

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM Horry COUNTY  
Court of Common Pleas

Honorable Debra R. McCaslin, Circuit Court Judge

Appellate Case No. 2023-000888

Case No. 2023-CP-26-01112

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Michael Isom, .....Appellant,

v.

Town of Atlantic Beach Municipal Election Commission, .....Respondent.

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RESPONDENT'S INITIAL BRIEF

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## **STATEMENT OF ISSUE ON APPEAL**

- I. Whether the circuit court erred in holding that the factual findings of the Town of Atlantic Beach Municipal Election Commission were supported by any evidence.

## INTRODUCTION

Appellant Michael Isom's ("Appellant") argument is simple: he disagrees with the weight and credibility that The Town of Atlantic Beach Municipal Election Commission ("the Commission") gave to evidence before it. Specifically, Appellant, who lost the election at issue and challenged the residency of the winner, John W. David, contends the evidence his mother presented at the certification hearing was more credible than the evidence presented by Mr. David. In order to find for Appellant, this Court would have to disregard its standard of review and ignore the evidence that supports the Commission's decision. The circuit court correctly affirmed the Commission's Order and Report.

## STATEMENT OF THE CASE

This case arises from a contested election for town council wherein Appellant's mother and later, Appellant himself, challenged the residency of the winner of a special election, John David. On November 9, 2022, the Commission<sup>1</sup> published public notice of a special election to take place on January 17, 2023 in The Sun News. (Order Denying Petitioner's Appeal & Affirming Order & Report of Town of Atl. Beach Election Comm'n, May 12, 2023, ¶ 2.) Approximately one week later, on November 16, 2022, the Commission corrected and republished the notice of special election. (*Id.*) Pursuant to the public notice, candidates were required to file Statements of Candidacy from November 11, 2022 at noon through November 29, 2022 at noon. (*Id.* at ¶ 3.) Appellant, John W. David, Lenny Evans, and Brian Taylor filed Statements of Candidacy for the special election.<sup>2</sup> (*Id.* at ¶ 4.)

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<sup>1</sup> The Town Council for Atlantic Beach appointed Joe Montgomery, Kenneth McIver, and Carolyn Gore as members of the Commission. (Order Denying Petitioner's Appeal & Affirming Order & Report of Town of Atl. Beach Election Comm'n, May 12, 2023, ¶ 1.)

<sup>2</sup> Mr. Taylor later removed his name from consideration. (*Id.* at ¶ 4.)

On January 17, 2023, the Town of Atlantic Beach held a special election for the position of councilmember, wherein Appellant, John David, and Lenny Evans were candidates, and the Commission announced the unofficial results of the election at the close of the polls. (*Id.* at ¶¶ 5-6.) Two days later, the Commission held a provisional ballot and canvassing hearing on January 19, 2023 at 10:00 a.m. (*Id.* at ¶ 7.) Because no candidate received a majority vote, a run-off election was held January 31, 2023. (*Id.* at ¶¶ 7-8.) The Commission announced the unofficial results of the run-off election at the close of the polls on January 31, 2023. (*Id.* at ¶ 9.)

Following the results of the run-off election, the Commission held a provisional ballot and canvassing hearing on February 2, 2023,<sup>3</sup> wherein Josephine Isom, sitting councilmember and mother of Appellant, challenged the validity of three ballots, including the ballot of run-off winner, Mr. David. (*Id.* at ¶¶ 10-11, 18.) Ms. Isom alleged that Mr. David was not a resident of the Town of Atlantic Beach. (*Id.* at ¶ 11.) In support of her challenge, Ms. Isom submitted several documents, which the Commission entered as an exhibit, including “Prince George’s County Property Data,” a photograph of a vehicle Mr. David allegedly drove in Atlantic Beach with a Maryland license plate, “Property Data for tax year 7/1/22 to 6/30/23,” certification of occupancy, “Red Pearl (Rental Dates) by Elliott Realty 8/6/22 to 12/27/2022,” and “Rental dates for August 6, 2022 to December 27, 2022.” (*Id.* at ¶ 11; Ex. 1 of Feb. 2, 2023 Hearing Tr.)

In opposition to the challenge of his ballot, Mr. David provided the Commission with his driver’s license and voter registration card, which reflected his Atlantic Beach, South Carolina

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<sup>3</sup> The Commission’s Order and Report filed February 13, 2023 contains a typographical error as to the date of the provisional ballot and canvassing hearing for the run-off election. (Order & Report of Town of Atl. Beach Municipal Election Comm’n, Feb. 13, 2023, ¶¶ 9, 10, 20, 28, & 30.) Specifically, the Order and Report provides that the hearing took place on February 4, 2023, but the hearing was noticed for and held on February 2, 2023.

address.<sup>4</sup> (Feb. 2, 2023 Tr. 9:2—10:12.) Mr. David also testified that he had been in the Town of Atlantic Beach for longer than thirty days prior to registering for his voter registration, and that he had a “tag” for his car. (*Id.* at 9:11-14.) Mr. David further testified he had been paying taxes in South Carolina for three years since he purchased the lot and that he lived in his home in the Town of Atlantic Beach. (*Id.* at 9:17—10:3.) Mr. David also testified he intended to make Atlantic Beach his home and to return there each time he left. (*Id.* at 10:18-25; 11:14-15.)

Ms. Isom again addressed the Commission concerning evidence she presented as to Mr. David’s residency. (*Id.* at 11:22—12:3.) The Commission voted on the challenged ballots and, relevant to this appeal, found Mr. David a resident and declared him the winner of the run-off election. (*Id.* at 12:22—13:18; 27:21—28:13.)

Following the February 2, 2023 certification, Appellant filed a protest of election with the Commission, of which the Commission served notice on all interested parties. (Order Denying Petitioner’s Appeal & Affirming Order & Report of Town of Atl. Beach Election Comm’n, May 12, 2023, ¶¶ 14-15.) At a hearing held on February 6, 2023 concerning the protest, Appellant challenged the special election for similar reasons set forth by his mother, Josephine Isom, at the February 2, 2023 hearing. (*Id.* at ¶¶ 15, 18.) Relevant to this appeal, Appellant asserted, *inter alia*, that “Candidate John W. David [did] not meet the qualifications of a candidate or voter in the Town of Atlantic Beach.” (Order & Report of Town of Atlantic Beach Municipal Election Commission, Feb. 13, 2023, ¶ 13(b).)

At the protest hearing, Appellant provided only his mother as a witness, who did not offer testimony, but rather, relied upon the exhibits she presented at the February 2, 2023 provisional ballot

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<sup>4</sup> Mr. David did not have copies of his driver’s license or voter registration card, but the record reflects he provided these to the Commission for its review. (Feb. 2, 2023 Tr. 9:2—10:12.)

and canvassing hearing. (Feb. 6, 2023 Tr. 7:11—8:22.) To be exact, the entirety of the evidence Appellant submitted at the election protest hearing was testimony of his mother in the following exchange:

MR. ISOM: I call Ms. Josephine Isom.

JOSEPHINE ISOM, having been first duly sworn testified as follows:

MR. MONTGOMERY: You may proceed.

MS. BAILEY: Mr. Isom, you can ask questions of your witness. Do you have any questions for your witness?

MR. ISOM: Yes. I would like for you to state when you established residence in South Carolina because it's stated on the application that you have to be a resident here first in a general election or a special election.

MS. ISOM: Those documents were included in your package if I'm not mistaken.

MR. MONTGOMERY: Yes, but that was for certification, Ms. Isom. It was in the documents for certification. This is different today. This is a hearing.

MS. ISOM: Yes, but that document is in your package from the beginning, so I didn't think it was necessary to present it because it went into evidence the first time.

MR. MONTGOMERY: Okay. You may proceed.

MS. ISOM: The only question I have for today is that some commissioners have shared the evidence package. Was that legal?

MS. BAILEY: You're providing testimony today, so this is not for public—you're providing testimony.

MS. ISOM: All right. Then I'll leave all of my other questions for my attorney.

MS. BAILEY: Mr. Isom, do you have any other witnesses?

MR. ISOM: No, ma'am.

MS. BAILEY: Do you wish to present any other evidence today, Mr. Isom?

MR. ISOM: No, ma'am.

(*Id.*)

Consequently, Mr. David did not provide any responsive testimony. (*Id.* at 8:23—9:14.) The Commission entered several exhibits, including a copy of the agenda, protest letter, and service documents of the protest letter, a copy of the Town of Atlantic Beach election ordinance, a copy of the public notices for the Special Election, and a copy of the Special Election candidates' statement of candidacy. (Order & Report of Town of Atl. Beach Municipal Election Comm'n, Feb. 13, 2023, ¶ 14.) Subsequent to the protest hearing, the Commission denied Appellant's protest by Order and Report dated February 13, 2023. (*Id.* at ¶ 31.) The Commission found in relevant part that Mr. David submitted a statement of candidacy on November 18, 2022, wherein he affirmed that he "[met], or will meet by the time of the General or Special Election or as otherwise required by law, the qualifications to hold this office. I the undersigned, certify that I am a legal resident and a registered voter of the Town of Atlantic Beach, South Carolina." (*Id.* at ¶ 27.) The Commission also noted that Mr. David's vote at the run-off election was previously subject to a challenge by Ms. Isom, which was decided at the provisional ballot and canvassing hearing for the run-off. (*Id.* at ¶ 28.) The Commission considered the evidence presented by the candidates and voted in favor of the motion that Mr. David did meet the qualifications to be a candidate for council and ultimately denied Appellant's election protest. (*Id.* at ¶¶ 29, 31.)

Appellant then filed a notice of appeal with the circuit court ten days later, seeking one of the following: a declaration that he was the winner of the election; a remand of the case to the Commission for a new hearing; or a new election. (Feb. 23, 2023 Notice of Appeal.) Appellant contended the Commission erred in: finding Mr. David was a resident when his property was a vacation rental and his legal residence was declared Maryland; determining Mr. David was a resident when he did not enter any evidence supporting residency; not including documents submitted with the notice of appeal

because the documents provided Mr. David was not a resident; and determining Mr. David was a resident without identifying or finding any facts to support that determination.<sup>5</sup> (*Id.*)

On April 18, 2023, the Commission filed its brief in opposition to the appeal along with a copy of the transcript and relevant exhibits of the February 2, 2023 provisional ballot and canvassing hearing. On April 21, 2023, Appellant filed his memorandum of law in support, including copies of the Commission's Order and Report, a transcript and exhibits of the February 6, 2023 election protest hearing, and the documents presented by Ms. Isom and entered as an exhibit at the February 2, 2023 provisional ballot and canvassing hearing. The circuit court heard arguments from counsel on April 24, 2023 and entered a Form 4 order taking the appeal under advisement. (Apr, 24, 2023 Form 4 Order.)

Subsequent to oral arguments, on May 12, 2023, the circuit court issued an order affirming the Commission's decision, holding the factual findings of the Commission were supported by the evidence and further holding there was no error of law to warrant a reversal of the election. (Order Denying Petitioner's Appeal & Affirming Order & Report of Town of Atl. Beach Election Comm'n, May 12, 2023, ¶¶ 43-44.) Appellant filed and served a notice of appeal with this Court on June 2, 2023. The Court granted the Commission's motion to expedite the appeal, and Appellant filed its initial brief and designation of matter on August 1, 2023. (June 9, 2023, Respondent's Mot. to Expedite Appeal; June 27, 2023 Order.)

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<sup>5</sup> In his appeal before this Court, Appellant appeals only the issue of whether the circuit court erred in finding evidence existed to affirm the Commission's Order and Report. To the extent Appellant argues the Order and Report should have contained further findings of fact, such an argument has previously been rejected by this Court. *See Taylor v. Town of Atl. Beach Election Comm'n*, 363 S.C. 8, 15, 609 S.E.2d 500, 503 (2005) (holding South Carolina Code Section 5-15-130 requires an election commission to "conduct a hearing, decide the issues raised, file a report with the testimony and exhibits, and notify the parties of the decision," but does not "require a written order containing findings of fact or conclusions of law similar to those, e.g., required of tribunals in APA or family court proceedings").

## STANDARD OF REVIEW

“In municipal election cases, [the Court] review[s] the judgment of the circuit court only to correct errors of law. [The Court’s] review does not extend to findings of fact unless those findings are wholly unsupported by the evidence.” *Taylor v. Town of Atl. Beach Election Comm’n*, 363 S.C. 8, 12, 609 S.E.2d 500, 502 (2005). The Court “will employ every reasonable presumption to sustain a contested election, and will not set aside an election due to mere irregularities or illegalities unless the result is changed or rendered doubtful.” *Id.*

## ARGUMENT

**I. The circuit court committed no error because evidence exists to support the Commission’s finding that John David met the qualifications of a candidate for council in the Town of Atlantic Beach.**

While Appellant recites the appropriate standard of review in his brief, he abandons the standard in his argument; specifically, Appellant focuses on the supposed strength of the evidence that his mother presented at the provisional ballot and canvassing hearing on February 2, 2023 and that she referenced at the election protest hearing on February 6, 2023 rather than on whether any evidence exists to support the Commission’s finding that Mr. David met the qualifications of a candidate for council. Indeed, at each hearing, evidence existed to support the Commission’s finding, and therefore, the Court may not substitute its judgment for that of the Commission.

“There are two prerequisites to maintaining an election contest in South Carolina: (1) the contest notice must allege irregularities or illegalities; and (2) the alleged irregularities or illegalities must have changed or rendered doubtful the result of the election in the absence of fraud, a constitutional violation, [or] a statute providing that such irregularity or illegality shall invalidate the election.” *Taylor*, 363 S.C. at 16, 609 S.E.2d at 504 (quoting *Butler v. Town of Edgefield*, 328 S.C. 238, 246, 493 S.E.2d 838, 842 (1997)) (internal quotation marks omitted). Although the residency of

Mr. David is an alleged irregularity that would change the result of the election if proven, the record supports the Commission's denial of the election protest.

South Carolina Code Section 5-15-100 provides the municipal election commission with the authority to determine legal qualifications of electors. S.C. Code Ann. § 5-15-100 ("The municipal election commission shall . . . supervise and conduct all municipal, special and general elections."). South Carolina Constitution, Article VI, Section 1 and Article XVII, Section 1 provide that an elected official must meet the "qualifications of an elector," or, stated differently, be eligible to vote for the office he proposes to hold. S.C. Const. art. VI, § 1 ("No person may be popularly elected to and serve in any office in this State or its political subdivisions unless he possesses the qualifications or an elector . . . ."); S.C. Const. art. XVII, § 1 ("No person shall be elected or appointed to any office in this State unless he possess the qualifications of an elector . . . ."). This requirement applies to city council members: "Mayors and councilmen shall be qualified electors of the municipality and, if they are elected subject to residential or ward requirements as provided in this section, they shall be qualified electors of the ward prescribed for their election qualification." S.C. Code Ann. § 5-15-20.

To be a qualified elector in the Town of Atlantic Beach, the elector must have resided within municipal limits for at least thirty days prior to an election, and this requirement is applicable to those serving as a councilmember. S.C. Const. art. II, § 5. If the council seat represents a specific ward, then the person must have lived within that ward. S.C. Code Ann. §§ 7-5-610 to -675.

In order to determine one's residence, this State considers one's domicile. S.C. Code Ann. § 7-1-25(A) ("A person's residence is his domicile. 'Domicile' means a person's fixed home where he has an intention of returning when he is absent. A person has only one domicile.").

Specifically, South Carolina Code Subsections 7-1-25(B) & (D) provide:

(B) For voting purposes, a person has changed his domicile if he (1) has abandoned his prior home and (2) has established a new home, has a present

intention to make that place his home, and has no present intention to leave that place.

...

(D) For voting purposes, factors to consider in determining a person's intention regarding his domicile include, but are not limited to:

- (1) a voter's address reported on income tax returns;
- (2) a voter's real estate interests, including the address for which the legal residence tax assessment ratio is claimed pursuant to Section 12-43-220(c);
- (3) a voter's physical mailing address;
- (4) a voter's address on driver's license or other identification issued by the Department of Motor Vehicles;
- (5) a voter's address on legal and financial documents;
- (6) a voter's address utilized for educational purposes, such as public school assignment and determination of tuition at institutions of higher education;
- (7) a voter's address on an automobile registration;
- (8) a voter's address utilized for membership in clubs and organizations;
- (9) the location of a voter's personal property;
- (10) residence of a voter's parents, spouse, and children; and
- (11) whether a voter temporarily relocated due to medical care for the voter or for a member of the voter's immediate family.

Significantly, a person's intent determines his residence. *See* S.C. Code Ann. § 7-1-25(A).

**A. Evidence presented at the election protest hearing supports the Commission's finding that John David met the qualifications of a candidate for council.**

At the February 6, 2023 election protest hearing, Appellant produced no witnesses other than his mother, Ms. Isom, who made reference to her previously-submitted documentation. (Feb. 6, 2023

Tr. 7:11—8:22.) Before the Commission at the February 6, 2023 election protest hearing was evidence of Mr. David’s residency.

Exhibit D at the election protest hearing included Mr. David’s statement of candidacy, which was signed and dated November 18, 2022. (Ex. D of Feb. 6, 2023 Hearing.) In addition to attesting to the validity of his name and that he had never be convicted of or pled guilty or nolo contendere to violations of South Carolina election laws, Mr. David affirmed that he “met, or will meet by the time of the General of Special election or as otherwise required by law, the qualifications to hold this office. I the undersigned, certify that I am a legal resident and a registered voter of the Town of Atlantic Beach, South Carolina. I sign this statement under the penalty of perjury.” (*Id.*) Mr. David also listed an Atlantic Beach property as his address and provided his voter registration number. (*Id.*)

Appellant, without citing to any authority in support, appears to contend that because this statement of candidacy is “self-serving” and not notarized, it is not evidence of Mr. David’s residency. This assertion is a thinly-veiled attempt to have this Court delve into the weight and credibility of the evidence before the Commission. Notwithstanding that such an argument is inappropriate for this Court’s standard of review, the statement of candidacy, one of which was also signed by Appellant, was signed by Mr. David under penalty of perjury and by a receiving authority. And, Appellant does not address the fact that this Statement also contained Mr. David’s voter registration number.

Moreover, the decision on the provisional ballots by the Commission at the February 2, 2023 provisional ballot and canvassing hearing of the run-off constitutes a final decision. *See* S.C. Code Ann. § 7-13-830 (“When the challenger appears or produces witnesses or evidence in support of the challenge, the authority in charge must proceed to hear and determine the question. Its decision is final.”). Given that the validity of Mr. David’s ballot was decided—particularly on the basis of his residency—at the February 2, 2023 provisional ballot and canvassing hearing for the run-off election,

that finding by the same Commission was a final decision, and Appellant offered no new evidence at the election protest hearing.

Accordingly, although Appellant disagrees with the weight given and the credibility determined as to the statement of candidacy and prior decision of the Commission at the provisional ballot and canvassing hearing, there did exist evidence to support the Commission's Order and Report following the election protest hearing.

**B. Evidence submitted at the provisional ballot and canvassing hearing further supports the Commission's finding that John David met the qualifications of a candidate for council.**

Appellant attempts to use his election contest as a vehicle for reasserting his mother's arguments concerning the validity of Mr. David's ballot. According to Appellant, and without citing to any authority, the Commission "committed an error of law" when it did not consider Appellant's mother's evidence.

First and foremost, the Commission was under no obligation to reconsider a final decision it had already determined, particularly when no new evidence was presented at the February 6, 2023 hearing, and the evidence referenced was not properly admitted. In other words, Appellant complains that the Commission did not expressly admit his mother's exhibits at the election protest hearing when deciding whether Mr. David was a resident and thereby, qualified as a candidate, but that issue had already been ruled upon and the exact same evidence considered at the February 2, 2023 provisional ballot and canvassing hearing. Having a final ruling as to the validity of Mr. David's ballot on the basis of his residency, and, with no new evidence presented before it at the February 6, 2023 election protest hearing challenging Mr. David's qualification on the same grounds, the Commission correctly denied Appellant's election protest. *See* S.C. Code Ann. § 7-13-830 ("When the challenger appears

or produces witnesses or evidence in support of the challenge, the authority in charge must proceed to hear and determine the question. *Its decision is final.*”) (emphasis added).

Thus, Appellant’s argument is truly one concerning the Commission’s finding at the February 2, 2023 provisional ballot and canvassing hearing. Notwithstanding, the record supports the Commission’s denial of the election protest even considering the evidence presented at the provisional ballot and canvassing hearing. Specifically, Mr. David provided the Commission his driver’s license and voter registration card for examination, which reflected his Atlantic Beach, South Carolina address, and Mr. David testified he resided within the district for more than thirty days prior to registering to vote, Atlantic Beach was his domicile, and he intended to return to Atlantic Beach any time he left. *Cf. Nagy v. Nagy-Horvath*, 273 S.C. 583, 586, 257 S.E.2d 757, 759 (1979) (“[D]omicile’ means the place where a person has his true, fixed and permanent home and principal establishment, to which he has, whenever he is absent, an intention of returning. The true basis and foundation of domicile is the intention . . . of residence.”) (quoting *Gasque v. Gasque*, 246 S.C. 423, 426, 143 S.E.2d 811, 812 (1965)) (internal quotation marks omitted). The Commission received and reviewed documents submitted by Ms. Isom at provisional ballot and canvassing hearing for the run-off on February 2, 2023, determined the weight and credibility of Ms. Isom and the documents she submitted, and nonetheless, found that the record supported the Commission’s determination at the provisional ballot and canvassing hearing and the election protest.

Nonetheless, pursuant to the Order and Report of the Commission entered February 13, 2023, the Commission noted the previous challenge to Mr. David’s ballot at the provisional ballot and canvassing hearing for the run-off on February 2, 2023. (Order & Report of Town of Atl. Beach Municipal Election Comm’n, Feb. 13, 2023, ¶ 28.) Furthermore, the record supports that the Commission—made up of the same three individuals—did consider the evidence submitted by Ms.

Isom at the provisional ballot and canvassing hearing on February 2, 2023, just *four days* prior to the election protest hearing. Appellant would have the Court disregard the reality of the Commission’s consideration of Mr. David’s residency and overturn an election on the basis of an alleged mere technicality—which the Commission does not concede. Ultimately, the Commission was presented with Ms. Isom’s arguments and exhibits concerning Mr. David’s residency, and delving into those exact documents again would have no effect on the Commission’s ruling as to Mr. David’s qualifications as a candidate. *Cf. Taylor*, 363 S.C. at 15, 609 S.E.2d at 503-04 (declining to “impose standards for written orders on election commissions beyond those imposed by statute [because] [i]t is within the plenary power of the Legislature, not this Court, to promulgate election standards or enact statutory election requirements which address the necessity or substance of written orders issued by an election commission”). “[W]hatever doesn’t make any difference, doesn’t matter.” *Watson & Howell Blds. v. Billingsley*, 310 S.C. 39, 41, 425 S.E.2d 43, 44 (Ct. App. 1992) (quoting *McCall v. Finley*, 294 S.C. 1, 362 S.E.2d 26 (Ct. App. 1987)).<sup>6</sup>

Thus, the circuit court—which had no authority to take testimony or conduct a *de novo* hearing—did not err in accepting the factual findings of the Commission as supported by the evidence or finding no error of law to warrant a reversal of the election. *Taylor*, 363 S.C. at 17, 609 S.E.2d at 504 (citing *Butler*, 328 S.C. at 248, 493 S.E.2d at 843; *Blair v. City of Manning*, 345 S.C. 141, 144, 546 S.E.2d 649, 651 (2001)). As such, this Court should affirm the circuit court’s order.

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<sup>6</sup> Indeed, it is evident Ms. Isom’s testimony and documentation from the provisional ballot and canvassing hearing were at the forefront of at least Ms. Gore’s mind as evidenced by her comment when asked for her vote on Mr. David’s qualifications as a candidate: “Well, I’m sorry, but I don’t [find him qualified] because I only knew him since we started voting, and *I think I told you that one time before . . .*” (Feb. 6, 2023, Tr. 10:22-24 (emphasis added).) *See also* Feb. 2, 2023, Tr. 13:6-8 (“All I know he’s a nice—he seems like a real nice person, and I just known him since we’ve been voting.”).

## CONCLUSION

For the foregoing reasons, this Court should affirm the circuit court's order.

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