

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THE SHEPHERDSTOWN OBSERVER, INC.,

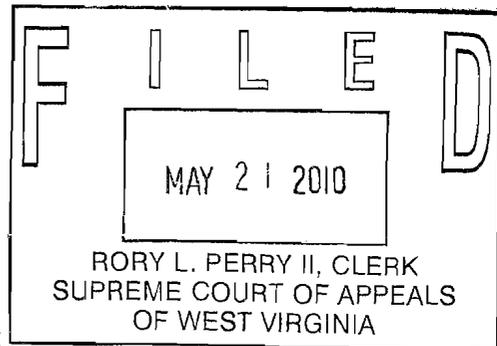
Appellant

v.

Supreme Court Docket No. 35446

JENNIFER MAGHAN,
JEFFERSON COUNTY CLERK

Appellee.



BRIEF OF THE APPELLEE

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Appellant

v.

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**JENNIFER MAGHAN,
JEFFERSON COUNTY CLERK**

Appellee.

BRIEF OF THE APPELLEE

Comes now, Jennifer Maghan, Clerk of the County Commission of Jefferson County (hereinafter "County Clerk") by and through counsel, Stephanie F. Grove, Assistant Prosecutor, to respond the Appellant's Brief on Appeal.

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I. STATEMENT OF THE FACTS

In October of 2008, the County Commission of Jefferson County enacted a traditional zoning ordinance, which ordinance was intended to replace the County's non-traditional zoning ordinance. Prior to enacting the Ordinance, on several occasions, the County Commission debated whether they should hold an election on the newly enacted traditional zoning ordinance, which election is authorized under the relevant land use statutes. Each time the issue was addressed at a County Commission meeting, a debate ensued and by majority vote, the Commission rejected placing the new ordinance before the voters.

Shortly thereafter, a petition drive in accordance with the provisions of W.Va. Code 8A-7-13, was instituted by a citizen group to bring the newly enacted ordinance to a referendum. The group collected signatures and presented them to Jennifer Maghan, the County Clerk of the County Commission of Jefferson County (hereinafter "County Clerk" or "Clerk"). After reviewing each and every signature on the petition and eliminating those signatures that were determined to be invalid, the Clerk certified that the petition contained the requisite number of signatures to bring the ordinance to referendum, using the guidelines promulgated by the West Virginia Secretary of State. Once the signatures and the petitions were certified, the County Clerk informed the County Commission that a petition had been presented containing the requisite number of signatures to bring the newly enacted traditional zoning ordinance to a referendum.

On March 30, 2009, Stephen Skinner, Esq., on behalf of the Shepherdstown Observer, requested the petition documents pursuant to the West Virginia Freedom of Information Act ("FOIA"). In his correspondence, Mr. Skinner asked the Clerk to provide him copies of any and all certification for the current proposed zoning referendum, including all

petitions and petition forms that were delivered to the Clerk's office for certification for the current proposed zoning referendum. The Clerk provided Mr. Skinner a certified copy of "Certification of Valid and Invalid Signatures on the Zoning Petition 2008," but refused to provide any other documents listed in the request, relying in part upon advice from the West Virginia Secretary of State's Office that the signatures and petitions should be kept confidential. After the Clerk denied the request, the Shepherdstown Observer filed a complaint in the Circuit Court in an attempt to enforce its FOIA request.

The County Clerk moved to dismiss the complaint, arguing that the petition was not a public document subject to the provisions of the West Virginia Freedom of Information Act. The Court granted this motion, and also ruled that releasing the names of those who signed the petition would violate the right to a secret ballot and would have a chilling effect on the ability of citizens to petition the government.

While the case was being litigated, a vote was held on the zoning ordinance, with an overwhelming majority of the county's citizens voting to reject the new ordinance. On the day of the vote, the Appellee entered a polling place, where Ronda Lehman, one of the organizers of the petition drive, and one of two citizens who were known to have signed the petition, and took a picture of Ms. Lehman, later posting it on the Observer's website. In addition, several other members of the public questioned Ms. Lehman's presence as a poll worker given what some termed a conflict of interest. As a result of the occurrences on the day of the zoning ordinance election, charges were filed against two individuals for unauthorized presence in a polling place.

II. POINTS AND AUTHORITIES RELIED UPON

Caselaw

Campaign for Family Farms v. Glickman, 200 F.3d 1180 (2000)

Daily Gazette Company v. Bailey, 152 W.Va. 521, 164 S.E.2d 414 (1968)

Daily Gazette v. Withrow, 177 W.Va. 110, 350 S.E.2d 738 (1986)

Louk v. Cormier, 218 W.Va. 81, 622 S.E.2d 788 (2005)

McIntyre v. Ohio Election Commission, 514 U.S. 334 (1995)

Ogden Newspapers, Inc. v. City of Williamstown, 192 W.Va. 648, 453 S.E.2d 631 (1994)

State v. Nelson, 189 W.Va. 778, 434 S.E.2d 697 (1993)

State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W.Va. 770, 461 S.E.2d 516 (1995).

West Virginia Human Rights Commission and Tidewater Grill v. West Virginia Human Rights Commission, 183 W.Va. 108, 394 S.E.2d 340 (1990)

Statutes

W.Va. Code § 3-1A-8

W.Va. Code § 3-1-28

W.Va. Code 8A-7-8a

W.Va. Code § 8A-7-13

W.Va. Code § 29B-1-2(4)

W.Va. Code § 53-3-2

Other Authorities

Thomas Harding, *Referendum Shenanigans*, The Shepherdstown Observer (Nov. 7, 2009).

Naomi Smoot, *Area Publisher Faces Charges*, Martinsburg Journal, (May 6, 2010).

Naomi, *Controversy Continues to Surround Recent Vote*, Martinsburg Journal, (Nov. 14, 2009).

West Virginia Secretary of State, *West Virginia Petition Process Reference Guide*, (October 2007).

III. STANDARD OF REVIEW

Appellate review of a circuit court order granting a motion to dismiss a complaint is de novo. Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995).

IV. MEMORANDUM OF LAW

A. **THE CIRCUIT COURT DID NOT ERR WHEN IT RULED THAT ALL ELEMENTS CONTAINED IN W.VA. CODE 29B-1-2 MUST BE MET**

The Supreme Court has clearly indicated that the provisions of 29B-1-2(4) constitute a definition, which contains the minimum requirements of a public record. Even though *State v. Nelson*, 189 W.Va. 778, 434 S.E.2d 697, was not an action brought pursuant to the provisions of the Freedom of Information Act, the Supreme Court interprets the provisions of the Act in that case and specifically indicates that the legislature provided a definition of a public record. “The term ‘public record’ is *defined* within the Freedom of Information Act, West Virginia Code § 29B-1-2(4), as ‘any writing containing information relating to the conduct of the public’s business, prepared, owned and retained by a public body.’ According to this *legislative definition*, the nature of a ‘public record’ is not based upon public availability as asserted by the Appellant, but rather it is based upon whether a public body prepares, owns and retains the record.” *Id.* at 787 (emphasis added). The Court has stated that it finds “the *definition of a public record* in W.Va. Code 29B-1-2 to be plain and unambiguous.” *Ogden Newspapers, Inc. v. City of Williamstown*, 192 W.Va. 648, 650, 453 S.E.2d 631, 633 (1994) (emphasis added). Thus, it is clear that the West Virginia Supreme Court has plainly interpreted that the provisions of W.Va. Code § 29B-1-2(4) constitute a definition, finding that a public record must not only relate to the

public's business, but also must have been a record that was created by the public body in the first instance.

The Appellant further asserts that *Daily Gazette v. Withrow*, 177 W.Va. 110, 350 S.E.2d 738, that the West Virginia Supreme Court defined a public record simply as any record which contains information relating to the public's business without the additional requirement that the record be kept as required by law. This is simply not the case. The Court specifically states in that case that "[i]n addition to containing information 'relating to the conduct of the public's business,' a writing **must have been** 'prepared, owned and retained by a public body' **in order to be a 'public record' under W.Va. 29B-1-2(4).**" *Id.* at 116 (emphasis added). The Court simply addresses the distinct requirements of a public record in separate sections of the opinion. First, the Court addressed whether the public record in question contained information relating the public's business. Next, it addressed whether the document in question relates to a public officer acting in an official capacity. And finally, it addressed whether the document was retained by the public body. However, it is clear that the Court, throughout the opinion, is addressing all facets of the definition contained in the Freedom of Information Act and that all must be present before the document will be considered a public record.

Furthermore, the Appellant may be correct that use of the term "includes" could demonstrate that the definition does not comprise every element or characteristic of a public record, and that a public record may contain other characteristics than those expressly listed in the statute. However, it is clear that the Supreme Court has stated that at a minimum a public record must meet the express criteria contained in W.Va. Code § 29-1-2(4). The petition does not even meet the express requirements of the definition let alone any additional requirements that

may be implied through the use of the word “include” rather than the word “means” because the document was not prepared by a public body.

The Appellant also argues that the Circuit Court suggests a narrow definition of a public record, one that would exclude any document that was not literally prepared by a public body. This is simply not the Circuit Court’s position. Rather, the Clerk has always argued and the Circuit Court has ruled that any document that was prepared either by the public body or on its behalf by a third party such as the case of the settlement agreement discussed in *Withrow*, would meet the definition of a public record.

The Petitioner also argues that several documents that have always been considered public documents would not meet the definition of a public record if the Circuit Court’s interpretation is permitted to stand. Included in Petitioner’s examples are deeds, wills, permits, and election campaign contributions just to name a few. However, each of the examples cited by the Petitioner are required to be recorded with the County Clerk by statute or are prepared at the government’s request to facilitate the governing body’s business. The Circuit Court stated in Conclusion of Law 10 that the “petition and signatures do not fall within the definition of a public record as the document was not prepared by or *on behalf of* the public body but rather was prepared by a private citizen group that was neither affiliated with nor under the control of the County Commission.” (emphasis added). This conclusion of law is clear that the records must either be prepared by or on behalf of the public body. In the case of the records cited by the petitioner, they were all prepared on behalf of the governing body or at the governing body’s request or are required by statute to be recorded as public records with the clerk of the governing body. As such, the records referenced by the Appellant, which records are

traditionally considered to be public documents, can be distinguished from the petition in the case, *sub judice*.

In the instant case, the petition was not prepared by the County Clerk, the County Commission, on its behalf, or even at its request. Instead, a private group presented the petition and signatures to the County Commission through the County Clerk for certification. The petitioners were in no way affiliated with the County Commission or the County Clerk as they sought to bring an ordinance enacted by the County Commission to a vote. Moreover, the petitions in this instance are simply not analogous to the examples cited by the Appellant. The petitions were not required to be submitted or recorded as public records. Nor was the petition a document used to facilitate the daily business of the governing body, as would the case with a permit, for example. As such, it is clear that the petition and signatures do not fall within the definition of a public record as the documents were not prepared by or on behalf of the public body but rather were prepared by a private citizen group that was neither affiliated with nor under the control of the County Commission. Accordingly, the petition does not comply with the requirements of a public record as articulated by both the West Virginia Code and this Court, and is not subject to the provisions of the West Virginia Freedom of Information Act.

B . A FREEDOM OF INFORMATION REQUEST SHOULD NOT BE USED TO REVIEW THE LEGALITY OF THE VERIFICATION PROCESS AND SEVERAL OTHER CHECKS ON THE COUNTY CLERK’S AUTHORITY

In its brief, the Appellant suggests that the petitions should be considered public records “to allow for the detection and prevention in qualifying referenda for the ballot in the first place.” This logic suggests that the Petitioner is in a position to “check” the work of the County Clerk. Moreover, the Appellant’s Brief seems to suggest that the County Clerk’s

verification process was flawed or illegal. The only way for an entity like the Shepherdstown Observer to achieve such a determination of fraud is to obtain the signatures and then contact every person whose signature appears on the petition. In fact, the Appellant's brief indicates an intention to do just that. "[WVFOIA] provides opponents of referenda with an opportunity to lobby persons who are, in effect, acting in a legislative capacity." See pg. 15, Petitioner's Brief. Such an activity would certainly have a chilling effect on the constitutional right to petition the government. As the Supreme Court stated in *Daily Gazette Company v. Bailey*, 152 W.Va. 521, 164 S.E.2d 414 (1968), "many signers of the certificates indicated that they would not have signed had they believed their names would be published." Similar to *Bailey*, the "check" suggested by the Appellant would certainly dissuade future citizens from petitioning the government.

The Appellant essentially argues that a WVFOIA request is the only check on the legitimacy of the referenda process. However, this is just simply not the case. Rather than interfering with the public's right to petition, there are several remedies to determine if the County Clerk acted improperly.

In the first instance, the County Clerk is provided guidelines for certifying petitions by the West Virginia Secretary of State. Although the Petitioner incorrectly asserts that there is no procedure certifying petitions, such a guide does exist to assist County Clerk's in processing the various petitions presented to them for certification. The Secretary of State has published the "West Virginia Petition Process Reference Guide" which was revised in October 2007. See guidelines attached as Exhibit A. The Jefferson County Clerk utilized this guide when she certified the zoning petition.

Furthermore, this Court has ruled that “[i]n the absence of evidence to the contrary, public officers will be presumed to have properly performed their duties.” *Daily Gazette Company v. Bailey*, 152 W.Va. 521, 528, 164 S.E.2d 414, 418 (1968) *see also* Syl. Pt. 3, *West Virginia Human Rights Commission and Tidewater Grill v. West Virginia Human Rights Commission*, 183 W.Va. 108, 394 S.E.2d 340 (1990) *quoting* Syl. Pt. 2 *State ex rel. Staley v. County Court*, 137 W.Va. 431, 73 S.E.2d 827 (1952). In *Bailey*, which case addressed a certificate of nomination, the petitioners contended that failure to publish the names on the certificate would encourage forgery or other types of fraud or irregularity. The Court found that the chief election officer took steps to insure that only valid signatures would be counted in the total required by the statute. Similar to the *Bailey* case, the County Clerk is the chief election officer of the county, and as such, she is vested with the duty to determine that the signatures presented complied with all statutory requirements. There is no reason to believe that the Clerk did not properly perform her duty to certify each and every signature presented or that a newspaper is in a better position to verify the signatures than those deputy clerks who are trained by and use the methods prescribed by the West Virginia Secretary of State.

In addition, there are several statutory remedies that act as a check upon the County Clerk’s authority to certify petitions. West Virginia Code § 53-3-2 provides in relevant part “in every case, matter or proceeding before a county court. . . the record or proceeding may, after judgment or final order therein, or after any judgment...be removed by writ of certiorari to the circuit court of the county in which such judgment was rendered.” Even though the County Clerk certified the petition, the legislation granting the right to petition for a vote on the zoning ordinance clearly indicates that the County Commission is clearly an essential entity in the referendum process. West Virginia Code 8A-7-13(j), which section provides the manner in

which the voters may petition for an election on replacing a non-traditional ordinance with a traditional ordinance, indicates that “a petition, signed by at least ten percent of the eligible voters. . .may be filed with the *governing body* of the county. . .” The County Clerk is the Clerk of the County Commission, whose duty it is to assist the Commission with its statutorily assigned duties. W.Va. Const. art. IX § 12. As such, any decision of the County Clerk, which decision is necessarily performed on behalf of the County Commission, is subject to review by certiorari. Thus, if the Appellant wished to challenge the determination that the requisite number of signatures had been submitted to the clerk or the county commission, such challenge should be achieved through a writ of certiorari not a Freedom of Information request.

In addition, if the Plaintiff feels that the County Clerk has acted improperly in the manner in which she certified the petitions, the West Virginia Secretary of State has a Fraud Unit formed to investigate any type of election fraud. Such a unit is authorized pursuant to W.Va. Code § 3-1A-8. If the plaintiff has concerns about the method the County Clerk employed to certify the signatures presented to her office, or feels that her office illegally colluded with the petition organizers, the Secretary of State’s Fraud Unit is the appropriate entity to investigate such allegations. In fact, it was this same Fraud Unit that investigated any reported irregularities that occurred on the day of the zoning election, including the Petitioner’s unauthorized presence in a polling place.

Finally, the West Virginia Legislature has recognized that at least some petitions should be confidential, suggesting that public access is not needed as a procedural check to prevent fraud. West Virginia Code § 3-1-28 provides for a petition to be presented to the County Commission requesting the suspension of an election official. The Petition must contain the signature of twenty-five registered voters in the precinct where the official served. However, this

code section specifically provides for confidentiality. “The names of those persons signing the petition must be kept confidential.” W.Va. Code § 3-1-28(6)(c). It is clear, that the Legislature vested the County Commission through the County Clerk with the authority to certify a petition, but did not contemplate any additional procedural safeguards, such as the public disclosure which the Petitioner suggests is so essential to prevent fraud.

Accordingly, it is clear that there are several checks on the County Clerk’s authority, and a FOIA request for a document that does not meet the definition of a public record should not be used as a substitute for the remedies already available by law.

C. THE CIRCUIT COURT DID NOT ERR BY ADDRESSING CONSTITUTIONAL ISSUES THAT WERE CONTROLLING ISSUES IN THE RESOLUTION OF THE CASE

The Appellant argues that the Circuit Court improperly decided the case based upon constitutional concerns although the issues were not briefed nor argued by the parties and that the Court improperly considered the constitutional issues of a secret ballot and the chilling effect that releasing the names would have on the ability of citizens to petition the government. However, the issue was raised below by the Appellee in its rebuttal to the Appellant’s Opposition to the Motion to Dismiss. After the Appellant argued in its rebuttal that the Observer could serve as a check on the County Clerk’s verification process, the Respondent argued that the only way to accomplish this would be for the Observer to contact “every person whose signature appears on the petition. Such an activity would certainly have a chilling effect on the constitutional right to petition the government.” *See* Rebuttal Memorandum, pg 5. Furthermore, the Respondent addressed the issue of the secret ballot in the same Rebuttal memorandum, when

it quoted extensively from *State ex rel. Daily Gazette Company v. Bailey*, 152 W.Va. 521, 164 S.E.2d 414. See pg 3, Rebuttal Memorandum.

However, even if these important constitutional issues were not addressed below, this Court may still address them. “A constitutional issue that was not properly preserved at the trial court level may, in the discretion of this Court, be addressed on appeal when the constitutional issue is the controlling issue in the resolution of the case.” Syl. Pt. 2, *Louk v. Cormier*, 218 W.Va. 81, 622 S.E.2d 788 (2005). The constitutional issues of a secret ballot and the ability of the citizens to petition the government are core issues in this case. The events leading up to and following the election on the ordinance, indicate that the issue of voting on the ordinance was a controversial issue and those signing the petition would be subject to harassment if their names were released to the public.

1. THE ZONING REFERENDUM PETITION SHOULD BE AFFORDED THE SAME PROTECTION AS A SECRET BALLOT

If a petitioner discloses his position on a controversial issue by signing a petition, then the names of those signing the petition are exempt from disclosure. In *Campaign for Family Farms v. Glickman*, 200 F.3d 1180 (2000), petitioners signed a petition that called for a referendum to terminate a federally-imposed assessment on pork sales. In that case the Eighth Circuit found that releasing the petition pursuant to a FOIA request would violate the petitioners’ privacy interest in a secret ballot. “To make public such an unequivocal statement of their position on the referendum would vitiate petitioners’ privacy interest in a secret ballot.” *Id.* at 1187. Furthermore, the United States Supreme Court, in *McIntyre v. Ohio Election Commission*, 514 U.S.334 (1995), recognized that anonymity is of utmost importance when controversial

issues are involved, and that protection of individuals by maintaining anonymity will take precedence over concerns about fraudulent conduct.

Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation-and their ideas from suppression-at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.

Id. at 357.

Accordingly, when a petition discloses a petitioner's view on a controversial subject, the petitioner's anonymity and constitutional right to be free from retaliation are of the utmost importance and will outweigh the public's desire to be informed.

The situation in the case, *sub judice*, is analogous to that in *Campaign for Family Farms v. Glickman*, 200 F.3d 1180 (2000). The signers of the petition, disclosed their viewpoint not only on the issue of whether an election on the zoning ordinance should be held but also, ultimately, their presumed position on the zoning ordinance itself. The Appellant asserts that the signers of the petition at issue did not disclose their thoughts on a controversial issue, and therefore the Circuit Court's reliance on case law involving controversial issues and secret ballots was misplaced. However, in Jefferson County there is no more controversial issue than land use and the accompanying zoning ordinance.

In addition, the decision to place the zoning ordinance on the ballot was a hotly debated and contested issue, and by signing the petition, the signers were revealing their thoughts on a controversial issue: whether an election should be held on the new Jefferson County Zoning Ordinance. West Virginia Code 8A-7-8a permits the governing body to voluntarily hold an

election on an amendment to the zoning ordinance. "After the enactment of the zoning ordinance, the governing body of the county may amend the zoning ordinance in accordance with section eight of this article as follows: (1) Without holding an election; (2) Holding an election on the proposed amendment; or (3) Holding an election on the proposed amendment pursuant to a petition." W.Va. Code 8A-7-8a(b). Similarly, W.Va. Code 8A-7-13 also provides the governing body the option to place the issue of replacing a non-traditional ordinance with a traditional ordinance on the ballot. "If a governing body of a county chooses to replace a nontraditional zoning ordinance with a traditional zoning ordinance *without holding an election*, a petition, signed by at least ten percent of the eligible voters who reside in the area affected by the zoning ordinance, for an election on the question of adopting a traditional zoning ordinance may be filed with the governing body of the county. . . ." (emphasis added).

It is clear that, under the relevant provisions, the County Commission could have voluntarily placed the zoning amendment on the ballot. In fact, this issue was addressed and intensely debated by the County Commission on at least three separate occasions. The minutes of the County Commission meetings indicate that they debated the issue as early as March 28, 2008. *See* Minutes Exhibit B. The issue was discussed again on May 8, 2008 and again August 28, 2008. *See* Minutes attached as Exhibits C and D. Each time, the County Commission declined to hold an election on the issue, by a 3-2 vote of the body. The fact that this topic was debated so often indicates that the issue of whether or not to hold an election on the zoning ordinance was a controversial issue, with proponents on each side.

In addition, it can be assumed that those individuals signing the petition indicated how they would vote in an election. If the signers supported the ordinance, why would they sign a petition to bring it to a referendum and risk the ordinance being overturned by the electorate? If

a party supported the ordinance, certainly he or she would not risk invalidating it by requesting it be brought to a referendum. Rationally, most would presume that those who signed the petition did not support the ordinance's provisions and sought to have it overturned by bringing it to a referendum. As such, those who signed the petition did inadvertently disclose the manner in which they would vote on the issue, and the petition should be accorded the same protections that attach to a secret ballot.

**2. RELEASING THE NAMES WOULD HAVE A CHILLING
EFFECT ON THE ABILITY OF THE CITIZENS TO PETITION
THE GOVERNMENT**

The events on the day of the election on the zoning ordinance indicate that those who signed the petition would be subject to harassment if their names were released. The Appellant, in the form of its owner, harassed Ronda Lehman, whom the Observer proclaims to be the “organizer of the petition drive that triggered the zoning referendum.” Thomas Harding, *Referendum Shenanigans*, Observer November 7, 2009 attached as Exhibit E. The proprietor of the Observer entered the polling place where Ms. Lehman was working, illegally took a picture of her working in the polling place, and subsequently placed it on the Observer's website. *Id.* In fact, the publisher of the Observer intends to plead by information to the unauthorized presence of a legitimate news person in a polling place. Naomi Smoot, *Area Publisher Faces Charge* May 6, 2010 attached as Exhibit F. It is clear from the Observer's Article that Ms. Lehman was targeted because of her position on bringing the Ordinance to a referendum.

In addition to the Appellant's harassment of Ms. Lehman, her integrity as a poll worker was also questioned by others in the community. For example, Commissioner Jim Surkamp indicated in the Observer's article that “[t]his does not seem right.” *Referendum*

Shenanigans. In an interview with the Martinsburg Journal, Commissioner Surkamp indicated that “Ms. Lehman was obviously a questionable choice given her deep involvement on the issue of the referendum.” Naomi Smoot, *Controversy Continues to Surround Recent Vote*, Martinsburg Journal, (November 14, 2009) attached as Exhibit G. Another Commissioner also questioned Ms. Lehman’s presence as a poll worker. “When asked about this [sic] Lehman being the lead pole [sic] worker, County Commissioner Frances Morgan said ‘This is highly unusual. We are looking into what we can do about it.’” *Referendum Shenanigans*. Comments on the Observer’s webpage indicate that other community members questioned Ms. Lehman’s presence as a poll worker as well because she had a “conflict of interest.” Another member stated, “I also think that Lehman (given her questionable background) should be the bigger person and step down from the job at hand specifically due to Conflict of Interest. This is just a disgusting situation if allowed to continue.” *Id.* at Comment of Striker. These comments indicate that Ms. Lehman, one of the only known signers of the petition, was questioned and indeed harassed, by the Appellant, about her presence as a poll worker, because of her involvement in the referendum process, demonstrating that the signers of the petition would be subject to intimidation and harassment. Ms. Lehman’s treatment is an indication of what other signers will experience if their names are released to the public. Furthermore, the comments of County Officials also indicate that the issue of putting the ordinance to referendum was a controversial one, given that Ms. Lehman never publicly proclaimed her position on the ordinance itself.

It is clear that the signers of the petition did express a viewpoint on a controversial issue. Furthermore, the fact the signers signed a petition to bring the ordinance to a referendum indicates how they would vote on the issue or what most would presume their vote would be. Moreover, the harassment of one of the only known signers of the petition is an

indication that other signers may also be harassed, which harassment would certainly have a chilling affect on others seeking to petition the government. Accordingly, release of the names of those signing the petition, pursuant to *Campaign for Family Farms* and *McIntyre*, is not only prohibited by the right to a secret ballot but also to eliminate the chilling affect that any intimidation would have on the right to petition the government.

VI. RELIEF REQUESTED

The Respondent respectfully requests that the Court: (1) deny the relief requested by the Appellant; (2) and award any other relief the court may deem appropriate.

Respectfully Submitted,

JENNIFER MAGHAN
By Counsel,

A handwritten signature in cursive script, appearing to read "Stephanie F. Grove", is written over a horizontal line.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA AT CHARLESTON

**THE SHEPHERDSTOWN OBSERVER, INC.,
APPELLANT,**

VS.

**Docket No.: 35446
Circuit Court of Jefferson County
Civil Action No. 2009-C-169**

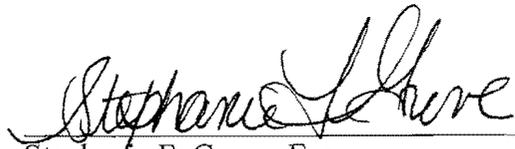
**JENNIFER MAGHAN,
APPELLEE**

CERTIFICATE OF SERVICE

I, Stephanie F. Grove, 19th day of May, 2010 that I mailed a copy of the foregoing Appellees Brief first class mail, postage prepaid to the following counsel at the addresses listed below:

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EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE