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AUG 29 2022

CLERK
SUPREME COURT

COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO.: 22-SC-_____

DAVID FISCHER, et al.

MOVANTS

v.

BRIAN PAINTER, et al.

RESPONDENTS

**MOTION TO ADVANCE AND FOR EXPEDITED REVIEW, AND FOR
LIMITATIONS TO RESPONSE TIMES**

The movant, by counsel, under Civil Rule 76.22, for his motion to advance and for an expedited review, and other relief states as follows:

This matter is before the Court upon a motion for discretionary review in a primary election contest. The trial court voided the nomination of the Respondent, Brian Painter, and found him guilty of electioneering. On expedited review, the Court of Appeals reversed, creating a glaring conflict with this Court's decision in *Ellis v. Meeks*¹ and electioneering election contest jurisprudence. The Court of Appeals rendered its "to be published" decision on August 26, 2022. A detailed and thorough motion for discretionary review under Civil Rule 76.22 was filed simultaneously with this motion to advance.

Time is of the utmost essence herein. The Kentucky Secretary of State and Campbell County Clerk have upcoming statutory deadlines to commence voting under state and federal law. They are:

- 1) **September 19, 2022.** Ky. Rev. Stat. § 117.085(5)(b) sets the deadline for county clerks to print and have absentee ballots printed. (50 days prior to the election);

¹ 957 S.W.2d 213 (Ky. 1998).

- 2) **September 23, 2022.** Ky. Rev. Stat. § 117.085(5)(a) last day for county clerks to transmit absentee ballots to voters who requested them prior to the printing of ballots.
- 3) **September 24, 2022.** 52 USC § 20302(a)(8), Ky. Rev. Stat. 117A.080 last day to transmit absentee ballots to military and overseas voters who have requested them by deadline (45 days prior to election)
- 4) **September 24, 2022** Ky. Rev. Stat. § 117.085(1)(f) opening of on-line absentee portal request by State Board of Elections (45 days before election)²

Civil Rule 76.22 permits advancement of appeals “for good cause shown.” Upon notice and motion, appellate courts often advance election matters for review and disposition.³ The imminent election deadlines coupled with the Court of Appeals failing to follow this Court’s direct precedent governing electioneering election contests rise to that level of good cause. And election contests take precedence over all other civil matters as directed by the General Assembly in the trial and intermediate court of appeals to allow for prompt adjudication.

Movants request this Court to immediately advance the motion for discretionary review this Court.

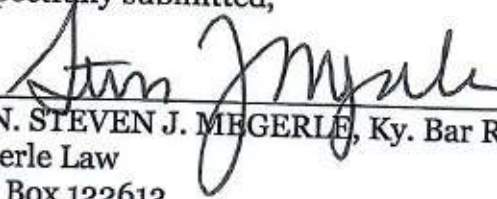
Movants further move this Court to limit the period under Civil Rule 76.20(5) for the Respondents to file their responses to motion for discretionary review from 30 days to 5 days, no later than Friday, September 2, 2022. Movants are prepared to file merits briefs in support within 24 hours, if ordered, under a briefing schedule when this Court grants discretionary review. Finally, movants request this Court to immediately issue an order to the Clerk of the Court of Appeals to certify and forward its record.

²[https://elect.ky.gov/Resources/Documents/2022%20Election%20calendar%20\(Final%20Revision\).pdf](https://elect.ky.gov/Resources/Documents/2022%20Election%20calendar%20(Final%20Revision).pdf) Last Reviewed, August 28, 2022, 12:00 p.m. EST. Pages 6-7.

³ *Hollenbach v. Carter*, 516 S.W.2d 336, 337 (Ky. 1974).

The advancement and limitations to response times will ensure this case reaches finality by this tribunal prior to the statutory election deadlines and without having to seek leave to put the November election on hold in Campbell County.

Respectfully submitted,




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CERTIFICATE OF SERVICE

I certify a copy of the foregoing motion was sent by Regular Mail and hand delivered on this 24th day of August, 2022 to the following:

Mr. Jeff Mando, Esq.,
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CLERK
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COMMONWEALTH OF KENTUCKY
SUPREME COURT

CASE NO.: 22-SC-_____

**DAVID FISCHER,
FISCHER FOR CAMPBELL COUNTY COMMISSIONER** **MOVANTS**

v.

**BRIAN PAINTER,
PAINTER FOR COMMISSIONER COMMITTEE
JAMES LUERSEN, CLERK, JACK SNODGRASS,
JAMES SCHROER, KENNETH FECHER, MEMBERS,
CAMPBELL COUNTY BOARD OF ELECTIONS** **RESPONDENTS**

On Review from the
Court of Appeals, 2022-CA-788-EL & 2022-CA-789-EL
(CONSOLIDATED)

Civil Action No.: 22-CI-387, In Equity, Campbell Cir. Ct., 2nd Division,
Charles Cunningham, Jr., Special Judge

MOTION FOR DISCRETIONARY REVIEW

The Movants, David Fischer and Fischer for Commissioner, by counsel, under Civ.R.

76.20 for their motion for discretionary review, states as follows:

A. Name of Parties and Counsel Information

Movants: David Fischer Counsel: Steven J. Megerle, Esq.
Fischer for Commissioner Megerle Law
P.O. Box 122613
Covington, Kentucky 41012

Respondents: Brian Painter Counsel: Ms. Carol Schureck Petitt, Esq.
Painter for County Commissioner Mr. Kyle Vaughn, Esq.
Tess Fortune, Esq.
7500 West Highway 146
Pewee Valley, Kentucky 40056

Jim Luersen, Clerk, and Counsel: Mr. Jeffrey Mando, Esq.
Jack Snodgrass, James Adams Law
Schroer, Kenneth Fecher, 40 West Pike Street
Members of the Campbell Covington, Kentucky 41011
County Board of Elections

B. Date of Entry of Judgment. Kentucky Court of Appeals (to be published)
decision issued August 26, 2022.

C. **Bond Status.** Brian Painter and Clerk Luersen and the Board of Elections posted supersedeas bonds as required by Ky. Rev. Stat. § 120.075 belatedly.

D. **Factual Background, Questions of Law Presented, Arguments in Support of Review**

i. **Factual Background**

This motion provides the Supreme Court an opportunity to re-affirm common law remedies the Court of Appeals failed to apply in this election contest surrounding electioneering and corrupt practices. And to conduct a *de novo* review of the trial court's application of common law equitable remedies this Court announced in *Ellis v. Meeks*¹, almost a quarter century ago.

Section 151 of the State Constitution is the origin of this primary election contest and plenary remedy levied by the trial court after making a finding of guilt for electioneering. *Ellis v. Meeks (hereinafter Meeks)* governs this case. It is an action in equity. The facts surround the Campbell Circuit Court's finding of guilt against Campbell County Commissioner Brian Painter for electioneering. Clerk James Luersen and his fellow election officials violated their oaths to administer fair elections by knowingly allowing Mr. Painter to solicit votes and gift "Painter pens" during mandated poll worker training sessions in May, 2022 inside the building housing the clerk's offices, and where early voting was going on at the same time. [Tr. Ct. R. at 6, 23, 285]

Commissioner Brian Painter and former Louisville Alderman Reginald Meeks² share a lot in common. Clerk James Luersen, the Campbell County Board of Elections, and the poll workers in Louisville's 11th Ward in 1996, not so much. The 34 Campbell County poll workers voting on May 4, 2022 and their brethren training on May 2 and 3 were caught "in the room where it happened." [R. 279-281] The trial court eradicated an illegal, ongoing "twenty-five year tradition" creating unfair elections in Campbell County. [R. 281-294] The Court of Appeals disagreed, legalizing Mr. Painter's

¹ 957 S.W.2d 213 (Ky. 1998).

² Joining the facts in this case and the facts *Meeks* in tandem are done so to compare and contrast and elucidate how the two cases are almost identical.

electioneering.

Both Brian Painter and Reginald Meeks were found guilty of electioneering.³ [R. 293-294] Painter was caught on video surveillance in the training room, not much clearer or convincing evidence may be known. [R. 141-146] Painter violated the electioneering law more than a dozen times on May 4th. [R. 142-144] Painter and his wife got caught passing out handbills and "Painter pens" at statutorily mandated poll worker trainings, and spoke with poll workers who voted on May 4th, inside the building housing the county clerk's office, simultaneously during early excuse voting. [R. 142-144, 285] The trial court demurred finding it was too close a call to find Commissioner Painter violated the corrupt practices act by gifting the "Painter pens" to the poll workers. [R. 285] Because his actions broke longstanding electioneering prohibitions, Commissioner Painter's 106 vote (1.4%) victory was voided by the trial court. David Fischer, the contestant, was decreed to be nominated. [R. 293-294]

Alderman Meek's offenses, voiding his own candidacy, included showing up at each and every polling place in the 11th Ward on primary day and leaving boxes of chicken for poll workers and voters alike.⁴ Meeks went to 10 of 15 polling places on primary election day in 1996.⁵ He delivered "lunch" consisting of fried chicken to the poll workers and anyone else who happened to come in that day.⁶ He spoke with voters inside the polling places. He never asked anyone to vote for him.⁷ And unlike Commissioner Painter, he *never* handed out and or even had any campaign handbills or literature in his possession.⁸

³ *Meeks, supra* at 217-218

⁴ *Id.* at 214.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 214

This Court under a *de novo* review found Alderman Meeks guilty of electioneering and that he violated the corrupt practices act.⁹ This Court unanimously announced a common law remedy voiding Alderman Meek's election setting the precedent the trial court followed here, and the Court of Appeals glossed over and failed to apply to these facts.¹⁰

Precinct judge Geneva Jones working a polling place in the Alderman Meeks' ward knew the law and did her duty to enforce the electioneering statute and corrupt practices act that day. "'Oh, Reggie, you know better. You have no business being in here."¹¹ To the contrary, Clerk Luersen created fraud by failing to faithfully discharge his lawful duties.

Clerk Luersen, the county attorney, and board of elections violated their oaths and legal obligations to administer "fair elections" with an even playing field for all candidates, by knowingly permitting Commissioner Painter's illegal electioneering. [R. 23] This corruption in Campbell County elections has gone on for "twenty-five years." Till now, *almost*. When Commissioner Painter texted Clerk Luersen and inquired about the trainings, Luersen responded to Painter they were occurring that very day, not "don't come." Commissioner Painter and his wife showed up shortly thereafter, handbills, "Painter pens" in hand, diligently placing them in plain view at each seat on May 3 and May 4. [R. 141-142] This was repeated at 5 different poll worker training sessions where Commissioner Painter politicked, electioneered, and gifted "Painter pens" to these most likely voters. [Id.] The trial court found this especially troubling that Clerk Luersen, the county attorney, and board of elections' violated laws they were charged to enforce. In stark contrast to lowly precinct judge Ms. Geneva Jones who did. [R. 285] The Court of Appeals decision legalizes the tradition Clerk Luersen knowingly and personally watched.

⁹ *McClendon v. Hodges*, 272 S.W.3d 188, 189 (Ky. 2008)

¹⁰ *Meeks*, supra at 216-217

¹¹ *Id.* at 215.

Electioneering only ended when the training begins. The future poll workers like Geneva Jones' were taught how to enforce elections laws, but just not at the trainings when the other poll workers are simultaneously voting in the same building. [R. 23]

A primary election contest proceeded in equity as required by Ky. Rev. Stat. § 121.055. The trial court found Alderman Meeks' own electioneering shenanigans and corrupt acts directly on point and voided Painter's nomination for Campbell County Commissioner.

After being found guilty of electioneering and knowingly being part of the electioneering scheme, Commissioner Painter and Clerk Luersen dashed to the Court of Appeals. But they failed to file supersedeas bonds with their notices of appeal, a longstanding, statutory jurisdictional requirement to file an appeal in a primary election contest. (Fischer, Mot. Dism. App.) Even after being given a do-over, Commissioner Painter then failed to correctly name the appellee on the surety of his supersedeas bond. The Court of Appeals improvidently kept jurisdiction. It then reversed the trial court's findings, reinstating and legalizing this stain on Campbell County elections. The intermediate appellate decision does not refute and approves of the facts outlined herein.

This timely motion for discretionary review follows.

ii Questions of Law Presented.

- a. The Court of Appeals Ignored Electioneering Precedent in *Ellis v. Meeks***
- b. The Court of Appeals Lacked Jurisdiction to Hear the Appeals**

iii Arguments in Support Questions of Law Presented.

- a. The Court of Appeals Ignored Electioneering Precedent in *Ellis v. Meeks***

Election contest jurisprudence in this Commonwealth is akin to a deep, brushy, thorny, thicket, or grove of a hodgepodge of trees of all sizes and shapes in our beloved Appalachian Mountains. There are a few tall chestnuts and yellow poplars standing as lodestars in our common law. *Ellis v. Meeks* is one of those yellow poplars standing tall. It is not surprising even the most seasoned appellate jurists can get caught lost in this thicket as the Court of Appeals did here. This case can serve to clear the weeds and brush and provide clarity to the varying types of election contest jurisprudence.

Justice Osborne concurring and dissenting in *Upton v. Knuckles*¹², made the last attempt to cut threw the brush outlining the four [now five] species of election contest proceedings and how they sprout:

1. Proceedings to declare a nomination or election invalid because of violations of the Electioneering Statute. The court may determine if there has been sufficient violation of the law to declare and must declare a nomination vacant. *Ellis v. Meeks*, Ky. Rev. Stat. § 117.235
2. Proceedings to declare a nomination or election invalid because of violations of the Corrupt Practices Act. The court may determine if there has been sufficient violation of the law to declare a nomination vacant, voiding the election. KY Const. 151, Ky. Rev. Stat. § 121.055
3. An action for a recount of votes only. Ky. Rev. Stat. § 120.095
4. An action to eliminate named and specified votes because they were illegally cast. The court will deduct from total those votes shown to have been illegally cast, no new election needed. Ky. Rev. Stat. § 120.015
5. Proceedings where it is alleged that because of fraud, intimidation, bribery, or violence in the conduct of the election it cannot be determined which candidates received the largest number of votes, new election needed
Ky. Rev. Stat. § 120.015

¹² 470 S.W.2d 822, 828-829 (Ky. 1971)(Osborne, J., concur, dissent in part).

The Court of Appeals grabbed aged and abrogated jurisprudence from an appropriately forgotten era when William Goebel was strong arming poor, illiterate German immigrants to vote his slate for swigs of bourbon to reverse here. Cases from the fourth and fifth species, *ante*, were misapplied by the appellate court to this electioneering and corrupt practices act case. Though it cannot be disputed Clerk Luersen's and the election officials failure to enforce both the Electioneering Statute or Corrupt Practices Act most certainly provides a factual basis for a good faith argument for Option #5 (proceedings of fraud, intimidation, bribery, or violence...). And, standing alone, Clerk Luersen and the election officials' own acts prove a finding of fraud or constructive fraud that too outweighs any hesitancy to voiding Painter's nomination as required by *Meeks*.¹³

Meeks is the most recent Supreme Court precedent for both Option # 1 (Electioneering Violations) and Option #2 (Corrupt Practices Acts). The trial court here followed it; our intermediate court of appeals chose to ignore it. The court of appeals' decision shows they took great lengths to *not* apply *Meeks*. An intermediate appellate court may not ignore or fail to apply binding precedent from this tribunal. This motion seeks discretionary review be granted, to reverse the Court of Appeals, and to reinstate the trial court's judgment.

Meeks announced a new common law remedy, for electioneering violations, voiding the election, to put electioneering on the same level as other corrupt acts. The origin of the common law remedy has its origin in Section 151 of our Commonwealth's Constitution and its offspring, the Corrupt Practices Act.¹⁴ As explained to the Court of

¹³ *McClendon v. Hodges*, 272 S.W.3d 188-190 (Ky. 2008), *Wood v. Kirby*, 566 S.W.2d 757, 755 (Ky. 1978)(election officials misconduct and failure to follow mandatory election law provisions is "constructive fraud").

¹⁴ Ky. Rev. Stat. §121.055.

Appeals, the influence of voters was a topic of discussion during our 1890 Constitutional Convention. (Fischer, App/ee Br., Painter at 8) The General Assembly was already the first legislature in America to adopt the “Australian” ballot reforms for Louisville city elections: 1) the secret ballot; 2) bans on electioneering inside polling places; and 3) corrupt practices acts to deter candidates from committing bribery, intimidation gifting of liquor, trinkets of any value [“Painter pens”], and other seedy corrupt conduct.¹⁵ In-order to expand the secret ballot beyond just Louisville, and discard *viva voce* “voice voting” or “showing of hands” as required in the 1850 Constitution, varying amendments were introduced to the Committee on Elections. Section 151 was adopted. It states,

The General Assembly shall provide suitable means *for depriving of office any person who, to procure his nomination or election, has, in his canvass or election, been guilty of any unlawful use of money, or other thing of value, or has been guilty of fraud, intimidation, bribery, or any other corrupt practice, and he shall be held responsible for acts done by others with his authority, or ratified by him.*

The General Assembly acted on its charge by enacting new laws to ban electioneering inside any polling place (Electioneering Statute¹⁶) and the Corrupt Practices Act¹⁷. Section 151 and the Corrupt Practices Act both contemplate strict liability as “*a suitable means for depriving a person of office...who has been guilty of any unlawful use of money, or other thing of value...or any other corrupt practice...*” *Meeks* extended it to the electioneering found here. The strong deterrent to candidates, like Mr. Painter, has been a successful and decisive remedy and remains the same, deprivation of office, when found guilty. Since *Meeks*, until now, electioneering has been almost non-existent. The plain language of Section 151, the Corrupt Practices Act, and the Electioneering Statute,

¹⁵ 1888 KY Acts Ch. 266, § 17

¹⁶ 1892 KY Acts, Ch. 65

¹⁷ Ky. Rev. Stat. § 121.055.

this Court's announcement of the *Meeks* rule, do not require any deducting illegally cast votes or a determination which votes were "illegal" as in Options 4 & 5. Electioneering is a strict liability offense with a penalty of voiding an election victory where the law is broken.¹⁸

The appellate panel cited the following grove of aged and antiquated cases, instead of following Occam's razor and applying, *Meeks*, the most recent and binding electioneering decision to the facts here. Here is a breakdown of the irrelevant precedents:

Case Name	Grounds for Election Contest	Electioneering OR Corrupt Practices Act Violation Alleged	Type (option) of Election Contest as Outlined by Justice Osborne in <i>Upton v. Knuckles</i>
<i>Stewart v. Wurts</i> , 135 S.W.434, 434 (Ky. 1911), Cited Ct. App. Dec. at 10	1)Illegal Voters; 2)monies illegally expended in a conspiracy; 3) failure to enter names on registration books; 4) no requirement to present registration to vote; 5) not less than 50 people allowed to vote in Catlettsburg; 6) voting boxes opened early; 7) persons not entitled to vote cast votes	NO	Option #4 An action to eliminate named and specified votes because they were illegally cast. The court will deduct from total those votes shown to have been illegally cast. Option #5 Proceedings where it is alleged that because of fraud, intimidation, bribery, or violence in the conduct of the election it cannot be determined which candidates received the largest number of votes. Ky. Rev. Stat. § 120.015
<i>Skain v. Milward</i> , 127 S.W. 773, 774, 776 (Ky.1910), Cited Ct. App. Dec. at 10	No election held in 3 precincts; polling place raided by band of armed men and ballot box carried off, no election held at 9 places where notice required it to held, no returns from 24 precincts	NO	Option #5 Proceedings where it is alleged that because of fraud, intimidation, bribery, or violence in the conduct of the election it cannot be determined which candidates received the largest number of votes.
<i>Hall v. Martin</i> , 208 S.W. 417, 418-	Ballot boxes removed and count totaled at hotel down the street, more votes cast than legal voters, bribery	NO	Option # 5 Proceedings where it is alleged that because of fraud, intimidation, bribery, or violence in the conduct of the election it cannot be determined which candidates received the largest number of votes.

¹⁸ *Bentley v. Allen*, 2008 WL 612348, *6, FN 4 (Ky.App 2008)(holding strict compliance for electioneering offenses citing *Ellis v. Meeks*)

419 (Ky. 1919) Cited Ct. App. Dec. at 11-12	for votes, and voters with fictitious names voted		
<i>Upton v. Knuckles</i> , 470 S.W.2d 822, 827 (Ky. 1971) Cited Ct. App. Dec. at 11-12	Allowing illegal persons inside polling places, electioneering in polling place during balloting, election officers electioneered inside polling place, talking inside polling place, failed to plead specifically plead as required under prior pleading requirements	Yes, Electioneering, but pre-Meeks	Option # 1 Proceedings to declare a nomination or election invalid because of violations of the Electioneering Statute. The court may determine if there has been sufficient violation of the law to declare a nomination vacant
<i>Goodwin v. Anderson</i> , 106 S.W.2d 152 (Ky. 1937) Ct. of App. Op. at 12	Illegal electioneering, alleged, but insufficiently pled under former standard requiring naming those engaging in electioneering,	YES, but pre-Meeks	Option # 1 Proceedings to declare a nomination or election invalid because of violations of the Electioneering Statute. The court may determine if there has been sufficient violation of the law to declare a nomination vacant
<i>Pettit v. Yewell</i> , 68 S.W. 1075 (Ky. 1902), Ct. App. Op. at 12	Illegal Electioneering, pre-Meeks, voiding election not a remedy at disposition	Yes, but pre-Meeks	Option # 1 Proceedings to declare a nomination or election invalid because of violations of the Electioneering Statute. The court may determine if there has been sufficient violation of the law to declare a nomination vacant
<i>Hill v. Motley</i> , 134 S.W. 469 (Ky. 1911) Ct. App. Op. at 13	Unsworn voters cast ballots, 19 African Americans were paid to vote "wet", African Americans bonded out of jail and voted in consideration of bond being posted	NO	Option #4 An action to eliminate named and specified votes because they were illegally cast. The court will deduct from total those votes shown to have been illegally cast.
<i>Sims v. Atwell</i> , 556 S.W.2d 929 (Ky.App. 1977), Ct. of App. Dec. at 13-14	Fraud by election officials, fraudulent vote of election clerk, illegal votes cast, some Electioneering up to polling place door, pre-Meeks, remedy of voiding election not available	YES, but pre-Meeks	Option #4 An action to eliminate named and specified votes because they were illegally cast. The court will deduct from total those votes shown to have been illegally cast. Option #5 Proceedings where it is alleged that because of fraud, intimidation, bribery, or violence in the conduct of the election it cannot be determined which candidates received the largest number of votes.
<i>Hardin v. Montgomery</i> , 495 S.W.3d 686 (Ky. 2016)	Single alleged, but unproven, violation of Corrupt Practices Act, statistical anomalies	Yes, Corrupt Practices Act Only	Option # 2 Proceedings to declare a nomination or election invalid because of violations of the Corrupt Practices Act. The court may

Ct. of App. Dec. at 14-15	only in absentee voting patterns		determine if there has been sufficient violation of the law to declare a nomination vacant
Fischer v. Painter, 22-CA-788, 22-CA-789, discret. Review pending <u>The Case at Bar</u>	Commissioner caught on video surveillance at poll worker trainings inside polling place electioneering during early voting giving out handbills, talking to voters, and gifting pens in same room as County Clerk and other election officials	Yes, Electioneering & Corrupt Practices Act alleged (gifting things of value)	Option # 1 Proceedings to declare a nomination or election invalid because of violations of the Electioneering Statute. The court may determine if there has been sufficient violation of the law to declare a nomination vacant Option # 2 Proceedings to declare a nomination or election invalid because of violations of the Corrupt Practices Act. The court may determine if there has been sufficient violation of the law to declare a nomination vacant

Misera est servitus, ubi lex est vaga aut incerta. The Court of Appeals failed to cite any **post-Meeks** electioneering decisions as shown **ante**. This error requires discretionary review to correct the errors. The panel meandered through the overgrown grove of election contest jurisprudence to find reasoning from 4 differing types of election contest cases to reverse and ignore **Meeks**. They didn't like the common law remedy originating in our Constitution announced in **Meeks** and hid behind the vote results, cited a lack of evidence of into voter coercion no longer required since **Meeks**. (App. Dec. at 12-14 The trial court was bound by **Meeks**, with an almost identical fact pattern, albeit worse **here**. This Court must reverse the Court of Appeals and re-instate the trial court's opinion that follow **Meeks**. Of course, this court can also take this opportunity to strengthen or re-examine **Meeks**.

This Court announced a strict liability rule for electioneering in **Meeks**. This complements the inclusion of a strong deterrent to candidates, *if you electioneer and cheat*, your election will be voided. Section 151 remains the tallest and oldest chestnut in the forest of election contest jurisprudence and laws retaining its strong deterrent status as expanded by this tribunal in **Meeks**.

Lastly, **Meeks** overruled and removed requirements to analyze whether: 1) ascertain if the electioneering actually changed votes; and 2) absolute proof the

electioneering changed the outcome of the election, instead if it created an unfair election.¹⁹ Dispensing those compliments the strict liability standard in electioneering contest cases only.²⁰ The Court of Appeals erroneously turned a blind eye to the precedential changes in electioneering (Option #1) and corrupt practice (Option #2) election contests. Their erroneous analysis (and cited in support cases **Meeks** overruled) required proof Painter's electioneering changed votes and if the electioneering change the outcome of the election in direct contradiction to the test and analysis announced in **Meeks**. It was absent because it wasn't required any longer. (App. Dec. 12-14, 15-17)

Reversal is required. It is not the function of the Court of Appeals to establish new rules or enunciate changes in jurisprudence.²¹ **Stare decisis et non queita movere.**

This court must be mindful that elections do represent the will of the people. Yet, our judiciary has a role to play to ensure fair play, honesty, and integrity in our rarely flawed electoral processes. You are the *final* arbiters of justice, especially when the constitution commands it, and in these unusually rare cases when you are called to

¹⁹ While this Court has previously held that it is insufficient to simply allege facts upon which election laws were violated and the contestant must go further and show how the alleged violation affected the votes cast...**Adams v. Wakefield**,...**190 S.W.2d 701 (Ky. 1945)**,...**Barger v. Ward**,...**190 S.W.701 (1945)**...**Hill v. Motley**, **134 S.W. 469 (1911)**..we not determine that because those cases were cited under previous versions of Kentucky election statutes, they cannot serve to interpret KRS 121.055 [corrupt practices act] or the amended 117.235 [electioneering statute]. Furthermore, to require appellant to show that a voter changed his vote would put an unreasonable burden on challengers forcing them to subpoena each and every voter to fund one who changed his or her vote as a result of the prevailing candidate. The Court of Appeals cited **Adams v. Wakefield**, **Barger v. Ward**, **Hill v. Motley**, in support of reversal despite **Meeks'** specific change in analysis in electioneering cases. **Meeks**, supra at 216. (App. Dec. at 12-14)

²⁰ An election shall be set aside if the electioneering **could have** resulted in something that changed the outcome or at least impaired the fairness of the election. **Meeks**, supra at 217. The Court of Appeals focused on the outcome only, not fairness. (App. Dec. at 15-17)

²¹ **Tucker v. Tri-State Lawn & Garden, Inc.**, **708 S.W.2d 116, 118 (Ky.App. 1986)**.

interpret and enforce the law at the zenith of your power in our system of ordered liberty, to void an election, it is an easy task with an election so unfair and flawed as here. But here, without reversal, of the intermediate appellate ruling, the voters of Campbell County, including the scrivener, are the real losers, not David Fischer. *We are entitled to confidence in the fairness and integrity of our elections.*

Levying the constitutional and common law remedy, voiding Commissioner Painter's nomination for electioneering, *as the trial court lawfully did*, will give strength to the aging *Meeks* decision. After a mere quarter century in existence, the intermediate appellate court threw it on the fire like a log, ignoring it as precedent here. That legalizes Painter's conduct. Punishing Commissioner Painter for his illegal electioneering and Clerk Luersen for casting doubt on fair elections by violating his oath to enforce and administer all of our election laws, *tradition be damned*, is a reasonable exercise of this tribunal's equitable powers. It will be the best deterrent and disinfectant needed since Alderman Meeks's shenanigans in the 10th Ward. It is equitable, right and just, and must be so ordered by this tribunal.

b. The Court of Appeals Lacked Jurisdiction to Hear the Appeals

Mr. Painter and Clerk Luersen failed to trigger the jurisdiction of the Court of Appeals in the specific manner required by statute. An election contest is purely a statutory proceeding. The mandates of the statute must be *strictly* construed.²² Ky. Rev. Stat. § 120.075 governs the procedures of a primary or general election contest. It is a two-step process. First, a party must file a notice of appeal with the Circuit Clerk. And simultaneously, any appellant shall also file a supersedeas bond, with surety, with the

²² *McClendon v. Hodges*, 2007-CA-488 and 2007-CA-524 (Ky.App. 2007)(citing *Brock v. Saylor*, 189 S.W.2d 688 (Ky. 1945)).

notice of appeal.²³ Without a correctly executed supersedeas bond, the Court of Appeals lacks jurisdiction to hear the appeal.²⁴ The execution of the bond is mandatory in an appeal or a cross-appeal.²⁵ Clerk Luersen and the election officials filed their notice of appeal without a supersedeas bond. Mr. Painter also filed his notice of appeal without a supersedeas bond.

The Court of Appeals' motion panel disregarded the requirement for strict compliance and the specific two-step process to perfect an election contest appeal. Mr. Fischer in his motions to dismiss the appeals cited the following binding appellate cases. They all hold the same legal proposition. An election contest appeal shall be dismissed when the appellant fails to file a supersedeas bond simultaneously with their notice of appeal: *Milliken v. Hatter*²⁶, *Davisworth v. Middleton*²⁷, *Kinner v. Zacherm*²⁸, *Campbell v. Combs*²⁹, 116 S.W.2d 955 (1938), *Brock v. Saylor*, *Wheeler v. Rhea*, *Walter v. Watts*, *Webb v. Webb*, 500 S.W.2d 59 (Ky. 1973), *Duvall v. Gatewood*, 500 S.W.2d 416 (Ky. 1973), *McClendon v. Hodges*³⁰, *Bunch v. Ky. Bd. Of Elections*.³¹ (App/ee Mot. Dism., App/ee Re-newed Mot. Dism, *passim*) *Bunch v. Bd. Of Elections* almost has the same facts as here. The Court of Appeals dismissed an election contest even where the trial court did not set a bond. Bunch took no steps to get a supersedeas bond amount established until after a motion to dismiss was pending.

²³ Ky. Rev. Stat. § 120.075.

²⁴ *McClendon*, supra. *Wheeler v. Rhea*, 306 S.W.2d 294 (Ky. 1957)

²⁵ *Id.* (citing *Campbell v. Combs*, 116 S.W.2d 955 (1938)

²⁶ 197 S.W. 511 (Ky. 1911),

²⁷ 155 S.W.2d 450 (Ky. 1938),

²⁸ 117 S.W.2d 943 (Ky. 1938);

²⁹ 189 S.W.2d 688 (Ky. 1945),

³⁰ 2007-CA-488 and 2007-CA-524 (Ky.App. 2007).


³¹ 2006-CA-1519 (Ky.App. 2006).

Mr. Painter then failed to correctly perfect the supersedeas bond and surety. A second motion to dismiss was filed citing *Barker v. Blakenship*³² *inter alia*. *Barker* involved an election contest where the surety named the wrong obligee (appellee) on the surety for the supersedeas bond. The Court of Appeals erred by failing to follow Supreme Court precedents from and its own series of merits panel decisions.³³

E. and F. STATEMENTS REGARDING RE-HEARING. The movant and Respondent do not have a motion for re-hearing or motion for reconsideration pending.

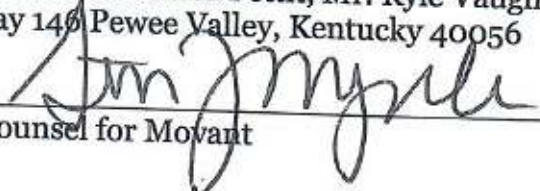
For the reasons stated herein, the Movant respectfully requests this Court **GRANT** discretionary review, vacate the decision of the Court of Appeals, and re-instate the trial court's judgment.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I certify a copy of the foregoing motion was sent by Regular Mail and hand delivered on this 24th day of August, 2022 to the following: Ms. Kelly Stephens, Esq., Clerk, Kentucky Supreme Court, 700 Capital Avenue, Frankfort, Kentucky 40601 (hand delivered); Mr. Jeff Mando, Esq., Ms. Olivia Amlung, Esq., Adams Law 40 West Pike Street, Covington, Kentucky 41011; and Ms. Carol Shureck Pettit, Mr. Kyle Vaughn, Esq., Ms. Tess Fortune, Esq., 7500 West Highway 140 Pewee Valley, Kentucky 40056


Counsel for Movant

³² 111 S.W.2d 592, 593 (Ky. 1937).

³³ SCR 1.030(7)(d), *Commonwealth v. Merriman*, 265 S.W.3d 196 (Ky. 2008) *Special Fund v. Francis*, 708 S.W.2d 641, 632 (Ky. 1986), *Metcalf v. Comm.*, 2009 WL 3151140, * 3 (Ky. App. 2009) (The only way the Court of Appeals can set aside its own merits decisions is by *en banc* review,³³ that didn't happen here.