STATE OF CONNECTICUT
BEFORE THE HOUSE OF REPRESENTATIVES
COMMITTEE ON CONTESTED ELECTIONS

IN THE MATTER OF:	**:**	**JANUARY 31, 2019**
JIM FEEHAN, CONTESTANT,	**:**	
AND	**:**	
PHILIP L. YOUNG III, CONTESTEE.	**:**	

REPLY MEMORANDUM OF PHILIP L. YOUNG III
REGARDING CONTESTED ELECTION

Two brief points should be made before the Committee further considers this contested election. First, although the contestant Jim Feehan in his memorandum seemed to predict that the Supreme Court (or the federal courts) could take up this case again at some point, after he filed his memorandum on January 30, 2019, the Supreme Court issued its written decision affirming the dismissal of all claims filed in Superior Court and vacating the injunction against certifying the results. The full written decision made it clear that what to do, if anything, belongs solely to this House.

Second, the contest must be dismissed for an uncomplicated reason: the contestant has not proved – nor has be even tried to prove – that the result of the election would have been different had an additional 76 people voted, nor has he offered any evidence at all as to what impact those 76 votes *might* have had. In effect, he leaves it to the committee to guess.

The contestant continues to rely on court decisions rather than parliamentary precedent, but on this issue, it makes little difference. He has the burden of proof, and that burden may only be met with evidence. Proof of this nature would typically be accomplished – if it could be – by use of expert testimony involving a statistical analysis. Indeed, this was exactly what happened

in a case where a voting machine failed to record any votes for a particular candidate – a close circumstance to our situation here. The plaintiff in that case, a candidate for a city council seat, lost by 27 votes, but one machine did not record any votes for her. She proved that the result probably would have been different had that machine recorded votes:

> Professor Benjamin Fine, a mathematics professor with experience in statistical analysis, testified that based on the fact that voters entered the two machines at Roosevelt School on a random basis, he was able to perform a statistical analysis. Grogins needed twenty-eight additional votes to win. Professor Fine testified that there is a 99.994 chance that Grogins received at least thirty-five votes from persons who entered machine number 160717 and that she could have received ninety to ninety-five votes.

Grogins v. City of Bridgeport, 2001 Conn. Super. LEXIS 3521, at *2 (Dec. 4, 2001). The court ordered a new election – although limited to the district involved.

Similarly, in *Bauer v. Souto*, 277 Conn. 829 (2006), on which the contestant here relies heavily, the plaintiff offered expert testimony from a statistics professor that one machine had malfunctioned and that had it not malfunctioned the plaintiff would have received additional votes that exceeded the margin by which he lost.

> The trial court credited the testimony of Steven Krevisky, a mathematics professor at Middlesex Community College, whose mathematical specialties include statistics. Krevisky testified that, based on an analysis of all of the votes received by the plaintiff on each of the thirty-one machines used in the election, the plaintiff had received a mean of 5.54 percent of the total vote, that the standard deviation for all votes for the plaintiff on all of the machines was .008, that 73 percent of the vote totals were within one standard deviation of the mean, and that 29 percent of the vote totals were within two standard deviations of the mean. Krevisky also testified that the vote total for the plaintiff on machine number 150051 was more than six standard deviations from the mean. He therefore concluded that either the data collected from machine number 150051 had been counted incorrectly or that there was a mechanical defect in the machine.

Id. at 835. "Thus, the [trial] court found that it is reasonably probable that if machine number 150051 had been operating properly, the plaintiff would have received at least 103 more votes than he had received and, therefore, his vote tally would have been more than that of Russo, who had received the twelfth highest number of votes in the election." *Id.* at 837. Similar expert

testimony was allowed in *Bennett v. Mollis*, 590 F.Supp.2d 273, 280 (D.R.I. 2008), on the issue of whether mistakes likely were consequential. Of course, there are other ways to prove an impact on the election. *See Keeley v. Ayala*, 328 Conn. 393, 428 (2018) ("Because the number of absentee ballots properly invalidated by the trial court is greater than Herron's eighteen vote margin of victory over the plaintiff, . . . the court correctly determined that the results of the November 14, 2017 special primary had been placed seriously in doubt, thereby necessitating that a new special primary be conducted."); *Wrinn v. Dunleavy*, 186 Conn. 125, 152 & n.5 (1982),(ordering new election where plaintiff was defeated in primary election by a margin of eight votes and court determined that twenty-five out of twenty-six of the improperly mailed absentee ballots had been cast for the plaintiff's opponent"); *compare Arras v. Reg'l Sch. Dist. No. 14*, 319 Conn. 245, 272 (2015) ("plaintiffs have failed to meet their burden of establishing the existence of a genuine issue of material fact as to whether the defendants' failure to strictly comply with the warning provisions of §§ 10-56 (a), 10-47c and 9-226 caused the referendum results to be seriously in doubt"). But the contestant here has not attempted any of them.

The court in *Rutkowski v. Marrocco*, 2013 Conn. Super. LEXIS 2770, at *10-11 (Dec. 3, 2013), also ordered a new election based on the finding from the evidence that "[i]t is reasonably probable that, had the seventeen voters at Voting District #14 voted properly on Ward 5 ballots and had their votes been counted, the final tally of votes would have had [the losing candidate] receiving more votes that [the winning candidate] and the outcome of the election would have been different." The winning candidate had won by only three votes, and it was clear from the court's examination of ballots that had proper ballots been used, the losing candidate probably would have won the election. It was this finding which led to the court concluding "the reliability of the result of the election for Ward 5 Aldermen in the City of New Britain is

seriously in doubt." *Id.* at *12. The finding of an impact on the election was based on *evidence*, not conjecture.

But in this case, we have no similar evidence, leaving it to the committee to speculate as to what impact 76 votes (or fewer, assuming some likely undervote), might have had on an election decided by 13 votes. No matter what standard the committee applies, whether a standard like the judicial standard for a new municipal election under Conn. Gen. Stat. § 9-328 ("result seriously in doubt" which may be established, among other ways, by proof that result would have been different),[1] or the standard specifically intended for parliamentary challenges set forth in *Deshler's Precedents* ("In order to set aside an election there must be not only proof of irregularities and errors, but, in addition thereto, it must be shown that such irregularities or errors did affect the result." § 7.7, at 882) –the contestant has left it up to the committee to guess. That is not enough.

[1] This standard is not in § 9-328, as the Supreme Court has held. The statute "does not make clear. . .what standard must be met in order for the court to order a new election. Indeed, it does not state, either directly or by implication, how significant the errors in the rulings or the mistakes in the count must be, and how likely it was that the errors or mistakes affected the result of the election." *Bortner v. Town of Woodbridge*, 250 Conn. 241, 259-60 (1999). The court's adoption of the "seriously in doubt" standard was based on debate in the House on an amendment to the statute. *Id.* at 261 & n.22.

RESPECTFULLY SUBMITTED,

By __/s/ William M. Bloss__

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CERTIFICATION

This is to certify that a copy of the foregoing has been emailed, on this 31st day of January 2019, to the Clerk of the Committee and to:

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__/s/William M. Bloss_____
William M. Bloss

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