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MEMORANDUM

TO: Committee on Government Operations & Military Affairs, Vermont House of Representatives

FROM: Sarah E. Buxton, Esq; Attorney for Representative Jonathan Cooper

RE: Petitions of Bruce Busa, et. al., Appealing the Election of Jonathan Cooper

DATE: January 20, 2025

INTRODUCTION

This Committee is asked to review the election of Jonathan Cooper and Bruce Busa and make a recommendation to the full House on the exercise of its constitutional authority to judge the elections and qualifications of Jonathan Cooper. This memorandum is intended to provide the Committee with an analysis of actions it might consider in response to petitioners' pleas. It makes specific recommendations as to the judgement the House should pass and remedies it might pursue to address matters raised in the four petitions.

SUMMARY OF RECOMMENDATIONS

1. The Committee should find that Jonathan Cooper was duly elected and is qualified to represent Bennington-1 House District as a member of the House of Representatives and recommend to the House that it find the same.
2. The Committee should prepare and recommend to the House a bill that would revise the boundary between the Bennington-1 and Bennington-5 House Districts to reflect the checklists prepared by the Town of Pownal in 2022, which remained in effect though the General Election of 2024.

ANALYSIS

- I. The election should be upheld because it was conducted according to the law and without incident or controversy prior to the close of the polls when opportunity for redress was available.**

There is no evidence that any voter eligible to vote in the Bennington-1 of Bennington-5 District attempted to and was denied the opportunity to vote for Jonathan Cooper or Bruce Busa. Vermont election law provides mechanisms for local election officials to make corrections to the checklist and permit eligible voters to cast their ballots through a bipartisan process.

Checklist or ballot errors are addressed by a statutory process that is designed to occur before Election Day. On Election Day, they are presumed to be conclusive. In the Attorney General's Report on the Buxton/Ainsworth election of 2010, dated December 29, 2010, Assistant Attorney General McShane reports on the issue of timing in raising issues with voter checklists (emphasis added):

*"In Vermont, eligible voters are identified by creation and maintenance of voter checklists; 17 VSA Chapter 43. **There is a very specific statutory framework that is designed to regulate voter checklists.** Included in that framework is a process for removal of voters from a checklist. A voter may be removed from a checklist if the voter is no longer a resident of the voting district. However, in all but the most obvious circumstances, removal may not occur without compliance with a number of provisions designed to prevent voters from being erroneously removed from checklists.'*

Boards of civil authority are required to meet at regular intervals to review the most recent checklist and consider "for each person whose name appears on the checklist, whether that person is still qualified to vote"; 17 VSA Section 2150(c). If the board is unable to immediately determine that a person is still qualified to vote in the district, the board is directed to attempt to determine the voter's status; 17 VSA Section 2150(d)(1). In that effort, the statute suggests that the board consider official and unofficial public documents including "telephone directories, city directories, newspapers, death certificates, obituary (or other public notice of death), tax records, and any checklist or checklists showing persons who voted in any election within the last four years." If after making the inquiry described above, the board is unable to locate the voter or if the inquiry reveals facts indicating that the voter may no longer be eligible to vote in the district, the board shall then send written notice to the voter at the last known address, asking the voter to verify his or her current eligibility to vote in the district; 17 VSA Section 2150(d)(3). There are a number statutory of requirements concerning the written notice, including that the voter be informed that if the form is not returned, a written affirmation of the voter's address will be required before the voter is permitted to vote again. If the voter responds to the notice by confirming that he or she no longer lives in the district, the board shall then remove the voter from the checklist; 17 VSA Section 2150(d)(4).

The above described statutes provide an orderly process to assure that persons on the checklist are qualified to vote in a particular municipality or district. It is a process that is intended to occur before Election Day. Checklists are presumed to be conclusive, and only under limited circumstance may the eligibility of a person on a checklist be challenged on Election Day; 17 VSA Section 2149. Residence is not among the issues that may be used to challenge a voter on Election Day. That is further evidence that it is an issue that should be raised before the election."

The statutory requirements surrounding posting, challenging, and changing the voter checklist are extensive. 17 VSA § 2141 requires that (emphasis added):

“(a) At least 30 days before any local, primary, or general election, the town clerk shall cause copies of the most recent checklist of the persons registered to vote to be posted in two or more public places in the municipality in addition to being posted at the town clerk’s office (...).

(b) Upon the checklist shall be stated against the name of each voter, if possible, the street and number of each voter’s residence and otherwise the mailing address of each voter’s residence. Additions or amendments to the checklist may be attached to the checklist by means of a separate list.

(c) The town clerk shall make available a copy of the list, together with lists of corrections and additions when made:

(1) to the chair of each political party in the municipality, upon request, free of charge;

(2) to officers with whom primary petitions are filed under section 2357 of this title, free of charge; and

(3) to any other person, upon request, at cost.”

Public policy should not support “after-the-fact” corrections to procedures related to voter eligibility or checklist verification and must avoid creating an incentive for interested parties to lessen their diligent attention to detail, presuming they will have an opportunity to “fix it” when the election is complete, and the results are known. This would lead to gamesmanship in an intolerable and undemocratic way.

The law requires town clerks to go to great lengths to provide significant notice of every decision made in preparing checklists, challenging voters, preparing ballots, and issuing ballots. This transparency provides ample opportunities for voters, political parties, candidates, public officials, and the public to examine checklists and ballots to ensure their accuracy. Elections by their nature must result in finality and must be conducted in a manner that promotes continued operation of government through its duly elected public officials. It has been and should continue to be of paramount importance that the rules surrounding elections favor early identification and resolution of any problems.

II. The House should exercise institutional restraint, mindful of the dangerous precedent it would set if it chose to do anything except judge the election on the facts already before it.

Since 1778, the people of Vermont have elected their local representatives to the General Assembly. In the 43 times that the General Assembly has been petitioned to “judge the elections and

qualifications of its members,” nearly all have alleged a violation of an election procedure. Not once has the House or Senate required a revote in any of these contests.¹ The custom has been – and should remain – *that the General Assembly consider only the facts before it and judge the election based on those facts alone*. The House should consider the precedent it would set in ordering a new election, including the frightening possibility that such an act might be politically weaponized in the future.

III. The House should not delegate its duty to “judge the elections” of its members by ordering a revote of any set of voters in the Bennington-1 or Bennington-5 House Districts.

A retroactive change to the conduct of an election violates principles of fairness, ballot access, and finality that have been cornerstones of our election law and governance since our founding as a nation and state. Practical and legal problems abound in any solution involving the casting of additional votes.

a. Ordering a revote for some or all eligible voters is likely unconstitutional as to the power of the House of Representatives.

The House does not have the Constitutional authority to delegate to another body, including to the electorate, the power to determine who is elected to serve as State Representative, as *it is the final arbiter of the election* and qualifications of its members. *Kennedy v. Chittenden*, 142 Vt. 397, at 399 (1983) (“This provision places the final determination of the election and qualifications of its members exclusively in the House of Representatives of the General Assembly as a part of its legislative powers.”) Section 14 of the Vermont Constitution states that “[T]he House of Representatives . . . shall have power to . . . judge of the elections and qualifications of their own members . . .” The specific and plain language of the Constitution is *retrospective with respect to elections*; the House shall judge the (past) elections of its own members. It is ongoing with respect to judging the qualifications of its members. Therefore, the House alone is required by the Constitution to determine whether Jonathan Cooper or Bruce Busa won the election and whether, as a member of the House they are (and remain) qualified to represent the citizens of the Bennington-1 House District in the 2025-2026 biennium. Establishing a secondary or supplementary election in the form of a new vote or revote, where new results would determine the election, contradicts this Constitutional directive.

To interpret Section 14 as permitting the House to order a new election is to read into Section 14 a power that was never intended. A cannon of constitutional interpretation is to avoid a reading of the plain language which would result in an irrational or absurd result. It is irrational to conclude that the framers meant for this clause to so readily convey the power to “redo” an election to a political body – without further limitation or direction.

¹ See [“Sampling of Past Contested Legislative Elections,”](#) BetsyAnn Wrask, Clerk of the House, Last updated Jan. 17, 2025

The House certainly has the power to change the laws related to the conduct of elections in the future. For example, it might allow aggrieved parties to petition a Committee of the House – or the full House – for a revote, prior to final certification, the way others might petition a Superior Court judge.² Ordering a revote stretches the House’s Section 14 power too far, especially when other constitutionally permissible remedies are available. It would set a dangerous precedent that could open the door to abuse of the petitioning process for political gain in the future.

b. Ordering a revote for some or all eligible voters is problematic at best and likely unconstitutional under ch. 1, Article 8 and ch. 2, § § 42 and 45 of the Vermont Constitution.

“[A]ll voters have a right to elect their officers, and be elected into office, agreeably to the regulations made in this constitution.” ch. 1 Article 8 Vt. Const. “The manner of election, certification, and filling of vacancies in office of Senators and Representatives shall be as established by law.” ch 2 § 45 Vt. Const. Read together, these provisions establish the principle that the rules of elections should be decided in advance so that voters and candidates may make informed decisions during the course of the election as they see fit – including when and if to cast their vote.

The General Assembly has detailed the process by which elections are to be conducted, including: eligibility requirements for candidates and voters; creation, maintenance, revision, and challenging of voter checklists; deadlines for challenging candidate and voter eligibility – and processes for doing the same; the manner of preparing and distributing ballots and establishing polling locations; the process of voting; the counting of ballots; the recounting of ballots; and more. See 17 V.S.A. Chapters 43 and 51. These requirements, consistent with the Constitutions of the United States and State of Vermont, have been established by law.

To conduct a second election where the available eligible voters are different from the available eligible voters on November 5, 2024, discards the effect and impact of votes, and indeed invalidates the votes cast on election day, in contrast with Section 42 of the Vermont Constitution. (“ Every person of the full age of eighteen years who is a citizen of the United States, having resided in this State for the period established by the General Assembly and who is of a quiet and peaceable behavior . . . shall be entitled to all the privileges of a voter of this state . . .” ch. 2, §42, Vt. Const.)

Additional problems that may arise in ordering a new election include:

1. Determining the legally permissible notice period for examining checklists and warning elections.

² The General Assembly has already described circumstances in which the judicial branch can order a revote in 17 VSA §2603 (Contest of Elections). It could easily legislate circumstances under which the House or Senate also could consider complaints related to the election of its members and similarly set timelines and deadlines for resolution that align with the orderly continuation of government.

2. Determining which campaign finance rules apply.
3. The handling of voter eligibility challenges pursuant to 17 VSA § 2564(2)(b) (Many voters will have already voted in *the same election* on November 5, 2024.)
4. Establishing who will be eligible to vote. (e.g. those who lived in the district on or before November 5, 2024, the date of the second election, or other.)
5. The recount process to be used, if needed.
6. Whether a run-off election is legally permissible and if write-in candidates can be legally excluded from a ballot for election of a House member.
7. Whether prior votes are officially voided and whether individuals who voted can be counted as having “voted in the prior presidential year.”

c. Ordering a revote for some or all eligible voters unfairly advantages participants in the second election and will disenfranchise voters in the first.

Key to the historical conduct of elections is the uniformity in time and conditions under which all voters cast their vote. Candidates, parties, and voters engage in verbose debate, dialogue, and discourse, up until the polls close, or sooner depending on when a voter decides to cast their ballot. We have soundly rejected the notion a ballot cast prior to the close of the polls may be rescinded and revoted, regardless of circumstances. Those who vote early do so with the risk that new information may come to light that dissuades their thinking and opinions.

Creating a de novo election by operation of this appeal would not only disenfranchise the voters in the first election but would grant unique and outsized power to the voters who are allowed and decide to participate in the revote.

Checklists establish the presumption of voter eligibility but do not comprise the total list of eligible voters. Any eligible voter may present themselves at the polls on election day and may be permitted to vote pursuant to 17 VSA § 2563. The actual number of eligible voters in the Bennington-1 and Bennington-5 House Districts is unknown, though the number of registered voters is (or can be) known. There may be voters who participated on November 5, 2024, who are no longer living or no longer residents of the district. Likewise, new voters may have become eligible since November 5th by virtue of age, residence, or citizenship. A revote under any set of conditions is bound to unfairly advantages participants in the second election, will void the votes of participants in the first, and can not be conducted to fairly include all eligible voters.

d. If only the 55 newly added voters to the Bennington-1 District (or the 42 that voted) are permitted a chance to revote, the result will still be inaccurate – and problematic.

To add any number of additional votes to the election total without also addressing the 14

registered voters (or the 8 that already voted) who are now reassigned to the Bennington-5 District and thus ineligible to participate in the election of Jonathan Cooper or Bruce Busa would create an inaccurate total. Further, an outcome derived from two separate elections is contrary to the principles of fair elections that have been overwhelmingly championed in a bipartisan manner for centuries. Key to any fair election is that all voters cast their ballots during the same agreed-upon timeframe. This would be a major departure from this long held and universally accepted practice.

e. Ordering a revote for some or all eligible voters undermines the necessary finality that elections require to preserve the continued operation of government.

Elections need to be final to enable the government to operate effectively. State and federal election procedures include deadlines for key activities along with timetables for appeals - all carefully aligned to enable transfer of power and the continuation of government operations. If the House were to order a revote at this stage of the post-election process, it would set precedent that may call into question the finality of all House elections going forward. If House races aren't final as to their result when they are certified by a duly authorized official (be it clerk or Judge), then the House may suffer impairment in its inaugural actions – until finality is determined.

The fact pattern here may be distinguished from a scenario where checklist irregularities are discovered before an election is certified. The General Assembly has the power to establish a process by which it could hear such complaints and order such action as may be necessary in a timeframe that resembles the current power of the Superior Court under 17 VSA § 2603.

IV. Petitioners' concerns are best addressed by redrawing the Bennington-1 and Bennington-5 House Districts to reflect the checklists prepared for and approved by the Pownal Board of Civil Authority and *understood to be in effect by the voters of Pownal in the past four consecutive elections (the 2022 and 2024 primary and general elections).*

The facts show that during the primary and general elections of 2022 and 2024, a number of voters in the Bennington-1 and Bennington-5 House Districts, residing in the Town of Pownal, cast ballots with named candidates who were later determined to be incorrectly listed on their ballot. There is no dispute that checklists used to determine which candidates may be elected in all four elections for both districts were inconsistent with the reapportionment plan signed into law in 2022 (2021, Act 89). The facts also show that these checklists went undisputed, despite multiple statutorily mandated notice opportunities for review and revision.

Article 8 of Vermont's Constitution grants "all voters, having a sufficient, evident, common interest with, and attachment to the community, . . . a right to elect officers . . . agreeably to the regulations made in this constitution." Further, Article 20 provides that "the people have a right to . . .

instruct their Representatives—and to apply to the Legislature for redress of grievances, by address, petition or remonstrance.”

Because the injury in this case is one where citizens have been and would continue to be deprived of their Constitutional right to elect and instruct their Representatives under Articles 8 and 20 of the Vermont Constitution, the House should find that it is proper and necessary to reapportion the Bennington-1 and Bennington-5 House Districts to protect the Constitutional rights of its citizens.

Section 73 of the Vermont Constitution directs the General Assembly to “establish representative districts within and including all of the state” and to revise these boundaries “following the taking of each decennial census . . . *and at such other times as the General Assembly finds necessary* . . . in order to maintain equality of representation among the respective districts as nearly as is practicable.” The plain language of the Constitution expressly permits the Legislature, upon a finding of necessity, to redraw the line between the Bennington-1 and Bennington-5 district.

Redrawing the boundaries of the districts will also have the effect of *improving* the current deviations of each impacted District. Currently, Bennington-1 is at a +2.94% deviation (over by 126 voters) and would stand to lose roughly 50 voters. Conversely, Bennington-5 stands at -5.02% deviation (under by 430 voters) and would benefit from gaining roughly 50 voters.

Further, should the House decline to take such action, it may leave open an opportunity for an aggrieved citizen to pursue relief from the Supreme Court to compel such action Vt. Const. ch. 2, § 73 (“If the General Assembly fails to revise the legislative districts as required in this section, the Supreme Court in appropriate legal proceedings brought for that purpose may order reapportionment of the districts.”)

Any remedy provided in this case must address both the prospective and retrospective injury to the voters of Bennington-1 and Bennington-5 Districts. The only remedy that can provide this relief is redrawing the lines to reflect the administration of the four elections and make it retroactive in its application. *This is consistent with how the local community has understood the boundaries to be, as evidenced by the lack of challenges in the last four elections.*

CONCLUSION

Jonathan Cooper and Bruce Busa competed for votes from the same checklist, which was publicly created, publicly posted, and available for correction and redress up until Election Day. No person raised objection to the checklist prior to the close of the polls. Neither candidate has raised any issue with the conduct of the election. The only complaint is related to the assignment of voters to the checklists and can be addressed by redrawing the House district boundaries to affirm (1) the votes in this election and prior elections cast for Representatives of Bennington-1 and Bennington-5 House

Districts and the (2) the understanding of the voters and their elected officials since the 2021 redistricting plan took effect. Therefore, the House should deem Jonathan Cooper as the duly elected State Representative of Bennington-1 and propose amendments to 17 V.S.A. Chapter 34 that would revise the boundary between the Bennington-1 and Bennington-5 House Districts to reflect the checklists used by the Town of Pownal since 2022.