STATE OF CONNECTICUT

STATE ELECTIONS ENFORCEMENT COMMISSION

Complaint of John Bromer, Easton, et al. File No. 2013-155-157, 159-161, 181

FINDINGS AND CONCLUSIONS

The Complainants filed these complaints pursuant to General Statutes § 9-7b. In summary, as the allegations relate to the Commission's jurisdiction, the Complainants allege various procedural irregularities concerning the November 5, 2013 municipal election in the Town of Easton. Such irregularities were the subject of a court action pursuant to General Statutes § 9-328. This litigation resulted in a court ordered recount, which confirmed the outcome of the election.

After an investigation of the complaint, the Commission makes the following findings and conclusions:

1. In summary, insofar as the allegations are within the jurisdiction of the Commission, the matters were largely addressed by the resolution of the court action filed pursuant to § 9-328, which resulted in a court ordered recount. See *Buckley v. Town of Easton*, CV-13-6039323-S, 2013 WL 6912822 (Conn. Super. Nov. 25, 2013).

2. While to total number of votes differed slightly, the recount served to confirm the outcome of the election. The relevant court memorandum of decision and order to recount as well as the order confirming the outcome of the recount are attached hereto as Attachment A and Attachment B respectively.

3. The Commission further notes that its investigation has independently confirmed that there is no evidence indicating any impropriety actually occurred regarding access to the voting tabulator or ballots and that, in fact, no one other than the appropriate individuals had access to the area where the voting tabulator or ballots were located.

4. The Respondent has been fully cooperative with the investigation.

5. General Statutes § 9-3 provides:

> The Secretary of the State, by virtue of the office, shall be the Commissioner of Elections of the state, with such powers and duties relating to the conduct of elections as are prescribed by law and, unless otherwise provided by state statute, the secretary's regulations, declaratory rulings, instructions and

> opinions, if in written form, shall be presumed as correctly interpreting and effectuating the administration of elections and primaries under this title, except for chapter 155, provided nothing in this section shall be construed to alter the right of appeal provided under the provisions of chapter 54.

6. According to page F-3 of the Moderator's Handbook for Elections and Primaries (moderator's handbook), "[w]hen hand counting a ballot, voter intent controls and two election officials from opposing parties of factions must agree on the voter's intent." See *Buckley*, 2013 WL 6912822, at *7.

7. Nevertheless, there was general good faith confusion regarding the above obligation for factional representation. Specifically, at that time, it was generally unclear how to recognize a "faction" as opposed to merely multiple write-in candidates. It also remains unclear how to identify any appropriate "election official" from such a faction (e.g., from a list submitted by such faction).

8. With no list of recognize representatives of the faction available, the Town of Easton's election officials appear to have made a good faith effort to permit an individual they believed to be associated with such candidates to observe the counting and examination of the ballots.

9. In light of General Statutes § 9-3, the Commission defers to the Secretary of the State for any further clarification through written instruction material regarding the above issues and in light of the associated litigation.

ORDER

The following Order is recommended on the basis of the aforementioned findings:

That no further action be taken.

Adopted this 16th day of July, 2014 at Hartford, Connecticut.

Anthony J. Castagno, Chairman
By Order of the Commission

Attachment A

DOCKET NO. CV-13-6039323-S	:	SUPERIOR COURT
VALERIE J. BUCKLEY	:	JUDICIAL DISTRICT OF FAIRFIELD
V.	:	AT BRIDGEPORT
TOWN OF EASTON, ET AL.	:	NOVEMBER 25, 2013

MEMORANDUM OF DECISION

I

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This is a case of first impression. The primary issue, which has yet to be addressed by any Connecticut court, involves the use of certain voting tabulator machines, which are now required to be used in all elections held in any municipality in the State. Before the court is a challenge to the November 5, 2013 municipal election results from the election held in the Town of Easton (town). The plaintiff, Valerie Buckley, lost the election for first selectman by fifty votes according to the certified election results. The plaintiff's complaint[1] alleges various discrepancies, erroneous

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[1] The operative complaint is the second amended complaint filed on November 19, 2013. The plaintiff filed her original complaint on November 13, 2013. That complaint named as defendants the town of Easton and the following town officials: the election moderator, Cheryl Everett, the democratic registrar of voters, Ronald Kowalski, and the republican registrar of voters, Krista Kot. The complaint also named as defendants the plaintiff's opponent for the office of first selectman, Adam Dunsby, and the republican candidate for the office of selectman, Scott Centrella. Thereafter, on November 14, 2013, pursuant to § 9-328, the court, *Bellis, J.*, issued an order to show cause to the defendants which also directed the plaintiff to provide notice to, inter alia, the

rulings by election officials, and mistakes in the counting of ballots. Her primary contention, however, is that many, if not all, of the 246 ballots identified by the tabulator as "blank" contained write-in votes that should have been but were not examined for voter intent because the voting tabulator used by the town separated those ballots into a bin that was separate from other ballots that were examined for voter intent. Pursuant to General Statutes § 9-328,[2] the plaintiff requests

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Secretary of the State and the State Elections Enforcement Commission. On November 15, 2013, the court, *Bellis J.*, ordered that the complaint be amended to state the interest of the town and also to join the town clerk as a party. The plaintiff complied with both orders, filing her first amended complaint on November 15, 2013. In response to the defendants' request to revise, the plaintiff filed a second amended complaint on November 19, 2013, which made clarifications as to the identity of the town clerk and the fact that Dunsby and Centrella were sued in their official capacities.. Except where necessary, the court refers to all the defendants collectively as "the defendants."

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Section 9-328 provides in relevant part: "Any elector or candidate claiming to have been aggrieved by any ruling of any election official in connection with an election for any municipal office or a primary for justice of the peace, or any elector or candidate claiming that there has been a mistake in the count of votes cast for any such office at such election . . . may bring a complaint to any judge of the Superior Court for relief therefrom. . . . If such complaint is made subsequent to such election . . . it shall be brought not later than fourteen days after such election . . . to any judge of the Superior Court, in which [she] shall set out the claimed errors of the election official [or] the claimed errors in the count . . . . Such judge shall forthwith order a hearing to be had upon such complaint, upon a day not more than five nor less than three days from the making of such order, and shall cause notice of not less than three nor more than five days to be given to any candidate or candidates whose election or nomination may be affected by the decision upon such hearing, to such election official, the Secretary of the State, the State Elections Enforcement Commission and to any other party or parties whom such judge deems proper parties thereto, of the time and place for the hearing upon such complaint. Such judge shall, on the day fixed for such hearing and without unnecessary delay, proceed to hear the parties. If sufficient reason is shown, [she] may order any voting tabulators to be unlocked or any ballot boxes to be opened and a recount of the votes cast, including absentee ballots, to be made. Such judge shall thereupon, if [she] finds any error in the rulings of the election official or any mistake in the count of the votes,

that the court order a recanvass, or, in the alternative, a new election.

The court held a bench trial beginning on November 18, 2013. The parties filed briefs on November 21, 2013. At the trial, the court heard testimony from Cheryl Everett, plaintiff's expert Michael DiMassa, Valerie Buckley, Ronald Kowalski, and from the Office of the Secretary of State, Director of Elections Peggy Reeves and Staff Attorney Ted Bromley.

From the testimony and evidence presented at trial, the court finds the following facts. Prior to the election, the plaintiff and three others unsuccessfully attempted to gain access to the ballot as candidates under a "reserved party designation." See *Buckley* v. *Secretary of State*, Superior Court, judicial district of Fairfield, Docket No. CV-13-6038400-S (October 7, 2013, *Bellis, J.*). In that case, which was also brought pursuant to § 9-328, this court concluded, following the credible testimony of Bromley, that General Statutes § 9-3 grants the Secretary of the State, in her capacity as Commissioner of Elections, the authority to interpret the strictures of

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certify the result of [her] finding or decision to the Secretary of the State before the tenth day succeeding the conclusion of the hearing. Such judge may order a new election or primary or a change in the existing election schedule. Such certificate of such judge of [her] finding or decision shall be final and conclusive upon all questions relating to errors in the ruling of such election officials, to the correctness of such count, and, for the purposes of this section only, such claimed violations, and shall operate to correct the returns of the moderators or presiding officers, so as to conform to such finding or decision, except that this section shall not affect the right of appeal to the Supreme Court and it shall not prevent such judge from reserving such questions of law for the advice of the Supreme Court as provided in section 9-325. Such judge may, if necessary, issue [her] writ of mandamus, requiring the adverse party and those under [that party] to deliver to the complainant the appurtenances of such office, and shall cause his finding and decree to be entered on the records of the Superior Court in the proper judicial district."

General Statutes § 9-453o (b)[3] as mandatory and that it was appropriate for the court to defer to that interpretation of § 9-453o (b). Id. Following that ruling, and because she was unable to appear as a named candidate on the ballot, the plaintiff launched a write-in campaign for the office of first selectman. The plaintiff was the only registered write-in candidate for that office.

As required of every municipality in Connecticut; see General Statutes § 9-238; the town used an electronic tabulator machine to count the votes cast in the election. The statutory and regulatory scheme is strict as to the specific manufacturing requirements for the tabulators. The memory cards for the tabulators are sent to the towns by "LHS", and the machines are serviced and pre-tested pursuant to the Secretary of State's written requirements. To vote using a tabulator machine, a voter first must first complete his or her paper ballot by hand, using a black or blue pen or pencil. Official ballots and absentee ballots are the same, with certain exceptions that are discussed below. Both ballots consist of a series of columns and rows. The rows list candidates according to their political party. The final row on the ballot is designated "WRITE-IN VOTES".

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3 Section 9-453o (b) provides the procedures and requirements through which an individual may have his or her name placed on a ballot under a "reserved party designation." A reserved party designation is a creature of statute, and is designed to allow a new political party to appear on a ballot under a specified and reserved party name. The name is reserved because the new party is not considered a "minor party" or a "major party," both of which are defined by statute, until a candidate for the reserved party has won a certain percentage of the vote in a given election. When that percentage is obtained, the reserved party becomes a minor or major party as the case may be, at which point in time it is subject to comprehensive statutory provisions. Valerie Buckley was not permitted to appear on the ballot under her chosen reserved party designation due to her not complying with all of the strictures of § 9-453o (b), a statute the Secretary of the State interpreted to be absolutely mandatory.

The columns, in turn, correspond to the twelve races for the various municipal offices, beginning with the office of first selectman.

On the reverse side of the ballot are instructions directing voters to cast their votes by filling in the ovals that appear next to the name of the candidate of the voter's choosing. Specifically, section I instructs the voter as follows: "I. **TO MARK THIS BALLOT.** Completely fill in each appropriate oval as shown." A picture of a filled in oval follows. Section I then directs the voter to "[u]se a black or blue pen or pencil." Finally, section I instructs voters to "[v]ote for candidates individually. Do not mark the party names in any way." Section II provides in part: "**TO VOTE FOR CANDIDATES.** In most cases, only one mark or write-in vote is allowable in each column (that is, for each office). **A. TO VOTE FOR CANDIDATES ON THE BALLOT.** Completely fill in the oval above the name of each candidate for whom you wish to vote." Pertaining to write in candidates, which is covered in section II B, the instructions on the ballot state: "**TO WRITE IN A VOTE** for a registered write-in candidate for a particular office, use the write-in row spaces provided for this purpose. The space you use for writing in a person's name as a candidate must be directly below the column headed with the title of the office to which you wish this person elected. It will have the same number as shown in the column-heading for that office. See example in III below." Immediately following this sentence, the official ballots, but not the absentee ballots, contain the statement: "Be sure to also completely fill in the appropriate oval."[4]

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[4] In addition, official and absentee ballots differ in the following ways. First, the ballots

Next, section III of the instructions on both ballots the official and absentee contains a visual example, which shows, inter alia, a write-in row with three boxes. In the first box, the words "WRITE-IN VOTES" appear. In the second box, "Name of Candidate" appears in a cursive font, with a filled-in oval above it. The third box contains a box with an oval that is not filled in, and with no writing.

After completing a ballot, the voter must deposit the ballot into the electronic tabulator. This is done by inserting the ballot into a slot, at which point the tabulator attempts to detect which ovals are filled in. The tabulator records the vote for each race, and then deposits the ballot into one of two bins. If any ovals designated as write-in ovals are filled in for any of the twelve races, the tabulator is programmed to deposit the ballot into the "write-in" bin so that the ballot may be examined manually following the close of the polls. The tabulators are not programmed to recognize the presence or absence of handwriting. The tabulator machine is programmed to deposit ballots on which no write-in ovals are filled in, and at least one oval corresponding to a named candidate is filled in, into the "regular bin."[5] Because the machine is programmed only to detect

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appear to be different colors. Second, absentee ballots contained additional instructions under the heading "**FOR ABSENTEE BALLOTS ONLY**," which explain how to return the ballot via the mail. Third, absentee ballots contain a second set of the instructions in Spanish.

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It appears that the tabulator would direct ballots into the regular bin when an oval designated to a write-in candidate was only partially filled in as the tabulator machine does not recognize any marking that does not completely and sufficiently darken the oval. The tabulator will also direct write-in votes into the regular bin where the write-in name is correctly filled in, but the corresponding oval was not filled in.

whether ovals have been filled in and do not detect the presence or absence of handwriting, a vote on which the voter had written a candidate's name, but failed to darken the corresponding bubble, would be marked as "blank" by the tabulator with respect to the particular race, and would be deposited into the regular bin UNLESS the voter happened to fill in the oval for another write-in race.[6] In the present case, 246 ballots, approximately 10.5% of the total number of ballots, were counted as "blank" with respect to the race for first selectman. Thus, according to the tabulator, "blank" ballots are not only ballots which are truly blank, but may include ballots where voters intent to vote for a write-in candidate was clearly evidenced by the voters writing in the name of the candidate but where the corresponding oval was not sufficiently darkened.

In addition to the two bins inside the tabulator machine, the polling place contained a third bin, external to the machine, called an "auxiliary bin." Ballots that were either "abandoned"[7] by voters, or which were rejected by the tabulator machine and not corrected by a voter prior to his

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[6] Thus, if a voter had written in a candidate's name but failed to darken the corresponding bubble, the ballot would only be diverted into the write-in the ballot for hand counting if the voter happened to darken a write-in bubble somewhere else on the ballot.

[7] An abandoned ballot is one that is discarded by the voter before it is completed and inserted into the tabulator. To ensure that duplicate ballots are not produced, the moderator's handbook directs moderators to refuse to issue a second ballot to any voter who has not returned the first ballot he or she received and requires the moderator's report to account for all abandoned or "spoiled" ballots.

or her departure, were placed into the auxiliary bin to be examined later.[8] For example, if no ovals were darkened anywhere on the ballot but a write-in name was written in, the ballot should be rejected by the tabulator. If not corrected by the voter, it should go in the auxiliary bin where it would be hand counted to determine voter intent. The same ballot, however, if it had an oval darkened for even one named candidate, would be diverted by the tabulator machine into the regular bin and the write in vote would not be counted.

Everett is the moderator for the town and has moderated at least six elections in her tenure in that role.[9] At 8:00 p.m. on the night of the election, Everett saw to it that the polls were closed. 2,235 registered voters went to the polling place on election day and cast a ballot by inserting it into the machine tabulator, 119 voters voted by absentee ballot, and 8 persons registered on election day and completed their ballots in the registrar's office. Following the closing of the polls, the ballots from the auxiliary bin were fed into the tabulator machine; any ballots that were not accepted by

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[8] If a ballot contained no filled-in ovals for any of the twelve races, or contained a greater number of filled in ovals in a race than the number of candidates for which a voter may vote, the machine should reject the ballot, giving the voter an opportunity to correct the mistake. If, however, the ballot contained too few ovals darkened, or no ovals darkened, for a particular race, the ballot would be accepted, the corresponding races marked "blank," and the ballot deposited in the regular bin, even if a write-in candidate's name had been hand written into the space provided. Voters in Connecticut do enjoy the right to submit a ballot that is blank for one or all of the races of a given election.

[9] The court found Everett's testimony to be highly credible and that she in all times acted in good faith during the night of the election. The same is true of all individuals who presented testimony before the court, including DiMassa, Kowalski, Valerie Buckley, Reeves, and Bromley.

the machine were set aside to be hand counted. If the ballots were accepted by the tabulator, the tabulator was programmed to divert them into the regular bin or write-in bin in accordance with the machine's programming. The machine was then locked and a tabulator tape, which is an unofficial report of the votes counted by the tabulator, was produced by the machine. For first selectmen, the tabulator tape reported a count of 1055 votes for Adam Dunsby, 1038 write-in votes, and 246 "blank" votes for that office. Everett directed that a copy of the tabulator tape be posted on a wall in the canvassing room so as to be visible to the public.[10]

Everett also directed, in accordance with law, that the write-in bin be opened and the votes therein counted by hand in order to determine for whom the votes were cast.[11] As the number of write-in votes was significant and much higher than Everett had expected, with an equal stack of

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[10] The plaintiff argues that the moderator violated General Statutes § 9-309 by not posting the tabulator tape herself because, by doing so, she did not announce the election results herself. This argument misconstrues the requirements of the statute. Section 9-309 requires an announcement of the total number of write-in votes cast for each candidate, which cannot occur until after a hand-count of the write-in ballots is completed. In addition, the statute distinguishes between the results contained on the tabulator tape, and the results which are to be announced aloud by the moderator once the canvass is complete. Thus the statute contemplates that the official results are those that are announced aloud.

[11] The plaintiff claimed in the complaint that the first counting may be characterized as a "recount," which the statute refers to as a "recanvass," on the theory that the 1038 write in votes on the tabulator tape is within 20 votes of the 1055 votes for Dunsby, and that General Statutes § 9-311a entitled the plaintiff to a recount. This claim has no merit, however, because initial numbers on the tabulator tape do not represent an official count of votes. Instead, the official count is not completed until *after* the write-in votes have been physically examined to determine voter intent.

regular votes and write-in votes, she then put together a second team of counters. Although the tabulator tape showed only a 17 vote differential between Dunsby and written-in names, and the paper ballots looked evenly split, the plaintiff was not afforded a representative counter even when Everett formed the second team of counters after the polls were closed. Thus, there were two teams of counters, consisting of one democrat and one republican each. Each write-in ballot was examined by two counters. If both counters agreed as to the intent of the voter, the vote would be counted accordingly. There was no evidence of any disputes between the counters regarding any write-in ballot, and as such, Everett was not called upon to rule on any such disputes that night. Everett agreed that since the plaintiff did not have a representative as a counter, there was no way for the plaintiff to challenge, for example, a write-in vote that was rejected. As discussed below, after the hand count, the plaintiff received 944 of the 1038 write-in votes counted by the tabulator.

In accordance with her understanding of voter intent, Everett directed the counters to count a vote for Valerie Buckley even if the corresponding oval was not filled in, as long as the writing could be interpreted to indicate a vote for the plaintiff. Although Everett could not recall precisely how many times this occurred, such a vote was tabulated in favor of the plaintiff on at least one occasion. This same procedure was followed for all other ballots that were hand counted.

The hand counted write-in ballots totaled 944 votes for the plaintiff. Everett attributed this reduction to the fact that a portion of the 1038 votes that were counted by the tabulator as write-ins in the first selectman race did not evidence an intent to vote for the plaintiff. It is not clear from the record whether any of the 94 write-in ballots that were not counted for the plaintiff contained

writing that was ambiguous, or whether any of these ballots had the ovals filled in but no write-in name indicated at all, and without a representative counter, the plaintiff could not post a challenge.

At first, Everett mistakenly certified the total vote for the plaintiff as 944. The next day, after adding in the absentee and same day registration ballots, Everett certified that Valerie Buckley received a total of 1007 votes. Dunsby's final total was certified by Everett to be 1057, leaving a 50 vote spread.

At some point during the canvass, some of those present at the counting became animated and requested that the regular bin be opened to examine the 246 "blank" votes. Ultimately, Kowalski contacted the Secretary of the State's office and was advised by Reeves that under no circumstances could the regular bin be opened, which he reported to Everett. The bin was not opened and no examination of the "blank ballots" has been made to date.

In addition to her phone call with Kowalski, on the night of November 5, 2013, Reeves received a call from Kot. On the morning of November 6, 2013, Reeves again received calls from Kowalski and Kot. Reeves indicated that it was the Secretary of the State's position that the blank ballots in the regular bin could not be looked at or hand-counted prior to transferring the ballots into the ballot transfer case, and that once transferred, the regular bin could not be opened absent a recanvass. Reeves also testified that it was the position of the Secretary of the State that when hand counting ballots, a write-in vote could not be counted without the corresponding darkened oval, except on a recanvass, and that this was because a recanvass calls for a higher standard. Reeves testified that the use of the tabulator is to preserve the integrity and security of the vote and

not for convenience or efficiency.

Bromley testified to the Secretary of State's position that write-in votes should not count if the corresponding oval has not been darkened for those ballots directed by the tabulator machine into the regular bin. He also testified that it was appropriate to count any write-in vote with an attendant filled-in oval as long as the ballot was properly in front of a manual hand-counter, regardless of whether the ballot was a regular ballot or absentee ballot. Bromley testified that while it is appropriate to quickly review an absentee ballot prior to scanning it in the machine, and set aside any ballots with problems to be hand counted, it was inconsistent with the regulations for a moderator to review the ballots in the regular bin to confirm that they were properly sorted by the tabulator prior to locking them in the ballot transfer case.

The following additional facts are relevant to a resolution of the present dispute. The plaintiff presented compelling expert testimony from DiMassa, the assistant Democratic registrar of voters for the town of West Haven and the head moderator for West Haven's November 5, 2013 election. West Haven is a larger municipality than Easton, containing ten voting precincts, whereas Easton contains one. Consequently, there were ten moderators that reported to DiMassa, one for each voting precinct. Given the strong write-in candidate there and DiMassa's concerns about the tabulators, DiMassa, the West Haven town registrars, and his moderators conducted a series of meetings prior to the election to develop a plan for addressing any issues that might arise. In addition, an email was sent to Bromley inquiring whether write-in votes that did not include a

darkened oval on an absentee ballot should be counted.[12] Bromley responded in the affirmative.

The moderator of the absentee ballots in West Haven had reported to DiMassa that when counting the absentee ballots, a number of ballots had the name filled in without the corresponding oval filled in. Accordingly, at the close of the polls DiMassa instructed his moderators to flip through the ballots in the regular bin, if the bin hadn't already been sealed, to ensure that there were no write-in ballots in that bin. After learning from his moderators that there were a significant number of write-in votes in the regular bins and registered-candidate votes in the write-in bins, as well as over-votes, determining that the 2-3% of "blank" ballots for the highest office in West Haven as registered by the tabulator was a significant discrepancy, and concerned with the bubble issue for the write in candidates on the absentee ballot, DiMassa ordered a recanvass as he could not, as head moderator, otherwise guarantee the accuracy of his totals. The recount altered the vote totals by 20-30 votes in either direction in every district, and cut the spread between the candidates, which had been approximately 168 votes, in half, bringing it to approximately 80 votes.

DiMassa testified that although the machines were properly serviced, in his opinion, the "arm" of the tabulator malfunctioned and misdirected ballots. The court accepts this testimony. In fact, marked as full exhibits at the hearing were handwritten letters from seven of his moderators, mentioning, inter alia, arm malfunction, misdirected ballots, and regular ballots found

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12 The email stated: "Dear Ted: If there is a hand counted AB [absentee] ballot with the write-in candidate's name written in but the oval is not colored in, would the vote count?" Bromley responded: "Yes."

in the write-in bin. He testified further that the primary duty of a moderator is to ensure the accuracy of the election results, and that it is the moderator's decision whether to order a re-canvass.

II

LEGAL STANDARD AND APPLICABLE LAW

Section 9-328, the statute under which the plaintiff seeks relief, is best discussed in three parts: what is required of the party bringing the action; what is required of the court when it receives the action; and what actions the court may take after hearing the matter.

First, § 9-328 sets forth the following requirements for bringing an action: "Any elector or candidate claiming to have been aggrieved by any ruling of any election official in connection with an election for any municipal office . . . or any elector or candidate claiming that there has been a mistake in the count of votes cast for any such office at such election . . . may bring a complaint to any judge of the Superior Court for relief therefrom. . . ." To be aggrieved by a ruling of an election official, the alleged conduct "must involve some act or conduct by the official that (1) decides a question presented to the official, or (2) interprets some statute, regulation or other authoritative legal requirement, applicable to the election process." *Bortner* v. *Woodbridge*, 250 Conn. 241, 268, 736 A.2d 104 (1999). Our Supreme Court, in *Caruso* v. *Bridgeport*, 285 Conn. 618, 647, 941 A.2d 266 (2008) (applying the test to § 9-329a), stated that "the test we adopted in

Bortner . . . is broad enough to include conduct that comes within the scope of a mandatory statute governing the election process, even if the election official has not issued a ruling in any formal sense. When an election statute mandates certain procedures, and the election official has failed to apply or to follow those procedures, such conduct implicitly constitutes an incorrect interpretation of the requirements of the statute and, therefore, is a ruling." (Citation omitted.) Our Supreme Court has stated that "[e]rroneous rulings by election officials do not . . . constitute the only predicate for a judicial order for a new election [or recount] under § 9-328. The other predicate is that there was a 'mistake in the count of the votes.'" *Bortner* v. *Woodbridge*, 250 Conn. 241, 271, 736 A.2d 104 (1999).

Once the complaint is filed, § 9-328 requires the following of the court: "Such judge shall forthwith order a hearing to be had upon such complaint, upon a day not more than five nor less than three days from the making of such order, and shall cause notice of not less than three nor more than five days to be given to any candidate or candidates whose election or nomination may be affected by the decision upon such hearing, to such election official, the Secretary of the State, the State Elections Enforcement Commission and to any other party or parties whom such judge deems proper parties thereto, of the time and place for the hearing upon such complaint. Such judge shall, on the day fixed for such hearing and without unnecessary delay, proceed to hear the parties."

§ 9-328 states that after the hearing the court may take the following actions: "If sufficient reason is shown, he may order any voting tabulators to be unlocked or any ballot boxes to be

opened and a recount of the votes cast, including absentee ballots, to be made. Such judge shall thereupon, if he finds any error in the rulings of the election official or any mistake in the count of the votes, certify the result of his finding or decision to the Secretary of the State before the tenth day succeeding the conclusion of the hearing. Such judge may order a new election or primary or a change in the existing election schedule. Such certificate of such judge of his finding or decision shall be final and conclusive upon all questions relating to errors in the ruling of such election officials, to the correctness of such count, and, for the purposes of this section only, such claimed violations, and shall operate to correct the returns of the moderators or presiding officers, so as to conform to such finding or decision, except that this section shall not affect the right of appeal to the Supreme Court and it shall not prevent such judge from reserving such questions of law for the advice of the Supreme Court as provided in section 9-325. Such judge may, if necessary, issue his writ of mandamus, requiring the adverse party and those under him to deliver to the complainant the appurtenances of such office, and shall cause his finding and decree to be entered on the records of the Superior Court in the proper judicial district."

With respect to "sufficient reason" to order a new election, our Supreme Court has stated the following: "[I]n order for a court to overturn the results of an election and order a new election pursuant to § 9-328, the court must be persuaded that: (1) there were substantial violations of the requirements of the statute . . . and (2) as a result of those violations, the reliability of the result of the election is seriously in doubt." *Bortner v. Woodbridge*, supra, 250 Conn. 258. But where only

a recount is sought, rather than a new election, the standard is less clear. Nevertheless, at minimum, there must appear to be a reasonable likelihood that a recount will change the result of the election. See 29 C.J.S. Elections § 488, p. 435 (2005). In any event, it is appropriate for the court to either consider a series of erroneous rulings, or to focus on a single erroneous ruling, as the case may be. *Caruso* v. *Bridgeport*, 285 Conn. 652. The appropriate inquiry does not entail an abstract calculation of the number or seriousness of each individual ruling or error but, rather, whether the plaintiff can establish causation between one or many injuries and an uncertain election result. See id. Our Supreme Court has warned, however that courts are not bound to "tolerate the wholesale flouting of the election laws by elections officials or a systematic failure of the election process." (internal quotation marks omitted). Id., 653.

III

LAW AND ANALYSIS

A

Denial of Representation During Hand Counting of Ballots

The plaintiff claims that, as a registered write-in candidate, she was improperly denied the right to representation in counting votes. According to page F-3 of the Moderator's Handbook for Elections and Primaries (moderator's handbook), "[w]hen hand counting a ballot, voter intent controls and two election officials from opposing parties or factions must agree on the voter's

intent." Under the plaintiff's interpretation of that provision, she should have been afforded a representative because she belongs to an opposing "faction," and Everett erred in assigning one republican and one democrat to perform any manual counting of votes, rather than one republican and one individual representing the plaintiff's "faction."

As this court recognized in *Buckley* v. *Secretary of State*, supra, Superior Court, Docket No. CV-13-6038400-S, § 9-3 provides: "The Secretary of the State, by virtue of the office, shall be the Commissioner of Elections of the state, with such powers and duties relating to the conduct of elections as are prescribed by law and, unless otherwise provided by state statute, the secretary's regulations, declaratory rulings, instructions and opinions, if in written form, shall be presumed as correctly interpreting and effectuating the administration of elections . . . ." The moderator's handbook for example, would be considered an instruction in written form promulgated by the Secretary of State.

The question, then, is whether the plaintiff, a registered Republican running against a Republican as a registered write in candidate, should have been afforded the opportunity to be represented in the counting process by someone other than a democrat or a republican. It was undisputed that the plaintiff, through the court, had previously attempted, unsuccessfully, to reserve the Easton Coalition as a reserved party designation. Black's Law Dictionary (9th Ed. 2009) defines faction as: "[a] number of citizens, whether a majority or a minority, who are united and motivated by a common impulse or interest that is adverse to the rights of others or to the

permanent or aggregate interests of the community." The plaintiff and her supporters would fit this definition as their interests are adverse to those Republicans supporting Dunsby; that is, she and her supporters can be considered a faction within the Republican party. Although the provision in the moderator's handbook can be construed as permitting the assignment of counters from *any* two opposing parties, notwithstanding the parties or factions running in any particular election, a better reading of the handbook would afford representation for a candidate who is not the major party nominee when hand counting ballots, would be consistent with the spirit and the intent of handbook, and would avoid an affiliation imbalance among those election officials discerning voter intent on ballots. In the present case, the plaintiff was not given representation even when a second team of hand counters was formed after the polls closed, when Everett saw the even stacks of ballots and realized the strength of the write in votes for the plaintiff. The court is also persuaded by the only expert testimony offered on this issue, that of DiMassa, who testified that the plaintiff should have been given representation so that she would be in a position to challenge any ballots counted by hand. Accordingly, the court finds that the Republican Registrar of Voters erred in ruling that the plaintiff could not have a representative present for the hand counting of ballots.

B

Unauthorized Individuals Near Canvass Tables

The plaintiff further claims that Dunsby improperly entered an unauthorized area during the canvass. General Statutes § 9-308 provides: "[t]he room in which][the] canvass is made shall

be clearly lighted and such canvass shall be made in plain view of the public. No person or persons, during the canvass, shall close or cause to be closed the main entrance to the room in which such canvass is conducted in such manner as to prevent ingress or egress thereby, but, during such canvass, no person other than the election officials shall be permitted to be in the area where the voting tabulator is located." During the canvass, Everett caused a railing to be erected between the public and the election officials, such that the canvass would be visible to the public while simultaneously preventing unauthorized persons from gaining access to the ballots or voting tabulator. Everett herself was not involved in the counting and was at a different table than those on which the counting was proceeding.

At some point during the count, Dunsby crossed the railing and knelt at the table at which Everett was situated in order to ask her a question. The plaintiff and Derek Buckley also, at one point, crossed the railing to ask a question of Everett. At no point did any of the three come into proximity with the actual counting tables; however, Everett admitted that their crossing the railing was improper and that they were unauthorized individuals. DiMassa also offered his opinion that, although there was no doubt in his mind from his review of the evidence that no impropriety occurred, permitting any unauthorized individual into the counting area ran the risk of giving the appearance of impropriety, which could dilute voter confidence in the election results. The court need not determine whether this unauthorized access was technically a ruling of an election official, because the court finds that despite the error, there is no evidence suggesting that any impropriety

actually occurred, or that the election results were affected in any way. Nevertheless, this error does highlight the importance of affording the plaintiff an observer, so that she may have a better opportunity to determine whether an impropriety *might* have occurred.

C

Ballots Not Reviewed/Accounted For

The plaintiff further claims that, amongst the 127 absentee and same day registration ballots, there are 11 ballots that were counted by the tabulator machine as "blank" for the race for first selectman, and thus not reviewed for voter intent, and an additional 10 ballots that are entirely unaccounted for. Specifically, the plaintiff's claim is as follows: The canvass of the 127 absentee and same day registration ballots, as reported by the moderator's return, indicates that 66 votes went to the plaintiff and 37 votes went to Dunsby. Three ballots were rejected by the tabulator as uncountable, and were not counted. Eleven ballots were counted by the tabulator as blank and were not manually reviewed for voter intent. At the same time, the moderator's report states that a total of 124 absentee and same day registration votes were tabulated, either by hand or by machine, and 3 were rejected. The moderator's report does not specifically account for the 10 votes that are not included in the totals for Dunsby, the plaintiff, blanks, and rejected ballots. The defendant argues that these 10 votes represent hand-counted votes that contained no vote for first selectman and were thus "blank."

The following additional facts are relevant to the resolution of this issue. Following the close of the polls, the moderator directed, in accordance with the moderator's handbook and state regulations, that all absentee and same day registration ballots, constituting 127 in total, be fed into the tabulator machine, at which point they were either accepted by the machine and deposited into the regular bin, rejected, or diverted into the write-in bin. Once this process was completed, a hand-count was performed of all ballots that were diverted to the write-in bin, or which were rejected. During her testimony, Everett explained that she had examined the discrepancy several times and was still unsure of its origin, but believed that the 10 votes were votes for unregistered write-ins, or for fictitious characters, such as Mickey Mouse, of which there are typically several each election. The absence of an accounting for the 10 ballots constitutes a discrepancy — and therefore a mistake — in the vote count. Whether these votes represent votes for unregistered write-in candidates, or for fictitious characters, or hand-counted "blanks," the fact remains that they are not specifically accounted for in the return.[13] The plaintiff's contention with respect to the 11 ballots that were counted by the tabulator machine as "blank" is the same contention with respect to the 246 "Blank" votes tabulated by the machine and directed into the regular bin, and therefore the court will discuss those issues together.

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[13] Whether the moderator's return form contained a preset location to report a "blank" hand counted vote bears little weight. Indeed, the moderator added to the report a location to write in the number of same day registration ballots received.

D

Announcement of Election

The plaintiff further claims that Everett erred in allowing the first selectman at the time to announce the results of the election, rather than announcing them herself. See General Statutes § 9-309. As discussed above, Everett did not violate § 9-309.

E

Blank Votes

Finally, the court addresses the plaintiff's primary claim in this case — that under these circumstances, votes for write in candidates should be hand counted to determine voter intent, including ballots considered as "blank" by the tabulator. This issue involves a tension between two competing interests. On one hand, the state of Connecticut has an interest in ensuring that elections are uniform and efficient, and to preserve the integrity and security of the vote. It is for these reasons, at least according to the testimony in this case, that the legislature has chosen to require the use of voting tabulator machines, with minor exceptions. On the other hand, there is a competing interest in ensuring that elections adequately reflect the will of the voters. This interest is reflected in the longstanding principle that the intent of the voter controls the outcome of any election. It became apparent throughout the hearing that, despite the best efforts of very competent and dedicated election officials, the use of the tabulator machine to decide a close

election between a candidate running on a party ticket and a strong write-in candidate is problematic.

The plaintiff claims that the primary problem with the tabulator machine is that the tabulator only recognizes the presence or absence of filled in ovals, and does not recognize the presence or absence of handwriting. She contends that as a result, she will never know whether any of the 246 ballots that the machine classified as blank contained her name written in for first selectman and furthermore, the plaintiff finds a discrepancy in that approximately 10.5 percent of ballots cast did not include votes for Easton's highest office.

The defendants have a very different explanation for the presence of 246 "blank" ballots in the regular bin. First, the defendants point out that, demographically, Easton is 22 percent democrat, and a democratic voter who is voting for other offices may not vote for either Dunsby or the plaintiff because they are both republicans, even though the office of first selectman is Easton's highest municipal office. Regarding the hand counting of the 246 ballots that were directed into the regular bin, the defendants posit that neither Everett nor anyone else had the authority to open the regular bin to review or hand count any of the ballots contained therein.

In support of her position, the plaintiff primarily relies on *In re Election of U.S. Representative for Second Congressional District*, 231 Conn. 602, 653 A.2d 79 (1994).[14] Because that case is the most relevant Connecticut case on the issue, it will be set forth in detail. In *Second*

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[14] For convenience, this case will be referred to as "*Second Congressional District.*"

Congressional District, the initial canvass for United States Congressman for the Second Congressional District race was close enough to trigger a mandatory recanvass pursuant to General Statutes § 9-311a. The recanvass resulted in a four vote differential between the candidates, and a challenge was eventually brought to our Supreme Court. The primary issue involved the use of a mechanical voting device in Norwich pursuant to a pilot program. Id., 612-13. The device was similar to that used in the election at issue in this case, in that a voter was to insert a paper ballot into the machine after marking his or her selections, and the machine was to read and tabulate the votes inserted into it. Id., 613-15.

In *Second Congressional District*, the Republican candidate, Edward Munster, argued that "sufficient inaccuracies and irregularities occurred in the original count and recanvass to require the handcounting of all ballots." (Internal quotation marks omitted.) Id., 615. He cited to several such inaccuracies, including a discrepancy of ten votes between the number of votes registered by a particular machine on election day and the number of votes registered by that memory pack during the recanvass, a discrepancy between the number of absentee ballots registered by the machines on election day and during the recanvass, and a change in the overall count for the candidates between election day and the Recanvass. Id., 615-16. He attributed these inaccuracies to the unreliability of the machine counting used during that election. Id. His Democratic opponent, Sam Gejdenson, alleged similar problems that, according to him, resulted in a reduction of votes counted for both candidates. Id., 616. He, too, requested that "all of the ballots in

Norwich be recounted by election officials and not by the new counting devices, in order to ascertain for which candidates votes contained thereon are cast." (Internal quotation marks omitted.) Id., 616-17.

Our Supreme Court heard argument on the issue, and then ordered a manual recount of all of the Norwich ballots, including the absentee ballots. Id., 617. Pursuant to the Court's order, all ballots were manually counted, and seventy-three challenged ballots were set aside to be reviewed by the Court. Id., 619. The parties disputed the proper legal standard that the Court should employ in determining the disposition of the ballots. Id., 620. More specifically, the dispute involved how the court should interpret a voter's marks on a predrawn, incomplete arrow that was to be completed by the voter to indicate the candidate of his or her choice. Id. Munster argued that, in order for a ballot to be voted for a particular candidate, the voter must have drawn a line that touches both ends of the interrupted or blank portion of the arrow. Id. According to Munster, the Court's function is not to attempt to discern the voter's intent in making the marks that he or she made, based upon all of the available evidence disclosed by the ballot. Id. Instead, he argued that the Court should merely examine the ballot in order to determine whether the voter complied strictly with the instruction on the ballot. Id. Conversely, Gejdenson argued that the Court's function is to determine, to the extent reasonably possible, the intent of the voter in making the marks that he or she made on the ballot, in light of all of the available evidence disclosed by the ballot. Id.

The Court in *Second Congressional District* agreed that their role was to determine the intent of the voter on each ballot, as expressed by the voter's mark, rather than merely determine whether the voter strictly complied with all of the technical rules for voting for a particular candidate. The Court articulated three reasons for this decision, which, based on their applicability to the present case, bear repeating at length. "First, the process of voting, whether by mechanical machine of the kind traditionally used in this state, by our traditional absentee ballot, or by paper ballot to be electronically read, is essentially the process by which a voter expresses his or her intent that a particular candidate represent the voter in the office in question, subject, of course, to the legal principles governing the voting process. That expression of intent is accomplished through the means supplied by the state for that purpose, whether those means are a mechanical machine of the kind traditionally used in this state, our traditional paper absentee ballots, or the marksense demonstration process used in Norwich. Similarly, the process of counting votes, irrespective of the means supplied to the voter for the purpose of voting, is the process of tabulating the individual and collective expressions of the voters' intentions, as disclosed by the particular means supplied for that purpose, and subject, of course, to the legal principles governing the voting process. Thus, in our view, voting and counting votes means, respectively, expressing intent and tabulating those expressions of intent in accordance with the legal principles governing those processes. Whatever the process used to vote and to count votes, differences in technology should not furnish a basis for disregarding the bedrock principle that the purpose of the voting process is

to ascertain the intent of the voters." Id., 621.

The Court's second reason involved an interpretation of the materials issued by the Secretary of State to the Norwich moderators. Id., 621-22. The Court noted that the applicable moderator handbook provided that incorrectly filled out ballots, such as those containing circled candidate names, X's or checks that the machine could not pick up, or containing marks written by the wrong kind of pen or pencil, may be rejected by the machine, but should "be hand counted after the polls close . . . *to determine what [the voter] meant by his [or her] markings* . . . ." (Emphasis in original.) Id., 622. The Court also noted that the applicable recanvass manual instructed that before the recanvass officials run the previously machine counted ballots through the machine at the recanvass, the ballots should be scanned for any defects or marking errors which could lead the machine to misread the ballot. Id. Additionally, if any such errors or defects were found, the ballot should be set aside for hand counting of the races involved in the recanvass. (Internal quotation marks omitted.) Id. The court also stated that the applicable absentee ballot manual also "emphasize[d] the importance of ascertaining the voter's intent." Id. The manual instructed election officials that if any ballots were marked in such a way that the machine could not read any votes, those ballots should be set aside for hand counting, and, in that case, the intent of the voter would govern. Id., 633. Our Supreme Court thus concluded that "if an absentee voter failed to comply with the voting instructions, the process of hand counting the absentee ballots required a search for the intent of the voter." Id. The Court further opined: "Because the Norwich

absentee ballots were essentially the same as the Norwich ballots used by voters who voted at the polls, and because the absentee ballots were designed to be run through the same counting technology, the conclusion is inescapable that the [machine tabulator pilot program] contemplated the same search for the intent of the voter when the election officials were hand counting ballots of voters who had voted at the polls. The conclusion is equally inescapable, therefore, that the manual count of all of the Norwich ballots that the parties requested and that we ordered should also be governed by a determination of the intent of the voter as disclosed by his or her ballot. Any other conclusion would have the bizzare result of requiring us to discern the intent of absentee voters, while requiring us to ignore the intent of voters who voted at the polls, despite the fact that both sets of voters used essentially the same ballot and voting technology." Id., 623-24.

Third, the Court noted that Connecticut has "long adhered to the principle that ballots should, where reasonably possible, be read so as to effectuate the expressed intent of the voter, so as not unreasonably to disfranchise him or her. Where the legislature in express terms says that a ballot shall be void for some cause, the courts must undoubtedly hold it to be void; but no voter is to be disfranchised on a doubtful construction, and statutes tending to limit the exercise of the ballot should be liberally construed in his favor. Unless a ballot comes clearly within the prohibition of some statute it should be counted, if from it the wish or will of the voter can be ascertained. . . . We see no reason to conclude that the legislature [or] secretary of the state . . . intended either to depart from this fundamental principle or to subvert the democratic process

designed to ascertain and implement the will of the people." (Citations omitted; internal quotation marks omitted.) Id., 624-25.

In the present case, the plaintiff argues that *Second Congressional District* supports the proposition that technology cannot furnish a basis for disregarding voter intent, and only when a controlling statute renders a ballot void should voter intent be frustrated. Although in *Second Congressional District* the Court was applying its analysis to the framework of a recanvass, the plaintiff sees no reason that this court should not apply the principals articulated in that case to the present one. The plaintiff argues that in Connecticut, there is no express prohibition in the statutes that prevents the counting of write-in ballots where a voter wrote a write-in candidate's name in the proper space but did not fill in the corresponding oval.

The defendants maintain that there was no legal authority to open up the regular bin and examine the ballots therein during the first canvass, and there is no legal authority to order a recount on the ground that the 246 "blank" ballots should be hand counted. In support, they rely on *Bortner* v. *Woodbridge*, supra, 250 Conn. 245. In *Bortner*, the plaintiff was the sole loser out of five candidates running for four positions on a local school board, and was the sole write-in candidate. Id., 246. There were multiple reports of different problems concerning several of the tabulator machines that were used in that election. Id., 250-51. The trial court found that, given the closeness of the vote, the tabulator machine errors amounted to a substantial enough problem to justify ordering a new election. Id., 252-53. Our Supreme Court disagreed, concluding that

"even if we were to regard these mistakes in the count as substantial, the evidence falls short of establishing that those mistakes rendered the reliability of the result of the election, as reported by the election officials, seriously in doubt. . . . [Even] [g]iving the plaintiff the full benefit of any mistakes in the count established by the evidence, we cannot conclude that those mistakes would have brought the plaintiff's number of votes significantly closer to that of Greene so as to cast doubt on the reliability of the result of the election." Id., 277.

In *Caruso* v. *Bridgeport*, supra, 285 Conn. 637, the Court, citing *Bortner*, reiterated the principles of judicial restraint in regard to election cases: "[U]nder our democratic form of government, an election is the paradigm of the democratic process designed to ascertain and implement the will of the people. . . . [E]lection laws . . . generally vest the primary responsibility for ascertaining [the] intent and will [of the voters] on the election officials. . . . [Courts] look, therefore, first and foremost to the election officials to manage the election process so that the will of the people is carried out. . . . Moreover, [t]he delicacy of judicial intrusion into the electoral process . . . strongly suggests caution in undertaking such an intrusion." (Citations omitted; internal quotation marks omitted.)

In addition to the principles of voter intent advanced by the plaintiff and set forth in *Second Congressional District*, and the principles of deference and judicial restraint set forth in *Bortner* and *Caruso*, the court also looks to the extensive statutory, regulatory, and administrative scheme with respect to machine tabulators and write-in voting. At the outset, as previously set forth, the

court recognizes that the legislature has mandated that, "The Secretary of the State, by virtue of the office, shall be the Commissioner of Elections of the state, with such powers and duties relating to the conduct of elections as are prescribed by law and, unless otherwise provided by state statute, the secretary's regulations, declaratory rulings, instructions and opinions, if in written form, shall be presumed as correctly interpreting and effectuating the administration of elections and primaries under [Title 9 of the General Statutes] . . . ." General Statutes § 9-3. Also, it bears repeating that, absent narrow exceptions, the use of machine tabulators such as those used in Easton is required in all elections held in any municipality.

Pursuant to authority granted by statute; General Statutes § 9-242a; the Secretary of State has promulgated regulations governing the approval and use of machine tabulators. See Regs., Conn. State Agencies §§ 242 et seq. and 242a et seq. Section 9-242-23 of the regulations provides that the machine hardware must accommodate write-in candidates: "The punchcard or marksense voting system shall provide a means of recording the selection of candidates for any office whose names do not appear on the ballot at an election. The write-in procedure shall be easy to perform and made possible through the use of a pencil or pen. The ballot shall be printed to enable the voter to fill in as many names of candidates as the voter is legally entitled to select for each contest. *The machines may retain separately those ballots with write-in votes so that they may be tabulated at the close of the polls.* The vote tally mechanism in the equipment shall provide a total of write-in votes cast for each contest on the ballot in order that a full accounting may be performed." Section

9-242-36 requires that, in order to provide the capability for recounting the results of a contested election, the tabulator machines "shall be capable of performing the following: (1) the removable memory devices shall be capable of being reread on a different punchcard or marksense tallying device than was used originally and a comparison made of the recount totals to the original totals, (2) the system shall keep the ballots of each voter to be used to manually count the votes cast for each candidate for each office in each contest and arrive at a manual tally of the election, and (3) the system shall be capable of re-running the vote-tally process on all punchcard and marksense voting devices producing new removable memory devices which are then used to produce new voting district tallies and a new town tally." (Emphasis added).

Section 9-242a-23 of the regulations provides some specific guidance on canvassing the votes, including instructions pertaining to write-in ballots: "The polling place officials shall complete the moderator's returns and shall be guided by instructions of the Secretary of the State. The moderator and assistant registrars of voters shall record on the moderator's returns the voting tabulator result totals for each candidate and question. The moderator and assistant registrars of voters shall unlock and remove all the ballots from the write-in bin. They shall record the number of ballots in the write-in bin. They shall count by hand the votes cast for the office in which the elector indicated a write-in vote. They shall record on the moderator's returns the write-in votes in accordance with the law governing write-in ballots. They shall seal the write-in ballots in a depository envelope marked "write-in bin" and place them in the ballot transfer case. The law

providing that the intent of the voter governs when counting absentee ballots shall apply to ballots counted by hand. Ballots counted by hand shall be counted by teams of two officials from opposing political parties and questions shall be submitted to the moderator for decision and endorsement on the ballot."

Section 9-242a-24 of the regulations provides guidelines for counting absentee ballots: "If absentee ballots are counted at the polls, the absentee ballots and the voting tabulator shall be adjusted to provide that the election results report printed by the voting tabulator at the close of the polls indicate for each candidate and question the absentee vote, the non-absentee vote and the totals.... Absentee ballots may be processed through the voting tabulator at times throughout the day or at the end of election. Before processing absentee ballots through the voting tabulator, the absentee ballot counters shall set aside for counting by hand those ballots which the Secretary of the State prescribes cannot be processed by the voting tabulator.... The absentee ballots which are counted by hand shall be counted in accordance with the law governing counting absentee ballots ...." A similar method is prescribed for absentee ballots counted at a central location, rather than at the polls. See Regs., Conn. State Agencies § 9-242a-25.

The Secretary of State has also distributed a Procedure Manual for Counting Absentee Ballots (absentee ballot manual). Section XI of the absentee ballot manual provides a 12-step procedure for counting absentee ballots. The manual dictates, on page 9, that the "procedure for counting absentee ballots must be strictly adhered to." Step 10, which is located on page 9 of the

manual, indicates that ballots with "obvious marking errors" must be hand counted as follows: "Before feeding the ballots into the tabulator, take a quick look at them. Any ballots which obviously cannot be processed by the tabulator (e.g., mutilated, completed in red ink, non-No. 2 pencil, etc.) should be set aside for hand counting. **Also** set aside any ballots which contain markings that will obviously result in lost votes (e.g., some races marked with a check or an 'X'; candidate name circled; name written in on the write-in line but the oval is not filled in). The point of this quick look is to spot obvious errors, not to substitute a hand count for tabulator processing. ***Remember:*** *all* offices and questions will have to be hand counted on these set aside ballots." (Boldface type; emphasis; and underlining in original). Step 12 reiterates that "[s]ome ballots will have to be hand counted. The **rule for counting ballots** is that **the intent of the voter governs.** If the ballot is properly marked, the voter's intent is clear. Many ballots are not properly marked. The statutes provide rules for determining the intent of the voter when the voter has incorrectly cast his ballot." Step 12 goes on to refer the reader to examples of properly and improperly marked absentee ballots, with Step 12 C pertaining to write-in votes. Subparts 2 and 3 of Step 12 C of the absentee ballot manual explain that unless the voter fills in the oval that corresponds to the write-in candidate, the tabulator machine will not recognize the vote as a write-in vote, and unless the ballot is caught before it goes through the tabulator, the vote would be lost (assuming the ballot is not rejected by the machine for some other reason).

The moderator's handbook also provides instructions with respect to absentee and write-in

ballots. First, the handbook instructs the moderator to process remaining ballots with the tabulator, such as ballots located in the auxiliary bin and absentee ballots counted at the polls. Moderator's handbook, p. F-2. If the machine does not accept any ballots they should be hand counted, along with all of the ballots in the write-in bin. Id., F-4. The handbook reiterates that when counting votes by hand, voter intent controls. Id., F-3.

Although there are many statutes, rules, and regulations governing the counting of write-in votes, both at the polls and by absentee ballot (the preceding paragraphs are not an exhaustive review), the law in that regard can be summarized somewhat briefly. First of all, as a starting point, the court notes that "[a] write-in vote for an office, cast for a person who has registered as a write-in candidate for the office . . . shall be counted and recorded." General Statutes § 9-265. The process set up by the Secretary of State with respect to write-in ballots expressly ensures that moderators do in fact count every write-in vote that is cast for an office in accordance with the intent of the voter — with the exception of those write-in ballots that are directed into the regular bin by the tabulator. As discussed, the ballots in the write-in bin are hand counted as a matter of course to determine voter intent.[15] Likewise, if an absentee ballot contains an obvious marking error, such as a write-in candidate's name written but no corresponding filled in oval, that is to be set aside to discern voter intent. Any other ballots that are not accepted by the tabulator machine

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[15] According to the testimony and documentary evidence, absent machine malfunction, the only way a ballot with a write-in name but no oval filled in for first selectman would end up in the write-in bin is if a write-in oval was filled in for another race.

are also examined for voter intent. The absentee ballot manual takes special care to warn election officials not to place improperly marked ballots in the tabulator machine, and stresses that improperly marked ballots should be counted unless voter intent cannot be discerned.

With respect to ballots that are put into the tabulator machine and directed into the regular bin, the law does not expressly provide a mechanism for inspecting ballots with "blank" votes. The defendants argue that because the law does not expressly allow a review or hand count of ballots in the regular bin in circumstances such as these, the law implicitly disallows it.

There are multiple reasons why the court believes that, in these circumstances, the law supports a recount. "[W]here the legislature in *express terms* says that a ballot shall be void for some cause, the courts must undoubtedly hold it to be void; but no voter is to be disfranchised on a doubtful construction, and statutes tending to limit the exercise of the ballot should be liberally construed in his favor. Unless a ballot comes clearly within the prohibition of some statute it should be counted, if from it the wish or will of the voter can be ascertained." (Emphasis altered; internal quotation marks omitted.) *In re Election of U.S. Representative for Second Congressional District*, supra, 231 Conn. 624.

As stated in *Second Congressional District*, "whether by mechanical machine of the kind traditionally used in this state, by our traditional absentee ballot, or by paper ballot to be electronically read, is essentially the process by which a voter expresses his or her intent that a particular candidate represent the voter in the office in question, subject, of course, to the legal

principles governing the voting process. That expression of intent is accomplished through the means supplied by the state for that purpose, whether those means are a mechanical machine of the kind traditionally used in this state, our traditional paper absentee ballots, or [machine tabulator.]" Id., 621. Moreover, Section 9-242-36 of the regulations contemplates a situation where ballots that have gone through the tabulator machine and would then be subjected to manual counting, requiring the hardware to be built such that: "the system shall keep the ballots of each voter to be used to manually count the votes cast for each candidate for each office in each contest and arrive at a manual tally of the election . . . ."

Although there are multiple documents and directions that set forth the *proper* way to vote for a write-in candidate, the law is clear that for a vote to count, it must merely be expressed in such a way that his or her intent is discernable from the markings on the ballot. For example, the defendants rely on an October 23, 2013 letter from the Office of the Secretary of State to municipal clerks holding November 5, 2013 elections. The letter states, in part: "In order to cast a vote for a write-in candidate a voter must fill in the oval in the appropriate column on the ballot and write-in the name of the write-in candidate on the ballot." The letter merely indicates the proper method of casting a vote for a write-in candidate — it does not promulgate a rule that the failure to fill in the oval for a write-in candidate by itself prevents the vote from being counted. Other provisions relied on by the defendants suffer from the same shortfall.

For these reasons, and for the reasons discussed below, the court holds that whether the tabulations performed by the tabulator machine constitutes the expressed will of the voters of Easton is in doubt, and the reliability of the results of the election are in question. The need for transparency and accuracy in the ballots cast and votes counted is paramount. It would be unjust to unnecessarily infringe upon the plaintiff's rights and disenfranchise voters and to allow technology to trump the voters and candidates' confidence in the vote and the election. Technology should be used as a tool, not an impediment.

The plaintiff has satisfied her burden of establishing that there were one or more erroneous rulings and/or discrepancies that would effect the results of the election such that the results of the November 5, 2013, election for first selectman of Easton are reasonably likely to change upon a recount. First, the plaintiff was not afforded a representative to observe the hand counting of the write-in ballots or any other hand counted ballots in this tightly contested election and was aggrieved by the ruling, as she was unable to challenge any of the ballots in this close race. Especially given the plaintiff's status as a registered write-in candidate, this calls the accuracy of the count into question because the plaintiff was unfairly deprived of her right to independently observe and ensure the accuracy of that count, and consequently deprived her of the ability to present a more complete case during the November 18 and November 21, 2013 hearings. Second, at least one unauthorized individual was permitted into the counting area. Although the court does not find that any impropriety occurred, the fact remains that such an action dilutes the public

confidence in the vote result. Third, there remain ten absentee and/or same day registration ballots that appear to be unaccounted for in the moderator's report. [16] Finally, 246 votes were counted as "blank" by the tabulator with respect to the first selectman race.[17] In light of these issues, the court finds sufficient reason to order a recount. Given the closeness of this election, involving a very strong write-in candidate, with only 50 votes between the two candidates, coupled with the fact that according to the tabulator, more than 10 percent of all people who voted did not vote for the highest office, there is a reasonable likelihood that a recount could change the election results particularly where there are 246 blank ballots and a 50 vote differential.

IV ORDER

For all of the aforementioned reasons, the court orders as follows:

1. The moderator and other pertinent election officials are ordered to conduct a recount of the November 5, 2013 election as to the office of first selectman and hand count all ballots to ascertain the intent of each voter in accordance with the law with all due haste.

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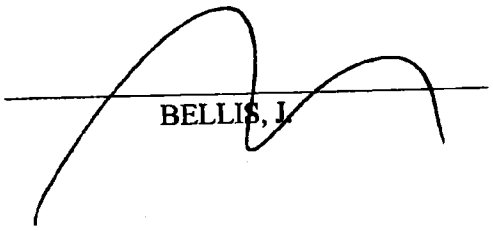
16 Fourth, the only evidence in the record concerning the functioning of the tabulator machines is that the properly serviced machines used in West Haven's ten precincts were malfunctioning such that write-in votes were erroneously deposited into the regular bin and registered candidate votes were deposited into the write-in bin.

17 This number does not include the eleven absentee and/or same day ballots that were fed into the tabulator machine and counted as blank.

2. No later than December 2, 2013, the moderator shall report back to this court the results of the recount and submit them for certification by this court and judgment thereon. At that time, the court shall determine whether any further relief is required or appropriate.



BELLIS, J.

ORDER 421277

DOCKET NO: FBTCV136039323S

SUPERIOR COURT

BUCKLEY, VALERIE J.
V.
TOWN OF EASTON Et Al

JUDICIAL DISTRICT OF FAIRFIELD
AT BRIDGEPORT

11/29/2013

ORDER

The following order is entered in the above matter:

ORDER:

Pursuant to CGS§9-328, the court hereby certifies to the Secretary of State the results of the Town of Easton first selectman election as follows: 1060 votes for Adam Dunsby,and 1026 votes for Valerie Buckley. The clerk is directed to immediately provide notice of this decision to the Office of the Secretary of State by fax as well as mail.

Judicial Notice (JDNO) was sent regarding this order.

421277

Judge: BARBARA N BELLIS