

**STATE OF CONNECTICUT
HOUSE OF REPRESENTATIVES**

**ELECTION CHALLENGE
120TH ASSEMBLY DISTRICT**

REPLY BRIEF IN SUPPORT OF NEW ELECTION

On January 30, 2019, this Committee asked Jim Feehan, the Republican Party and Independent Party candidate for the office of State Representative for the 120th Assembly District, to submit this reply brief in response to the brief submitted by Phil Young. In sum, Connecticut law requires that a new, district-wide election be held. The theme of Young's brief is that the House of Representatives should elevate partisanship over the General Assembly members' oath to abide by the law. The Committee is urged to reject Young's suggestions, stay true to the oath, and faithfully follow the law, which in no uncertain terms requires a new, district-wide election. 76 people were given the wrong ballots in an election decided by 13 votes. A new election is the only just and legal solution.

I. CONNECTICUT LAW IS CLEAR THAT A NEW, DISTRICT-WIDE ELECTION IS REQUIRED

A. The Denial of 76 Voters of the Right to Vote in an Election Where the Candidates Were Separated by 13 Votes Casts Serious Doubt On the Election Results

Young first argues that this Committee should ignore how Connecticut law settles any other election and apply special, partisan-driven rules for him. He does not claim that the legal standard for a new election is not met here. Indeed, he cannot because the facts are clear: 76 people were denied the right to vote in an election decided by 13 votes. As a matter of law, a new election is required.

The Connecticut Supreme Court has settled this issue. A new election is required when there is either an error or errors in the rulings of an election official or a mistake in the count of the votes and those errors or mistakes cast serious doubt on the reliability of the election results. Bortner, 250 Conn. 241, 263 (1999). Bortner expressly rejected Young's argument that there should be proof that the election result would have definitely changed. The court in Rutkowski explained how this standard applies to this very scenario. There, 17 voters were given the wrong ballots in an election decided by 3 votes. The proportional numbers are literally the same as in this case. In Rutkowski, a 10-7 voting distribution of the 17 voters would have made up the difference between the candidate (*i.e.* the trailing candidate captured 59% of those votes). Here, a 45-31 voting distribution of the 76 voters would have made up the difference between the candidates (*i.e.* Feehan captured 59% of those votes). Under well-settled law, a new election would be required in any other type of election in this State. It is required here as well and the Committee is urged to reject Young's request to ignore this settled legal standard.

B. It Was Proper Not To Include Voters In This Committee's Investigation

In subtle recognition of the clear legal requirement for a new election here, Young also faults this Committee for not including any voters in its investigation and argues that the absence of voter testimony should justify his claim to retain an illegitimate election. He again asks this Committee to ignore the law, this time voter secrecy laws.

Connecticut law is clear that voters in this state have an absolute right to a

secret ballot.

In all elections of officers of the state, or members of the general assembly, the votes of the electors shall be by ballot, either written or printed, except that voting machines or other mechanical devices for voting may be used in all elections in the state, under such regulations as may be prescribed by law. No voting machine or device used at any state or local election shall be equipped with a straight ticket device. **The right of secret voting shall be preserved.**

(Emphasis added.) Connecticut Constitution, Article Sixth, section 5; see also General Statutes § 9-261 (“The elector shall be permitted into the voting booth area, and shall then register his or her vote in secret.”); see also General Statutes § 9-242(a) (“A voting tabulator approved by the Secretary of the State shall be so constructed as to provide facilities for voting for the candidates of at least nine different parties or organizations. It shall permit voting in absolute secrecy.”)

In fact, it is a felony offense to invade the secrecy of voting. See General Statutes § 9-366 (“Any person who... does any act which invades or interferes with the secrecy of the voting or causes the same to be invaded or interfered with, shall be guilty of a class D felony.”).

There is no “legislative committee investigation” exception to our voter secrecy laws, nor should there be. Young’s claim that this Committee should have required voters to come in and testify as to whether they did or did not vote for certain candidates violates Connecticut constitutional and statutory law. The right to vote and the right to a secret vote must be preserved. A new election here is the only way to do that.

C. A New, District-Wide Election Is Required

Young also cites to one Connecticut case in which a new election was ordered

limited to a single poll location. The suggestion again asks this Court to ignore the law, this time Article Sixth, Sec. 7 of the Connecticut Constitution and the Connecticut Supreme Court's decision in Bauer v. Souto, 277 Conn. 829 (2006).

There are two superior court judges in Connecticut who have ordered new elections limited to a specific poll location - Grogins v. City of Bridgeport, No. CV01387804S, 2001 WL 1669293 (*Thim, J.*) and Bauer v. Souto, No. CV054004385, 2005 WL 3594536 (*Aurigemma, J.*). Those were both unlawful and unconstitutional election remedy orders.

In Grogins, the limited, new election in 2001, was the result of an *agreement* of the parties. So there was no further judicial review of that order which clearly violates Article Sixth, Section 7 of the Connecticut Constitution. Moreover, the parties did not have the benefit of the Supreme Court's 2006 decision in Bauer v. Souto, 277 Conn. 829 (2006).

In Bauer, there was further review of the trial court's limited, new election order. There, the Supreme Court reversed that order, concluded that a limited election was illegal, and ordered a district-wide election. See Bauer v. Souto, 277 Conn. 829 (2006). Post the Supreme Court's 2006 decision in Bauer, it is now clear that a new election must be district-wide. Any other type of piecemeal election, where votes from an election held on one day are combined with votes from an election held on another day, would violate the state constitution, the legal standard set forth in Bauer, as well as raise several federal equal protection clause issues regarding unequal treatment of

voters.¹

D. Do The Right Thing

Finally, it must be noted that yesterday afternoon the Connecticut Supreme Court issued its decision in this case in which it decided to defer to the House of Representatives. In doing so, the Court stated the following:

We are, however, cognizant of the seriousness of the plaintiff'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. Given the seriousness of those claims, and its exclusive jurisdiction under the elections clause, we "must presume that the members of the General Assembly will carry out their duties with scrupulous attention to the laws under which they serve. [W]e must and should presume that any officer of the state . . . will act lawfully, correctly, in good faith and sincerity of purpose in the execution of his [or her] duties." [] (Footnote omitted; internal quotation marks omitted.) *Kinsella v. Jaekle*, supra, 192 Conn. 729; see also General Statutes § 1-25 (prescribing identical oath to uphold Connecticut and federal constitutions for judges and members of General Assembly). Accordingly, we conclude that exclusive jurisdiction over the plaintiff's claims in the present case lies with our state House of Representatives

(Footnote omitted). *Feehan v. Marcone* (unpublished decision).

As the Supreme Court recognized, and as cannot be seriously disputed, 76 voters were denied the right to vote when they were given the wrong ballots and "the

¹ Notably, with a new, district-wide election, every voter is rightfully given the equal opportunity to exercise his or her right to vote. There is no disenfranchisement because if a voter is unavailable to vote in the new election, absentee voting is available. A new, district-wide election is the only fair way to provide everyone in the 120th Assembly District with the equal right to exercise their civic duty to vote for their state representative. See Fourteenth Amendment, U. S. Constitution; *Bush v. Gore*, 531 U.S. 98, 104–05 (2000); *Reynolds v. 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).

margin was small enough that the alleged error might have affected the outcome of the election.” Under Connecticut case law, Connecticut statutory law, and Connecticut constitutional law, a new, district-wide election is required. As the Supreme Court observed, the members of the General Assembly took an oath to abide by the law. The members are urged to honor that oath and to order the new election that is indisputably required here.

II. 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 serious 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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