding election law—that Respondent Case lacked standing to challenge her lost election. *Id.* 006.

## **II. The Circuit Court’s intermediate appellate decision.**

Nearly three weeks after the Trial Court issued its decision resolving this election contest, Respondents Case and McGee initiated the statutory appellate review process by filing an appeal with the local Circuit Court. *See* W. Va. Code § 3-7-7; App. 215. Following expedited briefing and oral argument, the Circuit Court issued an order reversing the Trial Court’s (and Board of Canvassers’) decision to not count the four disputed provisional ballots. *See id.* 319.

As to the four provisional ballots, the Circuit Court first found that the Trial Court should have given more “credit” to “the information provided by [] Painter as evidence of whether or not a technical error resulted in her having left the names of these four voters out of the Harpers Ferry Poll Book.” App. 326. After recounting Painter’s testimony and finding it competent, the Circuit Court concluded that “[it] was clearly against the weight of the evidence and manifestly wrong for the [Trial Court] to have listened to the undisputed testimony of [Painter] and not to have reached this conclusion.” *Id.* 327. After surveying testimony from Respondents’

view, the Circuit Court held that it was a “mistak[e]” for the Trial Court to have “focused on a need to hear from a DMV representative,” and that the Trial Court “ignored the totality of the circumstances” concerning the provisional voters’ registration reflecting a right to vote in another precinct outside the boundaries of Harpers Ferry. *Id.*

As for Voter ██████ no-show, the Circuit Court also found that Painter’s testimony about ██████ registration through the DMV, combined with the “fact that she appeared in Harpers Ferry on [election day] to vote” and had been “certified” to be included as a candidate in the election was “sufficient evidence” on which the Trial Court “*could have and should have* concluded Voter ██████ was a resident of Harpers Ferry at the time” she cast her provisional ballot. App. 328.

Next, the Circuit Court criticized the Trial Court for following what the Trial Court believed to be an on-point decision of this Court, *Galloway v. Common Council of City of Kenova*.<sup>8</sup> App. 331. The Trial Court concluded that, based on *Galloway*, the alleged registration errors did not constitute an excusable technical error under statute. In the Circuit Court’s view, the Trial Court was wrong to rely on this Court’s decision because that decision “predates” certain more recent voter registration laws—even though this Court has never overturned or recognized the abrogation of *Galloway*. *Id.*

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<sup>8</sup> 133 W. Va. 446, 57 S.E.2d 881 (1949).

Finally, as to the issue of standing, the Circuit Court affirmed the Trial Court's decision holding that Respondent Case lacked standing to bring this election contest in the first place. App. 325.

On the same day that the Circuit Court entered its intermediate appellate decision, Petitioners filed a notice of appeal in this Court invoking the statutory jurisdiction of this Court to review the decision of the Circuit Court. *See* W. Va. Code § 3-7-7 ("From the decision of the circuit court, an appeal shall lie to the supreme court of appeals, as in other cases. . . ."); *see, e.g., State ex rel. Bowling v. Greenbrier Cty. Comm'n*, 212 W. Va. 647, 575 S.E.2d 257 (2002).

#### SUMMARY OF ARGUMENT

Throughout its decision, the Circuit Court failed to follow this Court's repeated admonitions that while sitting as an appellate court reviewing election contest decisions, a Circuit Court "must give the [Trial Court's] factual determinations the same sort of deference that appellate courts generally give to fact-finder tribunals—disturbing such determinations *only* when they are arbitrary, capricious, or clearly wrong." *State ex rel. Bowling v. Greenbrier Cty. Comm'n*, 212 W. Va. 647, 649, 575 S.E.2d 257, 259 (2002) (emphasis added). In this case, the Circuit Court's error below—casting aside the credibility and evidentiary weight determinations of the Trial Court, which saw and heard witnesses testify live—is precisely the same type of error that led to the reversal of the circuit court in *Bowling*.

Specifically, the Circuit Court substituted its view of the evidence in deciding that Voter [REDACTED] ballot—despite her failing to even show up to testify about her

domicile or registration—should be counted after all. It also overruled the Trial Court’s findings in determining that Respondents presented sufficient competent and *credible* evidence to explain why the four voters’ registrations, each of which listed them as voters in the neighboring municipality of Bolivar (and different precinct)—not Harpers Ferry—were mere technical errors that could be overlooked.

Finally, in the event this Court concludes that some or all of the disputed ballots must be counted, this Court must make clear that because Respondent Case lacked standing to contest her loss in the first place, she is entitled to receive no additional votes from the ballots that are counted. In addition to the candidates who were made parties to this contest as contestees, only Respondent McGee as a proper contester is entitled to any votes that are tallied in her favor following the opening of the provisional ballots.

#### **STATEMENT REGARDING ORAL ARGUMENT**

Oral argument is unnecessary because this case is on expedited review and the dispositive issues have been “authoritatively decided.” W. Va. R. App. P. 18(a). Should this Court believe that oral argument may be helpful, argument under Rule 19 would be appropriate. W. Va. R. App. P. 19(a).



## ARGUMENT

- I. **The Circuit Court erred by substituting its own factual findings for those of the Trial Court.**
  - A. **The Trial Court correctly concluded that the losing candidates failed to satisfy their burden of proof to overturn the Board of Canvassers' decision not to count the four disputed ballots.**

As losing candidates and contesters, Respondents *alone* bore the burden of proof and persuasion to overturn the duly certified election. *See State ex rel. Bumgardner v. Mills*, 132 W. Va. 580, 601, 53 S.E.2d 416, 430–31 (1949) (“Whatever is done by persons exercising a legal authority is presumed to be done rightly. The burden of overcoming this presumption of the regularity of all these ballots as indicated by the face of the election returns was upon the petitioner.”) (cleaned up).<sup>9</sup>

In the election contest trial, Respondents did not satisfy their burden to prove facts sufficient to demonstrate that each of the four disputed provisional voters satisfied the legal requirements to have their ballots counted. West Virginia law specifies that a person’s ballot may not be counted unless he or she meets two requirements: (1) he or she is a “resident” of the municipality *and* (2) he or she is eligible and “duly registered” to vote in that municipality. *See* W. Va. Const., art. IV, § 1; W. Va. Code § 3-2-1(c); *see also id.* § 3-2-2(a). If a person is either not a resident

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<sup>9</sup> *See, e.g., State ex rel. Staley v. Wayne Cnty. Court*, 137 W. Va. 431, 437, 73 S.E.2d 827, 831 (1952) (“The rule just stated applies in this instance, and under the rule it will be presumed, in the absence of evidence to the contrary, that the county court sitting as a board of canvassers actually did ascertain and declare the results of the primary election.”).

or is not properly registered as residing in a municipality, then his or her vote cannot count in an election in that municipality.<sup>10</sup>

**Residency requirement.** First, in order to cast a valid and countable vote, a person must satisfy the residency requirement. Not only must a person be a resident of West Virginia, but that person must also be a “bona fide resident” of the county and “municipality in which she or he offers to vote.” *See* W. Va. Code § 3-1-3; *see also* W. Va. Const., art. IV, § 1. In addition, a voter must be a resident of a municipality at the time of casting a ballot and for a 30-day period before casting a ballot. *See* W. Va. Const., art. IV, § 1; *Ellis*, 153 W. Va. at 51, 167 S.E.2d at 288 (equating “offer[ing] a vote” with “cast[ing]” a ballot); W. Va. Code § 3-1-3.

In order to be a resident of a municipality—for purposes of casting a vote—a person must have a physical presence in that municipality and intend to remain there for the foreseeable future. *See White v. Manchin*, 173 W. Va. 526, 538, 318 S.E.2d 470, 482 (1984) (equating, for purposes of election law, residence with domicile, which has two elements “(1) [b]odily presence in a place [and] (2) [t]he intention of remaining in that place”); *see also* Syl. Pt. 7, *State ex rel. Peck v. City*

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<sup>10</sup> Because Harpers Ferry has adopted a permanent voter registration system under Article 2 of Chapter 3 of the West Virginia Code, the provisions of that article apply to this election contest. *See State ex rel. Ellis v. Cnty. Court of Cabell Cnty.*, 153 W. Va. 45, 52, 167 S.E.2d 284, 288–89 (1969) (applying provisions of permanent voter registration code to municipality that adopted it); *see also* Harpers Ferry, W. Va., Ordinances ch. 1, art. 103, § 103.04 (2019) (adopting permanent voter registration law of West Virginia).

*Council of City of Montgomery*, 150 W. Va. 580, 148 S.E.2d 700 (1966) (explaining residency requirement and applying domicile rule to municipal election).<sup>11</sup>

Therefore, if someone was not a resident of the municipality for the 30-day period immediately before casting a ballot or was not a resident at the time he or she cast a ballot, then that person's vote cannot be counted under West Virginia law. *See Peck*, 150 W. Va. at 588, 148 S.E.2d at 706 (concluding that the residency requirement contained in Article IV, section 1 of the West Virginia Constitution "applies to cities").

**Voter registration requirement.** *Second*, in addition to being a domiciliary of the municipality, a voter must also meet voter registration requirements in order for that person's vote to count. *See W. Va. Code § 3-2-1; see also W. Va. Const., art. IV, § 12* ("The Legislature shall enact proper laws for the registration of all qualified voters in this state."); *State ex rel. Willhide v. King*, 126 W. Va. 785, 789, 30 S.E.2d 234, 236 (1944) (concluding that § 12 of Article IV of the Constitution was "sufficient [to] warrant" enactment of voter registration requirements).

There are three voter registration requirements relevant to this contest: (1) a person must be "eligible" to register to vote, *see W. Va. Code § 3-2-1(c)*; (2) a person must be "*duly* registered" to vote, *see id.*; and (3) a person must be properly registered no later than twenty-one (21) days before the election in question. *See id.* at § 3-2-6(a) (setting the deadline for voter registration). A voter must satisfy *each*

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<sup>11</sup> *See also W. Va. Code § 3-1-3; W. Va. Const., art. IV, §1* (requiring a permitted voter be a "resident"); *W. Va. Code § 3-2-2* (mandating that a person must be "a legal resident" of location in order to register to vote).

of these three requirements in order for his or her vote to count. The purpose of these registration requirements is to enable election officials to determine whether someone satisfies the constitutional and statutory qualifications *before* he or she actually casts a ballot. *See State ex rel. Daily Gazette Co. v. Bailey*, 152 W. Va. 521, 525 164 S.E.2d 414, 417 (1968) (registration statutes “protect . . . the ballot box”).

A person is only “duly registered” for a municipal election when his or her registration shows that he or she resides in the municipality. Under West Virginia Code, “duly registered” means that a person is registered to vote in the location holding the election. As applied to a municipality, this Court has long held that a “duly registered” voter “must be registered and cast his [or her] ballot in the [municipal] precinct in which he [or she] resides.” *Ellis*, 153 W. Va. at 52, 167 S.E.2d at 289.

In other words, if a voter is not registered to a municipality—and in the corresponding municipal registration records (wherever they are kept)—when he or she casts a ballot, then that person’s vote cannot count in an election of that municipality. *See* Syl. pts. 2 & 3, *Galloway v. Common Council of City of Kenova*, 133 W. Va. 446, 57 S.E.2d 881 (1949).<sup>12</sup> Because of the importance of such residency information, when a person fills out a voter registration application, he or she must identify the address, city, and county where he or she resides *under oath*. *See* W.

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<sup>12</sup> This Court’s decisions in *Ellis* and *Galloway*, which squarely control here, have never been overturned or even questioned by this Court. In fact, this Court recently cited *Ellis* favorably. *See Miller v. Cty. Comm’n of Boone Cty.*, 208 W. Va. 263, 268, 539 S.E.2d 770, 775 (2000). The Circuit Court’s summary conclusion that *Galloway* and perhaps other longstanding decisions of this Court have been *silently overturned* by intervening legislative acts is unsupported by analysis and is otherwise unsound. *See* App. 331.

Va. Code § 3-2-5(c)(3). A person must be duly registered to vote by the registration cutoff date, which is 21 days before the election. *Id.* § 3-2-6(a).

Therefore, if a voter had not registered as residing in a municipality at least twenty-one days before a municipal election, that person would not be “duly” registered to vote in that election. *See Ellis*, 153 W. Va. at 52, 167 S.E.2d at 289 (explaining that ballots could not be counted in precinct that a voter moved to within the cutoff period before the election); *State ex rel. Lawhead v. Kanawha Cnty. Ct.*, 129 W. Va. 167, 172, 38 S.E.2d 897, 900 (1946) (applying former version of code that contained 30-day cutoff period and concluding that “[i]t is plain that in order to vote at an election a person must be registered thirty days or more prior to that election”). In other words, that person’s vote cannot not be counted in that municipal election.

**1. Respondents failed to present to the Trial Court any competent evidence of the residency of Voter [REDACTED]**

At the barest of minimums, the Circuit Court should have sustained the Trial Court’s decision not to count the ballot of Voter [REDACTED] because Respondents failed to adduce *any* competent evidence during trial that she “resided”—as defined by statute and Supreme Court precedent—in Harpers Ferry at the time of the election. At the start of the trial, Respondents’ counsel promised the Trial Court that it was “going to hear evidence . . . from [REDACTED] [REDACTED] App. 038. *But that never happened.* Unlike Voters [REDACTED] G. [REDACTED] and L. [REDACTED] Voter [REDACTED] was never called to the stand. Indeed, she apparently didn’t even show up. *See id.* 276 (Respondents’

counsel admitting to Circuit Court: “Ms. [REDACTED] did not testify. She did not appear at trial.”).

As a result, unlike the other voters, Voter [REDACTED] never testified that she had a physical presence in Harpers Ferry and intended to reside there for the foreseeable future. Nor did any other witness competently testify that Voter [REDACTED] had a physical presence in Harpers Ferry and intended to reside there permanently, as required by law. And nor did Respondents introduce any affidavit, records, or other competent evidence that Voter [REDACTED] had a physical presence in Harpers Ferry and intended to reside there permanently.

The sole basis for the Circuit Court overturning the Trial Court’s findings as to the complete lack of evidence at trial from Voter [REDACTED] was that [REDACTED] cast a provisional ballot on election day and that she “had been certified by the Town Council to be included as a candidate in the election.” App. 328.

There are several problems with this *new* factual finding by the Circuit Court. To begin with, Respondents presented no competent evidence to the Trial Court of any such “certification,” much less that the “Town Council” itself “certified” [REDACTED] candidacy. (The Circuit Court cites none). Nor did Respondents present the Trial Court with any applicable standard for such a “certification” to appear on a ballot. And for good reason: The Town Council does not, under any law, “certify” individuals filing for municipal election. Rather, individuals seeking to appear on

the ballot need only fill out a publicly available form called a “Certificate of Announcement,” created by the Secretary of State’s office, and submit it.<sup>13</sup>

Neither Respondents nor the Circuit Court have any legal support for the assertion that Voter ██████ was “certified” to be candidate, much less how any such “certification” bears on the legal requirements to count one’s vote. Although ██████ had been listed as a candidate on the ballot (despite later withdrawing her candidacy in writing), the Circuit Court entirely failed to explain what that has to do with affirmatively demonstrating evidence of domicile at an election contest.

Instead of recognizing that its “finding” contravened the law, the Circuit Court simply skipped over the residency requirement altogether, reasoning that “once the [Respondents] proved that the voters were ‘duly registered’ at the time of the election, they were presumed to be an eligible voter until proven otherwise.” App. 328. The Circuit Court cites no legal authority for this “presum[ption].” *Id.* There is none.

What’s more, had Respondents actually called Voter ██████ to testify, cross-examination would have revealed that Voter ██████ *intentionally withdrew* her supposed candidacy long before the election. But since Respondents failed to meet their burden entirely, Petitioners had no need to rebut it. Indeed, Petitioners were

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<sup>13</sup> The “Certificate of Announcement” form can be found on the West Virginia Secretary of State’s website at the following link:  
<https://sos.wv.gov/FormSearch/Elections/Candidate/C-1%20Certificate%20of%20Announcement.pdf>

also prepared to introduce documentary evidence of such withdrawal through municipal election supervisor Recorder Kevin Carden, who refused to testify.

Similarly, Respondents also failed in their appeal below to acknowledge Voter ██████ absence from the trial and glossed over the lack of evidence with missing, imprecise, or unclear citations to the record.<sup>14</sup> The closest Respondents actually came is the testimony of county clerk elections division employee Nikki Painter. Ms. Painter testified that, after becoming aware of problems with other voters' registrations, she "looked at" ██████ registration and "changed" ██████ voter registration from West Washington Street, which is in the municipality of Bolivar, to Washington Street, which is in municipality Harpers Ferry. App. 066–67.

But as Ms. Painter admitted, she *never* actually spoke to Voter ██████ and had *no personal knowledge* of ██████ actual residency. App. 066, 047 (One wonders on what basis or authority Painter *changed* ██████ registration following the election). As a result, Painter was unable to offer any competent evidence about whether Voter ██████ actually lived in Harpers Ferry on the day of the election and for 30 days before with an intent to remain—as required by the law.

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<sup>14</sup> Throughout their brief and oral argument before the Circuit Court, Respondents relied on uncited "facts" and documents that were *not* proffered as or received into evidence by the Trial Court. *See, e.g.*, App. 218, 220–21 (assertions as to Voter ██████ *id.* 278 (Respondents' counsel admittedly arguing facts to the Circuit Court that are "not in the record"); *id.* (Respondents' counsel: "It's not really fair for me to add that because it's not really in the record *but, . . .*"); *id.* 280 (Respondents' counsel arguing more facts, admitting "this is not in the record, *but, . . .*"). The Circuit Court could not consider or rely on them in its appellate review. *See* W. Va. Code § 3-7-7 (the appeal "taken to the circuit court . . . shall be heard and determined upon the original papers, evidence, depositions and records filed before and considered by" the Trial Court).



The best—and perhaps only—vehicle for that evidence was Voter [REDACTED] herself. *Respondents knew that*—which is why she was on their witness list, and why their counsel in opening statements told the Trial Court she *would testify*. See App. 038. One can only speculate as to why Voter [REDACTED] did not appear at the trial, but regardless of the reason, trials have consequences. The consequence of Voter [REDACTED] absence from this one is that Respondents failed to carry their burden of establishing [REDACTED] residency. Without residency established, the Trial Court could not conclude that her vote should have been legally counted under controlling law. At a bare minimum, Voter [REDACTED] provisional ballot cannot be counted.

**2. Respondents failed to present competent evidence to the Trial Court that the provisional ballots of Voters [REDACTED] G. [REDACTED] and L. [REDACTED] should have been counted.**

Even if Voter [REDACTED] had testified as to her residency, however, two other evidentiary reasons amply support the Trial Court's conclusion that her provisional ballot—and the provisional ballots of [REDACTED] G. [REDACTED] and L. [REDACTED]—could not be lawfully counted. The Trial Court was thus correct in sustaining the Board of Canvassers' decision not to count any of the four provisional ballots.

*First*, Respondents failed to adduce any competent evidence concerning the alleged DMV error. Although it made for a good soundbite—blaming the DMV for the four voters' registrations reflecting residency in another municipality and precinct *outside* Harpers Ferry—Respondents remarkably failed to call any witness from the DMV or present any other competent evidence derived from the DMV as to the actual source, nature, or cause of the alleged voter registration errors.

Here, Respondents did not even *attempt* to call a single witness from the DMV to discuss the voter registration process at the DMV; how the DMV computer systems worked (or failed to work properly); how those systems integrated (or not) with the voter registration process; or how the alleged registration errors at issue in this case were actually made (or not made). *See* App. 005. Rather, the only evidence purporting to support the “DMV theory” was presented through a deputy clerk from the Jefferson County Clerk’s office—again, Ms. Painter—who blamed the incorrect registration errors on the DMV but lacked any personal knowledge of whether, how, or why such an error actually (or even could have) occurred. *See id.* 047.

This is also what the Circuit Court hung its hat on, thereby replacing the Trial Court’s view of the evidence with its own (and Respondents’). *See* App. 326 (holding that the Trial Court should have given more “credit” to “the information provided by [ ] Painter as evidence of whether or not a technical error resulted in her having left the names of these four voters out of the Harpers Ferry Poll Book”); *id.* 327 (“It was clearly against the weight of the evidence and manifestly wrong for the [Trial Court] to have listened to the undisputed testimony of [Painter] and not to have reached this conclusion.”).

Unlike the Circuit Court, the Trial Court’s reasoning and decision worked from the presumption that the registration of the four voters, which listed their residency as the neighboring municipality of Bolivar, was correct until proven otherwise. This is because when a person fills out a voter registration application, he or she must identify the address and city where he or she resides (and is thus

entitled to vote) *under oath*. See W. Va. Code § 3-2-5(c)(3). So, when Respondents failed to present *any evidence* from the DMV concerning the actual source, nature, or cause of the alleged errors affecting these voters' registrations, Petitioners were in turn deprived of any opportunity to explore or test such evidence by cross-examination.

Worse still, the Trial Court was left without the evidence that it would have needed to evaluate and weigh in order to determine whether the disputed ballots could be counted under controlling provisions of law (i.e., whether the type of error was one that could be disregarded). Cross-examination revealed that the provisional voters who showed up *knew*—many for nearly a year—that their registration reflected residency in the neighboring municipality and precinct of Bolivar—not Harpers Ferry. See, e.g., App. 080, 093–94, 103.

Critically, at least as to the [REDACTED] they testified that they agreed to register to vote in the municipality and precinct of Bolivar while at the DMV knowing then that it was wrong. See *id.* Yet they did *nothing* to correct the error until after the election and just before this contest commenced. For his part, Voter [REDACTED] admitted on cross-examination that he (quite correctly) believed it was *his* “responsibility to make sure [his] voter registration was correct.” *Id.* 107. The ease with which the registrations were apparently changed by either going back to the DMV or by Ms. Painter directly—only *after* the election, but for some unexplained

reason not beforehand—raised serious questions of credibility that the Trial Court weighed in real time.<sup>15</sup>

And this is precisely the point of the standard of review that grants deference to the finder of fact: The Trial Court was entitled to make negative credibility interferences based on live testimony of the [REDACTED] and [REDACTED] which the Circuit Court's inappropriate *de novo* look at the evidence disregarded and overturned. This Court can and should reverse the Circuit Court as to the four ballots for this reason alone.

*Second*, this Court can affirm the Trial Court for another reason. Based on Respondents' stipulation that *none* of four provisional voters were, in fact, in the official registration record of the Corporation of Harpers Ferry—the Harpers Ferry Poll Book—at the time each of them cast their ballots, the Trial Court correctly found that the Board of Canvassers properly declined to count those ballots in accordance with binding decisional law of this Court. *See* App. 003, 071.

The law on this matter is well-settled. As explained above, in order for a vote to count, a voter must be “duly registered” to vote, including at least 21 days before the election at issue. W. Va. Code §§ 3-2-1(c) & 3-2-6(a). Under West Virginia Code, a person is only “duly registered” for a municipal election when his or her registration shows that he or she resides in the municipality.

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<sup>15</sup> It should go without saying that it is a harm to free and fair elections—a threat to election integrity—when a prospective voter affirms to a government official (even at the DMV) an incorrect address for purposes of registering to vote. This is again why law requires a voter to present such information under oath. *See* W. Va. Code § 3-2-5(c)(3).

As applied to a municipality, this Court could not have been clearer: a “duly registered” voter “must be registered and cast his [or her] ballot in the [municipal] precinct in which he [or she] resides.” *Ellis*, 153 W. Va. at 52, 167 S.E.2d at 289. In other words, if a voter is not registered to a municipality—and in the corresponding municipal registration records (i.e., the poll book)—when he or she casts a ballot, then that person’s vote *cannot* count in an election of that municipality. *See* Syl. Pts. 2 & 3, *Galloway v. Common Council of City of Kenova*, 133 W. Va. 446, 57 S.E.2d 881 (1949).

Accordingly, if a voter had not *properly* registered as residing in a municipality at least twenty-one days before a municipal election, that person would not be “*duly* registered” to vote in that election. *See Ellis*, 153 W. Va. at 52, 167 S.E.2d at 289 (explaining that ballots could not be counted in precinct that a voter moved to within the cutoff period before the election) (emphasis added). In short, that person’s vote cannot not be counted in that municipal election. Given Respondents’ stipulation that none of the four provisional voters’ registrations were in the Harpers Ferry poll book at the time of the election, App. 003, 071, the Trial Court was correct in concluding that those ballots cannot be counted.

*Third and finally*, assuming that the DMV somehow caused the incorrect registration—information concerning the four provisional voters—those errors are not the type that may be simply disregarded. This is a third independent ground on which this Court can—but need not—reach to reverse the Circuit Court and restore the decision of the Trial Court.

This conclusion is compelled by the longstanding decision of this Court in *Galloway v. Common Council of City of Kenova*, 133 W. Va. 446, 57 S.E.2d 881 (1949). In *Galloway*, this Court held that persons whose names appeared on the voter registration records used in county and state elections but not on municipal registration records were *not* entitled to vote in municipal elections. In that case, this Court *expressly acknowledged* the statutory provision stating that “errors, omissions or oversights” shall be “disregard[ed] . . . if it can reasonably be ascertained that the challenged voter was entitled to vote.” *Id.* at 453, 57 S.E.2d at 885 (citing the predecessor statute to current W. Va. Code § 3-1-41(e)). Critically, however, this Court *did not apply the provision* to the facts of that case to count the challenged votes of voters whose names did not appear to be registered in Kenova’s poll book.

Instead, the upshot of this Court’s decision in *Galloway* is that a voter’s failure to be *properly*—“duly”—registered in a municipality, where that municipality has adopted a permanent registration system, is not a mere technical error that may be disregarded. *See id.* (holding that the “challenged ballots” were not “otherwise valid” and thus not countable “[b]ecause the voters who cast these ballots were not duly registered by reason of the absence of their names from the municipal registration list or record”).<sup>16</sup>

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<sup>16</sup> *See also Brooks v. Crum*, 158 W. Va. 882, 890, 216 S.E.2d 220, 225 (1975) (“It was held in *State ex rel. Willhide v. King* that where persons duly qualified to vote failed to comply with requirements of the statutes concerning registration, which were enacted to prevent fraud in elections, they forfeited their right to the franchise.”) (citation omitted).

The Circuit Court addressed this critical analysis in cursory fashion by way of a single paragraph, and simply asserted that this Court's decision in *Galloway* is no longer good law whatsoever, because it "predates" the "Permanent Registration System" and "Singular Voter Registration System." App. 331. The Circuit Court does not cite to any sections of state code that supposedly abrogate *Galloway* much less explain which particular provisions or language of code displace *Galloway* or how. The Circuit Court simply asserts that it is so and leaves Petitioners and this Court to guess.

In any event, this Court need not reach the "technical error" argument or attempt to reconcile *Galloway* with uncited statutory provision(s) or attempt to fashion new election law. It is enough that this Court conclude, as noted above, that the Circuit Court failed to properly apply the standard of review when it disregarded 1) the findings as to Voter ██████ residency (lack of ██████ evidence) and 2) the findings as to the actual basis for the alleged registration errors affecting Voters G. ██████ L. ██████ ██████ and ██████ (lack of DMV evidence).

**II. Respondent Case's vote tally must remain as certified because she lacked standing to bring this contest.**

The Circuit Court correctly affirmed the Trial Court's decision that Respondent Case lacked standing to bring an election contest on her own behalf. As a result, even if this Court requires some or all of the four provisional ballots to be counted, none can be counted for Case. By law, her tally must remain as certified.<sup>17</sup>

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<sup>17</sup> If this Court affirms the Circuit Court in whole or in part but does not opine as to the effect of Respondent Case's lack of standing, Petitioners will continue to contend that in

No Standing. As both the Trial Court and Circuit Court agreed, Respondent Case plainly failed to meet her burden to establish standing. In order to mount an election contest, a losing candidate must first timely demand a recount. *Miller v. Cnty. Comm'n of Boone Cnty.*, 208 W. Va. 263, 270, 539 S.E.2d 770, 777 (2000) (affirming circuit court's decision to halt election contest where contesteer failed to timely request a recount in accordance with West Virginia Code § 3-6-9). A timely recount requires (1) a formal request, and (2) posting a bond, within 48 hours of the Board of Canvassers' declaration of election. W. Va. Code §§ 3-6-9(a)(8)(A) & (h). At the trial, Case admitted that she "personally did not" submit the required bond. App. 121. Thus, her lack of standing is beyond dispute.

Impact. The effect of Case's lack of standing is significant. One candidate's initiation of an election contest does not give rise to a roving writ under which courts may inspect and alter any aspect of that election. Instead, the right to vie for votes in an election contest is strictly circumscribed and, most important here, *it is an individual right*. Because Respondent Case did not adhere to the mandatory requirements for availing herself of that right, her vote totals (like all others who lost and did not challenge the result) are final.

The individualized nature of the right to contest an election under W. Va. Code § 3-7-6 is apparent in the plain language and structure of the statute. Where a losing candidate wishes to pursue an election contest to count previously rejected

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no event can Respondent Case's certified vote tally be altered by the provisional votes that are ordered to be counted. Petitioners are concerned that this live controversy will simply return to this Court at a later date if this Court affirms the Circuit Court but provides no clarification on this issue.



votes, that right inures only to a *particular* candidate to seek *specific votes for that candidate*. Specifically, the law requires that a 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*.” W. Va. Code § 3-7-6 (emphasis added). An ordinary reading of this provision means that where a contester seeks to count rejected votes (as here), the right to vie for those votes flows only to the individual contesting candidate. That narrow right stands in stark contrast to the limited circumstances (not applicable here) where the law allows a single candidate or citizen to challenge the validity of an entire election on grounds of fraud. *See Pridemore v. Fox*, 134 W. Va. 456, 462, 59 S.E.2d 899, 900 (1950).

Consistent with the plain language of the statute, this Court has long required that where “the matter of the result of the election as between candidates” is at the heart 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.” Syl. Pt. 1, *id.* at 462, 59 S.E.2d at 902. Emphasizing the individual nature of the right, this Court has held that even where candidates have properly initiated a challenge to election results, those candidates *must* request specific and individual relief as to their respective vote totals. *See State ex rel. Peck v. City Council of City of Montgomery*, 150 W. Va. 580, 584, 148 S.E.2d 700, 704 (1966) (noting that “although the unsuccessful candidates for [city] Council are parties to this proceeding[,] no relief is requested in the prayer as to them” and only deciding challenge of the one candidate identified in the prayer). If a candidate who properly files an election

contest but does not seek specific relief is not entitled to take office as a result of a challenge, then it cannot be the case that a losing candidate with no standing at all is entitled to more.

Finally, fundamental principles of the law of standing confirm the statutory directive: “[S]tanding to sue—the real party in interest requirement—goes to . . . whether *the plaintiff* has a *right to relief*.” *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 95, 576 S.E.2d 807, 822 (2002) (emphasis added). Here, the contest concerns the counting of rejected ballots that Respondent Case did *not* initiate properly and to which she was never a proper party. Case thus has no right to vie for votes in her favor, and her vote tally total must remain as certified.

### CONCLUSION

For the foregoing reasons, this Court should reverse the Circuit Court’s order and affirm the decision of the Trial Court. 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 Cty. Comm’n*, 212 W. Va. 647, 649, 575 S.E.2d 257, 259 (2002).

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 6, 2019, the **Petitioners' Brief and Appendix** was emailed and mailed via U.S. Mail to counsel for the parties as follows:

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