**STATE OF CONNECTICUT**
**GENERAL ASSEMBLY**

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| **IN RE:**<br><br>**120TH GENERAL ASSEMBLY DISTRICT** | **HOUSE OF REPRESENTATIVES**<br><br>**COMMITTEE ON CONTESTED ELECTIONS**<br><br>**FEBRUARY 4, 2019** |

# REPORT OF THE COMMITTEE ON CONTESTED ELECTIONS

Pursuant to House Resolution No. 4, and Rule 19 of the Connecticut House of Representative's Rules, the General Assembly's House Committee on Contested Elections hereby submits its report to the Clerk of the House.

## I. PROCEDURAL HISTORY

On the opening day of the January 2019 legislative session, the Connecticut House of Representatives created, for the first time in more than three decades, a Committee on Contested Elections ("the Committee"). While the Committee's charge encompassed the review of any contested elections brought before it, only one election sparked its creation: the 120th General Assembly race in Stratford, Connecticut on November 6, 2018. Results on Election Day showed Democratic incumbent Phil Young defeated the Republican candidate, Jim Feehan, by 18 votes (a third, independent candidate received only 55 total votes). A mandatory recanvass reduced the margin of victory between Young and Feehan to 13 votes.

After the November 6 election, however, reports began to surface that approximately 76 voters at one of the 120th District polling locations (Bunnell High School) had received ballots that did not include the correct candidates for that race. On that basis, Feehan brought an action in Connecticut Superior Court challenging the results and seeking an order for a new election.

Both the trial court and, ultimately, the Connecticut Supreme Court, held that the Connecticut Constitution vested the General Assembly with the exclusive jurisdiction to determine its membership: that is, only the General Assembly had the power to review the 120th election results and determine if those results should be upheld, or a new election, be ordered. That is this Committee's charge.

To carry out its responsibilities, the Committee did the following:

- The Committee met on January 11, 2019, January 18, 2019, January 24, 2019, January 25, 2019, February 1, 2019, and February 4, 2019. The Committee conducted all of its meetings in open session, with all sessions transcribed. The Committee noticed its meetings, with agendas, in accordance with the 2019-20 General Assembly's Joint Rules 5(f) and 5(h).

- The Committee specifically requested, and received from Mr. Feehan and his counsel, a formal complaint (with supporting documents) setting forth Mr. Feehan's challenge to the 120th District election results.

- The Committee asked both parties[1] to identify particular witnesses each party thought that the Committee should interview, as well as documents it should seek from those witnesses. Based upon the parties' submissions in that regard, and its own deliberations, the Committee subpoenaed, questioned and took in-person testimony, under oath, from the following witnesses:

| Name | Appearance Date | Role | Party Affiliation |
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| Louis Decilio | 1/24/2019 | Republican Registrar of Voters | R |
| Rick Marcone | 1/24/2019 | Democratic Registrar of Voters | D |
| Benjamin Proto | 1/24/2019 | Deputy Republican Registrar | R |
| Malcolm A. Starratt | 1/24/2019 | Moderator at the Bunnell | R |
| Peter Rusatsky | 1/24/2019 | Ballot Clerk at Bunnell | D |
| Joseph Collier | 1/25/2019 | Assistant Registrar, Bunnell | D |

[1] For ease of reference, we occasionally refer to Mr. Feehan and Mr. Young as the "parties".

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|---|---|---|---|
| Dave Heriot | 1/25/2019 | Assistant Registrar, Bunnell | D |
| John Krekoska | 1/25/2019 | Head Moderator Recanvass | R |
| Elizabeth Boda | 1/25/2019 | Head Moderator - Election Day | R |

- The Committee received and considered the following documentary evidence from the Secretary of the State, the parties, the witnesses or the Town of Stratford (though its counsel):

    - Bunnell High School Moderator Diary
    - Bunnell Moderator Return
    - Bunnell Official Check List 120-21 A-L
    - Bunnell Official Check List 120-21 M-Z
    - Bunnell Official Check List 122-21
    - Poll Worker List
    - Secretary of the State Election Results by Voting District
    - Secretary of the State Recanvass Return Form
    - Election Night Results Receipt
    - Recanvass Results Receipt
    - Ballot Order Worksheet
    - Hourly Turnout Count
    - Chapel School Moderator Diary
    - Lordship Elementary School Moderator Diary
    - Nichols School Moderator Diary
    - Second Hill Lane Moderator Diary
    - Stratford High School Moderator Diary
    - Wilcoxson School Moderator Diary
    - Wooster Middle School Moderator Diary
    - List of Counters for the Recanvass
    - Copies of Signed Moderator Returns
    - Bunnell High School Spoiled Ballots in Envelope

- The Committee invited Mr. Young, Mr. Feehan, and their respective counsel to appear before the committee and present any arguments. Counsel for Mr. Young appeared on January 25, 2019. Counsel for Mr. Feehan declined to appear before the Committee, citing legal ethics concerns under Rule of Professional Conduct 3.7. Neither Mr. Young nor Mr. Feehan sought to testify before the Committee.

- The Committee asked the parties and their counsel, as well as the Town of Stratford, to submit written arguments and any further documents they wished the Committee to consider by 9AM on January 30, 2019. Both parties did so. The Committee allowed each party to respond to the other parties' submissions, in writing, by 9 AM on January 31, 2019. Both parties did so.

Copies of the above-referenced materials are available to the public (and were made available to the public as the Committee received them). The Committee wishes to thank the witnesses who testified, as well as the town of Stratford (ably represented by its counsel, Brian LeClerc of Berchem Moses, PC).

## II. FACTUAL FINDINGS

Based upon the submissions and documents it received from the parties and the Town of Stratford, and the sworn testimony from the witnesses noted above, the Committee makes the following factual findings.

1. On November 6, 2018, voters of the 120th Assembly District could have voted from among three eligible candidates for State Representative: incumbent Philip Young for the Democratic Party, Jim Feehan, endorsed by the Republican Party and Independent Party, and petitioning candidate Prez Palmer.

2. The 120th Assembly District is a single-town district, the boundaries for which are solely within Stratford. Another Assembly District, the 122nd District, covers parts of Stratford, Shelton and Trumbull. The candidates for the 122nd District were Ben McGorty (Republican) and Jose Goncalves (Democrat).

3. There are eight separate polling places in Stratford for the 120th District. Two of those polling places, Chapel Street School (80-1) and Bunnell High School (90-1) ("Bunnell"), also serve as polling places for 122nd District.

4. Given that some voters voting at Bunnell vote in the 120th and some vote in the 122nd, the Stratford registrars testified that they typically order color coded ballots – so that election officials on site can easily discern which ballot is for the 120th and which is for the 122nd. (The Committee assumes the same is true for the Chapel Street location, but testimony

the Committee received necessarily focused on the Bunnell location.) Due to late changes to the ballot involving a third party candidate for Governor, ballots for the November 6 election were not color coded.

5. The registrars received ballots for the 120th and 122nd Districts before the election from their printer. Obviously, ballots for the 122nd District race listed only Mr. McGorty and Mr. Goncalves as candidates for state representative, while ballots for the 120th only listed Mr. Young, Mr. Feehan and Mr. Palmer as candidates for state representative (in addition, of course, to the candidates for other offices). In other words, there was no way that an elector receiving a ballot for the 122nd District could vote for the 120th District candidates.

6. Ballots came plastic wrapped in packs of 100, in boxes labelled and marked as containing ballots for only the 120th or 122nd. The Registrars believed that a box marked as containing ballots for the 120th only contained ballots for that district. The Registrars did not individually review each packet in every box to confirm this but testified that each packet also came with a sheet on top of it, clearly identifying the packet as either for the 120th or 122nd.

7. The night before the election, Stratford election officials delivered multiple, unopened boxes of ballots for the 120th and 122nd to Bunnell, where they were kept in a locked blue, two door locker, with boxes containing ballots for the 120th kept on one side and boxes for the 122nd on the other side.

8. The following officials were present at the Bunnell location on Election Day: Assistant Registrars, Mr. Heriot and Mr. Collier, a district moderator, Mr. Starratt, six official checkers, and three ballot clerks.

9. On Election Day, only the two assistant registrars and the moderator had access to the locker containing the ballots. Mr. Collier testified that he took on the primary (but not

exclusive) role of retrieving and opening the ballot packets and providing them to the ballot clerks on an as needed basis. (As the ballot clerks began to run low, they would ask for more).

10. Because more voters at Bunnell voted in the 120th than the 122nd, Stratford election officials traditionally set up two tables to check in voters in the 120th and one table to check in voters for the 122nd. The two 120th tables were divided by street, with voters residing on streets beginning with A through L checking in at one table and voters residing on streets beginning with M through Z checking in at another table. Consistent with this, the Registrars prepared two official voter checklists on the eve of the election for Bunnell: one for streets A-L and one for streets M-Z. (The Registrars also pre-marked any voters who had already voted by absentee with an "A" next to the name).[2]

11. Election Day was busy, with a steady and often heavy flow of voters. Rain throughout the day also resulted in the moderator having to spoil several dozen wet ballots throughout the day, and reissue new ballots to those voters. None of the evidence the Committee received, however, leads it to conclude that the spoliation issue contributed to the ballot mix-up at issue here.

12. At approximately 2:30 PM, an elector from the 120th approached Assistant Registrar Heriot and informed him that his ballot did not list the 120th candidates for state representative.[3] Mr. Heriot informed the moderator, Mr. Starratt, who determined that the elector's ballot was one for the 122nd, rather than the 120th. Mr. Starratt gave the elector the proper ballot for his district and spoiled the elector's 120th ballot.

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[2] The checklists are not numbered or provided electronically (e.g., excel spreadsheet) to the official checkers. A case like this demonstrates why they should be.

[3] Mr. Heriot testified that he worked almost exclusively at the front of the polling place to meet and direct voters to their lines. This voter apparently received a ballot and walked through and almost out of the polling place with it in hand.

13. Mr. Starratt then reviewed the ballots being used by the 120th ballot clerks and determined that one of them was using ballots for the 122nd.[4] Mr. Starratt halted the voter check in lines (but did not stop those who already had ballots from voting). He confiscated the impacted clerk's remaining ballots and gave them to the 122nd ballot clerk. (Mr. Starratt testified that the clerk had "about 15" ballots left but he could not state for certain exactly how many). He gave the 120th clerk a new pack of 120th ballots and instructed the ballot clerks to check the ballots carefully. Voting resumed.

14. It is the Committee's unanimous finding, based upon the testimony and evidence it received, that the 120th ballot clerk's use of 122nd ballots (the "Bunnell Issue") was not the result of any deliberate, intentional conduct on the part of any Stratford election official, or any of the candidates, to undermine or subvert the election results or otherwise manipulate the electoral system unfairly. Quite the contrary, the Committee finds that the Bunnell issue was an unintentional mistake born of simple negligence. It is unclear by whom. Mr. Collier candidly conceded that he could have grabbed the wrong packet from the locker in which they were stored and given it to the ballot clerk. Given how the boxes were segregated in the locker, and how boxes and packets were labelled, however, it is just as possible that the printer may have inadvertently included some 120th ballots in a box for the 122nd. Regardless, Mr. Collier did not spot the error. Neither did the ballot clerk, but we note that she was a minor apparently working her first election.

15. At the time the incident was discovered – between 2 and 3 PM – between 38.5% and 43% of the eligible, registered voters in the 120th had voted, according to the Registrars'

[4] It is unclear whether the 120th ballot clerk using the 122nd ballot was at the A-L table or the M-Z table for the 120th.

official Hourly Voter Turnout Count.[5] The Committee heard no evidence of any other incidents of note, or errors, that occurred at Bunnell or elsewhere in Stratford on Election Day concerning the 120th.

16. In the initial, town-wide vote tabulation for the 120th after the November 6, 2018 election, Mr. Young received 5,217 votes, Mr. Feehan received 5,199 votes, and Mr. Palmer received 55 votes.

17. At Bunnell, the initial tabulation on Election Day showed that Mr. Young received 607 votes, Mr. Feehan received 859 votes (total)[6] and Mr. Palmer received 6 votes, with 27 voters casting no vote in the race.

18. The difference of 18 votes between Mr. Young and Mr. Feehan triggered a mandatory statutory recanvass pursuant to General Statutes § 9-311a.

19. The recanvass occurred on November 13th and 14th at Stratford Town Hall. The recanvass resulted in Mr. Young receiving 5,222 votes town-wide, Mr. Feehan receiving 5,209 votes, and Mr. Palmer receiving 55 votes – for a difference of 13 votes between Mr. Young and Mr. Feehan. These are the official results that Stratford election officials reported to the Secretary of the State[7] and based upon them, the Secretary of the State certified Mr. Young as the winner of the 120th District race for state representative.

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[5] At 2PM, 941 people had voted (38.5%) and by 3PM, 1051 had voted (43%).

[6] This total includes those Mr. Feehan received on the Republican line, the Independent Party line and several where the line was "unknown" but the intent to vote for Mr. Feehan was clear.

[7] None of the witnesses could explain precisely why Mr. Young lost a net 5 votes. Of particular note is the fact that Stratford election officials rejected at least two absentee ballots for Mr. Young for reasons that neither the Recanvass Moderator, Mr. Krekoska, nor the Deputy Registrar overseeing the absentee ballot recanvass, Mr. Proto, could explain. Mr. Proto indicated that there may have been an issue with respect to those ballots having been cast by ineligible overseas or military voters. Remarkably, there is no requirement that election officials document, either in an official log or otherwise, the reasons why a vote is rejected. This should change. Indeed, with respect to absentee ballots, where the identity of the voter can be ascertained, questions about the eligibility of that voter can easily be answered before taking the drastic step of rejecting a vote.

20. No candidate (nor anyone else) has disputed the validity of, or otherwise challenged as improper, the 10,486 votes actually cast in the race for the 120th District.

21. The recanvass showed that, at Bunnell High School, Mr. Feehan still received a total of 859 votes, and Mr. Young received 608 votes (one more than initially counted). The totals for Mr. Palmer (6 votes) and those not voting in the race (27) remained unchanged. (These totals do not include absentee ballots from those living in the Bunnell District; absentees were counted separately).

22. Accordingly, given the recanvass results, the Committee summarizes the Bunnell Issue as follows:

- 1500 total ballots were processed for the 120th District at Bunnell: 859 for Mr. Feehan, 608 for Mr. Young, 6 for Mr. Palmer and 27 no votes. These are the verified recanvass totals, verified by machine count and hand count. The Committee received no evidence to contradict these totals.
- The official voter checklists for the 120th, however, show 1575 voters crossed off as having voted. The Committee received no reliable evidence to contradict that total.[8]

[8] As noted, the voter checklists are not the paradigm of reliability. Checkers can easily make mistakes on a hectic day. More importantly, they are not numbered. Thus, in order to count the total numbers crossed off each of the two lists for the 120th, one must count the names crossed off on each page, ticking off each name as one proceeds – a tedious process that can easily lead to errors. Indeed, the Registrars testified that they each had to recount the pages several times before agreeing on the 1575 total. Nevertheless, they did agree. The Committee's own independent review did not lead to a different conclusion. The Committee therefore accepts the 1575 number as the number of voters in the 120th who received ballots. The Committee notes that the Secretary of the State's election results for Election Day shows 1572 electors as "Checked as Having Voted" voted at Bunnell in the 120th. According to the Secretary of the State, Stratford election officials input this number on election night. All of the available evidence before the Committee contradicted this number and, after receiving testimony, Committee has determined that the 1572 number on the Secretary of the State form likely resulted from miscounting the checklists, or other negligence.

- Accordingly, 75 voters in the 120th received the wrong ballot. As a result of the unintentional conduct described above, these 75 voters instead received ballots for the 122nd District and thus were unable to vote for state representative in the 120th District, if they intended to do so.[9]

23. The Committee cannot determine the identity or intent of these 75 voters.

24. No one purporting to be one of the impacted 75 voters contacted the Committee to testify regarding his or her intention in voting that day.

## III. SPLIT AMONG THE COMMITTEE

All four members of the Committee agree upon Section I and II of this Report as set forth above. Consistent with their oaths, all Committee members conducted their negotiations, deliberations and, occasionally, argument, in good faith, with sincerity of purpose and "with scrupulous attention to the laws under which they serve." *Feehan v. Marcone et al*. (SC 20216-18) (officially released Jan. 30, 2019) at p. 17. The Committee, however, was unable to reach consensus on the remaining sections and ultimate conclusion. The entire Committee worked hard to achieve consensus members and regrets that it was unable to do so.

Nevertheless, the final decision on this matter never rested with the Committee. At the very least, the competing arguments and conclusions set forth below will inform the full House as it considers the Bunnell Issue. Accordingly, the remaining sections of this Report contain the separate conclusions of the two Democratic members and the two Republic member, as set forth below.

[9] According to the Registrars, the checklist 122nd District at Bunnell shows 954 names crossed off the official checklist, but the official vote total at Bunnell shows 1,031 ballots processed, for a difference of 77 more ballots than voters. The Committee did not investigate this discrepancy (77 more ballots in the 122nd and 75 more voters in the 120th) but does not consider it critical to the Committee's charge.

## IV. ANALYSIS

### A. Conclusions of Representatives D'Agostino and Haddad

#### 1. Applicable Standards

We start by recognizing, as the Connecticut Supreme Court recently did, that the Connecticut Constitution vests the state House of Representatives with "exclusive jurisdiction" over Mr. Feehan's election challenge. *Feehan v. Marcone et al*. (SC 20216-18) at p. 17. *See also* Connecticut Constitution, Article III, § 7 ("Each house shall be the final judge of the election returns and qualifications of its own members."). As the "final judge" vested with such exclusive authority, the House – and by extension this Committee created pursuant to House Rule 19 – acts, effectively, in a *judicial* capacity. *See Feehan* (SC 20216-18) at 16. "The exercise of this judicial power 'necessarily involves the ascertainment of facts, the attendance of witnesses, the examination of such witnesses, with the power to compel them to answer pertinent questions, to determine the facts and apply the appropriate rules of law, and, finally, to render a judgment *which is beyond the authority of any other tribunal to review*.'" *Id*. (quoting *Morgan v. United States*, 801 F.2d 445, 448 (D.C. Cir. 1986) (emphasis in original)).

The Committee, as noted above, has indeed compelled the attendance of witnesses, conducted the examination of such witnesses, taken evidence and, based upon that, determined the facts. We now must, in effect, "apply the appropriate rules of law" to those facts and make a recommendation to the full House, so that it may render a judgment. But what "rules of law"?

As a threshold matter, we believe that the parties to this proceeding, and the parties to any future investigation by a Committee on Contested Elections, are entitled to due process. That is, they should be given an opportunity to be heard – to submit testimony and evidence and argument, should they so desire. That occurred here.

Beyond that, however, no "rules of law" or other legal standards govern how this Committee, or any future Committee, is to analyze the facts before it. The Connecticut Constitution does not set forth any; nor do the House Rules, *Mason's Manual of Legislative Procedure*, or the resolution empowering this Committee. A historical review of prior General Assembly Contested Election Committee records reveal no guidance. And given that the "exclusive jurisdiction" to resolve this matter lies with the House, and this Committee, precedents from our State Supreme Court, or from the U.S. Congress, do not control.

They are, however, persuasive. When direct authority is lacking, courts routinely look for guidance from other courts or authorities that have considered the same or an analogous issues. *See Feehan* (SC 20216-18) at 21-22 (relying on Second Circuit decisions to reject Mr. Feehan's claimed federal constitutional violation). Here, we can look to our Connecticut Supreme Court and Congress for guidance as to the applicable standards.

In a series of cases deciding *municipal* election contests brought under applicable state statutes, the Connecticut Supreme Court has applied a two part test to determine whether or not a new election is warranted: "The court must be persuaded that: (1) there were *substantial errors* in the rulings of an election official or officials, or *substantial mistakes* in the count of the votes; and (2) as a result of those errors or mistakes, the reliability of the result of the election, as determined by the election officials, is *seriously in doubt*." *Bortner v. Town of Woodbridge*, 250 Conn. 241, 263 (1999) (emphasis added).[10] Further, in such cases, the complainant (the

[10] The Court based the "seriously in doubt" standard on the *legislative debate* underlying the relevant election contest statutes. *Id.* at 261, n.22 (quoting debate between then Representative Robert Frankel and then Representative Martin Looney). We have in effect, come full circle: the Legislature helped the Court craft an applicable standard in municipal election cases and the Court's standard helped this Legislative Committee craft a standard to apply here.

candidate seeking a new election) bears the burden of proof by a preponderance of the evidence. *Id* at 258.

The United States House of Representatives, acting in cases of contested elections, has also applied certain standards, as set forth in *Deschler's Precedents* assembled by the former US House parliamentarian. Of note, and like the *Bortner* test, the U.S. House has found that "[i]n 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*." 2 Deschler's Precedents, Chapter 8, § 7.7, at 882 (emphasis added). Further, "[i]n an election contest, contestant has the burden of proof to establish his case, on the issues raised by the pleadings, by a fair preponderance of the evidence." 2 Deschler's Precedents, Chapter 9,§ 35.2, at 1057.

With these authorities in mind, we conclude that this Committee – and any future Committee on Contested Elections considering a challenge to election results – should apply the following test: First, is there evidence that a substantial irregularity, mistake or error occurred? In this regard, intentional conduct by either an election official or candidate to influence an election improperly is always evidence of a substantial irregularity. A substantial irregularity, mistake or error can also result from unintentional conduct, such as the counting of votes that should not have been counted (*e.g.*, counting invalid absentee ballots), the failure to count votes that were properly cast (*e.g.*, rejecting proper military ballots, machine error, etc), or depriving valid electors the opportunity to vote. Whether an irregularity, mistake or error is "substantial" in terms of gravity and/or volume will depend on the circumstances of each case.

Second, if such a substantial irregularity, mistake or error occurred, did it seriously affect the election result such that the official result is seriously in doubt? In this regard, mathematical

certainty is not required. Nevertheless, there should be some concrete, verifiable evidence before the Committee that demonstrates, to a reasonable certainty, that a different electoral result would have occurred, but for the substantial irregularity, mistake or error. Guesswork or conjecture is not enough.

Third, it is the complainant's responsibility to present evidence to the Committee, so that it can answer these two questions. The failure of a complainant to do so may, in the Committee's discretion, be a basis to dismiss a complaint. Nevertheless, a Committee may consider other evidence not presented by a complainant when deciding these two questions.

Why do we adopt such a standard – particularly the second part of the test? Why do we not simply conclude that whenever the number of ballots in question exceeds the margin between the candidates, a new election should be ordered? Again, *Bortner* provides an answer: "[W]hen a court orders a *new* election, it is really ordering a *different* election. It is substituting a different snapshot of the electoral process from that taken by the voting electorate on the officially designated election day." *Bortner*, 250 Conn. at 256 (emphasis in original).

> Consequently, all of the electors who voted at the first, officially designated election . . . have a powerful interest in the stability of that election because the ordering of a new and different election would result in ***their election day disfranchisement***. The ordering of a new and different election in effect disfranchises all of those who voted at the first election because their validly cast votes no longer count, and the second election can never duplicate the complex combination of conditions under which they cast their ballots.

*Id*. (emphasis added).

In short, the power to order a new election is an awesome and potentially dangerous power, especially when in the hands of what is a political body. We must be careful. Establishing and following standards like those set forth above help balance the interests of the candidates, the voters impacted by any mistake and, importantly, the voters that did vote.

We now apply these principals to the undisputed facts of this case.

**2. Was The 120th Bunnell Issue A Substantial Irregularity, Mistake Or Error?**

Yes. Seventy-five voters were not given the opportunity to vote in the 120th, despite being at the polls in a timely manner. This was a substantial mistake that was likely the result of election officials at Bunnell, and not the result of any intentional conduct by election officials or the candidates. While we do not know the identity of those voters, or if they indeed intended to vote in the 120th race, the mistake prevented these 75 electors from voting in the 120th if they desired to do so.

**3. Did The 120th Bunnell Issue Significantly Affect The Election Results Such That They Are Seriously In Doubt?**

For several reasons, we cannot conclude that the Bunnell Issue significantly affected the 120th election results such that they are seriously in doubt.

First – as the entire Committee and even Mr. Feehan agree – it is impossible in these circumstances to determine the actual intent of the 75 affected voters. The 75 affected ballots were not segregated and instead were mixed in with the 122nd ballots. This is not a case where, for example, absentee ballots are at issue and voter intent can be determined and credibly assigned to one candidate or another. *See e.g.*, *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). Indeed, we do not even know if all of the affected voters even sought to vote in a state representative race (as noted, 27 voters of the 1500 who properly cast ballots in the 120th at Bunnell did not vote for any candidate in the state representative race). We cannot ask them. And none of the affected voters sought to testify

before the Committee.

On this last point, Mr. Feehan has argued that any effort by the Committee to determine the identity of the 75 voters would constitute an illegal infringement on those voters' right to anonymity in the voting process. This is a classic red herring. No one is suggesting that this Committee, or any future Committee, has the power to compel voters to testify as to how they voted. What we are pointing out, however, is that this Committee would have greatly appreciated and considered any *voluntary testimony* from a Bunnell elector claiming to be one of the 75, either in person or via affidavit.[11] Indeed, we would have expected either candidate to have appealed to their supporters in the Bunnell district to come forward and so testify.

None was received. With no ability to determine the intent of the 75, we have no concrete, verifiable evidence before us that demonstrates, to a reasonable certainty, that a different electoral result would have occurred, and that the results are seriously in doubt. We are left to guess and guesswork, as noted, cannot be a basis to order a new election and disenfranchise the more than 10,000 other Stratford residents who voted in the 120th.

Second, it has been suggested that, in order to divine the intent of the 75 and allocate their votes among the candidates, we should use the final ratio of the votes each candidate received at Bunnell. In other words (1) because Mr. Feehan received 57.267% of the vote at Bunnell (859 votes divided by the 1500 who voted), he would have received 42.950 of the 75 votes; (2) Because Mr. Young received 40.533% of the Bunnell vote (608/1500), he would have received 30.4 of the 75; and (3) because 2.2% of the votes went to either Mr. Palmer or no vote (33/1500), we can allocate 1.65 votes of the 75 to neither Mr. Feehan nor Mr. Young. We decline to do so.

[11] Of course, the Committee would evaluate the credibility of such testimony and be free to accept or reject it.

As a threshold matter, this "math" does not actually close the 13 vote gap between Mr. Young and Mr. Feehan. The difference is 12.55 (42.950 – 30.4) voters, whatever that means. Should we round up, to 13? Do we round down, since only a complete, full vote should count?

Even if we did round up, and use these ratios, they are based on the total vote *at the end of the day*, after more than 60% of the district's eligible voters had voted. The Bunnell Issue occurred between 2 and 3 PM, when only between 38.5% and 43% of the eligible voters had voted. What was the ratio at that time? Do more Democratic voters show up at the polls on or before early afternoon at Bunnell? Do more Republican voters come after 6PM? We do not know and neither candidate offered any information in that regard.

These statistical gymnastics demonstrate the flaw with using the final vote totals, standing alone, as part of any analysis: any exercise by the Committee in this regard is conjecture, without any grounding in statistical analysis, voter trends or other evidence. This is not to say that such an analysis is never relevant. *See e.g.*, *Bauer v. Souto*, 277 Conn. 829, 835-45 (2006) (ordering new election where the undisputed, expert statistical analysis from a mathematics professor showed that, had a malfunctioning machine been working properly, the plaintiff would have received at least 103 more votes). The point is that neither candidate offered a verifiable, statistical analysis from an expert in the field. None of the Committee members has such expertise.

We simply cannot overturn an entire election – and disenfranchise more than 10,000 voters – using a calculator and elementary-school math skills.[12]

[12] Mr. Feehan appears to argue in his reply brief that the Committee should assign him 59% of the votes at Bunnell, rather than the 57.267% we calculated. Again, this proves point: we cannot even agree on the basic math. This is no way to decide an election.

Third, analogous cases before the Connecticut Supreme Court militate against finding that the election results are seriously in doubt and ordering a new election. Again, we note that mathematical certainty is not required for a party to show that the results of an election are seriously in doubt. But time and again, our Supreme Court has required some verifiable, concrete evidence before ordering a new election. *See e.g.*, *Keeley v. Ayala*, 328 Conn. 393, 428 (2018) (reviewing absentee ballots and concluding that "[b]ecause 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"); *Bauer*, 277 Conn. at 835 (relying on expert statistical analysis from a mathematics professor); *Wrinn*, 186 Conn. at 152 (1982) (ordering a 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").

No such evidence is before us here. Perhaps recognizing this, Mr. Feehan urges us to ignore these Supreme Court precedents and instead rely upon the trial court's reasoning in *Rutkowski v. Marrocco*, No. HHDCV136046652S, 2013 WL 6916610 (Conn. Super. Dec. 3 2013). In that case involving a single district aldermanic race in New Britain, the margin between the two candidates at issue was only 3 votes, but 17 voters were given the wrong ballot, such that they did not have the opportunity to vote for either candidate. 2013 WL 6916610 at * 4. Relying *solely* on the fact that the number of ballots at issue (17) exceed the margin of victory (3), the trial court concluded that the election results were seriously in doubt and ordered a new

election for that particular ward (involving all candidates who ran for the seat). *Id* at 4-5.[13]

As noted above, we decline to apply such a standard that is (with respect to the judge in *Rutkowski*) unmoored from any concrete, verifiable evidence beyond the results themselves. How would such a standard be applied in other contests? What if the number of ballots at issue was 17 but the margin 7? Or 100 to 50? Are the results seriously in doubt in one case but not the other?

We therefore reiterate that relying on the difference between the ballots at issue and the margin of victory, standing alone, is not a basis for finding election results seriously in doubt and ordering a new election. *See e.g.*, *Tunno v. Veysey*, 2 *Deschler's Precedent's*, Chapter 9, § 64.1 (Congress refusing to order a new election in a case where the margin of victory was 1795 votes but 10,600 voters were improperly precluded from voting); *McCloskey and McIntyre*, H. Rept. 99-58, at 43 (1985) (refusing to order a new election where the margin was only 4 votes out of more than 200,000 cast even though complaints were raised about irregularities in the recount).

Accordingly, for all of these reasons, we cannot conclude that the Bunnell Issue so affected the election results in the 120th such that those results are seriously in doubt. We have before us no concrete, verifiable evidence that shows, to any degree of reasonable certainty, that a different electoral result would have occurred. The only thing we could do is guess as to whether or not the election result would have been different if the 75 voters had received the correct ballot. But a mere guess does not is not enough and does not justify disenfranchising over 10,000 electors who voted in the 120th on Election Day.

We therefore recommend that the House of Representatives dismiss the present complaint.

[13] The decision was not appealed.

## B. Conclusions of Representatives Candelora and Perillo

The Committee, being in agreement on the facts, acknowledges that a serious error occurred in the distribution of ballots in the 120th Assembly District at the Bunnell High School polling location. The scope of the error, combined with the narrow margin of victory for Representative Young, calls into question the reliability of the election outcome. The Committee is not, however, in agreement as to the appropriate remedy. We set forth our proposed remedy below. We recommend that each remedy set forth by the members of the Committee be drafted as House Resolutions and voted upon to determine which reflects the will of the House of Representatives.

**RECOMMENDATION 1 – ORDER A NEW DISTRICT-WIDE ELECTION FOR THE 120TH ASSEMBLY DISTRICT (REPS. CANDELORA, 86TH DISTRICT AND PERILLO, 113TH DISTRICT)**

The Connecticut Supreme Court, in this very case, *Feehan v. Marcone et al* (SC 20216-18) (officially released Jan 30, 2019), makes it clear the Elections Clause of Article Third of the Connecticut Constitution bestows exclusive jurisdiction for review of challenges to the election of House Members to the House itself. The Supreme Court describes the House as holding "judicial power" in this matter, notes that House Rule 19 directed proceedings on this matter "in a judicial character," and recognizes that members of the General Assembly take the same oath as judges to uphold the Connecticut Constitution. In effect, the Committee was the courtroom and the House of Representatives is now the jury. We are to act in the same manner, with the same sincerity of purpose, and the same non-partisan good faith as would a judge of the Superior Court or a justice of the Supreme Court. The Court noted its presumption that "members of the General Assembly will carry out their duties with scrupulous attention to the laws under which they serve." We note that they do not direct this body to scrupulously attend the rules and

precedents of the U.S. House of Representatives or of other states, but rather simply "the laws under which [we] serve."

As such, we bind ourselves to the same judicial precedents and principle of *stare decisis* as we would were we the Judicial Branch. Consideration of this matter by the House is merely a change in forum, not a change in law, standard, or applicable precedent. The standard of review laid out by the Connecticut Supreme Court in election disputes such as these is found in *Bortner v. Town of Woodbridge*, 250 Conn. 241 (1999). In order to overturn the results of an election and order a new election the following must be found:

1) There were substantial errors in the rulings of an election official or officials, or substantial mistakes in the count of the votes; and
2) As a result of those errors or mistakes, the reliability of the result of the election is seriously in doubt.

We further note that Supreme Court precedent established by *Bortner,* further affirmed and amplified by *Bauer v. Souto*¸ 277 Conn. 829 (2006), explicitly rejects the notion that a challenger must establish that, but for the irregularities, he would have prevailed in the election.

**1. Substantial Mistakes in the Count of the Votes**

As detailed above, the Committee received evidence and took testimony that proved, to the satisfaction of all four members of the Committee, the facts as alleged in challenger Feehan's complaint. The Committee is in agreement that the fact of 75 incorrect ballots being distributed and cast amounts to a substantial mistake in the count of the votes and thus satisfies the first prong of the *Bortner* standard.

**2. Serious Doubt as to the Reliability of the Result of the Election**

Analysis of this prong of the *Bortner* standard is guided somewhat by case law, but ultimately turns on the judgment of the judicial body whether or not the proven mistakes in the count of the votes cast serious doubt over the reliability of the election result. In its decision on this case, the Supreme Court notes its cognizance "of the seriousness of [Feehan's] allegations in this case, insofar as the alleged distribution of the wrong ballots could have deprived numerous electors of their right to cast a vote for their state representative, and that the margin was small enough that the alleged error might have affected the outcome of the election." As discussed above, this Committee has made findings of fact that substantiate challenger Feehan's allegations, so we must turn to whether the proven distribution of the wrong ballots that deprived 75 electors of their right to cast a vote for their state representative casts serious doubt on the outcome of an election separated by merely 13 votes.

On multiple occasions, the Committee embarked upon the math test of applying different ratios of Feehan's vote share from Bunnell to the 75 missing ballots to gauge the likelihood that, had those ballots been properly cast and tabulated, the outcome may have been different. The Committee did not agree whether to apply Feehan's vote share of all 1,500 ballots (57.3%) or his vote share just among the ballots that indicated a preference in the 120$^{th}$ race (58.3%), nor did the Committee agree to apply that ratio to all 75 ballots or to just the 74 ballots that the Bunnell participation rate suggests would have voted in the 120$^{th}$ contest. In any event, the different permutations have Feehan receiving a net of either 12 or 13 votes—enough to create a tie race or a single-vote margin. One additional vote cast in either direction could potentially have been the difference. We simply do not, and cannot, know for certain how the race would have finished if all electors who showed up to vote on November 8 had their ballots processed correctly. This, we

contend, is exactly the point. Applying Feehan's vote share from the polling location in which the mistake occurred to the number of incorrect ballots creates essentially a statistical tie.

Our task would have been much easier had we been able to identify the 75 voters who were given the incorrect ballots and had occasion to discover which candidate they preferred. Unfortunately, this is a legal and logistical impossibility, given voter secrecy laws. All we have to work with are the statistics above and the knowledge that, given such a small sample size, any potential distribution of those 75 votes amongst the three candidates was possible. Do we believe with any certainty that Feehan would have won if the 75 ballots were properly cast? We do not. But we also do not believe with any certainty that Representative Young would have still won if the 75 ballots were properly cast, which in our adjudication amounts to serious doubt.

**3. Other Public Policy Concerns**

Although we do not ultimately view them as dispositive, we want to briefly touch on two public policy concerns raised by fellow members of the Committee: a concern for the interests of the voters from November 6, 2018 with ballots properly cast, and a concern that this recommendation will set the standard in future cases that any situation in which an error with ballots or in the count of the vote exceeds in number the margin of victory, a new election must necessarily be ordered.

First, we are not insensitive to the interests of the 10,000-plus voters who properly cast ballots in the 120$^{th}$ Assembly District, and to their inconvenience at coming out to vote again in a new election. They have as much a right to ensure their vote will be properly counted and credited to their preferred candidate as do the other 75. We believe adamantly that a new election does not disenfranchise these 10,000-plus voters, as they have every opportunity to vote once again in the new election. We are certain the candidates will work diligently to ensure as many of

them return to vote as is possible. Elections held on days other than the first Tuesday in November occur frequently, with special elections, municipal referenda, and the like, and never in those instances do we equate citizens opting not to exercise their right to vote with disenfranchisement. Justice Berdon writes eloquently on this point in *Bortner*, noting that while voters have "a powerful interest in the stability of [an] election, the voters have an even more powerful interest in the integrity and accuracy of that election." We agree

The Committee discussed the possibility of holding a new election in voting district nine, at Bunnell High School only, where the error occurred. We do not, however, believe this remedy would support constitutional protections and previous case law. In *Bauer*, where the Supreme Court found that a districtwide election was the only proper remedy, it noted, "[i]n sum, once the trial court nullified the first election, 'what needed to be recreated was the 'democratic process' surrounding the selection of [the council], not the particular conditions surrounding the original election.' Ayers-Schaffner v. DiStefano, 37 F.3d 726, 729 (1st Cir. 1994). It is true that this result yields a more expensive and time-consuming process than either of the other two potential solutions. That, however, is the price of democracy." We note that, in *Bauer,* the Supreme Court ordered an entire new municipal election of an eighteen-candidate ballot due to the malfunction of a single voting machine in one precinct that might have affected the outcome of the 12th and 13th candidates in a race for 12 seats.

Second, we feel the need to state unequivocally that we do not support setting the standard that you must order a new election any time the magnitude of an error is larger than the margin of victory. We believe the *Bortner* standard is consistent with this. For example, in a hypothetical election where 100 ballots were misplaced and the margin of victory was 95, that error quite obviously does not cast serious doubt on the reliability of the result. The House of

Representatives and future Committees on Contested Elections must, as would a judge or jury, apply a reasonable analysis to the unique facts of each case. In some instances, the error may be significantly large and the margin significantly narrow to rise to the level of casting serious doubt, but that must be determined on a case-by-case basis.

#### 4. Having Satisfied Both Prongs of the *Bortner* Test, A New Election Must Be Ordered

As the *Bortner* standard has been satisfied, we see no other option than for the House of Representatives to order a new election. We do not take this step lightly, and are aware of the judicial and legislative history counseling caution before exercising its power to vacate election results. But similar to the Supreme Court in *Bauer*, given the facts properly found in the challenge before us, we have no other reasonable choice but to do so.

Although we are aware that a new election is really a *different* election, we follow the Supreme Court's guidance in *Bauer*. In *Bauer*, the Court ruled that the new election should attempt to "minimize, rather than to maximize, the differences between the first and new election. Put another way, the new election should be the result of an effort to approximate, as closely as is reasonably possible, the first election." We agree, and recommend that the new election should field the same slate of candidates (Rep. Young, Feehan, and Palmer), and operate with the same policies and procedures of a typical election, as is mandated by valid precedent of the Connecticut Supreme Court.

Respectfully submitted on this 4th day of February, 2019

Representative Michael D'Agostino

Representative Gregory Haddad

Representative Vincent Candelora

Representative Jason Perillo