STATE OF VERMONT
HOUSE OF REPRESENTATIVES

In Re: Petition Of Susan Hatch Davis,
Candidate For Orange-1 House District

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**Response of Candidate Robert Frenier**

**to Petition Of Candidate Susan Hatch Davis**

NOW COMES Candidate Robert Frenier, by and through his attorney, Thomas F. Koch, and hereby responds to the allegations made by Candidate Susan Hatch Davis (hereafter "Davis") in her Petition.

For the sake of brevity, the jurisdictional basis of the Davis Petition, the background of the present proceeding, and the various facts not otherwise disputed herein may be considered to be agreed to by Candidate Frenier (hereafter "Frenier"). In setting forth his position, Frenier will frequently quote portions of Davis' Petition by setting forth the quoted material in *italics.*

**I. Nature of the Proceeding**

In her Petition, Davis claims *to challenge the election and recount…in the Orange-1 House District during the November 8, 2016 election.* However, all of the complaints of procedure and assertions of fact made by Davis relate purely to the count (and recount) of the votes cast in the election, and do not call into question the validity of the election itself.

**II. Davis' Specific Complaints**

**A. That the Court denied Davis the right to present evidence**

Davis asserts that the Superior Court *denied Petitioner the statutory right to present*

*evidence relating to the conduct of the recount*.

The hearing on December 19, 2016 was held pursuant to 17 V.S.A §2602j (c), which reads, in relevant part:

> Candidates and their attorneys shall be given the opportunity to present evidence to the court relating to the conduct of the recount. If the court determines that any violations of recount procedures have occurred and that they may have affected the outcome of the recount a new recount shall be ordered. [Emphasis added.]

It is true that Davis showed up at the hearing with a coterie of witnesses prepared to describe various alleged procedural faults in the recount process. However, the ultimate question in such a hearing is not only whether technical defects occurred, but whether such defects may have affected the outcome of the recount. Following established judicial procedure, Judge Teachout afforded Davis the opportunity to make "an offer of proof." In an offer of proof, a party to a proceeding is invited to summarize the evidence the party intends to present, allowing the judge to evaluate the offer and decide whether the evidence, if offered in formal testimony, would be material to the issue at hand.

In this matter, Davis, through her attorney, made her offer of proof, and Judge Teachout concluded that the evidence, even if offered at length and under oath and taken as true, would not have the ability to affect the outcome of the recount. Therefore, her decision not to hear the testimony at length was entirely proper.

**B. The standard of proof**

Davis asserts that the Court *required Petitioner to prove that the procedural recount violations did affect the outcome of the recount, when the statute only requires Petitioner to demonstrate that the "violation" of recount procedures "may have affected the outcome of the recount."*

This is simply not true.

Following the recount, Frenier led Davis by six votes, with three ballots submitted to the Court for a decision. It was agreed during the hearing that the Court should proceed to rule on the "intent

of the voter" in each of the three ballots. The Court did so, resulting in Frenier's margin increasing to seven. The Court concluded that the evidence offered by Davis simply did not demonstrate even the possibility of affecting the outcome of the recount by overcoming the seven vote margin. This is far from requiring that Davis prove that her evidence actually would affect the outcome, and the Court's decision is clearly correct.

**C. Different treatment of ballots in different towns**

Davis claims *that identical absentee ballots, and perhaps other ballots, in different towns in the Orange-1 House District were counted in some towns and not others.*

This allegation appears to relate to Davis' claim that four absentee ballots in the Town of Orange were rejected because the inner envelope in which they were returned was not sealed. This allegation is factually incorrect. Orange Town Clerk Kathie Felch would testify that she observed that two of the rejected ballots were received completely outside the inner envelope and, therefore, were rejected according to law. Davis offers no evidence that the other two absentee ballots were rejected for different reasons. This allegation also is too late, because the counting teams did not challenge the failure to count these ballots during the recount. As Judge (now Justice) Eaton ruled in a previous recount in this same district, "The election statutes do not permit recount participants to challenge particular ballots after the recount is over." In re: Rodney Graham, No. 247-11-10 Oecv. And finally, even if these four ballots in Orange produced four votes for Davis and none for Frenier (an unlikely result, considering that Frenier beat Davis in Orange by a ratio of more than 3 to 2), those four votes would still not change the result of the recount.

Davis further alleges that *"…perhaps other ballots in different towns in the Orange-1 House District were counted in some towns and not others*." *[Emphasis added]* This is pure speculation, without even an offer of proof to support it. Aside from the four absentee ballots in Orange, there were five defective absentee ballots in Corinth, a single defective ballot in Vershire, and a single defective absentee ballot in Chelsea; all were properly ruled defective, and there was no challenge to these rejections during the recount.

**D. Alleged interference by candidates in the recount process**

Davis alleges that *candidates were consulted on how to treat ballots, in violation of the ground rules set by the county clerk* and that *one candidate convinced a counter to reverse her position and request that a ballot be sent to the Court to determine voter intent after she already had agreed with the other counters to spoil the ballot*.

Neither allegation is true.

A total of three ballots were challenged and submitted to the Court to determine the intent of the voters. As each of the first two ballots were set aside, the County Clerk took it upon herself to show the candidates the ballots and explain why they were being challenged. The candidates did not "consult" on the treatment of the ballots and had no influence on their treatment.

As to the third ballot, at the very end of the day, the counting team was considering whether to declare the ballot spoiled, when another person—not a candidate, but a person who had been appointed to participate in the recount—protested that the ballot should be submitted to the judge. The ballot was then submitted to the Court as a challenged ballot and was dealt with by the Court at the hearing on December 19.

**E. Allegation that ballots were "manually forced" through the tabulator**

Davis alleges that *a representative of the vote tabulator machine business manually forced ballots in the tabulator used for the recount*.... This totally misrepresents what actually occurred. In some cases, ballots had "dog ears" or other minor defects from being stored in ballot bags, which caused the tabulator to reject ballots; however, once the "dog ears" or other defects were smoothed out, the tabulator readily accepted and counted the ballots. This is not the same as being "manually forced" through the tabulator. Also, there were instances when ballots, having been counted, did not drop properly into the receptacle below, causing the next ballot to be rejected; once

the counted ballot was made to drop, the tabulator then accepted the next ballot. This is a frequent occurrence with these machines, the remedy is simple, and the result is an accurate count of the ballots.

**F. Not reviewing each ballot before submitting it to the tabulator**

Davis places great weight on the fact that counting teams *failed to individually review each ballot **before** ballots were sent through the tabulator, to determine if they had any stray marks or if there were creases or other defects with the ballot that might cause the ballot to be unreadable or to cause the tabulator to record a vote for a candidate where a crease in the paper was located when one was not intended by the voter.*

Very simply, this is not required by law. 17 V.S.A. §2602f. (b) is very specific in requiring ballots to be examined after, not before, ballots that can be read by the tabulator have been fed through the tabulator. The subsection reads, in relevant part:

> (b) After all ballots from a polling place have been tabulated by a vote tabulator, a recount team shall print the tabulator tape containing the unofficial results and document those results on a tally sheet. Another recount team shall then open the tabulator's ballot box and remove all ballots. The ballots shall then be divided among the recount teams to be examined to find write-in names and markings of voter intent that were not vote tabulator-readable…. [Emphasis added]

While it may make sense to examine each ballot prior to feeding it through the tabulator, that is not what the statute requires, and the fact that the County Clerk adhered to the statutorily mandated procedures cannot now be used to invalidate the recount.

**G. Failure to create transfer ballots**

Davis points out that the recount teams *failed to follow the applicable statute which requires that if a ballot is rejected by the tabulator, a new ballot must be created (transfer ballot) and then sent through the tabulator for tabulation.*

In this instance, Davis correctly states the facts, but in the end, no harm was done. Transfer ballots were not created during the recount, because the County Clerk had not been given

any blank ballots to work with. The Secretary of State's office informed the County Clerk that ballots that could not be read by the tabulator could be hand-counted, which was done. The hand-counted ballots were added to the count of the tabulator-counted ballots, and the counting teams agreed to the accuracy of those counts, so although the failure to prepare transfer ballots was technically not in accordance with the statute, no real errors were actually created by this omission. As an aside, it might also be noted that in her original letter requesting a post-recount hearing, Davis asked for a new recount to be done by hand.

**H. Tabulator card for ballots from the Town of Orange**

Davis complains that the recount *failed to use an appropriate "tabulator memory card" when counting the votes in the Town of Orange.* What is at issue here is that the memory card used in the recount was programmed for the Town of Williamstown, which is in a single-member senatorial district, while the Town of Orange is in a two-member senatorial district. When some ballots in the Town of Orange were fed to the tabulator, the tabulator read two votes for senators as being an overvote and rejected the ballot. The tabulator was then placed in "override" mode, and the ballot was accepted. What is important is that this procedure did not affect the count of the votes for House District Orange-1.

**I. Use of the tabulator from Williamstown in the recount**

Davis also complains that *a tabulator used in the November 8 election in Williamstown was used to count ballots during the recount, in violation of 17 V. S. A. Section 2493(c), which prohibits use of a vote tabulator used in the election.*

Once again, Davis correctly states the facts, but in the end, there is no reason to believe that the result of the recount has been adversely affected. First, it was the Secretary of State who made arrangements for the use of the Williamstown tabulator in the recount. Second, this issue could affect only Williamstown, because all of the other five towns in the district were hand-counted on election night, and the recount was the first time any ballots from those five towns had ever been run

through a tabulator. Third, while the tabulator was the same in the recount as during the November 8 election, a new memory card was used for the recount. Fourth, the fact that the hand-counted results in the towns of Vershire and Washington and the tabulator-counted results in those towns during the recount matched exactly should give a very high degree of confidence that the tabulator was working correctly during the recount.

Given all of the facts, there is no reason to believe that the use of the Williamstown tabulator for the recount should cast any doubt on the validity of the recount.

**J. Checklist discrepancies**

Davis claims that *17 V. S. A. § 2602d (Examination of checklists) was not followed in that there was no agreement on the number of voters and the number of votes cast in the Town of Orange (apparently entrance recorded 546, exit recorded 554, tabulator counted 542, and eight ballots were hand counted bringing the total to 550 voted ballots, secretary of state notified that there were 549 voted ballots; one ballot unaccounted for), and in the final analysis, the there was no agreement as required by the statute.*

One is tempted to respond, "So what?" For ages, there has been the question of what to do when the entrance checklist and the exit checklist do not agree, and there is no good answer. In fact, the two checklists frequently do not match, which is one reason why the law now permits towns to eliminate the exit checklist. If whole elections were to be voided simply because the entrance and exit checklists do not match, there would be many re-run elections, with no guarantee that the checklists would match the second time. Unless there is clear evidence of more votes being stuffed into the ballot box (or tabulator) that there were voters who cast ballots—which is not the case in the present matter—the fact that there are minor discrepancies in the checklists can have no effect on the validity of the election.

**K. The Windsor-Orange 1 recount**

Davis attempts to link the present recount with the recent recount in House District

Windsor-Orange 1. However, the two recounts are not the same. Faced with a recount that appeared to result in a tie (plus two ballots that may or may not have been previously counted—no one appeared to know), the parties agreed to a new recount in order to avoid a new election. Here, there is not a tie, but a seven vote margin in favor of Frenier that Judge Teachout found could not possibly be overturned by the evidence offered by Davis. She therefore issued her judgment finding that Frenier had been duly elected.

In Windsor-Orange 1, the parties stipulated to certain procedures for their second recount that are not required by law. Davis now appears to suggest that the present recount is not valid because similar procedures were not used here. But the fact remains that those procedures are not required by law and therefore are not required in the present recount; the fact that they were not used here cannot be grounds for objection.

## CONCLUSION

For all of the reasons set forth above, one should find that the recount concluded on November 28, 2016 and approved by the Judgment of the Court on December 19, 2016 resulted in the lawful election of Rodney Graham and Robert Frenier to the Vermont House of Representatives from House District Orange 1 for the 2017-2018 biennium, and the Petition of Candidate Susan Davis should be dismissed.

Dated at Town of Barre, Vermont this 31st day of December, 2016.

Respectfully submitted,

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