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DEPARTMENT OF STATE

BALLOT LAW COMMISSION
Legislative Office Building, Room 307
Concord, NH
Friday, January 22, 2010

MEMBERS PRESENT:

Gary Francoeur (Chairman)
Paul McGuirk
Christopher H.M. Carter
James St. Jean
~~George~~ Martin
GREG

Also Present: Richard W. Head, Esq.
James T. Boffetti, Esq.
Department of Justice
(For the Ballot Commission)

CHAIRMAN FRANCOUER: Being about 11:18 on January 22, 2010, having a quorum, we'll open the Committee on the Ballot Law Commission to hear the case of -- help me out here, guys.

COMMISSIONER MCGUIRK: JR Hoell.

CHAIRMAN FRANCOUER: JR.

COMMISSIONER MCGUIRK: Hoell.

CHAIRMAN FRANCOUER: Hoell concerning Senate race District 16. It's a petition; correct?

ATTORNEY HEAD: Yes.

CHAIRMAN FRANCOUER: Petition. We are going to have you go first, JR.

JR HOELL, Dunbarton, NH: Sure. Ballot Law Commission and other members here, thank you for taking the time to hear this. The reason I bring

this request to this group is given the shortness of this particular special election and the fact that there is 80 days to 87 between the time that there's a resignation and the time that the general election has to be held --

ATTORNEY HEAD: Let me interrupt one second.

CHAIRMAN FRANCOUER: You want to swear him in?

ATTORNEY HEAD: Can you please stand? Do you swear the testimony you're about to give will be the truth, the whole truth, and nothing but the truth so help you God?

MR. HOELL: Yes, sir.

CHAIRMAN FRANCOUER: Thank you.

MR. HOELL: Sorry. Where was I? So given the shortness of this campaign, and this particular special election, I had petitioned the Secretary of State's Office back in late December, December 22nd, to reduce the number of nomination papers required to be on the ballot for the general election from the seated 750 per the statute to only 275. And that was done as a proportional scaling based on a typical filing period of approximately 14 weeks versus the five weeks in this period. That petition was denied back then. And we subsequently, as a campaign, tried to collect the full 750 signatures. We did not. There's no disputing that. That's not the purpose of my -- of me bringing this before this Commission today.

We collected 594 that were agreed to. Another 16 more or so that were given on that day, and then another eight the day after that were in the mail to me to try and -- that were not given to the

supervisor of the checklist to validate. I have another 40 that were collected from Hooksett that, again, were not turned in on that same day.

The issue is one of timing. What is required of an independent candidate trying to get on the ballot for the general election in a special election is unduly burdensome relative to what the candidate as an independent would have to do to be on the ballot in a general election under normal conditions. If I wanted, for instance, to run for this same seat, State Senate seat, to be on the ballot in 2010, okay, I would have to turn in 750 nomination papers on August 11th. I can start collecting those as of January 1st this year according to the RSA. I have eight months to collect that many. Even if I waited till the beginning of the filing period, I still have approximately nine weeks or so to collect that many signatures. Hum -- however, in the case of a special election, you're not even aware that the special election when it's going to start. The paperwork isn't available until the filing period to do this. You are severely limited in the timing available to collect 750 nomination papers. Because of that, I am petitioning this group to do two things.

One, put me on the ballot in the general election. And two, although it's not the jurisdiction, and Bud Fitch will bring that up in his motion to dismiss, to argue whether the law makes sense or should be changed, I'd like this group to publish that there is clearly an issue for Independents filing in special elections and that the RSAs need to be looked at such that when we bring this up to -- in a future bill before the House, we can get this RSA adjusted. It is clearly

unconstitutional at this point. There is not equal right to -- to be -- sorry, let me get my notes.

Constitutional article -- Section 1, Article 11, every candidate of the state having proper qualifications has equal right to be elected to office. That is not held true for Independents running in special elections. The burden for them to get on the ballot is disproportionately high. For me to get on the ballot as a Republican or as a Democrat, I have to spend $100. Okay. And I'm into the primary. If it's an unopposed primary, like Jeff Goley, I'm on the general ballot. Whereas for an Independent, it's 750 signatures at the rate of over 20 per day, okay, during that shortened period of time. We were one weekend short of having collected sufficient signatures. Two of the weekends that were critical to us, places that are traditionally used to collect signatures, were closed. The Hooksett Transfer Station. Those are important facts in this particular case.

Yes, we were at the post office during those times. But the transfer stations have the largest number of registered voters showing up on a public property at one place in a very short period of time. And historically, over the weekends we were collecting well over 100 signatures per transfer station per weekend on the weekends that we were able to go. Because of these special circumstances, again, I am asking that the Ballot Law Commission notify that, yes, I submitted insufficient signatures to be on the ballot, but given the circumstances, that number of signatures is clearly the will of the voters and what would -- it makes sense to put me on the ballot. And two that, again, you guys put together at least a letter to the general -- to the general court stating that we

need to look at these RSAs. Hum -- are there any questions before I go on?

CHAIRMAN FRANCOUER: Usually, what we'll do is let you present all your testimony first and then we'll open it up to the Commission to ask questions.

MR. HOELL: Okay. My last point is the timing of this is -- is so tight that I've already been eliminated from the absentee ballots. Okay. And that's just because of the timing of this. Had I waited for my three days to contest the results of what had happened, again, there was a day between the end of that three-day period and the day the absentee ballots needed to be printed out.

The issue is one of timing. Given the fact that we had successfully collected enough signatures by the 22nd of December to go ahead and give them to the Secretary of State's Office, and be on the ballot so we could start campaigning, instead we were denied that. So we continued to collect signatures and we ran out of time. And the whole reason I'm bringing this before the court or before this Commission is that given the timing constraints of the 34 days to collect signatures or 31 days to collect signatures, we needed more time. One weekend would have been sufficient. That's it for my testimony.

CHAIRMAN FRANCOUER: Okay. Questions?

COMMISSIONER MARTIN: Yeah. Mr. Hoell, I'm Greg Martin from Keene.

MR. HOELL: Yes.

COMMISSIONER MARTIN: Is there any statutory authority that you know of that would allow the Ballot Law Commission to reduce the number of required petitions under the statute?

MR. HOELL: There is no -- I know of no New Hampshire RSA that would allow that. I do know that the Secretary of State's Office has been able to take one RSA and not apply it to a special election. And I -- I'm not criticizing them for that, but they did -- in fact, there's an RSA that requires these to be dated in the year of the election which meant I would have under -- if I were to follow that letter of the law and the paper that was given to me had a place for the petitioner to date as well, and it wasn't, so -- I don't have the nomination paper in front of me; but the nomination paper I was using, okay, had only place for the signature of the person and the printed name and their address and their mailing address. Newer nomination papers also have a place for them to date it. If that had been the case, the burden would have been 750 signatures in roughly 11 days. And then you have to find time to get to the supervisor of the checklist. Well, unfortunately, they don't meet that often this time of year. And in a special election, the likelihood is they meet the night before to arrange for whatever they have to do the day of polling and then they meet on the day of polling to be there. And that's the only time they meet. Meaning that you have to run around and see each of the polling places to actually have them review the nomination papers, sign them, and then collect them and get them back to the Secretary of State's Office.

So because of this -- the timing of this, this RSA was put in in September, they gave me

permission to not have to fight that one. That I could start collecting the day, December 7th, the day I actually elected to be part of this campaign. If they had the jurisdiction to do that, my question is why don't they have the jurisdiction to go ahead and say, because of a special election, 750 is unduly burdensome and should be reduced? And I've given four court cases, not of this jurisdiction, circuit court cases that had mentioned that in special elections, in particular, Independents had seen reductions in the number of nomination papers.

COMMISSIONER CARTER: In those cases -- I'm sorry. I'm Chris Carter. In those cases was the reduction approved by a court or by a Ballot Law Commission or some similar --

MR. HOELL: By -- in all cases it was by court. And I don't -- as Bud Fitch will testify, I don't know that you guys have the authority according to the RSAs to make this -- this reduction. If that's not the case, my petition is that you guys at least note the unfairness of this, and that we can take it up in the legislature next season. There is a bill before the legislature to reduce certain percentages, I believe it's Bill 1264.

HOWARD WILSON, Andover, NH: Yes.

MR. HOELL: 1264 to reduce the number of percentages to get a third party on the ballot. We should probably amend that bill to start looking at the unfairness for Independent candidates in special elections. And if it was scaled proportionately, it would be reasonable. The fact is, given the shortness of the time and there is no scaling for the number of signatures, you spend

your entire time getting signatures and no time campaigning.

CHAIRMAN FRANCOUER: Further questions?

COMMISSIONER MCGUIRK: I just have a comment to make, not a question.

CHAIRMAN FRANCOUER: Let me just go on for a second and then I'll give you a chance. Right now the current statute says you have to have 750 signatures.

MR. HOELL: Correct.

CHAIRMAN FRANCOUER: And at this time as of the time of the filing you only had 594; right?

MR. HOELL: 594 that had been verified. Eight that were not -- that were from the Town of Bow that we could not get to the polling station to have them reviewed. Sixteen that -- sorry. Another eight that I turned in the following day that were postmarked and in the mail on the 12th I just could not get to.

CHAIRMAN FRANCOUER: Even if we counted all those, we still wouldn't be up to 750?

MR. HOELL: Absolutely; and I had, believe it or not, in the rush I lost 37 from the Town of Hooksett that I had that we could go back and talk to those people. Again, there is not 750. There is, at best, 650. It's -- let's say it's for round numbers it's 600 of the 750. The reason I'm asking this is one additional weekend at the rate we were collecting would have been sufficient to be on the ballot.

CHAIRMAN FRANCOUER: Okay. Thank you.

COMMISSIONER MCGUIRK: Thank you, Mr. Chair. Mr. Hoell, I appreciate your willingness to throw your hat into the ring and run for that Senate seat out of District 16. And I was glad to hear that there's a House Bill --

MR. HOELL: Hm-hum.

COMMISSIONER MCGUIRK: -- in the current session of the legislature. What you're asking us to do is not within our jurisdiction -- our jurisdiction. And I would suggest strongly to you that you proceed and find a sitting -- is it a House Bill?

MR. HOELL: It's a House Bill, yes.

COMMISSIONER MCGUIRK: Find a member of the House that would be willing to sponsor an amendment to that bill and bring your concerns before the legislative body. I believe it's the Election Law Committee in the House.

MR. HOELL: Hm-hum.

COMMISSIONER MCGUIRK: And air it out for a public hearing and see what happens.

MR. HOELL: Thank you. I agree that that is the best and proper way to take this forward. Again, the reason I am protesting this was not so much to be on the ballot this point. I've made that comment to the Secretary of State's Office. I believe the current RSAs are unconstitutional. And I'm the type of person who when given the fact that there's an unconstitutional law, I'm going to throw my effort

into fixing that as part of just doing what is right for the State of New Hampshire.

I think the way to make that clear is for this Commission to note that there was, in fact, circumstances, extenuating circumstances that denied a person access to the ballot because of that. It's our recommendation as a Commission that this be addressed in the future by the House and that may be as far as we get. As I said, I have two petitions. One is to be on the ballot. You guys may have the jurisdiction to say the 750, did not meet the 750 but we are going to go ahead and put him on the ballot. It's not clear from the RSAs whether you guys can do that or not. Normally, it's one of contesting whether the ballots were good. Okay. There was 60 or so signed nomination papers that were denied. But again, even if you consider those 60, there's still not 750. So I don't know whether you guys have the jurisdiction or not. It's not clear.

At this point the -- there is no campaign for an Independent, okay, under the Constitution party for this election. There could be a write-in campaign, but there is no purpose to do that. I'm more interested in fixing what is a broken RSA. We have a great state here. We should work to do things to make it better. And to whatever extent that you guys can argue that or write a paper that says, you know what, we had a candidate who was denied access to the ballot because of timing requirements of a special election. That serves to make it a lot clearer and to make it -- to give good testimony when it's before the House.

I will find -- I will find a House member who can sponsor the amendment. That's easy. Getting

people to listen to that amendment and to believe that it's good law is more work which is why I'm starting here.

COMMISSIONER MCGUIRK: You bet it is.

CHAIRMAN FRANCOUER: Okay. Any other testimony?

MR. HOELL: I have none.

CHAIRMAN FRANCOUER: Okay. You're up next, Mr. Fitch.

ORVILLE "BUD" FITCH, Deputy Attorney General, Department of Justice: Thank you, Mr. Chairman, Members of the Commission. For the record, my name is Orville B. Fitch, II, better known as Bud. I'm the State's Deputy Attorney General. I appear this morning representing the Secretary of State. I intend to make only legal arguments. I don't believe I need to be sworn.

We have before you a Motion to Dismiss. I won't take a lot of your time going through what is written there; but the essence of the Motion to Dismiss is that your jurisdiction in this aspect of the execution of an election is to hear disputes about whether nomination papers that had been submitted conform to the law. There is no dispute before you today about whether the nomination -- petitioned nominating papers -- excuse me -- that were submitted conform to the law. There's no dispute about whether signatures are valid or the forms are filled out properly or of that nature. And there's no dispute that there were not 750 of them submitted. On that basis, it's our position that you lack jurisdiction to otherwise hear the arguments that are being made.

The question of fairness, we agree with some of the questions presented already. That is a question for the legislative branch. The people through their elected representatives set the rules for how our elections are to be conducted, and I think that we all have given similar counsel to Mr. Hoell that his right venue is before the legislature.

I'll take just a moment, if I may, to address even were you to find this were within your jurisdiction that the current laws are not unconstitutional. The Supreme Court in 2006 in the Libertarian party case looked at these very statutes. And I provided you with both a copy of that case, but in the motion before you I've also pulled out for you what I think are the most helpful excerpts from that case. The court recognized that seeking office in New Hampshire is a fundamental right, one of those rights that are most protected in our system of government. But nonetheless, that there may be reasonable and non-discriminatory regulations about how you get to run for office and that one of those is providing evidence of a significant modicum of support before you get on to the ballot, and the court has recognized the legitimacy of the State's interest in not just letting anybody who wants to come in and sign up their name and have their name on the ballot. It would confuse who the candidates were in some races and make the election process less effective. So it was within the legislature's prerogative.

I'll draw your attention to Page 5 of the memo of our Motion to Dismiss. In its discussion the Supreme Court quoted actually a Texas case heard by the United States Supreme Court where in talking about what are the bounds of reasonableness in

terms of requiring some set number of signatures. There they quoted favorably the federal Supreme Court saying challenging a signature requirement with a 500 signature limit as unduly burdensome, which is what I understand the petitioner to be doing this morning, approaches being frivolous. So that's in the context of a regular election. But I think it's good evidence that there's solid case law for the proposition that in order to be unconstitutional, this can't just be hard. This has to be unreasonably burdensome. And our court has said that requirements that range from 150 to 3,000 for nominations as an Independent candidate do not impose a severe burden. That very question has been answered.

I will finish up by just pointing out that the process of gathering nomination papers, I think, should be recognized as campaigning. And the burden that New Hampshire currently places on someone seeking access to the general election, including special election ballot by nomination papers, should not be understood to be materially different than the burden placed on a candidate who has to compete, in some cases, to win his or her party's nomination. They both have to go out and find folks that are willing to either sign the nominating paper or show up on election day. It's sometimes easier to get someone standing in front of you to sign the paper than it is to be sure they're going to actually come out on election day and cast a ballot in primaries, special primaries being -- having a history of particularly poor attendance. So this is not an equal in the way that it treats folks even when the coincidence of the timing of the election falls, as this one did, over a holiday and provides some additional constraints in addition to the normal short period of time in

which the elections are conducted. Thank you for the time, and I'd be happy to answer any questions.

COMMISSIONER CARTER: The Libertarian case was a general election?

MR. FITCH: The Libertarian case, Mr. Chairman, Members of the Commission, the Libertarian case was a general challenge to the construct of the laws for both individual candidates and for what we call third parties or minor parties getting ballot access.

COMMISSIONER CARTER: In a general election, how much time does an Independent candidate have to garner the 750 signatures?

MR. FITCH: Mr. Chairman, Members of the Commission, I don't have the specific number in front of you, but I can certainly assure you a whole lot more time than folks have in a special election.

COMMISSIONER CARTER: A matter of nine weeks or something of that nature?

DAVID M. SCANLAN, Deputy Secretary of State, Secretary of State's Office: January 1st through mid-August.

MR. FITCH: January 1st through mid-August is the right answer.

COMMISSIONER CARTER: Is it the Attorney General's position that the cutting that time period -- my math isn't so good.

MR. HOELL: One-third.

COMMISSIONER CARTER: Thirty-four days versus six months isn't a significant impact on the ability of a candidate like Mr. Hoell -- an individual like Mr. Hoell who desires to be a candidate, is it the Attorney General's position that that's not as significant a consideration in evaluating how the existing state of the law stacks up against the requirement for a special election?

MR. FITCH: It would be our position that the setting of how much time someone should have is, unless it becomes unconstitutional, a matter of public policy properly -- the decision properly made by the legislature.

COMMISSIONER CARTER: I'm just -- I'm not trying to give you a hard time. But since you invited us to entertain the merits, I just want to push you a little bit on that point since you quoted language, strong language, frivolous. Do you think it's -- it would be a frivolous argument that having only 34 days, including two weekends which fall over a major holiday, is an inadequate period of time? Is it your position that that is a frivolous argument?

MR. FITCH: Our position is that with a sufficient level of support, a candidate, an individual wishing to become a candidate by nominating papers in that time frame in this circumstance should be able to obtain 750 signatures.

COMMISSIONER CARTER: That's not my question. You invited us to consider the issue of frivolity. Is it the Attorney General's Office that that's a frivolous argument by Mr. Hoell?

MR. FITCH: Mr. Chairman, Members of the Commission, I think the purpose in pointing to the

language of the -- both the United States Supreme Court and the State Supreme Court wasn't to characterize the petition before you as frivolous. It was to provide you with information about how the courts that do construe the constitution have defined where those boundaries are in the context of a regular election, and to focus your attention on the difference between a judgment, properly made by the legislature, about what the ideal period of time or the ideal number of signatures for a particular period of time should be against the boundaries of the Constitution and what becomes unconstitutional. And so in this instance, we are dealing with numbers, pretty close to numbers that both the United States and New Hampshire Supreme Court have looked at in this other context. And they didn't say this was a frivolous argument in that case. They said that it came close to being a frivolous argument.

COMMISSIONER CARTER: Isn't that the whole issue here is the special election, not a general election?

MR. FITCH: Certainly that is the basis of the petition. Yes.

COMMISSIONER CARTER: Okay. Thank you.

COMMISSIONER MARTIN: Did the Secretary of State's Office comply with RSA 655:81 which is the setting of the dates of the special election within a certain period of time?

MR. FITCH: To my knowledge the Secretary of State did comply with that law. Yes.

CHAIRMAN FRANCOUER: Any other questions from

the Commission? Seeing none, thank you.

MR. FITCH: Okay.

CHAIRMAN FRANCOUER: Is there anybody else wishing to testify today? Come on up. You want to swear her in?

FRAN WENDELBOE, State Representative, Belknap County, District #01: Thank you, Mr. Chairman.

ATTORNEY HEAD: You swear the testimony you're about to give will be the truth, the whole truth and nothing but truth so help you God?

REP. WENDELBOE: I do.

ATTORNEY HEAD: Thank you.

REP. WENDELBOE: For the record, my name is Fran Wendelboe. And I'm -- would like to wear two hats before you this morning. The first hat I'd like to mention to you is that I'm a member of the Executive Board of the New Hampshire Republican Party. And while the party does not wish to testify as to the merits of this, we do want to make clear that should this Commission decide not to dismiss this case, we want to make sure that there's a recognition that we are, indeed, an interested party to this matter and retain our rights on the record should this go any further to a court challenge that our standing not be questioned at that point by, perhaps, the observation being made if we did not make mention of our concern as far as our interest in what happens with the ballot decision. So that's the first hat.

My second hat in sitting here and listening as

a legislator of 14 years, and I had not planned on testifying as to this issue, but as I listened to the debate about the shortness of time and the fairness, I think it's also important to consider while if this was a regular election an Independent candidate would have a much longer time to collect petition signatures for the general election. The same argument could be made as to the candidates, whether they are a Republican candidate or a Democratic candidate that they could have been campaigning since January. Indeed, we have some State Senate candidates who were declared even prior to January of this year for the 2010 election. So they, too, any candidate that ends up being in a special election is in a very shortened time frame and they have the same challenges of raising money, name recognition, particularly those in a primary which have an even shorter window than a candidate facing getting petitions. Not only are they raising money, they are having to turn out the vote as Deputy Attorney General Fitch pointed out.

So as far as a fairness issue, those candidates operate under the same short time frame and the legislature in setting the statutory language of the dates recognized that these candidates aren't going to have the time either. But in the interest of fairness to the people having a representative elected in a timely manner, they have established these deadlines. And so I think you have to look at that not just as to the Independent candidate and a shortened time frame, that same situation exists for the Republican candidate and the Democratic candidate. And let me throw out to you that was a contested primary on the Republican side. You know, what if one of the Republican candidates was here arguing to you that, you know, if the election had only been held two weeks later than it was, I would

have been able to get the votes and I would have been able to then win the primary instead of the other guy winning the primary. Because I campaigned shorter because I didn't realize the campaign that was going to be running and somebody else jumped me to it and was more active.

So I think it's a can of worms to open up. I think the legislation is very clear. And I hope you take that into consideration on the fairness issue that -- that it's equally a challenge to everybody on that ballot. Thank you. More than happy to answer any questions.

CHAIRMAN FRANCOUER: Questions from the Committee? Seeing none; thank you.

REP. WENDELBOE: Thank you.

CHAIRMAN FRANCOUER: Is there anybody else wishing to testify?

MR. HOELL: May I bring up two other points?

CHAIRMAN FRANCOUER: Is there anybody else? No. Then I will let you bring up.

MR. HOELL: JR Hoell, second time up here. There was approximately 400 votes for Jeff Goley in the primary on the same day that I turned in the papers. I believe there's approximately 800 for Mr. Terry Pfaff or Puff and about 1600, if I recall, for David Boutin. If we look at an order of magnitude on the same day that they had the primary, I turned in 600 nomination papers. It's clearly in line with the number of votes that either of the other candidates collected. It's not off by an order of magnitude. It's not off by half.

It's actually, in fact, more than the uncontested Democrat had votes on that same day.

Hum -- secondly, where the law requires roughly three or four percent to get on as a party, there was a total of only 2800 votes cast on the day of the primary. Six hundred is a substantial percentage of those. Okay. I had nomination papers turned in the same day.

Secondly -- so those two were all point one. Point two. It's clear from the RSA there's no provision regarding timing of special elections. I believe when the legislature wrote those laws they were only considering general elections. In terms of the timing, the fact that everything is so crunched for the Secretary of State's Office, they have enormous amount of work to do in the 80 to 87 days of a special election, between 34 days before the general election being the primary and then so many days before that being the nomination period. Everything is pushed together so tightly that it wasn't clear that all the RSAs that govern elections were considered when they set the timing of the special elections.

And then lastly, again, each voter shall sign and date an individual nomination paper is still part of the RSAs. Okay. If that were -- if I was held to that bar by the Secretary of State's Office for this special campaign, I would not have had 34 days, or 31, whatever it was to collect them. I would have had 12. Again, there's an issue with the laws as they're written as being un -- unduly burdensome for Independent candidates and I thank the Secretary of State's Office for allowing me not to have to abide by that one RSA for this special election. But clearly, there was significant voter

interest in having a third party candidate with the principle that I have in the election, such that there was 600 people or more sharing that on or by the 12th of January, which is the day of the primary. Hum -- that's it. Thank you.

CHAIRMAN FRANCOUER: Thank you. Okay. One last time, anybody else wishing to testify? Seeing none; we'll close the public hearing part. We'll meet before the Commission. Discussion -- or actually can have discussion or a motion.

** COMMISSIONER MCGUIRK: Want a motion, Mr. Chairman? Mr. Chairman, I move that the petition of Mr. JR -- pardon me if I miss pronounce your name - Hoell be denied because he did not meet the requirements of RSA 655:40, II, which requires 700 -- 750 nomination papers for Senate District 16 special election.

CHAIRMAN FRANCOUER: Okay.

ATTORNEY HEAD: Mr. Chairman, I just might express there's probably -- well, go ahead.

CHAIRMAN FRANCOUER: So there's a motion to deny JR Hoell that he did not meet the requirements of 655:40.

COMMISSIONER MCGUIRK: 40, II.

CHAIRMAN FRANCOUER: I want to make sure we got the right section.

COMMISSIONER MCGUIRK: I think. 655:42. I'm sorry.

COMMISSIONER CARTER: 655:42.

COMMISSIONER MCGUIRK: 655:42, II. My apologies.

CHAIRMAN FRANCOUER: Correct. We have a second?

COMMISSIONER MARTIN: I'll second.

CHAIRMAN FRANCOUER: We have a first and a second. We have some discussion.

ATTORNEY HEAD: Mr. Chairman, before you go into discussion you have a procedural motion that's pending that the motion that was just made was on the substance of the matter that's before you. You have a procedural motion pending filed by the Secretary of State, a motion to dismiss that you do not have jurisdiction. So you may want to consider in terms of order of things the procedural motion before you get to the substantive.

CHAIRMAN FRANCOUER: Okay.

ATTORNEY HEAD: At this point you have a pending motion and it's been seconded. It can either be tabled or withdrawn or voted on. It's up to you, ultimately, but that's a suggestion on my part.

CHAIRMAN FRANCOUER: Okay.

COMMISSIONER MCGUIRK: You want me to withdraw my motion?

CHAIRMAN FRANCOUER: If it's cleaner for you we can withdraw that motion and --

ATTORNEY HEAD: It's up to the Committee.

CHAIRMAN FRANCOUER: We can do that.

COMMISSIONER MCGUIRK: Sure.

CHAIRMAN FRANCOUER: If you're in agreement with the Secretary of State's Office, Mr. Fitch's motion to dismiss based on what was submitted to the Committee, you can do that, which is very similar to what you have done. We could ask you to table your motion, and then we could act on his motion to dismiss.

COMMISSIONER MCGUIRK: Okay. I'll withdraw my motion.

CHAIRMAN FRANCOUER: Okay. We have a withdrawal of the motion before the Committee. The Committee at this time will take up motion to dismiss by Mr. Fitch, Deputy Attorney General's Office, representing the Secretary of State. Any discussion on the motion to dismiss? Do you want --

COMMISSIONER MARTIN: Yes. I'm going to vote for the motion to dismiss. But I would say that I'm personally sympathetic to Mr. Hoell's position and other Independent candidates' position; but I really don't think it is the Ballot Law Commission's role to express an opinion or to act on the constitutionality of these petitions. I think it is the legislature's role and so my vote would be in favor of the motion to dismiss.

CHAIRMAN FRANCOUER: Okay.

COMMISSIONER CARTER: I would recommend that -- I don't know procedurally how to do this. The motion raises a jurisdictional and constitutional issue. I would suggest that we be clear in our -- whatever action we take that we're voting or we're adjudicating on which section we're addressing.

CHAIRMAN FRANCOUER: Okay.

** COMMISSIONER CARTER: So I would make a motion that we vote as to the first jurisdictional argument raised in the motion to dismiss.

COMMISSIONER MARTIN: Point of order, Mr. Chair?

CHAIRMAN FRANCOUER: Yes, give me one second, please.

COMMISSIONER MARTIN: Okay.

CHAIRMAN FRANCOUER: So you want to separate it into a jurisdictional?

COMMISSIONER CARTER: Yes. Because there is jurisdictional and substantive arguments raised in this motion that we just be clear as to what position this Commission is taking. I would move that we vote with respect to the jurisdictional argument raised in the motion to dismiss.

CHAIRMAN FRANCOUER: Okay. Did you want to separate it? Was there a second argument? Whether you wanted to say -- whether it was the Ballot Law --

COMMISSIONER CARTER: I don't believe we would need to reach the constitutional issue depending on what the outcome of the vote on the jurisdictional issue.

ATTORNEY HEAD: Procedurally, the motion pending is to have a vote on only one aspect of the motion to dismiss which is limited to whether or not the Ballot Law Commission has jurisdiction over the

matter that is the subject of Mr. Hoell's petition.

COMMISSIONER CARTER: Thank you.

CHAIRMAN FRANCOUER: That would suffice what you need.

ATTORNEY HEAD: It's not in terms of what I need, but it's a suggestion. The motion that is pending is an appropriate motion. It has not been seconded yet.

CHAIRMAN FRANCOUER: Okay. So just so we are all on the same plane here.

COMMISSIONER MARTIN: I understand Mr. Carter's point; but I looked at the relief of the motion to dismiss and it's only on the basis of jurisdiction even though he makes the argument of constitutionality. So I think we grant the motion to dismiss. It would be on the basis of jurisdiction. So I'm not -- you know, I understand that argument and I'm only voting for the motion to dismiss on the basis of jurisdiction.

COMMISSIONER CARTER: Just without quibbling, he does ask for both. He has A, jurisdiction; B, constitutional.

COMMISSIONER MARTIN: Oh, I'm sorry. I missed that. Okay. So I would vote for relief A.

CHAIRMAN FRANCOUER: Okay. If the intent of the Commission is to dismiss the case before it based on jurisdiction, it's not under the control of the Ballot Law Commission, do you want to state your motion so that -- you want it just to say we have dismissed it based on jurisdiction?

COMMISSIONER CARTER: I would move to grant the motion to dismiss for lack of jurisdiction.

CHAIRMAN FRANCOUER: We need a second.

COMMISSIONER ST. JEAN: I'll second.

CHAIRMAN FRANCOUER: Okay. We have a first and a second. Discussion?

COMMISSIONER MCGUIRK: Could you repeat the motion, please?

CHAIRMAN FRANCOUER: If I -- since you guys don't have to write it, too, they want to grant the motion to dismiss based on jurisdiction. Any other words I'm missing?

ATTORNEY HEAD: As it was phrased was to grant the motion to dismiss for lack of jurisdiction.

CHAIRMAN FRANCOUER: For lack of -- for lack of jurisdiction.

Any other questions? Comments? I think just so you get a feeling of everybody on the Ballot Law Commission, I'll give everybody an opportunity to speak. In the past that I've been on the Ballot Law Commission now I think since it was formed that we try to adhere strictly to what the statutes are. If the statute said 750, even if you were at 749, it isn't then our discretion to change what the statute does. I know serving in the legislature quite a few years and some of the other members of the Committee the same thing, is we don't try to make law. We just try to take a look at the situations before us and say, okay, does this

petition meet it or not. Does it have all the information on it and that type of stuff, where today we're looking at trying to change a number, based on how many weeks and what your argument is to allow you to be on the ballot, different from what the number in the statute says. I hope you do take it to the legislature. That's where it does belong. As been mentioned by one of the other commissioners, usually we do not take a stance on the legislative process.

MR. HOELL: Hm-hum.

CHAIRMAN FRANCOUER: As far as what they should approve, what they shouldn't approve. It's a great argument. I know I've been in the legislature. There are different committees that heard ballot law that that's the place to be and to, you know, to convince the number of the peers there. You know, it's a shortness of time. It's a great argument. I don't know if they'll go along with you or not, but that's the place for it to be heard.

Any other questions from the Commission? Comments? We have a motion. We have a first and a second. All those in favor say aye? All those opposed? None. Vote is unanimous.

ATTORNEY HEAD: Chairman, you don't have any other matters pending before you today.

MR. SCANLAN: Mr. Chairman, if I could briefly. When you came in this morning, there was a report in front of you from the Electronic Ballot Counting Advisory Committee. There are some action items in there that are going to require some approval on your part. We are thinking we might have a meeting in March or April to address those issues and they

relate to some changes that we might make to the optical scan ballot counting machines to help enhance their security. I just wanted to alert you.

CHAIRMAN FRANCOUER: You're going to need another meeting in the next couple of months?

MR. SCANLAN: Yes.

CHAIRMAN FRANCOUER: Okay. Nothing else before the Ballot Law Commission today? Okay. Motion to adjourn.

** COMMISSIONER MCGUIRK: So move.

ATTORNEY HEAD: One minute. If I can have everyone's e-mail address, I will draft a short order and e-mail for circulation.

CHAIRMAN FRANCOUER: Motion to adjourn.

** COMMISSIONER MCGUIRK: So move.

CHAIRMAN FRANCOUER: Second.

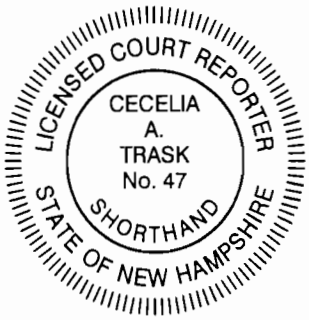
COMMISSIONER MARTIN: Second.

CHAIRMAN FRANCOUER: All in favor aye?

(Hearing concluded.)

CERTIFICATION

I, Cecelia A. Trask, a Licensed Court Reporter-Shorthand, do hereby certify that the foregoing transcript is a true and accurate transcript from my shorthand notes taken on said date to the best of my ability, skill, knowledge and judgment.

Cecelia A. Trask

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