

TOWN ELECTIONS BOARD
TOWN ETHICS COMMISSION

JOINT WORKSESSION MINUTES

June 4, 2015

Persons present:

Barry Hager, Chair, Ethics Commission
Scott Fosler, Commission member
Steve Lawton, Chair, Elections Board
Bob Charrow, Board member
Gloria Tristani, Board member
Ron Bolt, Town Attorney

On June 4, 2015, at 7:02 p.m., in the Town Hall, the Ethics Commission and Elections Board held a joint meeting to continue to discuss possible changes in Town election and ethics laws, in response to a request from the Town Council. The meeting was chaired by Mr. Hager, who distributed an agenda at the outset of the meeting.

Mr. Hager discussed the request from the Town Council and the timetable for submission of the joint recommendation. He noted that the Council requested a recommendation "in all due haste", but providing a recommendation before the Council's next meeting, on June 17, 2015, may be problematic based on the discussions remaining to be had and the individual schedules of the Board and Commission members.

Discussion followed on whether write-in candidacy should be allowed in the Town. Mr. Charrow commented on the importance of preserving freedom of assembly and, therefore, he stated that he is in favor of continuing to allow spontaneous write-in candidacy. Others commented on the need to prevent surprise and inform residents about who is running for office, and whether an election is contested.

Members present discussed possible changes in Town laws, including adopting the Maryland approach which would require write-in candidates to submit a certificate of candidacy before the election, in order to be eligible for service. Mr. Bolt suggested that a recall provision could be added to the Charter to preserve spontaneous write-in candidacy while providing a means to address post-election concerns. Discussion on options followed.

On behalf of the Ethics Commission, Mr. Hager made a motion to recommend to the Council that write-in candidacy be allowed, but that write-in candidates must submit a certificate of candidacy at least 14 days prior to the election in order to be eligible for service. Mr. Fosler seconded the motion and it passed unanimously, 2-0. On behalf of the Elections Board, Mr. Lawton made the same motion. It was seconded by Ms. Tristani, and approved by a vote of 2-1, with Mr. Charrow voting in opposition.

Discussion followed on when write-in candidates should be required to file a financial disclosure statement. Mr. Fosler, Mr. Charrow, and Mr. Lawton agreed that write-in candidates should be required to file financial disclosure statements only if they win an election, and must file before they can serve. Ms. Tristani and Mr. Hager disagreed, and found it appropriate to require write-in candidates to file a financial disclosure statement at the same time as the certificate of candidacy. By majority consensus, the recommendation to be written shall include the former approach.

Members present then discussed the responsibility of Town Council members to ensure that Town residents receive accurate information regarding the status of elections. Mr. Hager provided a proposed letter to the Council members, who were in office during the May 5, 2015 election, inquiring about their role in the write-in campaign. Mr. Charrow noted that he finds the letter to be inappropriate because the election results have already been confirmed and, while there may still be debate on whether a stealth campaign is moral, there was nothing unlawful about the write-in campaign. Discussion on Council member duties followed.

On behalf of the Ethics Commission, Mr. Fosler made a motion to issue the letter, a copy of which is attached. Mr. Hager seconded the motion and it passed unanimously (2-0). On behalf of the Elections Board, Mr. Lawton made the same motion. It was seconded by Ms. Tristani, and approved by a vote of 2-1, with Mr. Charrow voting in opposition.

Discussion followed on who would author the various components of the report to the Town Council to be prepared.

Hearing no objection, Mr. Hager adjourned the meeting at approximately 8:31 p.m.


Barry Hager, Chair, Ethics Commission


Steve Lawton, Chair, Elections Board

June 4, 2015

Dear TOCC Council Member:

As you are aware, the controversy over the recent Town elections has raised questions regarding write-in candidacies and the rules that apply to such candidacies.

At the May 13 Town Council meeting, the Council voted unanimously to ask the Ethics Commission and the Election Board to work jointly to inquire into the facts regarding the election and to make any recommendations or changes in either the Town's Ethics or Election laws that might be needed.

In order to pursue our work in response to that request, we would like to ascertain certain facts about the knowledge and involvement of then-incumbent Town Council members in the write-in campaign of Dr. Cecere.

Please respond to this inquiry by stating:

* when you first learned of the existence of the write-in campaign?

*what if any actions you took regarding that campaign, specifically:

*What participation in or assistance you gave to the write-in campaign?

*What efforts, if any, you made to notify other Town officials or the general public regarding the existence of the write-in candidacy?

Thank you for your response to this inquiry. As you know, the Council requested that the Ethics Commission and Election Board respond with its findings and recommendations "in all due haste." As prompt a reply as possible would therefore be appreciated.

TOCC Ethics Commission and Election Board

**TOWN OF CHEVY CHASE
ETHICS COMMISSION**

June 12, 2015

Mayor Al Lang
Town of Chevy Chase
Lawton Center
Chevy Chase, MD

Dear Mayor Lang:

In response to the request from the Town Council to the Town Ethics Commission and Election Board to review events surrounding the May Town Council election and to make recommendations about future elections, the two committees held joint public meetings on May 26 and June 4. The minutes of those meetings have been approved and filed with the Town Office.

Based on the extensive comments from town residents at those two meetings and through submissions to the Town Office, and on the discussion and debate within the two committees at those meetings, we are now working on finalizing our recommendations and writing a report to the Council conveying those recommendations.

In that regard, at our June 4 meeting, we also voted to send a letter of inquiry to the members of the Town Council prior to the recent election, regarding certain factual questions. We are hoping to receive responses to that inquiry from all of the Council members as soon as possible. Those responses will inform our further discussion and decisions about necessary reforms.

As Chairs of the two committees, Steve Lawton and I hope that we can get final agreement on our recommendations and complete the drafting of our report to you by the time of the Council's regular July meeting. We will keep you informed of our progress. Please convey this information to your colleagues on the Council at your meeting on June 17.

With best regards,

Barry Hager
Chair
Town Ethics Commission

Steve Lawton
Chair
Town Election Board

June 17, 2015

Via Electronic Mail

Mayor Lang and Members of the Town Council
c/o Todd Hoffman, Town Manager
Town of Chevy Chase
4301 Willow Lane
Chevy Chase, Maryland 20815

Subject: Minority Report--Election Board

Dear Mayor Lang and Members of the Town Council:

On June 4, 2015, a majority of the Election Board of the Town of Chevy Case (“Town”) voted to recommend to the Town Council that it amend section 8-3 of the Town’s Election Code¹ to effectively ban voters from writing-in a name for election to the Town Council unless the named write-in has filed appropriate papers with the Town two weeks in advance of the election.² Under the recommendation, write-in votes for an individual who has not filed the appropriate papers with the Town in advance of the election would not be counted.³ The proposed amendment is designed to eliminate spontaneous write-ins, which are currently permitted.

¹ Section 8-3, dealing with nominations to be a candidate for Town Council currently provides that “[t]his section does not prohibit write-in candidates.” § 8-3(a).

² The minutes of the June 4, 2015 meeting state as follows: “On behalf of the Ethics Commission, Mr. Hager made a motion to recommend to the Council that write-in candidacy be allowed, but that write-in candidates must submit a certificate of candidacy at least 14 days prior to the election in order to be eligible for service. Mr. Fosler seconded the motion and it passed unanimously, 2-0. On behalf of the Elections Board, Mr. Lawton made the same motion. It was seconded by Ms. Tristani, and approved by a vote of 2-1, with Mr. Charrow voting in opposition.”

³ By a 2 to 1 vote, the Election Board declined to recommend that a write-in candidate also file a financial disclosure form 14 days prior to the election. Instead, the Board recommended that only those write-in candidates who prevail would be required to file such a form. It should also be noted that the Election Board, over my objection, also directed a series of “investigative questions” to each Member of the Town Council serving at the time of the election concerning their actions with respect to the write-in campaign at issue. The Election Board has no authority to investigate these activities especially after having certified the election. These types of questionnaires fail to draw the distinction between acting in one’s official capacity and acting in one’s political capacity. Blurring the two, as the questionnaire does, raises serious legal concerns. As discussed later, I believe the so-called investigation is an impermissible interference with core First Amendment liberties and should be terminated.

I. Background

A. Basis of Election Board's June 4 Recommendation

The majority recommended banning open write-ins to prevent what it viewed as the disturbing results of the last election where a write-in candidate upset an incumbent running for re-election in what had been billed as an “uncontested election.” This echoed the views of some of those who spoke at the Election Board meeting of May 26, 2015. At that meeting, some residents voiced the view that a “secret write-in election” was not democratic, citing among other reasons its lack of transparency; others complained that it would be more convenient in terms of arranging their personal schedules to know in advance whether an election would be truly uncontested. If an election were uncontested, according to these residents, they would be more likely to forgo voting in favor of other activities. The risk of a vibrant spontaneous write-in option is, according to these residents, an unnecessary personal inconvenience. Still others argued that some members of Town Council may have been aware of the secret write-in campaign and by not informing the residents of the putative write-in candidate, they breached some unspecified fiduciary duty to the residents. The majority's recommendation was designed to address these concerns.

B. Minority Report

I dissented because none of these concerns, in my view, justifies amending the Town Election Code to restrict the flexibility and freedom of the citizenry. Mr. Lawton, Chair of the Election Board, invited me express my views in a Minority Report. This Minority Report, in the form of a letter, is divided in three sections. First, I provide an overview of write-in campaigns and the underlying rationale of providing voters with the ability to spontaneously write-in a name on a pre-printed ballot. Second, I examine the First Amendment status of a spontaneous write-in option and then assess whether the justifications offered would be adequate to support its abolition. Third, I assess whether it would be wise, as a matter of policy, to adopt the Majority's recommendation.

Much of the analysis in this Report is legal; I found it difficult to divorce the legal from the policy aspects of the analysis. With that said, though, this Report should not be viewed as a legal opinion; the only person authorized to provide legal opinions to the Town Council is the Town attorney. Nor is this Report intended to usurp his role or affect any opinions that he might offer or be asked to offer.

C. Absence of a Majority Report

The analysis in this Report can stand alone, which apparently it will, because there is no Majority Report. The Majority failed to prepare its report. Instead, the Chair of the Election Board, pursuant to an email notice sent on Sunday, June 14, hastily convened a meeting of the Board the following day. At that June 15, 2015, meeting, the Election Board voted 1-1 on a resolution asking the Council to delay consideration of the Board's recommendations of June 4 until the Board could complete its investigation and prepare a report. The Chair, claiming to cast a proxy vote on behalf of the absent third member of the Board, announced that the resolution had passed. In fact, by a vote of 1 to 1, that resolution failed to pass the Board. I cast a negative vote for two reasons. First, the Board has had more than ample opportunity to prepare a Majority Report in support of its recommendation to modify the Election Code. The justifications for the proposed change were presented by Board Members and residents during the May 26 and June 4 meetings. As to that recommendation, there is nothing more to be done other than present it to the Council for its consideration. Drawing things out by holding endless meetings is neither acceptable nor appropriate. The Board's putative investigation, as discussed later, is likely violative of State and Federal law. Both the Board and Ethics Commission appear to view this as a minor inconvenience that can be ignored. I do not. Accordingly, I urge the Council to act on the June 4 recommendation without further ado and to heed Court rulings by terminating the Board's and Ethics Commission's so-called "investigation."

II. Analysis of the June 4 Recommendation to Eliminate Open Write-Ins

A. Write-In Campaigns--Overview

Permitting citizens to express their displeasure with a crop of candidates through the write-in process or allowing others to run for elective office as write-in candidates is quintessentially American. While write-in candidates rarely win, there have been a significant number of notable exceptions, including the 2002 Mayoral Primary in the District of Columbia where incumbent Mayor Anthony Williams won as a write-in. In 1968, Lyndon Johnson, who had given no indication that he intended to seek re-election and was not on the primary ballot in any state, nonetheless won the New Hampshire primary as a write-in candidate. Most successful write-in candidates campaign as vigorously as those whose names appear on the ballots. The 2010 successful write-in candidacy of Senator Lisa Murkowski is a case in point. But that is not always the case. Recently, there have been a spate of spontaneous, quiet, yet successful write-in efforts where incumbents or others have lost and their post-election refrain is often the same as we have heard here. For example, in the town of South Haven, Minnesota, in 2012, "former mayor Marilyn Gordon says she lost an attempt to return to the city council in last week's election to a 'secret' write-in campaign." Chuck Sterling, *Gordon says 'secret' write-in campaign kept her off council*, Annandale Advocate (Nov. 2012). As here, Gordon complained that "[w]hen [an election is] secret you have no idea who is

running against you or if anyone is running against you. Write-in campaigns should be ‘transparent,’ Gordon said. Everyone ‘should be aware of who's running.’” *Id.*

Secret campaigns and successful campaigns are mutually exclusive. A write-in effort cannot succeed if it is truly secret. The vote totals in the Town’s most recent election do not suggest otherwise. Instead, campaigning, to the extent it occurred, was in all probability aimed at a limited audience of likely supporters. This is a proven and time-honored strategy in most registration and “get-out-the-vote” drives where campaigns target those most likely to vote for their candidate. In registration drives, democrats focus their efforts in traditionally democratic areas, while republicans focus on traditionally republican areas. The practice is often referred to as “bird dogging.” Campaigns that focus on garnering the support of select groups while ignoring others are as old as the Republic and part and parcel of our electoral system.

B. Write-In Process Is Supported by the First Amendment and Provides Electorate With Added Electoral Freedom

1. Majority’s Recommendation Curtails the Freedoms of Town Residents

The Supreme Court has consistently held that restrictions on candidacy and ballot access implicate First Amendment liberties. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 788-789 (1983). Normally, where there is a challenge to a governmental restriction on First Amendment rights, courts apply what is called a “strict scrutiny” test to determine whether the restriction is constitutional. Under that test, the governmental entity must demonstrate that the restriction is narrowly tailored to advance a compelling state interest. Recently, the Court emphasized, in the course of upholding a State Bar restriction on judicial campaigning, that “‘it is the rare case’ in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest.” *Williams-Yulee v. Florida Bar*, No. 13–1499, slip op. at 8 (U.S. April 29, 2015) (quoting *Burson v. Freeman*, 504 U. S. 191, 211 (1992)).

Even though most election laws restrict, in one way or another, ballot access and freedom of choice, it would be impractical to subject every voting regulation to the same strict scrutiny that pertains to other restrictions on First Amendment liberties. Strict scrutiny would “tie the hands of States seeking to assure that elections are operated equitably and efficiently.” *Burdick v. Takushi*, 504 U.S. 428, 423 (1992). Instead, a

court considering a challenge to a state election law must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against “the precise interests put forward by the State as justifications for the burden imposed by its rule,” taking into consideration “the extent to which those interests make it necessary to burden the plaintiff’s rights.” [*Anderson v. Celebrezze*, 460 U.S.] at 789[.]

Burdick, 504 U.S. at 434.

Burdick v. Takushi, itself, is informative because it involved a challenge to a Hawaii law that prohibited write-ins during either the primary or general elections.⁴ The State justified the restriction as prohibiting “party raiding” during the primary where blocs of voters, who are actually members of one party, vote in the other party’s primary and write in as a candidate someone who is really a member of their political party, as opposed to the party holding the primary. Hawaii also argued that their ban on write-ins was a legitimate means of averting divisive sore-loser candidacies, where someone who lost in the primary wages a write-in candidacy during the general election.

The Court in *Burdick* concluded that these two justifications were politically neutral and fostered legitimate interests of the State and they outweighed the “limited burden on voters’ rights to make free choices and to associate politically through the vote.” *Id.* at 439.

Even though the constitutionality of a politically neutral ban on write-ins would be judged using a relatively lenient standard, it is unclear whether the justifications offered by those who spoke at the May 26 meeting and by the majority of the Board and Ethics Commission during our discussions on May 26 and June 4 are sufficient to satisfy this relatively low bar. *See Common Cause Indiana v. Indiana Secretary of State*, No. 1:12-cv-01603 (S.D. Ind. Oct. 9, 2014) (Indiana’s justifications for its system of electing judges were insufficient to overcome the First Amendment limitations). This is especially so given that “[n]o bright line separates permissible election-related regulation from unconstitutional infringements.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997).

2. Justifications for Curtailing Freedoms May Not Be Adequate

a. Personal Convenience

Some residents voiced concern that as a result of the Town’s “open write-in” process they could not order their schedules when deciding whether to vote. These residents reasoned that now that they know that there is a possibility that a write-in candidate could prevail, they will have to vote in every election. If, in fact, they could know in advance whether the election would be contested, they could more safely avoid voting and instead, attend to other obligations.

⁴ Three years prior to *Burdick*, the Fourth Circuit concluded that a Maryland law which required write-in candidates to file certificates of candidacy and pay the same filing fees as candidates was unconstitutional. *See Dixon v. Maryland State Administrative Bd. of Election Laws*, 878 F. 2d 776 (4th Cir. 1989).

While this is a real, practical, and understandable concern, it is not a legitimate justification for curtailing voters' freedoms under the First Amendment. An election should not take a back seat to a soccer game, a tennis match, or even a book club meeting. Those who are burdened with complex and conflicting schedules can exercise their right to vote by absentee ballot. *See* Town Election Code § 8-5. Moreover, any process that promotes voter turnout is, from a good government perspective, to be favored over processes that have the opposite effect. *See, e.g., State ex rel. Skaggs v. Brunner*, No. 08-cv-1077 (S.D. Ohio 2008) ("election laws should be construed to promote voter participation, not to discourage it").

b. Government Failed to Correct the Town Forecast

A second concern, voiced by many, was that the information provided by the Town, in its annual pre-election Forecast, was inaccurate because it stated that the election was uncontested. While this justification overlaps with the "more transparency justification," I discuss the two separately because they are rooted in different underlying events.

Some residents argued that because the Forecast announced an uncontested election either they did not vote or others did not vote. This had the effect of suppressing voter turn-out. Other residents argued that Council Members who knew about the write-in campaign had some fiduciary duty to correct the inaccuracy in the Forecast the moment that they learned of the write-in campaign.

Everyone agreed that the Town Forecast was accurate when published in April 2015. Indeed, it was accurate on the day of the election. There were only two candidates seeking election to two seats on the Town Council. The individual elected through the write-in process was not a candidate under Maryland law and would not have been a candidate under the federal definition. *See* Md. Elect. Law. § 1-101(1); 52 U.S.C. § 30101(2). Moreover, no election in the Town of Chevy Chase can ever be viewed legally as truly uncontested, as there is always the possibility of a write-in, a fact that should have been known to every resident. *See Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979) (citizens are assumed to know the law). The Forecast merely reported the identities of those individuals who would appear on the May ballot as "candidates." It purported to do nothing more than that and legally it could do nothing more than that.

One resident suggested that it was somehow criminal to conduct a "secret" write-in campaign.⁵ This is "pure poppycock." *Norcia v. Equitable Life Assurance Society of*

⁵ There was reference made by one resident to the conviction of Paul Schurick for organizing an effort to suppress voter turnout in 2010 by using election-day robocalls informing prospective democratic voters that the election was in the bag and thanking them for their support. The robocalls implied that they were being made at the behest of either Martin O'Malley or the State Democratic Party, when in fact they were not. The Town resident implied that those in the Town who engaged in protected First

US, 80 F. Supp. 2d 1047, 1053 (D. Ariz. 2000). As noted above, voters are charged with knowing the law including the possibility of write-ins. A decision by a resident to forgo voting or campaigning is a personal one; residents who have exercised their preference should not blame others especially since no actions were taken to discourage voting or campaigning.

The opinion voiced by a number of residents that any Member of Town Council who knew about the write-in effort was under some unspecified fiduciary duty to advise the residents is illusory and inconsistent with Maryland law. If, in fact, government officials were under some fiduciary duty to inform the citizenry every time a fact changed, there would be no need for the Maryland Public Information Act or the federal Freedom of Information Act. *See* Md. Code Ann., Gen. Provs. § 4-101 *et seq.*; 5 U.S.C. § 552. Even in those instances where a law specifically directs the government to provide information, the accuracy of that information is judged against the state of affairs at the time the information was provided. There is rarely a duty to constantly update. *See, e.g.*, Social Security Act § 1804(a) (requiring government to prepared and disseminate information about Medicare annually to beneficiaries). I am aware of no such duty here and none has been identified. If there were such a duty aimed at Members of the Town Council acting in their private capacities as candidates or campaigners, the law imposing that duty would likely be unconstitutional.

Those who in engage in campaign activities, whether as elected officials or otherwise, have a constitutional right to do so privately, outside the watchful eyes of their opponents. “Almost 50 years ago, [the Supreme] Court declared that citizens do not surrender their First Amendment rights by accepting public employment.” *Lane v. Franks*, ___ U.S. ___, 134 S.Ct. 2369, 2375 (2014). In keeping with that notion, courts have consistently recognized that elective officials wear two distinct hats, one as public officials and the other as private actors campaigning for re-election or the election of others. *See, e.g.*, *Lacy v. Reagan-Bush '84*, No. C-3-84-843, Order at 8 (S.D. Ohio Oct. 11, 1984) (recognizing that incumbent President, when campaigning, is acting as a private citizen even though he may have Secret Service protection).

Government actions that seek to compel those engaged in campaign activities to disclose even their identities are subject to strict scrutiny and, as a result, have been consistently declared unconstitutional. In *McIntyre v. Ohio Elections Comm'n*, 514 US 334, 355 (1995), for example, the Court, in upending an Ohio campaign disclosure law, held that “identification of the author [of campaign materials] against her will is

Amendment activities by “secretly campaigning for a write-in candidate” were somehow committing a similar crime. The two aides, including Schurick, were actually charged with failing to identify who paid for the robocalls, which is a campaign finance requirement, election fraud by failing to include the disclaimer and conspiracy between the two aides to violate both laws. *See Henson v. State of Maryland*, 69 A.3d 26(Md. Ct. Sp. App. 2013). The State’s disclaimer laws do not and cannot constitutionally apply to Town elections where campaign financing is not involved. *See infra* at 8.

particularly intrusive” and that under the First Amendment, individuals have the right to campaign in secrecy. In light of *McIntyre*, this State’s Attorney General concluded that provisions of Maryland’s Fair Election Practices Act requiring campaign disclaimers in certain instances were unconstitutional and would not be enforced by his Office. *See* 80 Op. Md. Att’y Gen. 110 (May 16, 1995). The Court’s holding in *McIntyre* coupled with the Opinion of the Maryland Attorney General transforms the Election Board’s and Ethics Commission’s “investigation,” including its questionnaire, into an unconstitutional exercise of governmental authority designed to chill core First Amendment activities.

Thus, if the purpose of modifying the Town’s Election Code is to stifle these legitimate electioneering activities, such as meeting and planning campaigns, any such amendment would raise serious constitutional concerns.

c. Transparency

The third and most often voiced concern is that Town elections ought to be “transparent,” meaning that all residents should know who is really running for elective office; there ought not be “secret” write-ins. While this appears, at first blush, to be a legitimate justification for abandoning spontaneous write-ins, it is not for at least two reasons. First, to accommodate the wishes of that faction of residents who favor “more transparency,” the Town would have to sacrifice the First Amendment rights of all of the residents. Second, “more transparency” is not a justification, as much as it is a description. Spontaneous write-ins, by definition, are secret and lack transparency. Transparency is not necessarily a virtue, as anyone who has been “hacked” will tell you. No one who spoke at the May 26 meeting and no Board or Commission Member explained why personal privacy should take a back seat to so-called “transparency.” Balancing privacy and openness is often a delicate undertaking. In the context of elections, though, that balance is not only easy to achieve but occurs naturally. Secret campaigns do not do well in the political market place. It is difficult to garner votes when no one knows that you are seeking elective office. As a result, write-in candidates, who do not actively campaign, rarely receive more than a handful of votes. Where the write-in effort is more organized, its secrecy quickly wanes. A meaningful write-in campaign can only occur in relative “secret,” where those candidates in leadership positions in a town, village or city, are so out of touch with their constituents that they are unaware of the write-in effort and are taken by surprise. Creating a system that further fosters this “head in the sand” attitude on the part of elected officials is in no one’s best interest. The specter of a spontaneous write-in candidacy ensures that incumbents running for re-election constantly take the pulse of the citizenry.

In my view, none of the justifications offered is legitimate and sufficient to warrant modifying the Election Code to eliminate spontaneous write-ins. If the Town were writing on a clean slate independent of the recent and acrimonious Town election, there possibly could have been legitimate justifications offered for curtailing the freedoms of Town residents by abandoning the spontaneous write-in. That is not the case here. The justifications came across as remarkably “partisan,” largely driven by those

who were displeased with the outcome of the past election. The constitutionality of any restriction on First Amendment liberties is judged against the justifications offered by the government when the restrictions are enacted. Identical restrictions may be treated differently by the courts depending on the legitimacy of the underlying rationale. Here, a legitimate rationale is wanting.

C. Abandoning the Current Write-In Would Be Bad Policy

Abandoning the open write-in process would also be bad policy, for a number of reasons unrelated to the legal propriety of the recommendation. First, a radical change that affects the fabric of a town should rarely be undertaken to address a single event that some believe to be unfortunate, but is unlikely to recur. Constantly modifying a town charter or ordinances in response to “one off” occurrences undermines stability, certainty, and confidence in government. Charter provisions and ordinances should not be changed every time there is a switch in the ruling majority.

Second, a legislative fix is unnecessary. The outcome that many decried could have been easily avoided had the losing incumbent campaigned. As Senator Barbara Mikulski stated, while vigorously campaigning for a reelection, even though she was a shoo-in, “I don't take the voters for granted.” Amy Argesinger, *For Md. Incumbents, a Muted Campaign*, WASH. POST (Nov. 1, 1998). Taking the electorate for granted is never a wise campaign strategy, as many incumbents have learned to their Wednesday morning chagrin. Campaigning, even when running unopposed, is always the wisest course. More significantly, though, it gives the candidate, especially when that candidate is an incumbent, an opportunity to learn what the residents are thinking and whether the incumbent's views reflect those of the citizenry. The Election Board's recommended amendment would have the effect of promoting complacency and minimizing the likelihood that incumbents would get out and speak with their constituents.

Third, the Election Board's proposal provides an incentive for “not voting” and, if for no other reason, it ought to be defeated. The parties, politicians, and civic groups spend millions each year on get-out-the-vote drives; the Town of Chevy Chase is now contemplating a change in our law that will have the opposite effect. This is not a good message to send.

Mayor Lang and Members of the Town Council

June 17, 2015

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We have been residents of the Town for more than 25 years and have never been involved in Town government. I was understandably surprised at the vehemence with which many residents spoke during the May 26 Election Board meeting. I am, therefore, thankful that the Town is not located in either one of the fictitious villages of Midsomer, England or anywhere near Ms. Marple's St. Mary Mead.

Sincerely yours,



Robert P. Charrow
Member
Election Board

Cc: Members of the Election Board
Members of the Ethics Commission