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August 26, 2021

Honorable Chuck Morse
President of the Senate
Legislative Office Building
107 North Main Street
Concord, NH 03301


Honorable Sherman Packard
Speaker of the House of Representatives
Legislative Office Building
107 North Main Street
Concord, NH 03301

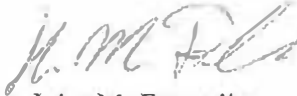
Dear Senator Morse and Representative Packard:

Enclosed please find the Joint Report of the Secretary of State and Attorney General regarding the Senate Bill 43 Audit of the Town of Windham for the 2020 General Election, submitted pursuant to Laws of 2021, Chapter 2. A copy of this Joint Report is posted to the New Hampshire Department of Justice's website under the link for the Windham Audit.

Associate Attorney General Anne Edwards is prepared to answer any questions you may have on behalf of both offices. She can be reached at 603-271-3650 or Anne.M.Edwards@doj.nh.gov.

Sincerely,


William M. Gardner
Secretary of State


John M. Formella
Attorney General

Enclosure

STATE OF NEW HAMPSHIRE

DEPARTMENT OF STATE AND DEPARTMENT OF JUSTICE

**JOINT REPORT OF THE SECRETARY OF STATE AND ATTORNEY
GENERAL**

REGARDING THE SENATE BILL 43 AUDIT

Submitted Pursuant to Laws of 2021, Chapter 2

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I. INTRODUCTION

On April 12, 2021, Senate Bill 43 was enacted. This law authorized the audit of the results of specific races from the November 3, 2020 General Election for Windham, New Hampshire, specifically the House of Representatives - Rockingham District 7 race. The law limited the scope of the audit to the ballot counting machines and their memory cards from Windham, as well as hand tabulations of the ballots from the above-described race, and the recount done by the Secretary of State. The law also required the hand tallying of all ballots cast in the races for governor and United States senator. The deadline imposed by the Legislature to complete this audit was May 27, 2021.

The audit confirmed that ballot counting machines reliably identify election outcomes. The audit similarly confirmed that the New Hampshire recount process reliably identifies election outcomes. The audit identified the source of the discrepancy between the election night vote counts and the New Hampshire recount to be the result of actions taken and decisions made by Windham election officials in response to unprecedented challenges that led to unintended consequences. Challenges included overwhelming participation in the 2020 General Election where a record turnout of approximately 87% of eligible Windham voters cast ballots, almost a third of which were cast by absentee ballots. Unintended consequences included the decision of Windham election officials to use a paper folding machine to fold ballots causing folds that did not follow the score lines on the ballots and resulting in fold lines going through ovals next to certain candidates' names. The audit itself was initiated, significantly in part, by Windham election officials believing that their election occurred without error and asserting their concerns with the accuracy of the New Hampshire recount. This was not

the case, and voters can be assured that the integrity of their voting process is secure when elections are conducted using best practices that have been developed and tested for decades.

Additionally, as the Senate Bill 43 audit has concluded, our Offices will resume our efforts to identify what procedural suggestions, requirements, or trainings may be necessary for Windham elections.

II. PROCEDURAL HISTORY

a. Recount

After the 2020 General Election, New Hampshire conducted 16 recounts of election night results that included 184,000 ballots from 65 different polling places. A recount is done entirely by experienced people, assigned by the Secretary of State, who count each ballot by hand. Recounts provide the opportunity to compare the ballot counting devices' results to carefully conducted hand counts of each ballot cast in the election. The Secretary of State does not use a ballot counting device at the recounts. It should be noted that hand counts, without protocols and procedures as established in the Secretary of State's recount, can be susceptible to human error. See Footnote 4.

On November 12, 2020, the Secretary of State's Office conducted a recount of the House of Representatives – Rockingham District 7 race. This was the race involving Windham. The recount at the State Archives building began at 9:00 a.m. and was completed before 1:00 p.m. that day.

The Secretary of State conducted the recount using a process that was fully transparent and consistent with recounts conducted for other 2020 races and for prior

elections. Each candidate had the opportunity, directly or through his or her representatives, to see each ballot as it was counted and to see the tally sheet on which each vote was recorded. A system, using a document camera projected onto two monitor screens visible to the public, allowed the candidates' observers to view both the ballot that was being counted and the tally sheet that was being marked with each vote. Any candidate or representative could stop the counting process at any moment if he or she had a concern that the ballot was not being accurately counted or if the tally sheet was not being accurately marked to reflect the vote observed on the ballot.

Upon completion of this process, the tally sheets from each team were added together. The results were:

District 7 (Choose 4)	Soti, r	Griffin, r	Lynn, r	McMahon, r
Windham Election Night	4,480	5,292	4,786	5,256
NH Recount	4,777	5,591	5,089	5,554
District No. 7	St.Laurent, d	Azibert, d	Roman, d	Singureanu, d
Windham Election Night	4,456	2,787	3,415	2,764
NH Recount	4,357	2,808	3,443	2,782

Following the recount, there was no change in the winners of the District 7 race.

b. Town of Windham

On November 19, 2020, the Attorney General's Office received a letter from Attorney Bernard Campbell, on behalf of the Town of Windham, requesting "an opportunity to re-canvass the votes, using the Town's Election equipment if necessary, [and] conduct another recount by hand, including all the data required to verify the total number of votes cast."

c. Ballot Law Commission

On November 30, 2020, the Attorney General's Office also received the decision by the Ballot Law Commission (BLC) on an appeal filed by state representative candidate, Kristi St. Laurent. The BLC met, on November 23, 2020, to consider Ms. St. Laurent's appeal, during which, she stated that her request was that the BLC request the Attorney General's Office "conduct a general review and investigation of the machines and conduct of the election." The BLC also heard testimony from Windham Moderator Peter Griffin, Assistant Moderator Elizabeth Dunn, and several Windham voters.

The BLC voted unanimously to uphold the results of the New Hampshire recount of the Town of Windham's ballots.¹ In addition, the BLC noted there was no allegation of wrong-doing or fraud.² However, the BLC, in responding to testimony regarding the possibility of fraud, requested the Attorney General "review the operation of the voting machines in Windham, and conduct a general review of the conduct of the election, to see if it can determine the reasons for the unusual variation between the machine and hand counts."

¹ In a letter dated February 15, 2021, Windham's Assistant Moderator, Betty Dunn, wrote a letter to the Secretary of State's and Attorney General's Offices. In it, Ms. Dunn inquired whether any materials or information from the recount were similarly being reviewed. She stated that there was minimal documentation of the recount and no means of cross-checking its results. Ms. Dunn also shared her observations from the Rockingham District 7 recount, citing issues such as unlabeled piles of ballots on each table.

² The BLC hearing on this matter documented that three absentee ballots were marked as rejected because there were no signatures on the respective affidavit envelopes. The BLC determined that these three absentee ballots did in fact bear the required signatures on the affidavit envelopes. Regardless, these three absentee ballots would not have been outcome determinative. The Secretary of State's and Attorney General's Offices will conduct a joint review and follow-up of the election procedures relative to absentee ballots with the Windham election officials to better understand the rejection of these three ballots.

d. No Statutory Authority to Conduct an Unfounded Criminal Investigation

There is no statutory authority for the Attorney General's Office to conduct an audit of the ballot counting devices where there is no basis to suspect that an election law has been violated. This Office similarly has no statutory authority to authorize election officials to conduct an independent re-canvass of the 2020 General Election ballots as requested by the Windham officials. Further, the BLC, as it recognized in its order, does not have the legal authority to require an audit of an election, any of the ballot counting devices, or the ballots themselves, except those specifically challenged as part of a recount appeal.

In fact, New Hampshire's law prescribes a specific process for the recounts (Chapter 660), the appeal of a recount to the BLC (Chapter 665), and the appeal to the Supreme Court of the BLC's decision (RSA 665:16). No appeal was taken to the Supreme Court related to the Windham recount.

Proposals for a "re-canvass" and other suggestions of an "audit" prior to the enactment of Senate Bill 43 were pervasive before the Legislature began crafting the bill. Often, the Attorney General's general enforcement authority of election laws, in RSA 7:6-c, was cited as a basis to conduct an audit similar to the one enacted in Senate Bill 43. New Hampshire's election law currently does not use the terms "audit" or "re-canvass" in the context of any post-election procedure applicable to these circumstances, nor does it contain any provisions that would allow something similar to the Senate Bill 43 audit. To the extent that a "re-canvass" or "audit" might involve recounting any cities' and towns' ballots after a Secretary of State's recount, the law explicitly prohibits more than one recount. "In no event shall a discrepancy result in a second recount for the same

candidate, as provided in RSA 660:3.” RSA 660:5. See also RSA 660:3. “In no case may the ballot law commission order a second recount.” RSA 665:8 I and II.

e. Secretary of State’s and Attorney General’s Review

While a comprehensive audit would not have been authorized by law prior to the enactment of Senate Bill 43, the Secretary of State’s and Attorney General’s Offices attempted to address the matter and identify the source of the Rockingham District 7 discrepancy by using existing statutory authority.

The Attorney General does have general authority to uphold the election laws and to provide training to election officials, in conjunction with the Secretary of State, on compliance with proper procedures for reviewing how the election was conducted, the counting of ballots, the reporting of election results, and the performance of recounts. That review can include working with local election officials to implement or refine their protocols and procedures.

As such, on January 5, 2021, both offices sent a joint letter to the Town of Windham requesting information in order to commence a review of this matter. See Attachment A.

On January 6, 2021, at the request of Senator Bob Giuda, the Attorney General’s Office took part in a virtual meeting with Senator Giuda, Senator Regina Birdsell, Dr. David Strang, and Windham officials: Town Clerk Nicole Bottai, Moderator Peter Griffin, and Assistant Moderator Betty Dunn. During the meeting, the Attorney General’s Office explained that, in conjunction with the Secretary of State, it would conduct a review of the matter, consistent with its statutory authority, to determine what may have

caused the discrepancy in the Rockingham District 7 race. The Windham officials agreed to send the Attorney General's Office documents for its review.

On January 7, 2021, the Secretary of State's and Attorney General's Offices received numerous documents from the Town of Windham including:

- Moderator's Worksheet
- End of Night Reconciliation Spreadsheet
- Machine Tapes (For all 4 ballot counting devices)
- Voter Registration Summary
- State Recount Summary
- State Recount Tallies
- State Recount Summary (Titled: "second version")
- End of Night Hand count
- Ballot Clerk Book summary
- Ballot Control- issued to ballot clerks
- Final check in tally summary supporting document
- Marked Checklist for November General
- Machine 1 Control Logs
- Machine 2 Control Logs
- Machine 3 Control Logs
- Machine 4 Control Logs

Upon receipt of these documents, both offices commenced a joint review of the information and data contained therein.

On February 5, 2021, at the request of Senate President Morse, the Attorney General's and the Secretary of State's Offices attended a virtual meeting to discuss the Rockingham District 7 results discrepancy. Also in attendance were Senator Jeb Bradley, Senator James Gray, Senator Birdsell, and Senator Giuda. During the meeting, the Attorney General's Office explained the ongoing joint review of the matter within the limited scope of existing statutory authority.

On or around February 9, 2021, Senator Gray contacted the Attorney General's Office to discuss Senate Bill 83 and potential revisions. This bill, while not specific to Windham, was an attempt to create authority for the Attorney General to commence investigations at the direction of the BLC, if the BLC concluded that there was a significant or unexplained discrepancy between election results and a recount.

Although both offices continued their review, including generating a list of potential follow-up questions for the Town of Windham, given the unprecedented speed at which Senate Bill 43 passed through the legislative process, it was determined that the offices' joint review should be paused in order to limit interference with the audit being constructed by the Legislature. Additionally, given preliminary drafts of the bill, the Secretary of State's and Attorney General's Offices began reallocating personnel and resources in order to secure the necessary logistical resources contemplated by Senate Bill 43. This included identifying a qualified expert to be the Secretary of State's and Attorney General's designee for the Senate Bill 43 election audit team.

Following the enactment of Senate Bill 43, on April 12, 2021, both offices redirected all resources dedicated to their review of the Windham election to quickly identify and secure logistical resources given the limited amount of time authorized for the audit by law. This included, but is not limited to:

- Booking a suitably large and secure venue with technological and electrical bandwidth to host the audit;
- Identifying and selecting a qualified expert for the audit team;

- Finding and hiring audio/visual companies that could provide high-definition livestreaming capabilities as well as any audio/visual equipment necessary to provide in-person audit observers with an optimal viewing experience;
- Assisting the audit team with scheduling a sufficient number of sworn election official-volunteers to carry out the team’s audit process each day; and
- Creating online resources on the Department of Justice website to host the livestream, provide notice of each of the audit days, and publish each audit days’ produced documents.

f. August 23, 2021, Ballot Law Commission Report

The BLC issued a report, on August 23, 2021, pursuant to Senate Bill 43, addressing the Forensic Election Audit Team’s report and recommendations. The Commission offered the following conclusion:

In summary, the Commission finds that the discrepancies in Windham in November, 2020 were the result of a unique set of circumstances, not the result of malfunction of the ballot counting devices, and are not likely to reoccur. The Commission finds that the presently authorized AccuVote machines are capable of continuing to meet the requirements for elections held in New Hampshire.

III. RESULTS OF AUDIT³

The Senate Bill 43 audit team was comprised of the following three team members:

- Mark Lindeman, named by the Town of Windham;
- Harri Hursti, named by the Secretary of State and Attorney General; and
- Philip Stark, named by the two above members in accordance with SB 43.

³ The following is merely a synopsis of the audit team’s findings. Readers are strongly encouraged to read the team’s report in its entirety to better understand its conclusions.

The audit team concluded that “the primary root cause of the discrepancy to be folds through vote targets on some absentee ballots...” New Hampshire SB 43 Forensic Audit Report, Pg. 4, (2021). Furthermore, the audit team found that “[n]o malware was found on any of the tabulators. Forensic examination of a random sample of paper ballots revealed nothing anomalous about the paper, printing, or marking.” Id.

The below image is a table found in the audit team’s report on Page 47, comparing:

- Under the “Hand count” column, the comparison is between the 2020 New Hampshire recount results and the audit’s hand count results;
- Under the “Machine count” column, the “2020” column lists the aggregated vote totals from all four of Windham’s ballot counting devices, for each candidate. Under the “2021” column, since Senate Bill 43 required all of Windham’s ballots to be run through each of the Town’s four ballot counting devices, the aggregate vote totals are displayed using the audit’s machine identification numbers.

State Representative, Rockingham District 7

candidate	Hand count			Machine count*				
				2020	2021			
	2020	2021	diff	1	2	3	4	
St. Laurent	4357	4355	-2	4456	4355	4349	4352	4367
Azibert	2808	2808	0	2787	2804	2805	2802	2800
Roman	3443	3442	-1	3415	3434	3436	3432	3432
Singureanu	2782	2782	0	2764	2777	2778	2776	2776
Soti	4777	4776	-1	4480	4742	4744	4727	4700
Griffin	5591	5591	0	5292	5558	5557	5540	5516
Lynn	5089	5089	0	4786	5055	5055	5037	5011
McMahon	5554	5554	0	5256	5520	5520	5502	5477
write in	n/a	34		41	41	41	41	41

* Machine-count results include 80 (for 2020) or 78 (for 2021) ballots that had to be hand counted. The 2021 results for machine 1 are adjusted for 11 ballots that went through the machine twice.

Based on this data, the audit team made two broad findings:

1. “[T]he audit hand count results are very close to the recount results.” New Hampshire SB 43 Forensic Audit Report, Page 47, (2021). In fact, as seen in the chart below, for five of the eight candidates the vote totals were exactly the same from the 2020 State recount to the audit hand count. Of the remaining candidates, two candidates were off by one vote and one candidate was off by two votes.

Election Night vs. NH Recount

NH Recount vs. Audit Hand Count

NH Windham Recount Change Nov. 4, 2020 Nov. 12, 2020				NH Audit Hand Recount Count Change Nov. 12, 2020 May 14 to May 21, 2021			
State Rep.				State Rep.			
Griffin, r	5,292	5,591	299	Griffin, r	5,591	5,591	0
McMahon, r	5,256	5,554	298	McMahon, r	5,554	5,554	0
Lynn, r	4,786	5,089	303	Lynn, r	5,089	5,089	0
Soti, r	4,480	4,777	297	Soti, r	4,777	4,776	-1
St. Laurent, d	4,456	4,357	-99	St. Laurent, d	4,357	4,355	-2
Roman, d	3,415	3,443	28	Roman, d	3,443	3,442	-1
Azibert, d	2,787	2,808	21	Azibert, d	2,808	2,808	0
Signatureanu, d	2,764	2,782	18	Signatureanu, d	2,782	2,782	0
Total Vote Change 1,363				Total Vote Change 4			

2. “[T]he audit machine count results are closer to the hand count results [from both the recount and audit] than the original election night totals were – but they still vary noticeably from the hand count totals and from each other.” *Id.* at 47-48.

Ultimately, through the election night results, the recount, and the audit, the outcome of the Rockingham District 7 race remained the same. “We found no basis to believe that the miscounts found in Windham indicate a pattern of partisan bias or a failed election.” *New Hampshire SB 43 Forensic Audit Report*, Pg. 106, (2021).

There has been a lot of focus by members of the public on the change in vote totals in the Rockingham District 7 race, specifically, the number of votes gained by certain candidates in this race. Statements were made to the effect that there have never been such high percentages of change in vote totals between election night and recounts throughout New Hampshire’s history of recounts. Those statements are not true. In fact, in analyzing percentage changes in vote totals across the State, Windham did not even

have the greatest change in the 2020 General Election. For example, as seen in the chart below, the State recounted races in Bridgewater and Chichester which had the largest percentage changes in vote totals between the election night counts and the New Hampshire recount. In that context, Windham is not an outlier. Additionally, both Bridgewater and Chichester are hand-count towns that do not use ballot counting devices. Changes in vote totals are not unique to cities and towns that use ballot counting devices.⁴

**Percentage Change in Vote Totals –
2020 General Election Night to New Hampshire Recount**

	Town	Candidate	Windham	NH Recount	% Change
1	Chichester	Doherty, d	621	669	7.73%
2	Bridgewater	Adjutant, d	333	358	7.51%
3	Windham	Soti, r	4480	4777	6.63%
4	Windham	St.Laurent, d	4456	4357	2.22%

IV. AUDIT TEAM’S RECOMMENDATIONS

On Pages 107-108 of the New Hampshire SB 43 Forensic Audit Report, the audit team makes nine recommendations of “possible policy and procedural changes” the State may want to consider. Each of these recommendations is reproduced below with a corresponding joint response from the Attorney General and Secretary of State.⁵

⁴ Academic research has analyzed this topic. “Historically, there is about a 1 percent difference between initial counts and recounts when ballots are tabulated by hand. The discrepancy between initial counts and recounts falls to about .5 percent with the optically scanned ballots.” *Ansolabehere, Stephen; Reeves, Andrew*, “Using Recounts to Measure the Accuracy of Vote Tabulations: Evidence from New Hampshire Elections 1946-2002,” Caltech/MIT Voting Technology Project, VTP Working Paper Series;11, page 7 (available at: <https://dspace.mit.edu/handle/1721.1/96548>). “Looking at recounts from 2002, controlling for total vote, initial vote, and office sought, optically scanned paper produced a lower discrepancy between the initial count and the recount compared to hand-counted paper.” *Id.* at 7-8.

⁵ Readers are encouraged to review Pages 107-108 of the New Hampshire SB 43 Forensic Audit Report, in order to read the audit team’s full explanation, basis, and rationale behind each recommendation.

The joint responses are offered to the following recommendations, without commenting on whether folds on ballots in any other context beyond the scope of the Windham audit have any impact on the accuracy of the State’s ballot counting devices. Additionally, the New Hampshire Constitution assigns the process of administering a town or city’s election to its moderator. As such, the Secretary of State’s and Attorney General’s Offices encourage the sharing of best practices while respecting the allocation of duties under the law.

Forensic Audit Report Recommendation 1: Consider not folding ballots at all.

Secretary of State’s and Attorney General’s Offices’ Response:

During the virtual meetings of the Secretary of State’s Select Committee on 2020 Emergency Election Support, the Committee members spoke with representatives from the United States Postal Service (“USPS”). USPS explained that using larger envelopes, that would be required to return marked, non-folded absentee ballots, would subject those envelopes to a different USPS processing method than the smaller letter-sized envelopes, which could lead to delays in delivery.⁶ Thus, any benefits of not folding ballots must be balanced against any risks of delay in delivery of absentee ballots.

⁶ Additionally, town and city election officials noted that there is potentially an increased cost for postage to send larger absentee ballot envelopes to requesting voters—a cost that would be borne by cities and towns.

Forensic Audit Report Recommendation 2: Clearly instruct election officials to fold absentee ballots along the score lines and to double-check the location of the folds.

Secretary of State's and Attorney General's Offices' Response:

The Secretary of State's Office, pursuant to its statutory responsibility, designs ballots for elections with score lines on them showing where the ballots should be folded. These score lines are placed in order to ensure that they do not run through a timing mark or through an oval near a candidate's name. These score lines indicate to election officials the correct location for folding the ballots.⁷

Additionally, cities and towns contract with LHS Associates, the New Hampshire vendor that sells and maintains ballot counting devices approved by the BLC, directly in order to obtain and maintain ballot counting devices. The Offices understand that the instructions to election officials explain that ballots should be folded on the provided score lines. Cities and towns are responsible for using and handling ballots and election officials are expected to carefully follow instructions that are consistent with the ballot design.

The Offices will look into the possibility of trainings on this topic and will work collaboratively with election officials on establishing best practices.

⁷ The Premier "Ballot Specifications Guide," which we understand is provided to a city or town purchasing an AccuVote ballot counting device, in Section 7.1, references avoiding scoring or perforations on the timing marks. Timing marks correspond to target ovals beside candidates' names, but those target ovals are not themselves referenced in the Guide. This instruction, speaking only to "scoring or perforations" and "timing marks," requires an election official to make an additional logical leap to understand that it means they must not fold (by hand or by device) a ballot in a way that the fold is through or over a target oval.

Forensic Audit Report Recommendation 3: Check the fold locations when opening absentee ballots.

Secretary of State's and Attorney General's Offices' Response:

As outlined in the answers above, election officials are strongly encouraged to follow the ballot counting device instructions from the vendor and ensure that the ballot is folded along the delineated score lines.

Forensic Audit Report Recommendation 4: Add process controls to ensure all accepted absentee ballots are counted.

Secretary of State's and Attorney General's Offices' Response:

Part 2, Article 32 of the New Hampshire Constitution identifies the moderator as the election official responsible for governing elections in the State. As such, moderators have the discretion to identify and adopt processes they determine to be helpful in carrying out their respective elections.

The Offices encourage moderators to consider this recommendation from the audit team. The Offices are available to assist officials in the consideration of how to implement this recommendation.

Forensic Audit Report Recommendation 5: Enable overvote notification on AccuVote ballot counting devices.

Secretary of State's and Attorney General's Offices' Response:

The Offices do not agree with this recommendation. The Secretary of State's Office has previously testified against legislative bills that attempted to establish similar

overvote notification in the State's ballot counting devices. Readers are encouraged to review the record from those hearings for a better understanding of the concerns raised and the applicable testimony. For the purposes of this response, the Offices have significant concerns regarding the privacy implications associated with overvote notification because election officials will be asked to review ballots to determine what the overvote issue is and voters will raise concerns about loss of secrecy of their ballots.

Additionally, there is a concern as to whether voters are treated equally if overvote notifications on ballot counting devices are actively identifying overcount ballots while hand count ballots are not provided the same review. For example, if a ballot counting device notifies a voter that the voter marked two candidates in the same race, it gives the voter the option of correcting the ballot or submitting the ballot with an overvote. However, there is no corresponding notification for hand counted ballots.

Adopting a "review the ballot and notify the voter of overvotes" policy, if applied equally to all voters, would require election officials to study each and every hand count ballot to see if an overvote exists. To replicate the vote counting device's real-time overvote notification, election officials would have to review a hand count ballot immediately prior to a voter casting the ballot and notify the voter if there is an overvote. This would violate the voter's right to a secret ballot and would significantly slow down the voting process.

There are currently more than 100 towns and unincorporated places that use hand count ballots, meaning that an overvote notification requirement would impose a substantial burden.

Finally, the information on a completed ballot evidences personal beliefs and choices. Having an election official review and inform voters of “errors” on their ballots has the potential to deter or embarrass voters by publicly calling out their purported ballot mistakes. The likelihood of chilling voter participation runs contrary to our constitutional protection of free elections. Sometimes, for personal reasons, voters choose to overvote a race, such as when two cousins of a voter are competing for the same office. In that situation, the voter may choose to vote for both cousins, rather than just for one. That voter should have the option to overvote without being told by an election official that the voter made a mistake on his or her ballot.

Forensic Audit Report Recommendation 6: Improve machine maintenance.

Secretary of State’s and Attorney General’s Offices’ Response:

Testing and maintenance procedures of ballot counting devices are within the purview of the Ballot Law Commission. See RSA 656:42 (“The ballot law commission shall make such rules as may be necessary to ensure the accuracy of electronic ballot counting devices, including rules for the testing of electronic ballot counting devices prior to each election and the submission of testing records to the secretary of state. The ballot law commission shall make such rules as may be necessary in order that electronic ballot counting devices may be used in this state in such a manner that the election laws may be complied with as far as possible.”)

The Offices defer to the determination of the Ballot Law Commission as to whether improved maintenance should be tied to the use of the ballot counting devices.

The Offices understand that many cities and towns that utilize ballot counting devices have an annual maintenance schedule. That said, the Offices will consult with experts in the field to determine thresholds for more comprehensive maintenance for ballot counting devices, and in particular the cleaning of devices' optical scanners. These thresholds could include, for example, a certain amount of time between cleanings or a certain number of ballots cast through a given device. The Offices will work with the General Court, if it chooses, to discuss the usefulness of off-cycle ballot counting device inspections to promote compliance with best practices, particularly for devices where counting discrepancies are identified.

Forensic Audit Report Recommendation 7: Conduct routine risk-limiting audits of all election results.

Secretary of State's and Attorney General's Offices' Response:

The subject of this recommendation is already before the Legislature in Senate Bill 89 (Laws of 2021, Chapter 177), which was approved on July 30, 2021. Part III of Senate Bill 89, with an effective date of July 30, 2021, established a committee to study post-election audit counting devices. The committee's duties include studying the feasibility, time constraints, and cost of conducting post-election audits using any counting equipment it identifies.

Forensic Audit Report Recommendation 8: Keep ballots from different scanners or counting methods separate on election day and thereafter.

Secretary of State's and Attorney General's Offices' Response:

The Offices have significant concerns regarding the substantial burden implementing this recommendation could place on election officials on election day. Election officials invest significant time and effort into preparing for an election, and it is common for them to work substantial hours carrying out the election on election day. On top of the existing demands, this recommendation would add another responsibility onto election officials at the end of election day.

However, the Offices will look into the possibility of trainings related to organization techniques and work collaboratively with election officials on establishing best practices. In polling places with more than one ballot counting device, storing ballots, on election day, by separating them according to the device through which the ballots were cast may help officials avoid having to feed every ballot through the devices again at the end of the day if a device malfunctions.

Forensic Audit Report Recommendation 9: During recounts, track ballots, write-in votes, undervotes, and overvotes.

Secretary of State's and Attorney General's Offices' Response:

RSA 660:5, which outlines the conduct of a recount, states in relevant part that “[a]t the time and place so appointed, the ballots cast for such office shall be counted by the secretary of state and such assistants as the secretary of state may require” (emphasis added). A recount is not an investigation of the election, nor is it an audit of the election.

The law does not require the Secretary of State to also conduct a separate tally of undervotes and overvotes. In light of the forgoing, and in consideration of the limited time frame within which the Secretary of State must often conduct multiple recounts, the Offices do not agree with this recommendation.

The Secretary of State has constitutional obligations to complete the recounting process in strict timeframe in order to meet the constitutionally-defined deadlines. There are other constitutional provisions similarly establishing deadlines that would not realistically permit the Secretary to complete recounts at the pace of the Senate Bill 43 audit team operating with its recommended techniques.⁸

⁸ New Hampshire Constitution, Part II:

[Art.] 3. [General Court, When to Meet and Dissolve.] The senate and house shall assemble biennially on the first Wednesday of December for organizational purposes in even numbered years....

[Art.] 33. [Secretary of State to Count Votes for Senators and Notify Persons Elected.] And that there may be a due meeting of senators and representatives on the first Wednesday of December, biennially, the secretary of state shall, as soon as may be, examine the returned copy of such records; and fourteen days before the first Wednesday of December, he shall issue his summons to such persons as appear to be chosen senators and representatives, by a plurality of votes, to attend and take their seats on that day.

[Art.] 12. [Biennial Election of Representatives in November.] The members of the House of Representatives shall be chosen biennially, in the month of November, and shall be the second branch of the Legislature.

[Art.] 27. [Election of Senators.] The freeholders and other inhabitants of each district, qualified as in this constitution is provided shall biennially give in their votes for a senator, at some meeting holden in the month of November.

[Art.] 42. [Election of Governor, Return of Votes; Electors; If No Choice, Legislature to Elect One of Two Highest Candidates; Qualifications for Governor.] The governor shall be chosen biennially in the month of November; and the votes for governor shall be received, sorted, counted, certified and returned, in the same manner as the votes for senators; and the secretary shall lay the same before the senate and house of representatives, on the first Wednesday following the first Tuesday of January to be by them examined....

[Art.] 60. [Councilors; Mode of Election, etc.] There shall be biennially elected, by ballot, five councilors, for advising the governor in the executive part of government. The freeholders and other inhabitants in each county, qualified to vote for senators, shall some time in the month of November, give in their votes for one councilor; which votes shall be received, sorted, counted, certified, and returned to the secretary's office, in the same manner as the votes for senators, to be by the secretary laid before the senate and house of representatives on the first Wednesday following the first Tuesday of January.

ATTACHMENT A

**ATTORNEY GENERAL
DEPARTMENT OF JUSTICE**

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

GORDON J. MACDONALD
ATTORNEY GENERAL



JANE E. YOUNG
DEPUTY ATTORNEY GENERAL

January 5, 2020

Bernard Campbell, Esq.
Town of Windham
1 Stiles Road, Suite 107
Salem, NH 03079

Re: Town of Windham Election Results (2020146288)

Dear Attorney Campbell:

New Hampshire has a long-standing tradition of well-run, public, open, and transparent elections and that tradition was on full view during the 2020 General Election. And, in accordance with Part II, Article 32 of the New Hampshire Constitution, all of our record-breaking number of ballots were received and publicly counted. On Election Day, the New Hampshire Attorney General's Office had more than 100 State employees inspect or monitor more than 99% of the State's polling places, including Windham's. We fielded more than 275 calls and emails on our Election Day hotline to make sure that all voters qualified to vote were able to vote. Since Election Day, we have responded to numerous, additional emails and calls providing detailed information to voters who were concerned about whether their ballots were cast and counted, or who raised issues about their polling places or the election itself.

Many of the concerns raised in emails after the Election related to the ballot counting devices currently in the news in other states. Those devices are different than the ones used in New Hampshire. The AccuVote optical scanner used in New Hampshire is older technology. The device is used only to count paper ballots at a polling place; it is not used in the canvas or aggregation of votes from multiple polling places. Each moderator uses the device's results tape as part of the election night count of ballots, adding the votes from any hand counted ballots to the device totals. The aggregated results are then reported to the public at the polling place on election night and recorded on a paper "Return of Votes" form, completed by the clerk. The New Hampshire State Police transport the paper Return of Votes forms to the Secretary of State's office in Concord.

The AccuVote devices have been in use in New Hampshire for over 25 years and are approved by the New Hampshire Ballot Law Commission. The device was originally manufactured by Unisys, then by Global Elections Systems, Inc., which are no longer in business. The device used in New Hampshire is no longer being manufactured. Dominion owns

the intellectual property of the AccuVote and its related elections management system, but does not manufacture the device.

The AccuVote device's memory cards are programmed in advance of the election and local election officials are required to test each device using marked test ballots. Local officials can use the device at an election only if the test shows that the device is programmed properly and accurately counts the test ballots which are separately hand counted as confirmation of each device's results.

After the 2020 General Election, New Hampshire conducted 16 recounts of election night results. A recount is done entirely by people, assigned by the Secretary of State, who count each ballot by hand. Recounts provide the opportunity to compare the ballot counting devices' results to carefully conducted recounts of each ballot by teams of people. The Secretary of State does not use a ballot counting device at the recounts. Decades of recount results confirm the accuracy and reliability of the ballot counting devices in use at the 2020 General Election. And, the 2020 General Election recounts were no different.

On November 12, 2020, the Secretary of State's Office conducted a recount of the State Representative – Rockingham District 7 race. This was the race involving Windham.

The Secretary of State conducted the recount using a process that was fully transparent. Each candidate had the opportunity, directly or through their representatives, to see each ballot as it was counted and to see the tally sheet on which each vote was recorded. A system using a document camera projected onto two monitor screens allowed the candidate's observers to view both the ballot that was being counted and the tally sheet that was being marked for each vote. Any candidate or representative could stop the counting process at any moment if he or she had a concern that the ballot was not being accurately counted or that the tally sheet was not being accurately marked to reflect vote observed on the ballot.

Counting teams first separated the ballots into three groups. All ballots where the voter voted for all four Democratic candidates were put into one pile. There were 2,447 ballots where the voter voted for all four Democratic candidates. All ballots where the voter voted for all four Republican candidates were put into a second pile. There were 4,038 ballots where the voter voted for all four Republican candidates. The remaining ballots, where the voter voted for one or more candidates from both parties and/or did not mark four candidates (under voted), were put into a third pile.

The number of ballots that were exclusively for all the candidates from one party (straights) were counted. That total number of ballots was added to the tally of votes for each candidate from that party.

The pile of ballots where the voter either marked less than four choices or voted for one or more candidates from different parties were then counted with one counting team member reading off the name of each candidate who received a vote and a second making a harsh mark on a tally sheet under the name of that candidate for each vote.

Upon completion of this process, the tally sheets from each team were added together. The results was:

District No. 7 (4)	Soti, r	Griffin, r	Lynn, r	McMahon, r		
Windham	4,480	5,292	4,786	5,256		
Recount	4,777	5,591	5,089	5,554		
District No. 7	St.Laurent, d	Azibert, d	Roman, d	Singureanu, d		Scatter
Windham	4,456	2,787	3,415	2,764		19
Recount	4,337	2,808	3,443	2,782		

Following the recount, there was no change in winners.

On November 19, 2020, this Office received your letter, on behalf of the Town of Windham, requesting “an opportunity to re-canvass the votes, using the Town’s Election equipment if necessary, conduct another recount by hand, including all the data required to verify the total number of votes cast.”

On November 30, 2020, this Office also received the decision by the Ballot Law Commission on an appeal filed by state representative candidate, Kristi St. Laurent. The Ballot Law Commission (BLC) met on November 23, 2020, to consider Ms. St. Laurent’s appeal, during which, she stated that her request was that the BLC request the Attorney General’s Office “conduct a general review and investigation of the machines and conduct of the election.” The BLC also heard testimony from Windham Moderator Peter Griffin, and Assistant Moderator Elizabeth Dunn.

The BLC voted unanimously to uphold the results of the recount of the Town of Windham’s ballots. In addition, the BLC noted there was no allegation of wrong-doing or fraud. However, the BLC requested the Attorney General “review the operation of the voting machines in Windham, and conduct a general review of the conduct of the election, to see if it can determine the reasons for the unusual variation between the machine and hand counts.”

As a preliminary matter, there is no statutory authority for the Attorney General’s Office to conduct an audit of the ballot counting devices where there is no basis to suspect an election law violation. This Office similarly cannot authorize election officials to conduct an independent re-canvass of the 2020 General Election ballots as requested by the Windham officials. Further, the Ballot Law Commission, as it recognized in its order, does not have the legal authority to require an audit of an election, either of the ballot counting devices or the ballots themselves, except those specifically challenged as part of a recount appeal. In fact, New Hampshire’s law prescribes a specific process for the recounts (Chapter 660), the appeal of a recount to the BLC (Chapter 665), and the appeal to the Supreme Court of the BLC’s decision (RSA 665:16). No appeal was taken to the Supreme Court related to the Windham recount.

You have proposed a “re-canvass” and others have raised conducting an “audit.” New Hampshire’s election law currently does not use the term “audit” in the context of any post-election procedure applicable to these circumstances. To the extent that a “re-canvass” or “audit” might involve recounting the Windham ballots, the law explicitly prohibits more than one recount. “In no event shall a discrepancy result in a second recount for the same candidate, as

provided in RSA 660:3.” RSA 660:5. See also RSA 660:3. “In no case may the ballot law commission order a second recount.” RSA 665:8 I and II.

However, the Attorney General does have general authority to uphold the election laws and to provide training to election officials, in conjunction with the Secretary of State’s Office, on compliance with proper procedures for reviewing how the election was conducted, counting ballots, reporting election results, and performing recounts. That review can include working with local election officials to implement or refine their protocols and procedures.

Given your request for our Office to complete a review Windham’s election process, it is necessary to first understand the conduct of Windham’s election officials in preparation for and on Election Day. As a result, this Office is requesting the Town of Windham election officials prepare a written report explaining in detail, but not limited to, the following matters:

- How Town election officials managed Windham’s ballot counting devices prior to the election. (*i.e.* Copy of the Canvas Bag - Electronic Ballot Counting Device Activity Log, Counting Device - Ballot Counting Device Activity Log, Memory Card Bar Slot - Ballot Counting Device Activity Log, Memory Card Storage & EBCD Access to Storage Area Log. How were the devices tested? The training of the individuals who tested and set up the devices? Information on any contact with LHS regarding concerns with the devices – either before or after the election? Please provide copies of all documents used in the pre-election testing of the devices and the results of those tests.)
- How Town election officials managed Windham’s ballot counting devices on Election Day (*i.e.* Who supervised the devices? How often were the devices emptied of processed ballots? How were counted ballots maintained in comparison to the ballots that required hand counting at the end of the night? Where were the ballots located once they were removed from the devices?)
- Copies of Windham’s long report of the result tapes for all its ballot counting devices used during the November 3, 2020 General Election.
- Did the ballot diverter function operate correctly on each of Windham’s ballot counting devices? If yes, for those ballots that were deflected into the hand count compartment of the ballot counting device, how were these ballots stored and tracked prior to the hand count?
- A description of the election night counting process, including applicable hand counting processes as well as recording of the device counts. (What number of people assisted in the counting? Were new teams of people who had not been working the polls all day brought in to do the hand counting? How many ballots were hand counted? Where were these ballots stored after the count was completed? How were the hand count ballots separated? How were the counting teams set up? How were vote tallies recorded? Who was involved in the aggregation of results from hand count totals and ballot counting device result tapes?)

- A description of the reconciliation process, including copies of the worksheets used by officials to tally and ultimately complete the "Return of Votes" form submitted to the Secretary of State's Office.
- We request that Windham continue to preserve the primary and back-up memory cards programmed for the November general election. We understand this will require you to work with LHS to obtain substitute memory cards for programming your Spring 2021 town election.

We understand that we are requesting a significant amount of information and appreciate your cooperation in providing it so that we can respond to your request for our review of your process.

Please feel free to contact us should you have any questions. Thank you.

Sincerely,



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cc: Ballot Law Commission