

**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA**

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

**Petitioners,**

**v.**

**Civil Action No.: 19-P-111**

**CORPORATION OF HARPERS FERRY  
(the governing body of Harpers Ferry),  
HARDWICK SMITH JOHNSON, and  
CHARLOTTE WARD THOMPSON,**

**Respondents.**

**MOTION FOR EXPEDITED HEARING AND PRELIMINARY INJUNCTION BASED  
UPON PETITIONERS' PETITION FOR WRIT OF PROHIBITION**

Petitioners, Nancy Singleton Case and Deborah A. McGee, by and through their counsel, Gregory A. Bailey, Esq., J. Daniel Kirkland, Esq., and the law firm of Arnold & Bailey, PLLC, and pursuant to Rule 65 of the West Virginia Rules of Civil Procedure and other applicable statutory and common law, file the foregoing Request for Preliminary to prohibit members of the Harpers Ferry Town Council whose election is at issue from serving on the tribunal to judge the election, qualifications and returns from the June 11, 2019 Harpers Ferry municipal election at the tribunal hearing scheduled for August 24, 2019.

Petitioners filed a Petition for Writ of Prohibition on August 21, 2019, to prohibit disqualified members of the Harpers Ferry Town Council from judging their own election. The request for expedited relief is necessary because the Town has set the adjudication of the election

contest on August 24, 2019 and just announced that members of the tribunal whose election is in contest will not disqualify themselves.

### STANDARD OF REVIEW

Rule 65 of the West Virginia Rules of Civil Procedure governs injunctions. The West Virginia Supreme Court has set forth the following standard for issuing a preliminary injunction:

The customary standard applied in West Virginia for issuing a preliminary injunction is that a party seeking the temporary relief must demonstrate by a clear showing of a reasonable likelihood of the presence of irreparable harm; the absence of any other appropriate remedy at law; and the necessity of a balancing of hardship test including: “(1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff’s likelihood of success on the merits; and (4) the public interest.” *Jefferson County Bd. of Educ. v. Jefferson County Educ. Ass’n*, 183 W.Va. 15, 24, 393 S.E.2d 653, 662 (1990)(quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1054 (4th Cir.1985); *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir.1977).

*State By & Through McGraw v. Imperial Mktg.*, 196 W. Va. 346, 352, 472 S.E.2d 792, 798 (1996).

When deciding whether to grant or refuse an injunction, West Virginia courts have applied the following reasoning:

The granting or refusal of an injunction, whether mandatory or preventive, calls for the exercise of sound judicial discretion in view of all the circumstances of the particular case; regard being had to the nature of the controversy, the object for which the injunction is being sought, and the comparative hardship or convenience to the respective parties involved in the award or denial of the writ.

The central core of this decades-old analysis is the “comparative hardship” of the parties. The federal courts have evolved a detailed methodology to guide courts in balancing the hardship of the parties. West Virginia trial courts apply this same four-factor methodology when weighing the granting or refusal of a preliminary injunction:

Under the balance of hardship test the district court must consider, in ‘flexible interplay,’ the following four factors in determining whether to issue a preliminary injunction: (1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) *the plaintiff’s likelihood of success on the merits*; and (4) the public interest.

*Morrisey v. W. Virginia AFL-CIO*, 239 W. Va. 633, 638, 804 S.E.2d 883, 888 (2017).

**1. The Petitioners are Likely to Suffer Irreparable Harm in the Absence of a Preliminary Injunction.**

This election contest was timely filed on July 8, 2019, within 10 days of the certification of the election results. The trial of this election contest must be held no later than (3) months after the election. The governing body delayed for over a month but eventually acted on August 12, 2019, to set the trial date on Saturday, August 24, 2019. In the last few days, the governing body finally responded to repeated demands by Petitioners that the members of the governing body whose elections are at issue disqualify themselves from judging this election. The initial response was that two of the three council members would be disqualified, then today August 21, 2019, the governing body reversed its position and stated that only one of the council members would recuse himself, leaving two disqualified members on the tribunal judging the election.

If these disqualified members proceed to judge this matter on August 24, 2019, the Petitioner's only avenue of relief will be to seek appellate review in this Court after irreparable injury. The appellate process is likely to proceed over the course of several months. During that time, a potentially illegitimate governing body will be free to enact policies, procedures, and agendas that potentially contravene the will of Harper's Ferry voting citizens. The longer it takes, the longer the potential damage survives. Moreover, in the interests of judicial economy the trial should go forward only with the members who are not clearly statutorily disqualified to avoid an order of remand and trial that will not take place within the statutorily mandated three (3) month period. In short, time is of critical essence.

Based upon the clear statutory provisions at issue, this Court has the ability to enter a preliminary injunction enjoining the disqualified council members from participating the August 24, 2019, contested election hearing.

## 2. The Petitioners Likelihood of Success is Great.

The election contest at issue could not be clearer. At issue is the validity of five (5) provisional ballots cast by residents and registered voters of Harper's Ferry, West Virginia. What is unclear, however, is the outcome Petitioner's will receive when two (2) members of the Harper's Ferry town council, whose elections are being contested, are tasked with sitting in judgment of the election results. In that regard, W.Va. Code § 3-7-6 is clear and provides the following:

**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)<sup>1</sup>

In response to Council Members Johnson and Thompson's outright refusal to disqualify themselves from judging the contested municipal election, Petitioners have filed a Writ of Prohibition seeking an order prohibiting said council members from sitting in judgment at the August 24, 2019, election contest. The Petitioner's likelihood of success in this matter is substantial based upon the clear and unambiguous statutory law set forth in W.Va. Code § 3-7-6. Until such time that this Court has an opportunity to determine the validity of the Petitioner request, it would be improper to proceed forward with the August 24, 2019, contested election proceeding.

Accordingly, because the Petitioners are likely to prevail on the issue of recusal a preliminary injunction enjoining the August 24, 2019, contested election proceeding is proper.

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<sup>1</sup> 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."

### **3. The Public Has a Substantial Interest in the Outcome of the Contested Municipal Election.**

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.

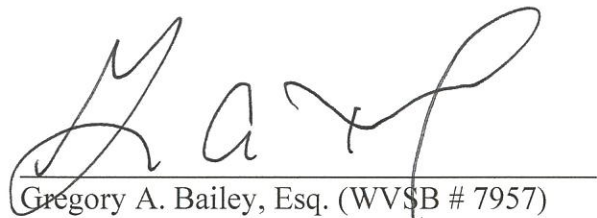
In this matter, the provisional ballots of at least five (5) residents and registered voters of Harper's Ferry will summarily and improperly rejected without any lawful justification and/or process by the Board of Canvassers. The citizens of Harper's Ferry, and Jefferson County in its entirety, have a fundamental constitutional right to a fair and impartial election process to choose the officials that will govern their community affairs. That right is being persistently eroded by the appearance of bias and impropriety in the manner in which the so-called elected officials are placing their individual desires over that of the community. The issues related to the provisional ballots are neither complex, nor complicated. Rather, it requires a simple determination of whether or not the person casting the provisional ballots were registered voters of Harper's Ferry. It is undeniable that they were. Yet, instead of following statutory law and recusing themselves from judging an election that involves the validity of their own election, two members of the council are willfully refusing to recuse themselves.

It is undeniable that the citizens of Harper's Ferry have a substantial public interest in a fair and impartial election process and any subsequent contest to that election. The manner in which the tribunal has decided to proceed is fundamentally flawed and violative of the fair election process. Thus, the public has a substantial interest in not only the results of the election, but the manner in which it is contested and ultimately certified.

**CONCLUSION**

Accordingly, based upon the clear and undeniable public interest surrounding this issue a preliminary injunction enjoining council members Hardy Johnson and Charlotte Thompson from judging election contest scheduled for the August 24, 2019.

**NANCY SINGLETON CASE and  
DEBORAH H. McGEE,  
Petitioners, By Counsel**

A handwritten signature in black ink, appearing to read "G. Bailey", written over a horizontal line.

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**CERTIFICATE OF SERVICE**

**I, Gregory A. Bailey, Esquire, Counsel for Petitioners, do hereby certify that I have served a true copy of the attached Motion for Expedited Hearing and Preliminary Injunction Based upon Petitioner's Petition for Writ of Prohibition upon the Respondents by e-mailing a true copy thereof to their respective counsel of record listed below this 21<sup>st</sup> day of August, 2019:**

**Effie Kallas, Esquire  
Counsel for Respondent Corporation of Harpers Ferry**

**Zack Ritchey, Esquire  
Counsel for Respondents Johnson and Thompson**

**/s/ Gregory A. Bailey, Esquire**