

**STATE OF CONNECTICUT
HOUSE OF REPRESENTATIVES**

**ELECTION CHALLENGE
120TH ASSEMBLY DISTRICT**

BRIEF IN SUPPORT OF NEW ELECTION

Jim Feehan, the Republican Party and Independent Party candidate for the office of State Representative for the 120th Assembly District, submits this brief asserting that a new election is required as a matter of law because the allegations in the Election Challenge Complaint have been conclusively proven through the evidence and testimony introduced at this Committee's hearings.

I. PROCEDURAL HISTORY

On November 6, 2018, 76 voters were denied the right to vote for their state representative in the 120th Assembly District and the candidates' vote totals were separated by 13 votes. On November 15, 2018, Feehan filed a complaint in the Connecticut Superior Court. The operative complaint, brought under General Statutes §§ 9-328 (municipal office election challenge), 52-29 (declaratory judgment), 52-471 (injunctive relief), and 42 U.S.C. § 1983 (federal constitutional violations), sought a new election for the office of State Representative for the 120th Assembly District.

On November 30, 2018, the trial court (*Bellis, J.*) agreed that, if the allegations set forth in Feehan's complaint were true, there was a high likelihood of success on the merits of his claim (*i.e.* that a new election was required). T.11/30/18 at 20-21 (“[G]iven the serious allegations with respect to the incorrect ballots distributed during the election, the number of voters who were deprived of their constitutional rights to

vote, and the margin by which the plaintiff lost the election, the plaintiff has demonstrated that he is likely to prevail on the merits of his underlying claim.”) However, the trial court also concluded that it was for the House of Representatives, and not the Superior Court, to order that new election. T.11/30/18 at 17-18. As a result, the court granted Feehan’s request to enjoin the state defendants from certifying the election and from declaring a winner. T.11/30/18 at 21. The court granted Young’s motion to dismiss Feehan’s request for a new election, concluding that Feehan’s remedy was before the House of Representatives. T.11/30/18 at 17-18.

On December 7, 2018, the Chief Justice of the Connecticut Supreme Court granted General Statutes § 52-265a applications for an expedited public interest appeal. The Court held oral argument on December 21, 2018. At that argument, much of the discussion concerned whether the Court should wait to see whether the House of Representatives grants a new election before the judiciary addresses the federal constitutional violations caused by the distribution of the improper ballots. See Feehan v. Marcone, S.C. 20216, 20217, 20218, Supreme Court oral argument (available at <https://ct-n.com/ondemand.asp?ID=15856>).

At the conclusion of arguments, the Supreme Court issued the following order:

After a hearing and based on the record and claims before the Court, it is hereby ordered that the judgment of the trial court is affirmed insofar as it lacks jurisdiction **at this time**. In accordance with this determination, it is further ordered that the trial court’s injunction is vacated. A written decision will follow.

(Emphasis added.) Supreme Court Order, S.C. 20216, 20217, 20218 (12/21/19).¹

¹ The Supreme Court’s decision remains pending.

On January 9, 2019, the House of Representatives opened its session. The House adopted House Resolution 3, which raised a Committee to Canvass the Votes for State Representatives. The Committee to Canvass reported that it recommended that “all vote tallies be accepted pending the report of the Committee on Contested Elections.” The House then adopted House Resolution 4, which raised a Committee on Contested Elections.

On January 11, 2019, the Committee on Contested Elections convened and Feehan filed this Election Challenge Complaint. This Committee heard testimony from witnesses on January 24th and 25th, 2019 to investigate the allegations in the Complaint.

II. THE COMPLAINT

The complaint set forth the following straightforward allegations:

1. On November 6, 2018 electors of the 120th Assembly District were to choose from among three candidates to represent them as State Representative: Jim Feehan for the Republican Party and Independent Party, Philip Young for the Democratic Party, and petitioning candidate Prez Palmer. See Exhibit 7 (Ballots for 120th);
2. One of the eight polling places for the 120th Assembly District was Bunnell High School in Stratford, Connecticut. See Exhibit 9 (Notice of Election);
3. Bunnell High School also served as the polling place for the 122nd Assembly District. See Exhibit 9 (Notice of Election);
4. Around midday on November 6, 2018, a packet of ballots for the 122nd Assembly District was used in the 120th Assembly District voting line at Bunnell High School. See Exhibit 5 (Moderator Log Entry);
5. The 122nd Assembly District ballots did not offer a way to vote for State Representative for the 120th Assembly District because the 122nd Assembly ballots listed the names of Ben McGorty and Jose Goncalves, not of Feehan, Young, and Palmer. See Exhibit 8 (Ballot for 122nd);

6. As a result, voters who were eligible to vote for State Representative for the 120th Assembly District were unable to do so, instead casting votes in the wrong district. See Exhibit 1 (Tabulator Tape for 120th and 122nd); See also Bunnell Voter Checklists for 120th and 122nd;

7. The checklist for the Bunnell High School poll in the 120th Assembly District shows 1,575 voter names crossed off the official checklist, but only 1,499 ballots processed, for a difference of 76 fewer ballots than voters. See Exhibit 6 (Summary: Voters v. Ballots Processed); Exhibit 1 (Tabulator Tape);

8. The checklist for the Bunnell High School poll in the 122nd Assembly District shows 954 names crossed off the official checklist, but 1,031 ballots processed, for a difference of 77 more ballots than voters. See Exhibit 6 (Summary Voters v. Ballots Processed); Exhibit 1 (Tabulator Tape);

9. Thus, approximately 76 voters in the 120th Assembly District were deprived of their right to vote for their state representative because they were improperly given the ballot for the 122nd Assembly District;

10. In the initial vote tabulation for the 120th, Young received 5,217 votes, Feehan received 5,199 votes, and Palmer received 55 votes. See Exhibit 1 (Tabulator Tape);

11. Due to the difference of only 18 votes between Young and Feehan, a statutory recanvass was triggered. See General Statutes § 9-311a;

12. The recanvass was held on November 13th and 14th. The recanvass resulted in Young receiving 5,222 votes, Feehan receiving 5,209 votes, and Palmer receiving 55 votes. See Exhibit 3 (Tabulator Tape Recanvass);

13. Following the recanvass, there is now a difference of only 13 votes between Feehan and Young. See Exhibit 3 (Tabulator Tape Recanvass);

14. The recanvass showed that, at Bunnell High School, a total of 859 votes were cast for Feehan, 608 votes for Young, 6 votes for Palmer, and 27 ballots presented no votes in the race for the 120th Assembly District. See Exhibit 3 (Tabulator Tape Recanvass);

15. The voter checklist showed that 1,575 voters in the 120th Assembly District received ballots. See Exhibit 6 (Summary: Voters v. Ballots Processed); see also Bunnell Voter Checklists for 120th.

16. Thus, after the recanvass, the candidates were separated by 13 votes, with a shortfall of 75 votes at Bunnell High School for the 120th Assembly District;

17. The recanvass did not address the ballot discrepancy between the 120th and 122nd Assembly Districts, which calls into question the integrity of the election for the position of State Representative in the 120th Assembly District;

18. There is now a difference of only 13 votes between Feehan and Young, significantly less than the number of ballots for the 120th Assembly District that were not provided to voters in the 120th District;

19. Electors and candidates in the State of Connecticut have a fundamental right under the Constitution of the State of Connecticut and the United States Constitution to a just and fair election;

20. It is impossible to determine the identity or intent of the approximately 76 voters whose votes were improperly cast for the wrong district;

21. Feehan wishes to assure that all properly registered voters of the 120th Assembly District who were denied the right to vote in the 120th Assembly District election have the opportunity to vote and to have their vote counted;

22. Absent a new election in the 120th Assembly District, the choice of electors of the 120th Assembly District for the position of State Representative cannot be known;

23. Where a sufficient number of voters are given the wrong ballots so as to call into question the reliability of the election, Connecticut law requires that a new election be held. See Exhibit 10 (Rutkowski v. Marrocco, 2013 WL 6916610 (Conn. Super. Ct. 2013) (*Sheridan, J.*) (applying standard set by Supreme Court in Bortner v. Town of Woodbridge, 250 Conn. 241, 259 (1999) and ordering a new election where 17 voters received the wrong ballots in an election decided by 3 votes).

Election Challenge Complaint dated 1/11/19.

III. WITNESSES

This Committee heard testimony on January 24th and January 25th, 2019 from the following witnesses:

1. Rick Marcone, Stratford Democratic Registrar of Voters
2. Lou Decilio, Stratford Republican Registrar of Voters
3. Mal Starratt, Head Moderator at Bunnell High School
4. Ben Proto, Deputy Republican Registrar
5. Peter Rusatsky, Ballot Clerk at Bunnell High School
6. Elizabeth Boda, Head Moderator, Election Day
7. John Krekoska, Head Moderator, Recanvass
8. Joseph Collier, Democratic Poll Moderator, Bunnell High School
9. David Heriot, Republican Assistant Registrar
10. William Bloss, Young's Lawyer;² see *Feehan v. Marcone*, S.C. 20216, 20217, 20218; FBT-CV-18-6080798-S

See Legislative Committee on Contested Elections January 24th Meeting (<https://ct-n.com/ondemand.asp?ID=15945>); Legislative Committee on Contested Elections January 25th Meeting (<https://ct-n.com/ondemand.asp?ID=15949>). Witnesses Marcone, Decilio, and Starratt all confirmed the facts alleged in the Election Challenge Complaint as well as the accuracy of the exhibits submitted in support of those

² The Committee also invited the undersigned to testify at the hearing. Because the ethics rules that govern lawyers practicing in this State do not allow a lawyer to represent a party in a case in which he will be a witness, and because the status of subsequent judicial proceedings is unclear, the undersigned had to decline the invitation. See Rule of Professional Conduct 3.7 (disqualification of lawyer as a witness). For the same reason, because Bloss was a witness before this legislative committee, there is a question about whether Young will need to be represented by new counsel in any future judicial proceedings arising in this matter.

allegations (Feehan's Exhibits 1-6). See 1/24/19 Meeting. Additional witnesses further confirmed those facts and no one presented any testimony to dispute them.

The most significant facts conclusively established were that *76 voters in the 120th Assembly District were given ballots that did not list the candidates for their state representative and the margin between the candidates was only 13 votes.*³

III. CONNECTICUT LAW REQUIRES THAT A NEW ELECTION BE HELD

A new, district-wide election must be held because the improper use of the 122nd Assembly District ballots in the 120th Assembly District and the resulting substantial mistake in the count of the votes in the 120th Assembly District casts serious doubt on the reliability of the election for the office of State Representative in the 120th Assembly District. Because the fact that 76 voters were given the wrong ballots was conclusively established at this Committee's hearings, there is no credible *legal* doubt that a new election must be held.⁴

³ Before the Supreme Court, Young disputed the fact that voters in the 120th Assembly District were given the wrong ballots. See Young's Reply Brief, Feehan v. Marcone, S.C. 20218, p. 7-8 n.6. Young's position has been proven to be unreasonable and wrong by the overwhelming testimony and evidence presented before this Committee proving that fact.

⁴ Members of the General Assembly take the following oath:

"You do solemnly swear (or affirm, as the case may be) that you will support the **Constitution of the United States**, and the **Constitution of the state of Connecticut**, so long as you continue a citizen thereof; and that you will faithfully discharge, **according to law**, the duties of the office of to the best of your abilities; so help you God."

(Emphasis added.) General Statutes § 1-25. At the Supreme Court oral argument, Justice D'Auria specifically cited to this oath as the basis for his belief that the state representatives' would honor their duty to void an unconstitutional election. See Feehan v. Marcone, S.C. 20216, 20217, 20218, Oral Argument (<https://ct->

A. The Standard Set By The Connecticut Supreme Court Requires That A New Election Be Held

Rutkowski v. Marrocco, 2013 WL 6916610 (Conn. Super. Ct. 2013) (*Sheridan, J.*)⁵ explains the legal standard for a new election and its application when incorrect ballots are distributed which cast doubt on the reliability of the election. In Rutkowski, incorrect ballots were distributed to voters at the polling location for Voting District Number 14 in Ward 5 of the City of New Britain. These incorrect ballots contained the names of aldermanic candidates in Ward 2, not Ward 5. Seventeen voters in Ward 5 cast votes using Ward 2 ballots, and the aldermanic candidates in Ward 5 were separated by only three votes after the election. The plaintiffs brought an action pursuant to General Statutes § 9-328 seeking a new election and alleging that the use of incorrect ballots in Ward 5 deprived Ward 5 voters of the right to vote for the office of Ward 5 aldermen.

The court in Rutkowski followed the standard set forth by the Supreme Court in Bortner v. Town of Woodbridge, 250 Conn. 241 (1999) to order a new election.⁶ A new election is required when there is either: (1) an error or errors in the rulings of an election official, or (2) a mistake in the count of the votes and that those errors or mistakes cast serious doubt on the reliability of the election results. Bortner, 250 n.com/ondemand.asp?ID=15856 (Justice D'Auria (10:30)).

⁵ A copy of this decision is appended to the Election Challenge Complaint.

⁶ Prior to the start of this Committee's investigation into the allegations in the Election Challenge Complaint, the Chairman of this Committee quoted from this very case as the operative authority as to when a new election should be held. See Comments of Rep. D'Agastino (1/11/19). The fact that the allegations have now been proven and that, under Bortner, a new election is clearly required, should not change this recognition of Bortner as the proper legal standard.

Conn. at 259, 263. The court in Rutkowski noted that distribution of the wrong ballots meant that election officials failed to adhere to or apply the mandatory procedures set forth in Regulations of Connecticut State Agencies § 9-242a-8, which is designed to prevent the use of incorrect ballots. According to the court, “§ 9-242[a]-8 requires the registrars (or their designees), prior to the opening of the polls, to deliver to the election officials for each polling place ‘a number of ballots sufficient for three hours operation for their polling place’” and that “[u]pon receipt of those ballots, the election officials for each polling place ‘*shall* ensure that the ballots are the correct ones for their polling place.’” Id. at *3 (emphasis in original). The court in Rutkowski also noted that the use of Ward 2 ballots in Ward 5 resulted in “a substantial mistake in the count of the votes” in Ward 5. The 17 voters who used Ward 2 ballots were unable to vote for the position of Ward 5 aldermen and were unable to have their vote counted. Id. at *4.

After determining that the election officials committed errors and that there was a substantial mistake in the count of the votes in Ward 5 (thus satisfying both of the criteria under the Bortner standard) the court observed that there was serious doubt about the reliability of the election results. Id. at *4-5. Given the three vote difference between the plaintiff and defendant candidates, if the seventeen voters had the opportunity to vote in the correct election, the outcome of the election could have been different. Id. at *4.

The present case is no different than Rutkowski. As in Rutkowski, the use of incorrect ballots casts serious doubt on the reliability of the election results for the office of State Representative in the 120th Assembly District. As alleged in the

Elections Challenge Complaint, and now proven through the testimony and evidence received by this Committee, 76 ballots were improperly cast for the 122nd Assembly District instead of being cast for the 120th Assembly District. The improper use of 122nd Assembly District ballots in the 120th Assembly District is in direct contravention of Regulation § 9-242a-8. The 76 ballots that were improperly cast for the 122nd Assembly District were not counted in the 120th Assembly District election, resulting in a substantial mistake in the count of the votes in Assembly District 120. According to the recanvass, Young received 5,222 votes, Feehan received 5,209 votes, and Palmer received 55 votes. The difference of only 13 votes between Feehan and Young is significantly less than the number of voters (76) who were given the wrong ballots. Consequently, there is serious doubt about the reliability of the election results for the office of State Representative in the 120th Assembly District.

Under the legal standard announced by the Connecticut Supreme Court in Bortner, and acknowledged by the Chair of this Committee, a new, district-wide election in the 120th Assembly District is required as a matter of law.

B. A New, District-Wide Election Is The Only Appropriate Remedy

A new, district-wide election in the 120th Assembly District is the only appropriate remedy under the Connecticut Constitution. As a matter of state constitutional law, a new election could not be confined to the portion of the 120th Assembly District that votes at the Bunnell Polling Location. Rather, a new, district-wide election is legally mandated in order to replicate, as closely as possible, the election held on November 6, 2018.

Under the Connecticut Constitution, with the exception of absentee voting, all

votes must be cast on the same day.

The general assembly may provide by law for voting in the choice of any officer to be elected or upon any question to be voted on at an election by qualified voters of the state who are unable to appear at the polling place on the day of election because of absence from the city or town of which they are inhabitants or because of sickness, or physical disability or because the tenets of their religion forbid secular activity.

Article Sixth, Sec. 7 of the Connecticut Constitution.⁷

If the House were to attempt to limit a new election in this case to only the portion of the 120th Assembly District that votes at the Bunnell Polling Location, it would violate the Connecticut Constitution because the votes would not be cast on the same day. Therefore, a new, district-wide election for State Representative in the 120th Assembly District is the only constitutionally valid remedy.

The Supreme Court's decision in Bauer v. Souto, 277 Conn. 829 (2006), is controlling. There, the Supreme Court held that an entirely new, citywide election, not limited to the district where a voting machine malfunctioned, was the appropriate remedy in an election challenge brought pursuant to General Statutes § 9-328.⁸ Id. at 841. The plaintiff in Bauer challenged the results of an election for the City of Middletown common council. Id. at 830. The court stated that “[a]n election is . . . a snapshot” which “captures . . . only the results of the election conducted on the officially designated election day” and “reflects the will of the people as recorded on that particular day, after that particular campaign, and as expressed by the electors

⁷ Indeed, this is why current discussions within the Legislature regarding early voting revolve around proposed amendments to the state constitution.

⁸ See also Rutkowski, supra, at *5 (adopting the reasoning in Bauer to order a new election across the entire ward that best approximates the first election).

who voted on that day.” Id. at 841-42; see also Oral Argument (<https://ct-n.com/ondemand.asp?ID=15856>) (Justice McDonald (8:45)). Because “that snapshot can never be duplicated . . . when a court orders a new election, it is really ordering a different election” and “substituting a different snapshot of the electoral process from that taken by the voting electorate on the officially designated election day.” Id. at 842-43. “Although... the new election is really a different election, the court should nonetheless attempt to minimize, rather than to maximize, the differences between the first and new election” and “the new election should be the result of an effort to approximate, as closely as is reasonably possible, the first election.” Id. at 843.

The court in Bauer held that a new, citywide election best approximates the first election. Id. at 843-45. “[I]f the new election were to be limited to district eleven, it would not only be a *different* election; it would also be a wholly *different type* of election” because “[i]t would be an election in which all of the candidates’ energies and resources would be concentrated in district eleven, instead of being spread across all fourteen voting districts.” Id. at 843. (emphasis in original). Furthermore, an election limited only to district eleven “would involve a wholly different set of voting incentives than obtained in the first election, in which the voters, unaware of which candidate would finish where, did not have the same set of incentives to cast bullet votes.” Id. Finally, “[a] runoff between the plaintiff and [the next highest vote getter] would be a wholly different type of election” and “would in fact *require* bullet voting, which could entirely change the preexisting lineup of successful candidates, without those candidates having the chance to defend their prior success.” Id. (emphasis in

original).⁹

As the Supreme Court's decision in Bauer makes clear, a new election in the 120th Assembly District must be district-wide and cannot result in piecemeal voting from different polling locations. A new election limited to the Bunnell Polling Location would be an entirely different type of election in which the candidates' energy, time, and resources would be focused solely on the portion of the 120th Assembly District that votes at the Bunnell Polling Location, instead of being spread throughout the entire 120th Assembly District. A new election, across the entire 120th Assembly District, best approximates the election held on November 6, 2018 and minimizes the differences between the first election and the new election.¹⁰

C. Anything Other Than A New Election Would Leave In Place Constitutional Violations Necessitating A Judicial Remedy

It is now beyond peradventure, based on the evidence and testimony received by this Committee and in juxtaposition with the allegations in the Election Challenge Complaint, that the rights of the candidates and the voters to a just and constitutional election were violated. See Bush v. Gore, 531 U.S. 98, 104–05 (2000); Reynolds v.

⁹ This is why in the new election here, the names of all three candidates – Feehan, Young, and Palmer – should appear on the ballots.

¹⁰ At oral argument, Justice McDonald suggested that, if indeed the evidence presented at the hearings before the House of Representatives established the facts set forth in the complaint, the House could declare a vacancy in the seat and the Governor could then call for a special election (34:00). This approach, while reasonable and appropriate, would be different than calling for a new election pursuant to Bortner, Bauer, and Rutkowski. If there were a special election called for in this way, rather than a new election called for by the House, then the special election would not be limited to Feehan, Young, and Palmer because any eligible person would have the right to seek the opportunity to run in the special election. Significantly, Justice McDonald's suggestion recognizes the indisputable point that the new or special election must be district-wide.

Sims, 377 U.S. 533, 579 (1964); Wesberry v. Sanders, 376 U.S. 1, 18 (1964); Baker v. Carr, 369 U.S. 186, 208 (1962). Butterworth v. Dempsey, 237 F.Supp. 302 (1964); Butterworth v. Dempsey, 229 F.Supp. 754 (1964). While this Committee does not adjudicate federal constitutional claims in and of themselves, the failure to provide for a new election would not only violate Connecticut state law; see Bortner, Bauer, Rutkowski; it would leave intact the federal constitutional violations caused by the improper distribution of the wrong ballots.

While the decision from the Supreme Court is still pending, comments and questions from the Court members may provide some guidance as to how, given that the facts have now been indisputably proven, this matter might proceed. See Oral Argument (<https://ct-n.com/ondemand.asp?ID=15856>). Chief Justice Robinson (5:30), Justice Mullins (6:00), Justice Ecker (24:30), and Justice Palmer (28:00), all discussed waiting to see whether the House of Representatives grants a new election before the judiciary addresses the federal constitutional violations. In other words, if the House of Representatives orders a new election in response to this election challenge, then the constitutional violations will be remedied and it will not be necessary for the courts to intervene. However, if the House of Representatives does not order a new election, then those constitutional violations will still need to be remedied through the courts. This is consistent with the Supreme Court's "at this time" qualifier set forth in its December 21, 2019 order.

IV. CONCLUSION

Given the undisputed and overwhelming evidence that this election was unlawful and unconstitutional, that 76 voters were denied the right to vote for their

state representative, and that the reliability of the election decided by 13 votes is in doubt, the members of the House of Representatives are urged to stay true to their oaths, to put aside their political affiliations, and to call for a new election as required by Connecticut law.

Respectfully submitted,

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