

State of New Hampshire  
Supreme Court

NO. 2013-0043

2013 TERM

MAY SESSION

**William L. O'Brien**

v.

**New Hampshire Democratic Party**  
and  
**Raymond C. Buckley, Chairman**

RULE 7 APPEAL OF FINAL DECISION OF THE  
HILLSBOROUGH COUNTY (NORTH) SUPERIOR COURT

APPENDIX TO OPPOSING BRIEF OF DEFENDANTS-APPELLEES,  
NEW HAMPSHIRE DEMOCRATIC PARTY AND RAYMOND C. BUCKLEY

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THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.  
NORTHERN DISTRICT

SUPERIOR COURT

William L. O'Brien

v.

New Hampshire Democratic Party and  
Raymond C. Buckley, individually and as Chairman

DECLARATION

I. Parties:

1. The plaintiff, William L. O'Brien, is the Speaker of the New Hampshire House of Representatives and is a resident of the State of New Hampshire with a mailing address of 9 Southview Drive, Mont Vernon, New Hampshire 03057.

2. The defendant, New Hampshire Democratic Party, is an organized political party in the State of New Hampshire with an address of 105 North State Street, Concord, New Hampshire 03301.

3. The defendant, Raymond C. Buckley, is the Chairman of the New Hampshire Democratic Party and is a resident of the State of New Hampshire with an address of 700 South Porter Street, Apartment 9, Manchester, New Hampshire 03103.

II. Jurisdiction & Venue:

4. This Court has jurisdiction over the subject matter of this proceeding pursuant to RSA 491:7.

5. Venue is proper in Hillsborough County as it is the plaintiff's county of residence.

III. Facts:

6. William L. O'Brien is a New Hampshire State Representative who currently serves as Speaker of the New Hampshire House. He is a Republican representing District 4 in the New Hampshire House.

7. In 2010, Plaintiff O'Brien was running for re-election and had requested Democratic write-in votes in the September 14, 2010, primary so that he could appear on the ballot in the November cycle for elections as both (R)epublican and (D)emocrat, which is done predominantly in the smaller towns of New Hampshire from time to time. There is nothing wrong about what Mr. O'Brien was attempting to do but it clearly irritated Mr. Buckley who did not want Mr. O'Brien to have the appellation of both R and D after his name on the November ballot.

8. The New Hampshire Democratic Party (hereinafter "NHDP"), Mr. Buckley and others presently unknown to the Plaintiff, were responsible for causing a prerecorded political audio message, as defined in RSA 664:14-a, I, to be delivered to residents of New Hampshire on September 13, 2010, the day before the primary. The audio message contained the recorded voice of the Chairman of the NHDP, Raymond C. Buckley, giving the following message:

This is State Democratic Chair Ray Buckley calling with the important news that current Republican Bill O'Brien has asked to join the Democratic Party's ticket for the November elections.

If he succeeds tomorrow, we expect Bill O'Brien will embrace the Democratic Party's platform, support President Obama, national health care reform and stand up for gay marriage, and protect a woman's right to choose and our agenda to move New Hampshire and America forward.

Once again, we wanted you to know before you vote tomorrow that Bill O'Brien has asked to join the Democratic ticket and our progressive agenda. Thank you so much.

9. By being responsible for causing the delivery of these false prerecorded political messages, the NHDP violated RSA 664:14-a, II, in that the audio message failed to contain "[t]he name of the person or organization paying for the delivery of the message, and the name of the fiscal agent, if applicable" as required by RSA 664:14-a, II (b).

10. Accordingly, the NHDP was responsible for knowingly causing the subject prerecorded political messages to be delivered in a manner that violated New Hampshire law.

11. The audio message was recorded for the telephone calls by Raymond Buckley and recorded by Broadcast Solutions. The NHDP provided Broadcast Solutions with an electronic list of 456 telephone numbers of New Hampshire residents to call. On September 13, 2010, Broadcast Solutions delivered the prerecorded political message to those telephone numbers.

12. The NHDP and Mr. Buckley were responsible for knowingly causing the delivery of the illegal prerecorded political messages by Broadcast Solutions to 394 New Hampshire households on September 13, 2010.

13. On August 29, 2011, the Democratic Party agreed to pay the State a penalty of \$5,000 for violating the election laws.

14. The conduct of Mr. Buckley is especially egregious given the fact that he was the plaintiff in litigation brought against the Republican party in 2004 regarding the

2002 election where it was alleged Republicans had jammed a few phone lines for an hour in Manchester.

15. Mr. Buckley, of all people, is very familiar with the election laws and how phone campaigns are to be conducted, thus making his deceptive message, and the way it was delivered against Mr. O'Brien, a willful violation of the law.

16. RSA 664:14-a, IV(b) provides for trebling of damages in the event of willfulness and permits any person injured, such as Mr. O'Brien, to bring an action "for actual damages or \$1,000, whichever is greater."

17. If all calls involved were subject to be considered only one violation for \$1,000 then it would not matter whether there were 394 or 39,400 or 394,000 calls. At a fixed \$1,000, it would merely be a cost of doing business in violation of RSA 664:14-a for a party or campaign with the penalty being chump change compared to other costs.

18. By analogy under a different statute a federal court reasoned in U.S. v. Golden Fifty Pharmaceutical Co., Inc., 421 F.Supp. 1199, 1207 (D.C. Ill. 1976):

The statute provides that each violation of a cease and desist order is a separate offense. The order prohibits defendants from mailing or causing to be mailed any advertisement which contains a proscribed representation. If defendants had mailed a single advertisement in Count I, we would have little trouble finding a violation. The fact that they mailed millions rather than one or two, as in Count III, does not diminish the seriousness of each individual violation.

(citing U.S. v. J. B. Williams Co., Inc., 354 F.Supp. 521, 547-48 (D.C.N.Y., 1973) *aff'd* in part and *rev'd* in part, 498 F.2d 414 (2d Cir. 1974) ("Harm results each time the same deceptive advertisement reaches consumers and the harm is cumulative." Addressing



the broadcast of eleven commercials on 100 separate television programs, constituted 100 violations.).

19. A similar federal telephone law is also instructive on damages because the federal Telephone Consumer Protection Act has been held to provide damages at the rate of \$500 per call, Charvat v. GVN Michigan, Inc., 561 F.3d 623 (6 Cir. 2009).

20. William L. O'Brien, therefore, seeks damages in the amount of \$1,000 for each of the 394 phone calls and asks that the \$394,000 be trebled for a total amount of asserted damages of \$1,182,000.

HILLSBOROUGH, SS.  
NORTHERN DISTRICT

THE STATE OF NEW HAMPSHIRE  
SUPERIOR COURT

WILLIAM L. O'BRIEN

v.

NEW HAMPSHIRE DEMOCRATIC PARTY, et. al.

Docket # 216-2011 CV-00786

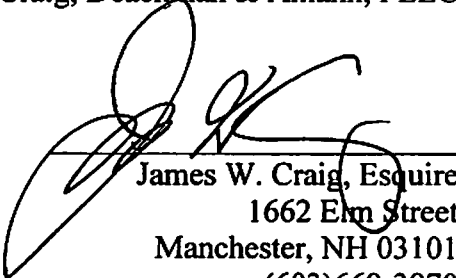
**DEFENDANT NEW HAMPSHIRE DEMOCRATIC PARTY'S BRIEF  
STATEMENT AND SPECIAL PLEA OF DEFENSE.**

NOW COME the Defendant, New Hampshire Democratic Party, by and through its attorneys, Craig, Deachman & Amann, PLLC and, subject to discovery, respectfully submits the following Brief Statement and Special Plea of Defense:

1. The Defendant New Hampshire Democratic Party is not a proper defendant pursuant to the cited statute.
2. The Defendant New Hampshire Democratic Party, did not violate the cited statute.
3. The Plaintiff did not suffer injury by any action of the New Hampshire Democratic Party.
4. Petitioner, assuming arguendo that he can prove a statutory violation, is limited to one violation only and not 394 violations.
5. Prosecution and an award of damages in this case will violate the defendant's Constitutional double jeopardy safeguards.
6. The defendant reserves the right to amend this Special Plea and Brief Statement of Defense to include additional defenses as discovery may indicate.

Respectfully submitted,  
NEW HAMPSHIRE DEMOCRATIC PARTY  
By their attorneys,  
Craig, Deachman & Amann, PLLC

Dated: November 28, 2011

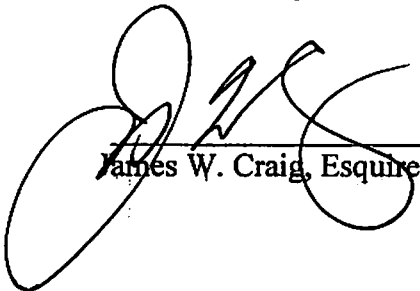


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James W. Craig, Esquire  
1662 Elm Street  
Manchester, NH 03101  
(603)669-3970  
NH Bar # 183

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Brief Statement and Special Plea of Defense has been forwarded this November 28, 2011 to Charles C. Douglas, Esquire and Gregory J. Ahlgren, Esquire



---

James W. Craig, Esquire

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS  
NORTHERN DISTRICT  
216-2011-CV-00786

SUPERIOR COURT

William O'Brien

v.

New Hampshire Democratic Party, et. al.

**DEFENDANT RAY BUCKLEY'S SUMMARY STATEMENT**

The defendant, Ray Buckley, was at all of the relevant times articulated in the plaintiff's civil writ of summons, and during the occurrence of all of the claimed actions referenced in the plaintiff's civil writ of summons, the Chairman of the Democratic Party of New Hampshire, and all actions complained of in the said plaintiff's civil writ of summons occurred while Mr. Buckley was functioning within his capacity as said chairman. Defendant Buckley did cause to be placed the referenced phone calls, but the exact number is currently unknown, and Mr. Buckley denies that in doing so he violated any statutory obligation as referenced in the plaintiff's writ. Even if the fact finder ultimately determines that Mr. Buckley did violate a statutory provision, Mr. Buckley denies that the plaintiff was either injured thereby and entitled to damages, or is even entitled to bring said civil writ of summons as he was not injured by the alleged acts.

Mr. Buckley further states that he is not personally responsible for any damages if damages there even are, as his actions were done in good faith in the performance of his duties for his employer.

The defendant, Raymond Buckley, is not insured for this action.

The defendant, Raymond Buckley, denies that the plaintiff's computation of damages, instead averring that at most there was one only count of statutory violation.

There has been no demand to date and no offer.

Defendant Ray Buckley would request mediation in this matter.

Interrogatories and other discovery has not yet been implemented by either party as a scheduling order has not yet been issued by the Court.

This document is merely a summary of what appear at this time to be the major issues in this case.

Respectfully submitted,  
Ray Buckley  
By his attorney

December 5, 2011

---

Gregory J. Ahlgren  
N.H. Bar # 267  
529 Union St.  
Manchester, NH 03104  
(603) 669-6117

I hereby certify that I have on this date forwarded a copy of this Summary Statement to Charles Douglas, Esquire and James Craig, Esquire.

---

Gregory J. Ahlgren

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.  
NORTHERN DISTRICT

SUPERIOR COURT

William L. O'Brien

v.

New Hampshire Democratic Party and  
Raymond C. Buckley, individually and as Chairman

Docket No. 11-CV-786

**PLAINTIFF'S SUMMARY STATEMENT**

NOW COMES the plaintiff, William L. O'Brien, by and through his attorneys, Douglas, Leonard & Garvey, P.C., and respectfully submits this Summary Statement, stating as follows:

1. William L. O'Brien is a Republican State Representative who currently serves as Speaker of the New Hampshire House.

2. In 2010, Plaintiff O'Brien was running for re-election and had requested Democratic write-in votes in the September 14, 2010, primary so that he could appear on the ballot in the November cycle for elections as both (R)epublican and (D)emocrat, which is done predominantly in the smaller towns of New Hampshire from time to time.

3. The New Hampshire Democratic Party (hereinafter "NHDP"), Mr. Buckley and others presently unknown to the Plaintiff, were responsible for causing a prerecorded political audio message, as defined in RSA 664:14-a, I, to be delivered to residents of New Hampshire on September 13, 2010, the day before the primary. The

audio message contained the recorded voice of the Chairman of the NHDP, Raymond C. Buckley, giving the following message:

This is State Democratic Chair Ray Buckley calling with the important news that current Republican Bill O'Brien has asked to join the Democratic Party's ticket for the November elections.

If he succeeds tomorrow, we expect Bill O'Brien will embrace the Democratic Party's platform, support President Obama, national health care reform and stand up for gay marriage, and protect a woman's right to choose and our agenda to move New Hampshire and America forward.

Once again, we wanted you to know before you vote tomorrow that Bill O'Brien has asked to join the Democratic ticket and our progressive agenda. Thank you so much.

4. By being responsible for causing the delivery of these false prerecorded political messages, the NHDP violated RSA 664:14-a, II, in that the audio message failed to contain "[t]he name of the person or organization paying for the delivery of the message, and the name of the fiscal agent, if applicable" as required by RSA 664:14-a, II (b).

5. On August 29, 2011, the Democratic Party agreed to pay the State a penalty of \$5,000 for violating the election laws.

6. Mr. Buckley, of all people, is very familiar with the election laws and how phone campaigns are to be conducted, thus making his deceptive message, and the way it was delivered against Mr. O'Brien, a willful violation of the law.

7. RSA 664:14-a, IV(b) provides for trebling of damages in the event of willfulness and permits any person injured, such as Mr. O'Brien, to bring an action "for actual damages or \$1,000, whichever is greater."

8. If all calls involved were subject to be considered only one violation for \$1,000 then it would not matter whether there were 394 or 39,400 or 394,000 calls. At a fixed \$1,000, it would merely be a cost of doing business in violation of RSA 664:14-a for a party or campaign with the penalty being chump change compared to other costs.

9. William L. O'Brien, therefore, seeks damages in the amount of \$1,000 for each of the 394 phone calls and asks that the \$394,000 be trebled for a total amount of asserted damages of \$1,182,000.

Respectfully submitted,  
WILLIAM L. O'BRIEN  
By his attorneys,  
DOUGLAS, LEONARD &  
GARVEY, P.C.

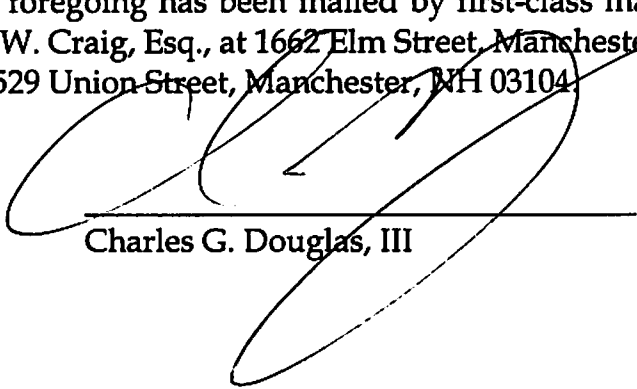
Date: December 7, 2011

By: 

Charles G. Douglas, III, Bar #669  
6 Loudon Road, Suite 502  
Concord, NH 03301-5321  
(603) 224-1988

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been mailed by first-class mail this 7<sup>th</sup> day of December 2011, to James W. Craig, Esq., at 1662 Elm Street, Manchester, NH 03101; and Gregory J. Ahlgren, Esq., 529 Union Street, Manchester, NH 03104.

  
Charles G. Douglas, III



HILLSBOROUGH, SS.

STATE OF NEW HAMPSHIRE

SUPERIOR COURT  
NORTHERN DISTRICT

William O' Brien

v.

New Hampshire Democratic Party, et. al.

**DEFENDANT NEW HAMPSHIRE DEMOCRATIC PARTY'S SUMMARY  
STATEMENT**

The Defendant, New Hampshire Democratic Party, according to it's Constitution, consists of all Democrats registered to vote in the State. It is neither a candidate nor a political committee.

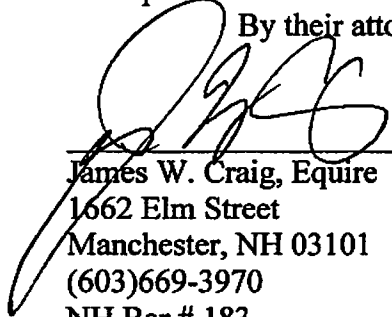
Raymond Buckley is the Chairman of the New Hampshire Democratic Party. In September, 2010, Mr. Buckley made an audio message call to certain New Hampshire residents concerning the current Speaker of the New Hampshire House, William O'Brien concerning an upcoming election.

The New Hampshire Democratic Party denies that any of its political committees authorized this action as required by statute and further denies that Speaker O'Brien was injured by Mr. Buckley's call and it further denies that Speaker O'Brien has correctly calculated damages pursuant to the relevant statute assuming arguendo, that he was in fact injured.

There has been no discovery undertaken yet in this case and no demand or offer made.

Respectfully submitted,  
New Hampshire Democratic Party  
By their attorney

Dated: December 8, 2011

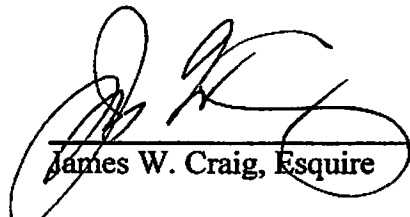


---

James W. Craig, Esquire  
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Manchester, NH 03101  
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NH Bar # 183

**CERTIFICATION OF SERVICE**

I hereby certify that a copy of this Summary Statement has been forwarded to Charles Douglas, Esquire and Gregory Ahlgren, Esquire this December 8, 2011.



---

James W. Craig, Esquire

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.  
NORTHERN DISTRICT

SUPERIOR COURT

William L. O'Brien

v.

New Hampshire Democratic Party and  
Raymond C. Buckley, individually and as Chairman

Docket No. 11-CV-786

**PLAINTIFF'S MOTION TO STRIKE JURY DESIGNATION**

NOW COMES the plaintiff, William L. O'Brien, by and through his attorneys, Douglas, Leonard & Garvey, P.C., and respectfully submits this Motion to Strike Jury Designation and, in support thereof, states as follows:

1. Under date of September 12, 2011, the plaintiff filed his Writ of Summons against the defendants and checked the court designation rather than jury trial designation on the Writ of Summons.
2. Under date of November 1, 2011, Gregory J. Ahlgren, Esq. entered an Appearance in this action on behalf of the defendant, Ray Buckley. On the Appearance form, Attorney Ahlgren checked the jury trial box.
3. The plaintiff moves to strike the defendant's jury trial designation because there is no right to a jury trial in the case brought under RSA 664:14-a, Pre-recorded Political Message. This case was designated as a non-jury case because it arises out of a unique statute and contains one count solely related to a statute that did not exist at

common law. In this case, there is neither a constitutional nor statutory right to a jury trial on a claim brought under RSA 664:14-a.

4. Statutory provisions do not have the right to trial by jury if the act was unknown at common law. See McElroy v. Gaffrey, 129 N.H. 382 (1987); see also Hallahan v. Riley, 94 N.H. 338 (1947).

5. RSA Chapter 664:14-a creates new statutory rights which did not exist in New Hampshire common law in 1784 when the State of New Hampshire adopted its constitution. Because of this, the New Hampshire constitution does not confer the right to a jury trial for a claim under RSA 664:14-a. State v. Morrill, 123 N.H. 707, 712 (1983).

6. Moreover, nothing in the language of RSA 664 specifically provides for a right to a jury trial. The statute states that:

Any person injured by another's violation of this section may bring an action for damages and for such equitable relief, including an injunction, as the court deems necessary and proper. If the court finds for the plaintiff, recovery shall be in the amount of actual damages or \$1,000, whichever is greater. If the court finds that the act or practice was willful or knowing violation of this section, it shall award as much as 3 times, but not less than 2 times, such amount. In addition, a prevailing plaintiff shall be awarded the costs of the suit and reasonable attorney's fees, as determined by the court.... Injunctive relief shall be available to private individuals under this section without bond, subject to the discretion of the court.

RSA 664:14-a, IV (b) (emphasis added). This identical language is in the New Hampshire Consumer Protection Act, RSA 358-A:10, I. The New Hampshire Supreme Court ruled in Hair Excitement, Inc. v. L'Oreal U.S.A., 158 N.H. 363 (2009) that this same provision does not provide for a trial by jury. Id. at 369.

7. In its ordinary meaning, "court" refers to a judge rather than a jury. Id. at 369. Furthermore, had the legislature intended to provide for a jury trial, it could have expressly done so. Hair Excitement, Inc. v. L'Oreal U.S.A. 158 N.H. at 369 (2009).

8. Accordingly, under the plain language of the statute, the court is vested with the authority to decide claims brought under RSA 664:14-a.

WHEREFORE, the plaintiff respectfully requests that this Honorable Court:

- A. Grant this Motion to Strike Jury Designation; and
- B. Grant such other and further relief as the court deems just and equitable.

Respectfully submitted,  
WILLIAM L. O'BRIEN  
By his attorneys,  
DOUGLAS, LEONARD &  
GARVEY, P.C.

Date: January 19, 2012

By: 

C. Kevin Leonard, Bar #10019  
Charles G. Douglas, III, Bar #669  
6 Loudon Road, Suite 502  
Concord, NH 03301-5321  
(603) 224-1988

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been mailed by first-class mail this 19th day of January, 2012 to James W. Craig, Esq., at 1662 Elm Street, Manchester, NH 03101; and Gregory J. Ahlgren, Esq., 529 Union Street, Manchester, NH 03104.

  
C. Kevin Leonard

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS  
216-2011-CV-00786

SUPERIOR COURT

William L. O'Brien

v.

New Hampshire Democratic Party and  
Raymond C. Buckley, Chairman

**DEFENDANT RAYMOND BUCKLEY'S OBJECTION**  
**TO PLAINTIFF WILLIAM O'BRIEN'S MOTION**  
**TO STRIKE JURY DESIGNATION**

NOW COMES the defendant, Raymond C. Buckley, by and through his attorney, and hereby objects to the plaintiff's Motion To Strike Jury Designation and requests that said motion be denied.

IN SUPPORT THEREOF, defendant Raymond Buckley states as follows:

1. This is a suit for monetary damages brought by William L. O'Brien, the Republican Speaker of the New Hampshire House of Representatives, against both the New Hampshire Democratic Party and Raymond C. Buckley, individually and as chairman of the party.

2. Raymond C. Buckley has demanded a jury trial pursuant to his rights as found in Part 1, Article 20 of the New Hampshire Constitution.

3. Plaintiff William L. O'Brien has moved to strike this case from the jury list, and alleges that although this is a suit for damages between at least two individuals, that because the specific statute under which he claims a cause of action did not exist in 1784 that somehow that means that the defendants have no constitutional right to a jury trial.

4. Part I, Article 20 of the New Hampshire Constitution states, unequivocally, that

"In all controversies concerning property, and in all suits between 2 or more persons except those in which another practice is and has been customary and except those in which the value in controversy does not exceed \$1,500.00 and no title to real estate is involved, the parties have a right to a trial by jury. This method of procedure shall be held sacred unless, in cases arising on the high seas or in cases relating to mariners' wages, the legislature shall think it necessary to alter it."

5. This is a suit between two or more persons (William O'Brien and Raymond Buckley) in which, in the underlying writ, the plaintiff seeks damages in the amount \$1,182,000.00 (see paragraph 20 of the plaintiff's underlying writ).

6. The plaintiff now takes the position that since the lawsuit is brought under a statute (RSA 664-14a) that did not exist at common law in 1784, there is no right to a jury trial. In support of this position the plaintiff cites *State v. Morrill*, 123 NH 707, at 712 (1983) that held that a defendant charged with a DWI violation in New Hampshire does not have the right to a jury trial.

7. That case has nothing to do with the right cited in Part 1 Article 20, which has to do with right of jury trial in civil causes, and the *Morrill* decision is limited in its holding to the right of jury trials in criminal cases.

8. Under a logical extrapolation of the plaintiff's constrained argument there would be no right to litigants in New Hampshire involved in a whole series of civil disputes arising from actions involving motor vehicles, computers, business corporations (not recognized at common law), etc. Without going through the totality of the New Hampshire RSA's item by item, it is the position of Raymond Buckley that the vast majority of statutory regulation that exists today did not exist prior to 1784.

9. The parties in this case are left with the plain language of Part 1, Article 20, which deems as *sacred* the right to a jury trial in a dispute between two or more individuals

if the amount in controversy is more than \$1,500.00.

10. The plaintiff also cites the Supreme Court holding in *Hair Excitement, Inc. v. L'Oreal U.S.A.*, 158 NH 363 (2009) in support of its position that regulatory language contained in the New Hampshire Consumer Protection act (RSA 358-A:10 I) is the same as contained in RSA 664:14-a IV, which is the statute in this case upon which the plaintiff relies.

11. In *Hair Excitement* the New Hampshire Supreme Court held that there was no right to a jury trial. However, what the plaintiff in this case fails to point out is that in the *Hair Excitement* case liability and damages had been bifurcated, and the case that went up to the New Hampshire Supreme Court was after a trial *on liability only*.

In this case William O'Brien also seeks monetary damages against the New Hampshire Democratic Party and Raymond C. Buckley, so the trial in this case will involve liability *and* monetary damages.

12. By arguing that RSA 664:14-a creates new statutory rights which did not exist at common law in New Hampshire when our State adopted its constitution in 1784, the plaintiff argues that means that there is no right to a jury trial.

13. However, the subject matter that is regulated by RSA 664:14-a does pertain directly to man's common law right to vote and take part in the political and electoral process. These rights were held fundamental and sacred not only in our Declaration of Independence, but also codified in both our federal and state constitutions. Elections and politics played vital roles in the establishment and creation of our constitutions, both in the United States and in the State of New Hampshire. The very premise of elections, the fairness of elections, and the right to vote, is based upon involvement by the citizens of this



great state and of this country, and this right existed in 1784.

14. The citizens of New Hampshire have shaped the electoral process and regulations throughout its history. These citizens have the duty to elect political candidates who are voted into office by their social peers. Therefore, with all due respect, a jury of these peers is better suited than an unelected court, to decide the outcome of a case based on those values and rights related to the election and voting processes.

15. By way of historical precedence, in 1974 New Hampshire witnessed the closest electoral election of all time between Louie Wyman and John Durkin who finished their general election senate race with a vote differential of two. The case went to the Ballot Law Commission in New Hampshire, the New Hampshire Supreme Court, and even ended up on the floor of the United States Senate. However, realizing the political inexpediency of allowing either unelected Judges, or Senators, to decide an important electoral and political issue, all parties wisely agreed to send this issue back to the New Hampshire electorate and to allow the people of New Hampshire to decide, which they did by holding a new special election. This is despite the fact that the case could have been decided by the New Hampshire Supreme Court on an appeal from the New Hampshire Ballot Law Commission. However, there was a recognition that the Ballot Law Commission and the Courts should not decide political issues.

16. There is no question that the case before this Honorable Court is a political one. Anyone who claims otherwise is disingenuous. The Republican Speaker of the New Hampshire House of Representatives has brought a lawsuit in which he claims damages in the amount of \$1,182,000.00 against the New Hampshire Democratic Party and its Chairman. Any such successful lawsuit against the New Hampshire Democratic

Party will, in essence, result in the financial oblivion of the New Hampshire Democratic Party. There are strong philosophical and policy reasons to not allow such a decision to be made by unelected judges who are appointed by a governor who himself or herself would have been a member of one of the two New Hampshire political parties whose state is so greatly affected by this decision. An electoral decision in 2001 in *Gore v. Bush* may have forever tainted the reputation of the federal judiciary. New Hampshire should not now make a similar mistake.

17. As a policy matter, this is the type of case that absolutely should be handled by a jury of the peers of those most affected.

WHEREFORE, defendant Raymond Buckley hereby requests that this Honorable Court deny the plaintiff's motion to strike this case from the jury list and instead maintain this case as a jury trial or, in the alternative, transfer this issue to the New Hampshire Supreme Court on an interlocutory basis without ruling..

Respectfully submitted,  
Raymond Buckley  
By his attorney

January 30, 2012

---

Gregory J. Ahlgren  
NH Bar #: 267

I hereby certify that I have on this date forwarded a copy of this Objection to Charles Douglas, Esquire and James Craig, Esquire.

---

Gregory J. Ahlgren  
Attorney At Law  
529 Union Street  
Manchester, NH 03104  
(603)669-6117

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.  
NORTHERN DISTRICT

SUPERIOR COURT

William L. O'Brien

v.

New Hampshire Democratic Party and  
Raymond C. Buckley, individually and as Chairman

Docket No. 11-CV-786

**PLAINTIFF'S RESPONSE TO DEFENDANT RAYMOND BUCKLEY'S  
OBJECTION TO MOTION TO STRIKE JURY DESIGNATION**

NOW COMES the plaintiff, William L. O'Brien, by and through his attorneys, Douglas, Leonard & Garvey, P.C., and replies to the defendant Buckley's Objection as follows:

1. Defendant Buckley in paragraph 8 of his objection points out that there are a number of statutes which did not exist in 1784. In fact, the New Hampshire Supreme Court has for years analyzed a statute to see whether it even provides for a private cause of action and then turns to the question of whether the cause of action existed at common law or not.

2. For instance, in Marquay v. Eno, 139 N.H. 708 (1995), the question was whether there was a private right of action in favor of abused children who were not reported in accordance with the reporting law set forth in RSA 169-C:29. The Court denied the abused children relief because it concluded that the reporting law was not something that existed at common law. See Id. 713-716.

3. In the instant case, the Court is dealing with the details of election law provisions and a unique provision allowing civil suits for damages tracking RSA 358-A:10. There were no election laws in New Hampshire in 1784, nor was there a statutory framework for reporting of contributions, regulating telephone calls, etc.

4. While the legislature could have made RSA 664:14-a, subject to jury trial, it did not. Thus, the analysis is the same as the Court said using the almost identical statutory language of RSA 358-A:10, I:

RSA Chapter [664:14-a] creates new statutory rights which did not exist in New Hampshire law in 1784 when the State of New Hampshire adopted its constitution. Because of this, the New Hampshire constitution does not confer the right to a jury trial for a claim under RSA [664:14-a].

Hair Excitement, Inc. v. L'Oreal U.S.A., Inc., 158 N.H. 363 at 358, (2009). (Statutory cite substituted).

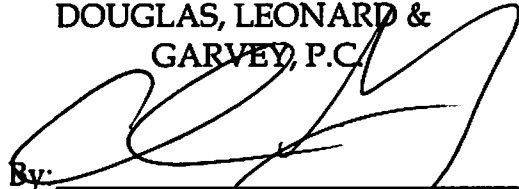
5. The arguments presented in the political polemic concerning the Wyman Durkin race almost 40 years ago are irrelevant because at no time was that dispute going to be presented to a jury. The mere fact that people who are in politics may feel strongly one way or the other does not mean that this Court can overturn a three-year old precedent from the New Hampshire Supreme Court deciding there is no jury trial under a statute that was specifically mimicked in RSA 664:14-a.

WHEREFORE, the undersigned prays that this Honorable Court:

- A. Grant this Motion and Strike the Jury Designation; and
- B. Grant such other and further relief as the court deems just and equitable.

Respectfully submitted,  
WILLIAM L. O'BRIEN  
By his attorneys,  
DOUGLAS, LEONARD &  
GARVEY, P.C.

Date: February 8, 2012

By:   
\_\_\_\_\_  
Charles G. Douglas, III, Bar #669  
6 Loudon Road, Suite 502  
Concord, NH 03301-5321  
(603) 224-1988

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been mailed by first-class mail this 8<sup>th</sup> day of February, 2012 to James W. Craig, Esq., at 1662 Elm Street, Manchester, NH 03101; and Gregory J. Ahlgren, Esq., 529 Union Street, Manchester, NH 03104.

  
\_\_\_\_\_  
Charles G. Douglas, III

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.  
NORTHERN DISTRICT

SUPERIOR COURT

William L. O'Brien

v.

New Hampshire Democratic Party  
Raymond C. Buckley

No. 11-C-786

**ORDER**

Presently before the court is plaintiff's motion to strike jury designation, to which defendant Raymond C. Buckley objects. After consideration of the pleadings and applicable law, the court finds and rules as follows.

Plaintiff's writ in this case contains a single cause of action alleging a violation of RSA 664:14-a concerning Prerecorded Political Messages. Defendant asserts a right to trial by jury on this cause of action under Part I, Article 20 of the New Hampshire Constitution. Plaintiff asserts that no such right exists. The court agrees.

Under Part 1, Article 20 of the New Hampshire Constitution, a jury trial is guaranteed only where (1) "the controversy concern[s] property[,] or involve[s] two or more persons" and exceeds \$1,500.00; and (2) "the controversy [is] one that was resolved by a jury at the time of the constitution's adoption." Gilman v. Lake Sunapee Properties, LLC, 159 N.H. 26, 30–31 (2009). "To resolve whether a party has a right to trial by jury in a particular action, [courts] generally look to both the nature of the case and the relief sought, and ascertain whether the customary practice included a trial by jury before 1784." Id. (quoting Hair Excitement, Inc. v. L'Oreal U.S.A., Inc., 158 N.H.

363, 368 (2009)). “Part I, Article 20 was a recognition of an existing right, guaranteeing it as it then stood and was practiced, guarding it against repeal, infringement, or undue trammel by legislative action, but not extending it so as to include what had not before been within its benefits.” *Id.* at 31 (internal quotations and citations omitted).

RSA 664:14-a, II provides that “[n]o person shall deliver or knowingly cause to be delivered a prerecorded political message unless the message contains, or a live operator provides, within the first 30 seconds of the message . . . [t]he name of the candidate or of any organization or organizations the person is calling on behalf of . . . [and] [t]he name of the person or organization paying for the delivery of the message and the name of the fiscal agent, if applicable.” A “prerecorded political message” means a prerecorded audio message delivered by telephone by . . . a candidate or political committee . . . .” RSA 664-14-a, I(a). “Any person injured by another’s violation of this section may bring an action for damages . . . . If the court finds for the plaintiff, recovery shall be in the amount of actual damages or \$1,000, whichever is greater.” RSA 664:14-a, IV(b).

The cause of action set out in RSA 664:14-a was created by the legislature in 2004 in response to significant “use of pre-recorded telephone messages by various political factions during the [2004] primary and general election.” *An Act Relative to the Use of Prerecorded Telephone Messages by Candidates and Political Committees: Hearing on HB 332-FN Before the H. Comm. on Election Law*, (N.H. 2003) (testimony of Rep. Spiess, Prime Sponsor). The law was “intended to place a regulatory structure over the use of” automatic dialing systems to send out pre-recorded political messages. *Id.* However, “it [was] in no way . . . intended to prohibit a candidate from making a

political call or an individual on behalf of the candidate making a political call, so long as that call is made in person and not through a pre-recorded message.” *An Act Relative to the Use of Prerecorded Telephone Messages by Candidates and Political Committees: Hearing on HB 332-FN before the S. Comm. on Interstate Cooperation*, (N.H. 2003) (testimony of Rep. Spiess).

Here, the court finds there is no constitutional right to a jury trial for a claim brought pursuant to RSA 664:14-a. See State v. Morrill, 123 N.H. 707, 712 (1983) (stating right to jury trial “extends only to those cases for which the jury trial right existed when the constitution was adopted in 1784”). RSA 664:14-a specifically regulates the use of certain new technology by political candidates. As such, the statute “creates new statutory rights which did not exist in New Hampshire common law in 1784 when this state adopted its constitution.” Hair Excitement, 158 N.H. at 368.

Defendant nonetheless contends he is entitled to a jury trial because “the subject matter that is regulated by RSA 664:14-a does pertain directly to man’s common law right to vote and take part in the political and electoral process” and this right existed in 1784. (Def.’s Obj. Mot. Strike ¶ 13.) The pertinent inquiry, however, is not whether the *subject matter* of a particular cause of action relates to a right recognized at common law, but whether the specific cause of action existed in 1784 and was traditionally tried to a jury. See Gilman, 159 N.H. at 33–36 (conducting historical analysis of partition actions to conclude that action existed in 1784 and that there was a right to jury trial for such actions). As a new cause of action created by the legislature in 2004, there is no constitutional right to a jury trial for actions brought under RSA 664:14-a. In re Sandra

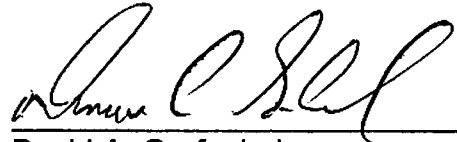


H., 150 N.H. 634, 636 (2004) ("The right [to] trial by jury does not extend . . . to special, statutory or summary proceedings unknown to the common law.")<sup>1</sup>

Nor does RSA 664:14-a provide a statutory right to a jury trial. A plain reading of the statute establishes that claims brought pursuant to RSA 664:14-a are for determination by the court, not the jury. Hair Excitement, Inc. v. L'Oreal U.S.A., Inc., 158 N.H. 363, 369 (2009) ("In its ordinary meaning, the word 'court' refers to a judge rather than a jury.") Accordingly, because there is neither a constitutional nor statutory right to a jury trial on a claim brought under RSA 664:14-a, the plaintiff's motion to strike defendants' jury trial designation is **GRANTED**.

**SO ORDERED.**

March 20, 2012



David A. Garfunkel  
Presiding Justice

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<sup>1</sup> To the extent defendant contends he is entitled to a jury trial because a jury trial is constitutionally guaranteed "in all suits between 2 or more persons except those . . . in which the value in controversy does not exceed \$1,500.00 . . ." and "[t]his is a suit between two or more persons . . . in the amount of \$1,182,000.00, (Def.'s Obj. Mot. Strike ¶¶ 4-5.), he ignores the requirement that the cause of action must have existed in 1784 and must have provided a jury trial right. Morrill, 123 N.H. at 712.

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.  
NORTHERN DISTRICT

SUPERIOR COURT

William L. O'Brien

v.

New Hampshire Democratic Party and  
Raymond C. Buckley, individually and as Chairman

Docket No. 11-CV-786

**PLAINTIFF'S FIRST REQUEST FOR ADMISSION UNDER RULE 54**

NOW COMES the plaintiff, William L. O'Brien, by and through his attorneys, Douglas, Leonard & Garvey, P.C., and requests that the defendants admit that the following documents are true and accurate copies of excerpts of the legislative history of RSA 644:14-a:

**Request for Admission No. 1:** Admit that the document attached at Tab 1 is a true and complete copy of the 2003 Record of House action on HB 332-FN (34 pages).

**Request for Admission No. 2:** Admit that the document attached at Tab 2 is a true and complete copy of the 2003 Record of Senate legislative history on HB 332-FN (29 pages).

**Request for Admission No. 3:** Admit that the document attached at Tab 3 is a true and complete copy of the Senate Journal, June 24, 2003, (pages 776-777).

**Request for Admission No. 4:** Admit that the document attached at Tab 4 is a true and complete copy of the House Journal, June 20, 2003, (2 pages).

Respectfully submitted,  
WILLIAM L. O'BRIEN  
By his attorneys,  
DOUGLAS, LEONARD &  
GARVEY, P.C.

Date: February 10, 2012

By:   
Charles G. Douglas, III, Bar #669  
6 Loudon Road, Suite 502  
Concord, NH 03301-5321  
(603) 224-1988

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been mailed by first-class mail this 10<sup>th</sup> day of February, 2012 to James W. Craig, Esq., at 1662 Elm Street, Manchester, NH 03101; and Gregory J. Ahlgren, Esq., 529 Union Street, Manchester, NH 03104.

  
Charles G. Douglas, III

# Bill as Introduced

HB 332-FN - AS INTRODUCED

2003 SESSION

03-0076

03/09

HOUSE BILL            **332-FN**

AN ACT                relative to the use of prerecorded telephone messages by candidates and political committees.

SPONSORS:            Rep. Spiess, Hills 47; Rep. Dokmo, Hills 47; Rep. Hess, Merr 37; Rep. Bergin; Hills 47; Sen. Below, Dist 5

COMMITTEE:          Election Law

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ANALYSIS

This bill requires that certain identifying information accompany prerecorded political telephone messages. This bill also requires that recipients of such messages be permitted to place themselves on a do not call list.

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Explanation:          Matter added to current law appears in ***bold italics***.  
Matter removed from current law appears [~~in brackets and struck through.~~]  
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

HB 332-FN - AS INTRODUCED

03-0076  
03/09

STATE OF NEW HAMPSHIRE

*In the Year of Our Lord Two Thousand Three*

AN ACT                   relative to the use of prerecorded telephone messages by candidates and political committees.

*Be it Enacted by the Senate and House of Representatives in General Court convened:*

1           1 New Section; Political Advertising; Prerecorded Political Messages. Amend RSA 664 by  
2 inserting after section 14 the following new section:

3           664:14-a Prerecorded Political Messages.

4           I. In this section, "prerecorded political message" means a prerecorded audio message delivered  
5 by telephone by:

6                   (a) A candidate or political committee; or

7                   (b) Any person when the content of the message expressly or implicitly advocates the  
8 success or defeat of any party, measure, or person at any election, or contains information about any  
9 candidate or party.

10           II. No person shall deliver a prerecorded political message unless the message contains, or a  
11 live operator provides, the following information:

12                   (a) The name of the person who recorded the message.

13                   (b) The name of any organization or organizations the person is calling on behalf of.

14                   (c) The name of the person paying for the delivery of the message.

15                   (d) How the recipient may place his or her telephone number on a do not call list, or  
16 otherwise request that no further prerecorded political messages be delivered by the person to the  
17 recipient telephone number.

18           III. No person shall deliver a prerecorded political message to any telephone number on the  
19 person's do not call list, or to any telephone number which has otherwise been the subject of a  
20 request that no further prerecorded political messages be delivered by the person to the telephone  
21 number.

22           IV. Violators of this section shall not be subject to penalties under RSA 664:21, V, but shall  
23 be subject to a civil penalty of \$250 per incident up to a total of \$50,000.

24           2 Effective Date. This act shall take effect January 1, 2004.

**HB 332-FN - AS INTRODUCED**  
**- Page 2 -**

LBAO  
03-0076  
1/10/03

**HB 332-FN - FISCAL NOTE**

**AN ACT** relative to the use of prerecorded telephone messages by candidates and political committees.

**FISCAL IMPACT:**

The Department of Justice states this bill will increase state expenditures by an indeterminable amount in FY 2004 and each year thereafter. There will be no fiscal impact on state, county, and local revenue or county and local expenditures.

**METHODOLOGY:**

The Department states this bill establishes a civil penalty for violations of RSA 664:14-a regarding prerecorded political messages as inserted by this bill. The Department states enforcement of the penalty has the potential to involve the agency in additional litigation. Costs would include the production of documents, research, travel, overtime for support staff, and additional caseloads for attorneys. Exclusive of staff time, the cost of litigation averages \$2,388 for civil cases and \$1,351 for criminal cases. In addition, any increase in the number of complaints to the agency will increase both workload and the priority in which they are handled. The Department cannot project the number of instances in which the Department will become involved because of an alleged failure by a candidate or committee to abide by the requirements of this bill, therefore, cannot estimate the fiscal impact at this time.

# Amendments



DID  
NOT  
USE

Rep. Spiess, Hills. 47  
Rep. Dokmo, Hills. 47  
February 10, 2003  
2003-0233h  
03/09

Amendment to HB 332-FN

1 Amend the bill by replacing section 1 with the following:

2

3 1 New Section; Political Advertising; Prerecorded Political Messages. Amend RSA 664 by  
4 inserting after section 14 the following new section:

5 664:14-a Prerecorded Political Messages.

6 I. In this section, "prerecorded political message" means a prerecorded audio message  
7 delivered by telephone by:

8 (a) A candidate or political committee; or

9 (b) Any person when the content of the message expressly or implicitly advocates the  
10 success or defeat of any party, measure, or person at any election, or contains information about any  
11 candidate or party.

12 II. No person shall deliver a prerecorded political message unless the message contains, or a  
13 live operator provides immediately after telephone contact, the following information:

14 (a) The name of the person who recorded the message.

15 (b) The name of any organization or organizations the person is calling on behalf of.

16 (c) The name of the person paying for the delivery of the message.

17 III. No person shall deliver a prerecorded political message to any telephone number on the  
18 person's do not call list, or on any state or federal do not call list, or to any telephone number which  
19 has otherwise been the subject of a request that no further prerecorded political messages be  
20 delivered by the person to the telephone number.

21 IV. Violators of this section shall not be subject to penalties under RSA 664:21, V, but shall  
22 be subject to an administrative fine of \$250 per incident up to a total of \$50,000.



**Amendment to HB 332-FN  
- Page 2 -**

2003-0233h

**AMENDED ANALYSIS**

This bill requires that certain identifying information accompany prerecorded political telephone messages.

Rep. Buckley, Hills. 56  
Rep. Dickinson, Carr. 4  
March 5, 2003  
2003-0547h  
03/04

Amendment to HB 332-FN

1 Amend the bill by replacing all after the enacting clause with the following:

2

3 1 New Section; Political Advertising; Prerecorded Political Messages. Amend RSA 664 by  
4 inserting after section 14 the following new section:

5 664:14-a Prerecorded Political Messages.

6 I. In this section, "prerecorded political message" means a prerecorded audio message  
7 delivered by telephone by:

8 (a) A candidate or political committee; or

9 (b) Any person when the content of the message expressly or implicitly advocates the  
10 success or defeat of any party, measure, or person at any election, or contains information about any  
11 candidate or party.

12 II. No person shall deliver a prerecorded political message unless the message contains, or a  
13 live operator provides immediately after telephone contact, the following information:

14 (a) The name of any organization or organizations the person is calling on behalf of.

15 (b) The name of the person or organization paying for the delivery of the message and  
16 the name of the fiscal agent, if applicable.

17 III. No person shall deliver a prerecorded political message to any telephone number on the  
18 person's do not call list, or on any state or federal do not call list, or to any telephone number which  
19 has otherwise been the subject of a request that no further prerecorded political messages be  
20 delivered by the person to the telephone number.

21 IV. Violators of this section shall not be subject to penalties under RSA 664:21, V, but shall  
22 be subject to an administrative fine of \$250 per incident up to a total of \$50,000.

23 2 Effective Date. This act shall take effect upon its passage.

Amendment to HB 332-FN  
- Page 2 -

2003-0547h

AMENDED ANALYSIS

This bill requires that certain identifying information accompany prerecorded political telephone messages.

# Speakers

## SIGN UP SHEET

To Register Opinion If Not Speaking

Bill # HB332 Date 2/4/03  
 Committee Electron Law

\*\* Please Print All Information \*\*

Name	Address	Phone	Representing	(check one)	
				Pro	Con
Erik Pierce	A Park St Rm 300 Concord, NH	603 226 1550	Verizon		X
Matt Quandt	Exeter	772-3412	Rochester	X	
A. Kopka	Nashua	577-5561	Nashua	X	
Paul Spasi	Anheast	623-6220	Dix 47	X	

# Hearing Minutes



HOUSE COMMITTEE ON ELECTION LAW

PUBLIC HEARING ON HB 332-FN

**BILL TITLE:** relative to the use of prerecorded telephone messages by candidates and political committees.

**DATE:** {January 29, 2003

**LOB ROOM:** 308      **Time Public Hearing Called to Order:** 10:04am

**Time Adjourned:** 10:50am

(please circle if present)

**Committee Members:** Reps. Stritch, Dickinson, Flanagan, Reeves, Kennedy, Drisko, Dionne, Whalley, Vaillancourt, Luebker, Flayhan, Cady, Derby, Borsett, Infantine, Clemons, Buckley, D. Cote, Kony, Splaine and Weed.

**Bill Sponsors:** Rep. Spiess, Rep. Dokmo, Rep. Hess, Rep. Bergin, Sen. Below

TESTIMONY

\* Use asterisk if written testimony and/or amendments are submitted.

\* **Rep. Spiess, prime sponsor**, spoke in support of this legislation and provided written testimony.

**Rep. Vaillancourt** questioned Line 15, Section D. He asked if the call would now be longer. Rep. Spiess stated that with all the information needed when calling it will be discouraging to the caller.

**Rep. Buckley** asked Rep. Spiess if he was aware that other states had similar law. Rep. Spiess responded in the affirmative.

**Rep. Hess, representing himself and House Leadership** stated that he, leadership and particularly the Speaker of the House strongly supports this legislation. He referenced Line 15, Section D and stated that at the present time there is no "do not call" list. If the FN is a problem then amend the bill to have the violator pay the state's fees from prosecution as well.

**Sen. Below, co-sponsor**, spoke in support of this legislation. He read an email that he had received from an opponent of the bill. Sen. Below gave a brief explanation of what happened throughout his and his opponent's campaign. He stated that he wants disclosure on who is paying for the call. No name is needed, not at the beginning but within 60 seconds. He stated that \$250 per incident is not enough. Suggested it should be \$5000.

**Rep Bergin, co-sponsor** and proud supporter, feels that the candidate should be the one at the end of the message saying who he/she is with in his or her own voice. He feels that the candidate might be a little more reluctant to violate this legislation. He also agrees with Sen. Below on the amount of the fine.

Rick Newman, Nottingham NH, spoke in support of this legislation. He would like this committee to find a way to make his life easier by making a "no call list".

Former State Rep. Peter Bragdon, Milford NH, spoke in support of this legislation. He admitted that he used this phone service during the last election. He thought that New Hampshire had a "no call" list. He also thought that New Hampshire had a law to cover these phone calls. He suggested that a disclaimer should be at the beginning of the call, who's paying, etc. He further suggested amending the "do not call" bill to add political advertising. He noted that RSA 664-15 already has an fine existing structure. He stated that he felt that callerID should not be blocked that a real number should be displayed.

Rep. Buckley asked Mr. Bragdon if he felt that the caller's number ID should be the calling company or the candidate's number. Mr. Bragdon responded by stating that the number should be that of the company.

Chairman Stritch recessed this hearing until 12:00noon on February 12, 2003.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "KD" followed by a long horizontal line.

Kimberley O M Dionne, Clerk

HOUSE COMMITTEE ON ELECTION LAW  
PUBLIC HEARING ON HB-332-FN

BILL TITLE: \_\_\_\_\_

DATE: 11/29/03

LOB ROOM: 308 Time Public Hearing Called to Order: 10:04 AM

Time Adjourned: 10:50  
recessed  
to 2/12@12pm

(please circle if present)

Committee Members: Reps. Stritch, Dickinson, Flanagan, Reeves, Kennedy, Drisko, Dionne,  
Whalley, Vaillancourt, Luebker, Flayhan, Cady, Derby, Dorset, Infantine, Clemons, Buckley, D.  
Cote, Kony, Splaine and Weed.

Bill Sponsors: Rep. Spiess, Rep. D'Amico, Rep. Hess, Rep. Bergin  
Sen. Below

TESTIMONY

\* Use asterisk if written testimony and/or amendments are submitted.

\* Rep. Paul Spiess

HB 330 - FN 11/29/03

Prime Sponsor - full support  
Paul Spiess Hillsborough 47

\* Rep Spiess gave written testimony  
and read it from the entirety

Rep Neillancourt ask and question line  
is letter D of the Bill.  
And would the call now  
be even longer?

Spiess: said with all the info needed  
when calling it will be  
discouraging to the caller.

Rep Buckley asked if Rep Spiess was aware  
that other states had similar  
Laws. Rep Spiess ~~gave~~ answer, that  
yes indeed he knew that.

---

Rep Hess representing self and leadership.

Rep Hess stated that himself, leadership,  
and particularly the speaker of  
the House strongly supports this

332-FN

page 2

legislation ~~and~~ concept

Line 2  
15 Line <sup>letter</sup> D - NO do not call list yet

If the FN is a problem that  
~~the~~ Amend the Bill to have the  
Violator pay the states fee's  
as well.

From  
~~prosecution~~  
prosecution

Sen. Below Dist. 5 Co-Sponsor  
Supports this legislation

Sen. Below read Nancy Marrow's (Opponent)  
email to the committee  
Sen Below gave a brief explanation  
on what happened through out  
his 3<sup>rd</sup> his OPPONENTS campaign.

WANTS Disclosure on who is paying for  
the call.

- NO name, } not even at the beginning of  
is needed } but with in 60 seconds.

- 250. per incident is not enough → 500. ~~per~~ Appendix page 49

HB 332-FN

page 3

Rep Buckley - Per call is AS he read it  
Q: did he read it right.

line  
23

Sen. Below answered that he did read  
it right [per incident]

Rep. Peter Bergin Dist. 47 Co-Sponsor  
and - Proud supporter

FEELS THAT THE THE CANDIDATE  
SHOULD BE THE ONE AT THE END OF  
THE MESSAGE SAYING ~~THIS TO BE AND SO~~  
WHO HE/SHE IS WITH THEIR OWN VOICE.  
FEELS THAT THE CANDIDATE MIGHT BE  
A LITTLE MORE RELUCTANT TO VIOLATE  
THIS LEGISLATION.

Rep. Bergin AGREES WITH SEN. BELOW ON  
THE SIZE OF THE FINE.

RICK NEWMAN FROM NOTTINGHAM  
IS IN SUPPORT OF THIS LEGISLATION  
AND WOULD LIKE ~~the~~ <sup>this</sup> COMMITTEE  
TO FIND A WAY TO MAKE HIS  
LIFE EASIER BY ~~passing this~~  
MAKING A NO CALL LIST.

Former Rep. Peter Bragden from Milford  
supports this Bill.

He admits he used this phone  
service last election.

He thought ~~we~~ <sup>N.H.</sup> had a no call list  
He also thought NH had a law  
to cover these phone calls

suggestions

Rewarding - Political advertising

Disclaimer should be in  
the beginning of call

Who's paying

Do not call list is already  
moving through the system.

(should amend the do not call  
Bill to add Appendix page 1112)

page 5

- ESI 664-15 Already has an existing fine structure.

- ALSO caller id should NOT be blocked  
Most numbers came up as  
000-000-000 or unavailable.  
A Real Number should supplied.

Rep Buckley ask Mr. Bragdon if he felt  
the caller's number id  
should be the Calling Company  
or the Candidates number.

Mr. Bragdon stated he felt the company's

Recess @ 10:50  
332

FEB 12, 2003  
Till NOON.



HOUSE COMMITTEE ON ELECTION LAW

PUBLIC HEARING ON HB 332

**BILL TITLE:** relative to the use of prerecorded telephone messages by candidates and political committees.

**DATE:** February 04, 2003

**LOB ROOM:** 308      **Time Public Hearing Called to Order:** 12:00pm

**Time Adjourned:** 12:11pm

(please circle if present)

**Committee Members:** Reps. Stritch, Dickinson, Flanagan, Reever, Kennedy, Drisko, Dienne, Whalley, Vaillancourt, Buehler, Flayhan, Gady, Derby, Dorsett, Infantine, Clemons, Buckley D. Cote, Konys, Splaine and Weed.

**Bill Sponsors:** Rep. Spiess, Rep. Dokmo, Rep. Hess, Rep. Bergin, Sen. Below

TESTIMONY

\* Use asterisk if written testimony and/or amendments are submitted.

**Orville B. Fitch, II, representing the Attorney General's Office,** spoke in support of this bill. He affirmed that there have been many complaints at the Attorney General's Office. He stated that the Attorney General's Office would like there to be an administrative fine. He further stated the Attorney General's Office desires that the penalties be well defined and is not in favor of any particular political phone call bill, but feels that one is needed.

**Rep. Buckley** stated that he would like to see an investigation by the Attorney General's Office to find all possibilities and loopholes.

**Rep. Kennedy** asked Mr. Fitch if there could be a criminal penalty. Mr. Fitch responded by stating that that is up to the legislature.

**Rep. Dokmo, co-sponsor,** spoke in support. She feels that this bill would aid in voter education on candidates. She stated that this bill will not stop all offenders but is a great start. She further stated that it gives teeth to enforcers of the law.

**Rep. Infantine** asked Rep. Dokmo if she would have a problem with not having to give real name. Rep. Dokmo responded by stating that she would have to think about this but feels that the real name should have been given.

**Rep. Buckley** asked Rep. Dokmo if the company or the individual is the offender. Rep. Dokmo responded by stating that if the committee needs to use another bill to define this, then that is fine.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Andrew L. Dorsett". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Andrew L. Dorsett, Clerk pro-tem

# Testimony

Testimony of Representative Paul Spiess  
Prime Sponsor HB332-FN  
Before the House Election Law Committee  
January 29, 2003

Thank you Mr. Chairman and members of the committee,

My name is Paul Spiess, representing Hillsborough 47, the towns of Amherst and Milford. I have brought this bill to the Legislature for consideration because of my shock, dismay and outrage over the use of pre-recorded telephone messages by various political factions during the last primary and general election. This is a relatively new technology, which I believe was employed to its full effect for the first time during this last election cycle.

I found the employment of this technology and the frequency of these calls to be excessive and offensive. I believe that they interfered with my rights to privacy and the quiet enjoyment of my home. I found the content of some of the messages to be unethical and the purpose of others to disparage the position and reputation of a political opponent. In almost every instance, I was unable to determine who made the recording, who paid for the message, and which political candidate (if any) they were endorsing.

While I respect the right of freedom of speech, I believe that there is a counterbalancing right to privacy. If it were within my power, I would put an outright ban on all pre-recorded political messages. I have no problem with the practice of a candidate or volunteers taking their time and energy to make a personal call to a registered voter. I have a significant concern with allowing the unregulated use of pre-recorded messages sent out in mass by automatic dialing systems on a repetitive basis to individuals who are unaware who is behind the call.

This concern is shared by many of my constituents. I have never before experienced such a spontaneous visceral negative reaction to anything, like I received from voters to this practice. My friends and neighbors confronted me repeatedly as they entered and left the polls complaining about these calls. They were flat out annoyed, and put off by both the practice and the content. At a time when we have legitimate cause for concern about voter apathy, I would suggest that we cannot afford to allow practices, which continue to alienate voters.

This bill is intended to place a regulatory structure over the use of this technology. First, it defines what is a "prerecorded political message". Second, it prescribes what information must be provided at a minimum in each message. Third, It prohibits the delivery of prerecorded political messages to any telephone number that has been placed on a "do not call" list. And finally it provides for monetary penalties for breach of the statute.

A companion bill to HB 332 has been submitted by representative Dokmo, HB 364-FN, which will require the registration of any individual or organization that uses automatic dialing systems within the state. I believe that bill will be before you shortly.

I hope that you share my concern over the use of prerecorded political messages and automated dialing systems, and that you will see the value of creating a regulated environment for this practice.

Thank you for your time and consideration, and I would be pleased to answer your questions.

# Voting Sheets

HOUSE COMMITTEE ON ELECTION LAW

EXECUTIVE SESSION on HB 332-FN

**BILL TITLE:** relative to the use of prerecorded telephone messages by candidates and political committees.

**DATE:** March 18, 308

**LOB ROOM:** 308

**Amendments:**

Sponsor: Rep. Buckley OLS Document #: 2003 0547h

Sponsor: Rep. Dickinson OLS Document #:

Sponsor: Rep. OLS Document #:

**Motions:** OTP OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep. Dickinson

Seconded by Rep. Buckley

Vote: 16-2 (Please attach record of roll call vote.)

**Motions:** OTP, OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep.

Seconded by Rep.

Vote: (Please attach record of roll call vote.)

CONSENT CALENDAR VOTE: 18-0

(Vote to place on Consent Calendar must be unanimous.)

**Statement of Intent:** Refer to Committee Report

Respectfully submitted,

  
Rep. Kimberley O. M. Dionne, Clerk

HOUSE COMMITTEE ON ELECTION LAW  
EXECUTIVE SESSION on 332-FN

BILL TITLE: \_\_\_\_\_

DATE: 3/18/03

LOB ROOM: 308

Amendments:

Sponsor: Rep. Buckley & Dickinson OLS Document #: 2003-05476  Adopted/Failed  
Sponsor: Rep. \_\_\_\_\_ OLS Document #: \_\_\_\_\_ Adopted/Failed  
Sponsor: Rep. \_\_\_\_\_ OLS Document #: \_\_\_\_\_ Adopted/Failed

Motions: OTP,  OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep. Dickinson

Seconded by Rep. Buckley

Vote: 16-2 (Please attach record of roll call vote.)

Motions: OTP, OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep. \_\_\_\_\_

Seconded by Rep. \_\_\_\_\_

Vote: \_\_\_\_\_ (Please attach record of roll call vote.)

CONSENT CALENDAR VOTE: 18-0

(Vote to place on Consent Calendar must be unanimous.)

Statement of Intent: Refer to Committee Report

Respectfully submitted,  
  
Rep. Kimberley O. M. Dionne, Clerk



**ELECTION LAW**

Bill #: 332-FN Title: Relative to the use of pre-recorded telephone messages by candidates & political committees  
 PH Date: 1/1/ Exec Session Date: 3/18/03

Motion: OTPA Amendment #: 2003-0547h

MEMBER	YEAS	NAYS
Stritch, C Donald, Chairman	1	
Dickinson, Howard C. V Chairman	1	
Flanagan, Natalie S	Absent	
Reeves, Sandra J	1	
Kennedy, Richard E	Absent	
Drisko, Richard B	1	
Dionne, Kimberley O M	1	
Whalley, Michael D	1	
Vaillancourt, Steve	1	
Luebker, Bernard J	1	
Flavhan, Marv Lou		1
Cady, Harriet E	1	
Derby, Mark S	Absent	
Dorsett, Andrew L	1	
Infantine, William J		1
Clemons, Jane A	1	
Buckle, Raymond	1	
Cote, David E	1	
Konvs, Christine M	1	
Splaine, James R	1	
Weed, Charles F	1	

TOTAL VOTE:  
 Printed: 1/6/2003

16

# Committee Report

## COMMITTEE REPORT

COMMITTEE: Election Law

BILL NUMBER: HB 332

TITLE: relative to the use of prerecorded telephone messages by candidates and political committees.

DATE: March 18, 2003

CONSENT CALENDAR YES  NO

- OUGHT TO PASS
- OUGHT TO PASS WITH AMENDMENT
- INEXPEDIENT TO LEGISLATE
- REFER TO COMMITTEE FOR INTERIM STUDY  
(Available only in second year of biennium.)

### STATEMENT OF INTENT (Include Committee Vote)

HB 332 as amended requires that all pre-recorded political messages shall include the names of the organization that the person is calling on behalf of, and the name of the person or organization paying for the call and the fiscal agent, if applicable. Furthermore, no one shall be called whose name is on a "do not call" list. Violators shall be subject to an administrative fine of \$250 per incident, up to a total of \$50,000.

Vote 16-2.

Rep. Howard C. Dickinson  
FOR THE COMMITTEE

Original: House Clerk  
cc: Committee Bill file

USE ANOTHER REPORT FOR MINORITY REPORT

CONSENT CALENDAR

Election Law

**HB 332**, relative to the use of prerecorded telephone messages by candidates and political committees. **OUGHT TO PASS WITH AMENDMENT**

Rep. Howard C. Dickinson for Election Law: HB 332 as amended requires that all pre-recorded political messages shall include the names of the organization that the person is calling on behalf of, and the name of the person or organization paying for the call and the fiscal agent, if applicable. Furthermore, no one shall be called whose name is on a "do not call" list. Violators shall be subject to an administrative fine of \$250 per incident, up to a total of \$50,000. **Vote 16-2.**

~~XXXXXXXXXX~~  
**COMMITTEE REPORT**

COMMITTEE: Election Law  
BILL NUMBER: 332 - FN  
TITLE: Relative to the use of prerecorded telephone messages by candidates & political committees  
DATE: 3/18/03 CONSENT CALENDAR: YES  NO

- OUGHT TO PASS
- OUGHT TO PASS W/ AMENDMENT
- INEXPEDIENT TO LEGISLATE
- RE-REFER
- INTERIM STUDY (Available only 2<sup>nd</sup> year of biennium)

Amendment No.  
2003-0547h

**STATEMENT OF INTENT:**

HB 332, as amended, requires that all prerecorded political messages shall include the name of the organization that the person is calling on behalf of and the name of the person or organization paying for the call and the fiscal agent, if applicable. Furthermore, no one shall be called who's name is on a "Do-not-call" list. Violators shall be subject to an administrative fine of \$250 per violation.

COMMITTEE VOTE: 16-2 →

RESPECTFULLY SUBMITTED,

- Copy to Committee Bill File
- Use Another Report for Minority Report

Rep. [Signature]  
For the Committee

# Bill as Introduced

HB 332-FN - AS INTRODUCED

2003 SESSION

03-0076

03/09

HOUSE BILL            **332-FN**

AN ACT                relative to the use of prerecorded telephone messages by candidates and political committees.

SPONSORS:            Rep. Spiess, Hills 47; Rep. Dokmo, Hills 47; Rep. Hess, Merr 37; Rep. Bergin; Hills 47; Sen. Below, Dist 5

COMMITTEE:          Election Law

---

ANALYSIS

This bill requires that certain identifying information accompany prerecorded political telephone messages. This bill also requires that recipients of such messages be permitted to place themselves on a do not call list.

.....

Explanation:          Matter added to current law appears in *bold italics*.  
Matter removed from current law appears [~~in brackets and struck through~~]  
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

*In the Year of Our Lord Two Thousand Three*

AN ACT                   relative to the use of prerecorded telephone messages by candidates and political committees.

*Be it Enacted by the Senate and House of Representatives in General Court convened:*

1           1 New Section; Political Advertising; Prerecorded Political Messages. Amend RSA 664 by  
2 inserting after section 14 the following new section:

3           664:14-a Prerecorded Political Messages.

4           I. In this section, "prerecorded political message" means a prerecorded audio message  
5 delivered by telephone by:

6                   (a) A candidate or political committee; or

7                   (b) Any person when the content of the message expressly or implicitly advocates the  
8 success or defeat of any party, measure, or person at any election, or contains information about any  
9 candidate or party.

10           II. No person shall deliver a prerecorded political message unless the message contains, or a  
11 live operator provides, the following information:

12                   (a) The name of the person who recorded the message.

13                   (b) The name of any organization or organizations the person is calling on behalf of.

14                   (c) The name of the person paying for the delivery of the message.

15                   (d) How the recipient may place his or her telephone number on a do not call list, or  
16 otherwise request that no further prerecorded political messages be delivered by the person to the  
17 recipient telephone number.

18           III. No person shall deliver a prerecorded political message to any telephone number on the  
19 person's do not call list, or to any telephone number which has otherwise been the subject of a  
20 request that no further prerecorded political messages be delivered by the person to the telephone  
21 number.

22           IV. Violators of this section shall not be subject to penalties under RSA 664:21, V, but shall  
23 be subject to a civil penalty of \$250 per incident up to a total of \$50,000.

24           2 Effective Date. This act shall take effect January 1, 2004.



HB 332-FN - AS INTRODUCED  
- Page 2 -

LBAO  
03-0076  
1/10/03

HB 332-FN - FISCAL NOTE

AN ACT                   relative to the use of prerecorded telephone messages by candidates and political committees.

**FISCAL IMPACT:**

The Department of Justice states this bill will increase state expenditures by an indeterminable amount in FY 2004 and each year thereafter. There will be no fiscal impact on state, county, and local revenue or county and local expenditures.

**METHODOLOGY:**

The Department states this bill establishes a civil penalty for violations of RSA 664:14-a regarding prerecorded political messages as inserted by this bill. The Department states enforcement of the penalty has the potential to involve the agency in additional litigation. Costs would include the production of documents, research, travel, overtime for support staff, and additional caseloads for attorneys. Exclusive of staff time, the cost of litigation averages \$2,388 for civil cases and \$1,351 for criminal cases. In addition, any increase in the number of complaints to the agency will increase both workload and the priority in which they are handled. The Department cannot project the number of instances in which the Department will become involved because of an alleged failure by a candidate or committee to abide by the requirements of this bill, therefore, cannot estimate the fiscal impact at this time.

HB 332-FN - AS AMENDED BY THE HOUSE

25mar03... 0547h

2003 SESSION

03-0076  
03/09

HOUSE BILL **332-FN**

AN ACT relative to the use of prerecorded telephone messages by candidates and political committees.

SPONSORS: Rep. Spiess, Hills 47; Rep. Dokmo, Hills 47; Rep. Hess, Merr 37; Rep. Bergin; Hills 47; Sen. Below, Dist 5

COMMITTEE: Election Law

---

AMENDED ANALYSIS

This bill requires that certain identifying information accompany prerecorded political telephone messages.

-----

Explanation: Matter added to current law appears in *bold italics*.  
Matter removed from current law appears [~~in brackets and struck through~~].  
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

HB 832-FN - AS AMENDED BY THE HOUSE

25mar03... 0547h

03-0076  
03/09

STATE OF NEW HAMPSHIRE

*In the Year of Our Lord Two Thousand Three*

AN ACT relative to the use of prerecorded telephone messages by candidates and political committees.

*Be it Enacted by the Senate and House of Representatives in General Court convened:*

1 1 New Section; Political Advertising; Prerecorded Political Messages. Amend RSA 664 by  
2 inserting after section 14 the following new section:

3 664:14-a Prerecorded Political Messages.

4 I. In this section, "prerecorded political message" means a prerecorded audio message  
5 delivered by telephone by:

6 (a) A candidate or political committee; or

7 (b) Any person when the content of the message expressly or implicitly advocates the  
8 success or defeat of any party, measure, or person at any election, or contains information about any  
9 candidate or party.

10 II. No person shall deliver a prerecorded political message unless the message contains; or a  
11 live operator provides immediately after telephone contact, the following information:

12 (a) The name of any organization or organizations the person is calling on behalf of.

13 (b) The name of the person or organization paying for the delivery of the message and  
14 the name of the fiscal agent, if applicable.

15 III. No person shall deliver a prerecorded political message to any telephone number on the  
16 person's do not call list, or on any state or federal do not call list, or to any telephone number which  
17 has otherwise been the subject of a request that no further prerecorded political messages be  
18 delivered by the person to the telephone number.

19 IV. Violators of this section shall not be subject to penalties under RSA 664:21, V, but shall  
20 be subject to an administrative fine of \$250 per incident up to a total of \$50,000.

21 2 Effective Date. This act shall take effect upon its passage.

HB 332-FN - AS AMENDED BY THE HOUSE  
- Page 2 -

LBAO  
03-0076  
1/10/03

HB 332-FN - FISCAL NOTE

AN ACT relative to the use of prerecorded telephone messages by candidates and political committees.

**FISCAL IMPACT:**

The Department of Justice states this bill will increase state expenditures by an indeterminable amount in FY 2004 and each year thereafter. There will be no fiscal impact on state, county, and local revenue or county and local expenditures.

**METHODOLOGY:**

The Department states this bill establishes a civil penalty for violations of RSA 664:14-a regarding prerecorded political messages as inserted by this bill. The Department states enforcement of the penalty has the potential to involve the agency in additional litigation. Costs would include the production of documents, research, travel, overtime for support staff, and additional caseloads for attorneys. Exclusive of staff time, the cost of litigation averages \$2,388 for civil cases and \$1,351 for criminal cases. In addition, any increase in the number of complaints to the agency will increase both workload and the priority in which they are handled. The Department cannot project the number of instances in which the Department will become involved because of an alleged failure by a candidate or committee to abide by the requirements of this bill, therefore, cannot estimate the fiscal impact at this time.

# Amendments

Sen. Clegg, Dist. 14  
April 22, 2003  
2003-1350s  
03/01

Amendment to HB 332-FN

1 Amend the title of the bill by replacing it with the following:

2

3 AN ACT relative to the use of prerecorded telephone messages for political advocacy.

4

5 Amend the bill by replacing all after the enacting clause with the following:

6

7 1 Definitions; Communication. Amend RSA 664:2, VII to read as follows:

8 VII. "Communication" shall include, but not be limited to, publication in any newspaper or  
9 other periodical, broadcasting on radio, television, or over any public address system, *transmission*  
10 *by telephone*, placement on any billboards, outdoor facilities, window displays, posters, cards,  
11 pamphlets, leaflets, flyers, or other circulars, or in any direct mailing.

12 2 New Subparagraph; Political Advertising; Signature, Identification, and Lack of  
13 Authorization; Telephone. Amend RSA 664:14, IV by inserting after subparagraph (b) the following  
14 new subparagraph:

15 (c) Any political advertising in the form of a prerecorded message transmitted by  
16 telephone shall, within the first 60 seconds of the message, disclose the name and telephone number  
17 of the candidate, committee, or other person paying for the telephone call.

18 3 New Paragraph; Political Advertising; Signature, Identification, and Lack of Authorization.  
19 Amend RSA 664:14 by inserting after paragraph VI the following new paragraph:

20 VII. Any person who knowingly causes any communication that violates this section to be  
21 received within the state of New Hampshire shall be guilty of a misdemeanor if a natural person or  
22 shall be guilty of a felony if any other person.

23 4 Effective Date. This act shall take effect January 1, 2004.

2003-1350s

AMENDED ANALYSIS

This bill requires that any political advertising in the form of a prerecorded telephone message disclose the name and telephone number of the candidate, committee, or other person paying for the telephone call. This bill also requires that violations of the political advertising identification law meet a knowing standard of conduct for criminal penalties to apply.

Interstate Cooper  
April 24, 2003  
2003-1376s  
03/01

IF this amendment is adopted  
by the Committee, please  
deliver to the House Clerk  
(Room 317) or Senate Clerk  
(Senate Chamber), the 2  
originals and 2 copies

Amendment to HB 332-FN

1 Amend the title of the bill by replacing it with the following:

2

3 AN ACT relative to the use of prerecorded telephone messages for political advocacy.

4

5 Amend the bill by replacing all after the enacting clause with the following:

6

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12 2 New Subparagraph; Political Advertising; Signature, Identification, and Lack of  
13 Authorization; Telephone. Amend RSA 664:14, IV by inserting after subparagraph (b) the following  
14 new subparagraph:

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17 of the candidate, committee, or other person paying for the telephone call.

18 3 New Paragraph; Political Advertising; Signature, Identification, and Lack of Authorization.  
19 Amend RSA 664:14 by inserting after paragraph VI the following new paragraph:

20 VII. Any person who knowingly causes any communication that violates this section to be  
21 received within the state of New Hampshire shall be guilty of a misdemeanor if a natural person or  
22 shall be guilty of a felony if any other person.

23 4 Effective Date. This act shall take effect January 1, 2004.





2003-1376s

AMENDED ANALYSIS

This bill requires that any political advertising in the form of a prerecorded telephone message disclose the name and telephone number of the candidate, committee, or other person paying for the telephone call. This bill also requires that violations of the political advertising identification law meet a knowing standard of conduct for criminal penalties to apply.

# Committee Minutes

# Interstate Cooperation Committee

## Hearing Report

**To:** Members of the Senate

**From:** Susan Duncan  
Senior Legislative Aide

**Re:** HB 332-FN – *AN ACT relative to the use of prerecorded telephone messages by candidates and political committees*

**Hearing date:** April 23, 2003

**Members present:** Senators Gatsas, Estabrook, Clegg and Johnson

**Members absent:** Senator Sapareto

---

**Sponsor(s):** Representatives Spiess, Dokmo, Hess and Bergin;  
Senator Below

**What the bill does:** This bill requires that certain identifying information accompany prerecorded political telephone messages.

**Who supports the bill:** Rep. Spiess, Senator Below, Rep. Dickinson  
Rep. Drisco

**Who opposes the bill:** No one spoke in opposition

**Summary of testimony received:**

- This legislation defines what a prerecorded political message is and allows those on the national "do not call listing" to opt out of receiving these political calls.
- Senator Below suggested considering amending the bill to mirror the language contained in the similar Senate Bill (already passed by the Senate and sent to the House).
- Testimony indicated the concern with the "visceral" reaction by the public to these messages that were used in the past election.
- Senator Clegg offered amendment #1350s to blend the two bills.

**Funding:** It would have an indeterminable impact, according to the fiscal note attached to the bill.

**Action:** Senator Clegg moved "ought to pass" with amendment #1350s and the committee voted 4 to 0 in support. Senator Clegg will report the bill out of committee.

sfd

[file: HB 332-FN report]

Date: April 25, 2003

SRB

Date: April 23, 2003  
Time: 3:30 p.m.  
Room: LOB< Room 101

The Senate Committee on Interstate Cooperation held a hearing on the following:

HB 332-FN relative to the use of prerecorded telephone messages by candidates and political committees.

Members of Committee present: Senator Gatsas  
Senator Estabrook  
Senator Clegg  
Senator Johnson

---

The Chair, Senator Theodore Gatsas, opened the hearing on HB 332-FN and called on Representative Spiess, prime sponsor, to introduce the legislation.

Representative Paul Spiess: For the record, my name is Paul Spiess. I represent Hillsborough 47, the towns of Amherst and Milford.

With your permission, Mr. Chairman, I will spare the reading of my fluffy written testimony for the House and just pass out copies for the record and get right to heart of the bill.

This bill is the direct result of a very strong visceral response that I received as a candidate as Representative for the House during the last election to a practice commonly referred to as pre-recorded political messages. Needless to say, the messages that I received from my constituents were that they don't like it, they don't like the interruption implied by it, they don't like the means of communication, and they asked me to do something about it.

So, I took that challenge, along with a number of other Representatives and Senator Below and put together a bill that, for the first time, defines what a pre-recorded political message is and further states that, if you are going to use a pre-recorded political message, that you must give certain pertinent information during the message, in particular, the name of the person who is

JAB

recording the message, the name of the organization or organizations the sponsor is calling on behalf of, and the name of the person delivering the message, paying for the message.

It also provides for a prohibition against sending pre-recorded political messages to anybody who enters their name on state or federal do not call lists and provides penalties for failure to comply with the statute.

The clear intent here is to make it more difficult to use pre-recorded political messages for campaign purposes and to allow people to make the choice of opting out as to whether or not they receive those messages by entering a do not call list. It in no way is intended to prohibit a candidate from making a political call or an individual on behalf of the candidate making a political call, so long as that call is made in person and not through a pre-recorded message. So, we do not believe that it in any way infringes on First Amendment rights, the freedom of speech, merely the use of a technically pre-recorded message, which can be done repetitively, cheaply and annoyingly. That's the sum of my testimony.

**Please see "Testimony of Representative Paul Spiess, Prime Sponsor HB 332-FN, April 23, 2003", attached hereto and referred to as Attachment #1.**

Senator Theodore L. Gatsas, D. 16: Any questions? Senator Estabrook?

Senator Iris Estabrook, D. 21: Thank you, Mr. Chairman. Do you know what the Committee in the House has done with the companion Senate bill that went over on this subject?

Representative Spiess: I do not, Senator. I know that they were taking it up the other day. I was not able to stay around for the hearing. There is somebody from the Election Law Committee here and they may be able to enlighten you.

Senator Iris Estabrook, D. 21: Thank you.

Senator Theodore L. Gatsas, D. 16: Any other questions? Thank you. Senator Below?

Senator Clifton Below, D. 5: Thank you, Mr. Chairman. Representing District 5 and I am here to support the bill, but that you consider amending it in this Committee to reflect a couple of the ideas that were developed when we heard the bill that I presented.

JMB

Senator Clegg had the idea that we should extend this to cover not just the person delivering the pre-recorded message 'cause that person could be on the other side of the country or even out of the country. They could go offshore and deliver the message over long distance lines. It is probably cheaper than instate. We would have not made the person paying for the ad, not the ad, but the pre-recorded message to be delivered, we wouldn't pick them up. So, I think Senator Clegg had worked with Senate counsel to draft some language about a person causing such message to be made also having responsibility and accountability. I would urge the Committee to look at that.

I think also the penalty is lighter than what we had done with the Senate bill. That was a misdemeanor situation, I believe. This is an administrative fine of \$250.00 per incident, to a maximum of \$50,000. I would submit that in some gubernatorial or presidential elections, \$50,000 might seem like a cheap price to pay for the damage you might be able to do with these kind of pre-recorded calls. So, I think either looking at the possibility of criminal sanctions in addition or alternatively, or taking the \$50,000 limit off would be something to consider and/or a steeper initial.

The very first instance might be \$10,000, then \$250 per incident thereafter simply because the cost to prosecute something like this is all going to be in the first call, if you will, and it may be able to document a handful of these by people who tape them on their message machines, but you may have a hard time prosecuting incident upon incident upon incident, particularly if the party delivering the message has managed to destroy its records. So, that would be a concern as well.

Just one more observation for the Committee to consider. We, in the House, in the version that came out of the Senate, had language about disclosing the name and the phone number of the entity paying for the delivery of the message, something like that, as opposed to the fiscal agent. I'm not sure the value of the fiscal agent, but that's just a question and I'm just not sure what the right answer is. Whether we should have the phone number in there, too.

The other concern is that this calls for it to be done immediately. It doesn't say where it contains that information. I think there is a question of whether that information should be available within the first minute. That's what we had in the Senate bill, that that information be disclosed within the first minute of the call.

That's all. Thank you.

Senator Theodore L. Gatsas, D. 16: Thank you. Questions? Senator Clegg?

Senator Robert Clegg, Jr., D. 14: Senator Below, since we have already covered all the problems, do you see any reason why we don't just send it up to the Senate, put it in here...

Senator Clifton Below, D. 5: Well, I think one good idea, one very good idea that this contains that we didn't have in our Senate version of the bill was that they not be placed to the do not call list. I think that's a good idea.

Senator Robert Clegg, Jr., D. 14: We already have...

Senator Clifton Below, D. 5: We put that in the other bill. Sure.

Senator Robert Clegg, Jr., D. 14: This kind of duplicates what has already been done in two other places.

Senator Clifton Below, D. 5: That's true. Okay. Thank you. I'm sorry. We had drafted an amendment. We just hadn't gotten together. I would be happy to work with the Committee if you would like.

Senator Theodore L. Gatsas, D. 16: Senator Johnson?

Senator Carl R. Johnson, D. 2: Senator Below, are you aware of any challenges in the courts relative to these issues?

Senator Clifton Below, D. 5: I'm not. There might be a member of the House Committee who is here. I do remember Representative Kennedy raising the question in the House Committee, but I don't really remember what it was or how much it related to pre-recorded messages specifically. The question he raised and I asked him if he could give me the court case, but I never got the case with the citation, concerned the requirement that political advertising disclose the name of the person paying for it and the fiscal agent and address and such, and he made reference to some case, I don't think it was in New Hampshire, regarding that. But, I never got the details on it.

Senator Theodore L. Gatsas, D. 16: Any other questions? Thank you, Senator.

Senator Clifton Below, D. 5: Thank you.

Senator Theodore L. Gatsas, D. 16: Representative Dickinson, with a question mark.



JWB

Representative Howard Dickinson: Yes, Mr. Chairman, I think I have, can perhaps make you feel a little more comfortable about things.

Mr. Chairman and members of the Committee, I'm Howard Dickinson from Carroll County District 4. I appear before you this afternoon in favor of HB 332 as amended by the House and I am here representing the Election Law Committee.

If you want to beef up this in some fashion, I think we would be perfectly agreeable to that and would probably, in all likelihood, concur with any changes you saw fit to make. I think that what we did, it turns out, I have the committee report, and I will read it to you.

HB 332, as amended, requires that all pre-recorded political messages shall include the name of the organization that the person is calling on behalf of and the name of the person or organization paying for the call and the fiscal agent, if applicable. Furthermore, no one shall be called if their name appears on the do not call list. Violators shall be subject to an administrative fine of \$250 per incident and up to a total of \$50,000. I agree with you. Perhaps we should have no upper limit.

We tried to put forward an idea. In fact, there is only a civil penalty; there's no criminal penalty. Perhaps the reason being is the burden of proof the more serious the crime or felony, it is far more difficult than a misdemeanor and perhaps the easiest way to proceed is a civil penalty. If you want to take out the limit, I have no problem with that. It costs about four to eight cents a call to place these calls, which is really pretty cheap and I would hate to think that this was generally just a cost of doing business and pass it along to the person paying the bills. So, whatever you can do to put some teeth in this, I think we would probably appreciate.

Thank you.

Senator Theodore L. Gatsas, D. 16: I guess I have a follow up question to Senator Estabrook's earlier question. What happened to the Senate bill?

Representative Dickinson: The Senate bill is right here. It is SB 215 and we had a hearing on that, but we have not worked on it at all. So, we are perhaps not quite sure. We haven't even had a subcommittee meeting on it.

Senator Theodore L. Gatsas, D. 16: Any other questions? Thank you, Representative Dickinson.

Representative Dickinson: I think we are all on the same page and whatever, if you would like to pursue something in an aggressive fashion, we probably will agree.

Senator Theodore L. Gatsas, D. 16: Anyone else wishing to speak for a first time on HB 332? Yes?

Representative Drisko: Representative Drisko from District 46. I just wanted to underscore Representative Speiss's comments about the election and visceral affect on our constituents. Also as a member of the Election Law Committee, we were very much in favor of that. It was a 16 to 2 vote.

Senator Theodore L. Gatsas, D. 16: Thank you. Anyone else?

Senator Robert Clegg, Jr., D. 14: I would like to ask Representative Drisko. Are you telling me that two people didn't think we should do that?

Representative Drisko: Two people did think that we shouldn't which, for the Election Law Committee, Senator Clegg, is a non-partisan vote.

Senator Robert Clegg, Jr., D. 14: Wow! Thank you.

Senator Theodore L. Gatsas, D. 16: Any other questions? For a second time?

Representative Spiess: Just quickly. I just wanted to address the issue of the do not call list. I'm not sure where else in the legislation you have heard that this might be present. I do know that the larger do not call bill that's in the House is now under a lot of pressure to have exemptions and amendments made to it. One of the strengths, I think, of this bill is that it puts the prohibition, the requirement that you do not call list as part of the statute and I think that's fine. Whatever version survives, perhaps we could put that in.

Senator Theodore L. Gatsas, D. 16: Thank you. Anyone else? I will close the hearing on HB 332.

Hearing concluded at 3:45 p.m.

Respectfully submitted,

A handwritten signature in black ink that reads "L. Gail Brown". The signature is written in a cursive style with a large initial "L" and "G".

L. Gail Brown  
Senate Secretary  
6/2/03

1 Attachment

Testimony of Representative Paul Spiess  
Prime Sponsor HB332-FN  
April 23, 2003

Thank you Mr. Chairman and members of the committee,

My name is Paul Spiess, representing Hillsborough 47, the towns of Amherst and Milford. I have brought this bill to the Legislature for consideration because of my shock, dismay and outrage over the use of pre-recorded telephone messages by various political factions during the last primary and general election. This is a relatively new technology, which I believe was employed to its full effect for the first time during this last election cycle.

I found the employment of this technology and the frequency of these calls to be excessive and offensive. I believe that they interfered with my rights to privacy and the quiet enjoyment of my home. I found the content of some of the messages to be unethical and the purpose of others to disparage the position and reputation of a political opponent. In almost every instance, I was unable to determine who made the recording, who paid for the message, and which political candidate (if any) they were endorsing.

While I respect the right of freedom of speech, I believe that there is a counterbalancing right to privacy. If it were within my power, I would put an outright ban on all pre-recorded political messages. I have no problem with the practice of a candidate or volunteers taking their time and energy to make a personal call to a registered voter. I have a significant concern with allowing the unregulated use of pre-recorded messages sent out in mass by automatic dialing systems on a repetitive basis to individuals who are unaware who is behind the call.

This concern is shared by many of my constituents. I have never before experienced such a spontaneous visceral negative reaction to anything, like I received from voters to this practice. My friends and neighbors confronted me repeatedly as they entered and left the polls complaining about these calls. They were flat out annoyed, and put off by both the practice and the content. At a time when we have legitimate cause for concern about voter apathy, I would suggest that we cannot afford to allow practices, which continue to alienate voters.

This bill is intended to place a regulatory structure over the use of this technology. First, it defines what is a "prerecorded political message". Second, it prescribes what information must be provided at a minimum in each message. Third, It prohibits the delivery of prerecorded political messages to any telephone number that has been placed on a "do not call" list. And finally it provides for monetary penalties for breach of the statute.

A companion bill to HB 332 has been submitted by representative Dokmo, HB 364-FN, which will require the registration of any individual or organization that uses automatic dialing systems within the state. I believe that bill will be before you shortly.

I hope that you share my concern over the use of prerecorded political messages and automated dialing systems, and that you will see the value of creating a regulated environment for this practice.

Thank you for your time and consideration, and I would be pleased to answer your questions.

# Speakers

# SENATE INTERSTATE COOPERATION COMMITTEE

Date 4/23/03

Time 3:15 p.m.

Public Hearing on HB 332-FN

HB 332-FN - relative to the use of prerecorded telephone messages by candidates and political committees.

(Insert here the title of the Bill)

Please check box(es) that apply.

SPEAKING FAVOR OPPOSED

NAME (Please print)

REPRESENTING

SPEAKING	FAVOR	OPPOSED	NAME (Please print)	REPRESENTING
✓	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Richard B. Drusko Rep	District 46
✓	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Rep Paul Spain, former	Hillsborough 97
✓	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Sen. Clifton Belen	DIST 5
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✓	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Rep. H. C. Dickinson	Dist #4
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# Committee Report



STATE OF NEW HAMPSHIRE  
SENATE  
REPORT OF THE COMMITTEE

Date: `

THE COMMITTEE ON Interstate Cooperation

to which was referred House Bill 332-FN

AN ACT                      relative to the use of prerecorded telephone messages by  
                                 candidates and political committees.

VOTE: 4-0

2003-1376s

Having considered the same, report the same with the following amendment and  
recommend that the bill: **AS AMENDED OUGHT TO PASS.**

Senator Robert Clegg, Jr.  
For the Committee

[Home](#)[Bill Status](#) ◆[Members](#) ◆[Calendars/Journals](#) ◆[Miscellaneous](#) ◆

## **HB332 Docket**

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**Bill Title:** relative to the use of prerecorded telephone messages by candidates and political committees.

<u>Date</u>	<u>Body</u>	<u>Description</u>
1/9/2003	H	Introduced and ref to Elec Law; HJ 12, p191
1/22/2003	H	Copy to Chairman on 1/22/2003
1/22/2003	H	Hearing Jan 29 10:00 RM308,LOB
1/29/2003	H	Continued Hearing Feb 4 noon RM30,LOB
3/18/2003	H	Maj Report OTP/AM for Mar 25 (Vote 16-2;CC)
3/18/2003	H	Prop Comm Am{0547}; HC26, p691-692
3/25/2003	H	Passed with Am; HJ 29-pt 1, p865 + pt 2, p966
4/10/2003	S	Introduced and Ref. to Interstate Cooperation; SJ 12, Pg.316
4/16/2003	S	Hearing; April 23, 2003, Room 101, LOB, 3:15 p.m.; SC19
4/28/2003	S	Committee Report; Ought to Pass with Amendment{1376},(New Title), [05/08/03]; SC21, Pg.12-13
5/8/2003	S	Committee Amendment{1376},(New Title), AA, VV; SJ 15, Pg.356-357
5/8/2003	S	Ought to Pass with Amendment{1376},(New Title), MA, VV; OT3rdg; SJ 15, Pg.357
5/8/2003	S	Passed by 3rd Reading Resolution; SJ 15, Pg.369
5/29/2003	H	House Nonc with Sen Am req Conf Comm, Rep Whalley MA VV; HJ 45, p1447
5/29/2003	H	(Spkr appts: Reps Spiess, Cady, Drisko & Clemons)
6/5/2003	S	Sen. Gatsas Accede to House Request For Committee of Conference, MA, VV
6/5/2003	S	President Appoints; Senators Gatsas, Johnson, Estabrook
6/10/2003	H	Conf Comm Meeting June 12 2:00 RM302,LOB
6/13/2003	H	Continued Conf Comm Meeting June 17 9:00 RM103,St House
6/19/2003	S	Committee of Conference Report; New Am.{2227}, Filed;
6/24/2003	S	Conference Committee Report{2227}, Adopted, VV
6/24/2003	H	Conf Comm Report Adopted VV;

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*Docket Abbreviations*

**June 18, 2003**  
**2003-2227-CofC**  
**03/05**

Committee of Conference Report on HB 332-FN, an act relative to the use of prerecorded telephone messages by candidates and political committees.

Recommendation:

That the House recede from its position of nonconcurrence with the Senate amendment, and

That the Senate recede from its position in adopting its amendment to the bill, and

That the Senate and House adopt the following new amendment to the bill as amended by the House, and pass the bill as so amended:

Amend the bill by replacing all after the enacting clause with the following:

1 New Section; Political Advertising; Prerecorded Political Messages. Amend RSA 664 by inserting after section 14 the following new section:

664:14-a Prerecorded Political Messages.

I. In this section, "prerecorded political message" means a prerecorded audio message delivered by telephone by:

(a) A candidate or political committee; or

(b) Any person when the content of the message expressly or implicitly advocates the success or defeat of any party, measure, or person at any election, or contains information about any candidate or party.

II. No person shall deliver or knowingly cause to be delivered a prerecorded political message unless the message contains, or a live operator provides, within the first 30 seconds of the message, the following information:

(a) The name of the candidate or of any organization or organizations the person is calling on behalf of.

(b) The name of the person or organization paying for the delivery of the message and the name of the fiscal agent, if applicable.

III. No person shall deliver or knowingly cause to be delivered a prerecorded political message to any telephone number on any federal do not call list.

IV.(a) A violation of this section shall result in a civil penalty of \$5,000 per violation.

(b) Any person injured by another's violation of this section may bring an action for damages and for such equitable relief, including an injunction, as the court deems necessary and proper. If the court finds for the plaintiff, recovery shall be in the amount of actual damages or \$1,000, whichever is greater. If the court finds that the act or practice was a willful or knowing violation of this section, it shall award as much as 3 times, but not less than 2 times, such amount. In addition, a prevailing plaintiff shall be awarded the costs of the suit and reasonable attorney's fees, as determined by the court. Any attempted waiver of the right to the damages set forth in this paragraph shall be void and unenforceable. Injunctive relief shall be available to private individuals under this section without bond, subject to the discretion of the court. Upon commencement of any action brought under this section, the clerk of the court shall mail a copy of the complaint or other initial pleadings to the attorney general and, upon entry of any judgment or decree in the action, shall mail a copy of such judgment or decree to the attorney general.

2 Effective Date. This act shall take effect January 1, 2004.

The signatures below attest to the authenticity of this Report on HB 332-FN, an act relative to the use of prerecorded telephone messages by candidates and political committees.

*Conferees on the Part of the Senate*

Sen. Gatsas, Dist. 16

Sen. Johnson, Dist. 2

Sen. Estabrook, Dist. 21

*Conferees on the Part of the House*

Rep. Spiess, Hills. 47

Rep. Cady, Rock. 73

Rep. Drisko, Hills. 46

Rep. Clemons, Hills. 62

2003-2227-CofC

## AMENDED ANALYSIS

This bill requires that certain identifying information accompany prerecorded political telephone messages.  
Senator Gatsas moved adoption.

**Adopted.****June 13, 2003****2003-2115-CofC****04/09**

Committee of Conference Report on HB 336, an act relative to the development and adoption of the school administrative unit budget.

Recommendation:

That the House recede from its position of nonconcurrency with the Senate amendment, and concur with the Senate amendment, and

That the Senate and House each pass the bill as amended by the Senate.

The signatures below attest to the authenticity of this Report on HB 336, an act relative to the development and adoption of the school administrative unit budget.

*Conferees on the Part of the Senate*

Sen. Johnson, Dist. 2  
Sen. O'Hearn, Dist. 12  
Sen. Larsen, Dist. 15

*Conferees on the Part of the House*

Rep. Alger, Graf. 14  
Rep. Laurent, Ches. 24  
Rep. Snyder, Straf. 67  
Rep. Leone, Sull. 21

Senator Johnson moved adoption.

**Adopted.****June 13, 2003****2003-2111-CofC****05/09**

Committee of Conference Report on HB 357-FN, an act relative to child support insurance settlement intercept.

Recommendation:

That the House recede from its position of nonconcurrency with the Senate amendment, and concur with the Senate amendment, and

That the Senate and House adopt the following new amendment to the bill as amended by the Senate, and pass the bill as so amended:

Amend RSA 161-C:3-e as inserted by section 1 of the bill by replacing it with the following:

161-C:3-e Child Support Insurance Settlement Intercept. The department may provide certain information to public agencies or its contracted agents in order to intercept insurance settlement payments or judgments claimed by individuals who are subject to a child support lien pursuant to RSA 161-C and who owe past-due support. The department may identify such individuals by name, last 4 digits of the individual's social security number or other taxpayer identification number, date of birth, last known address, employer, or any combination thereof. Any information provided by the department in accordance with this section shall remain the property of the state of New Hampshire and shall be purged by any public agency or contracted agent receiving said information upon completion of the data match exchange. The department may perform an audit to insure that any public agency or contracted agent has purged said information. The specific penalty for failure to purge the information shall be set forth in any contract or agreement between the department and any public agency or contracted agent made pursuant to this section. Any transaction cost incurred by the department related to the data match exchange shall be directly recovered by the department from any insurance settlement or judgment proceeds. Insurance settlement payments for casualty loss to personal or real property, past or future medical treatment, and a pro-rated amount equal to 185 percent of the self-support reserve defined in RSA 458-C:2, X for the period of lost work for which the settlement or judgment constitutes recovery shall be exempt from this section. Reasonable attorney fees and expenses related to obtain-

# State of New Hampshire HOUSE RECORD

First Year of the 158<sup>th</sup> Session of the General Court  
Calendar and Journal of the 2003 Session

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Vol. 25

Concord N.H.

Friday, June 20, 2003

No. 49

Contains: Proposed Amendment to House Rules, Governor's Veto Messages, List of Committees of Conference, Committee of Conference Statements, Meetings, Work Sessions and Notices

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## HOUSE CALENDAR

### NOTICE

#### MEMBERS OF THE HOUSE:

The House will meet in session on **Tuesday, June 24, at 9:30 a.m.** to act on all committee of conference reports.

The House will take up Senate Bills first and then act on any House Bills favorably acted on in the Senate. Committee of Conference reports will be in seat pockets by Monday, June 23. They are now posted at <http://www.gencourt.state.nh.us/ie/billstatus/cofc.asp>.

The House will also vote on the proposed Rules deadlines as printed in this calendar for the next session year.

I am sure you all join me in congratulating Representative and Mrs. Harry Haytayan (Hollis) on the birth of their son, Robert Haytayan, on June 6, 2003. Best wishes to the family!

All members are invited to the End of Session Party and Dessert Bake-Off. House staff members will act as judges on all entries of items baked by members and submitted for judging. Please see the notice in this calendar for more details or call the Majority or Minority offices for more information.

House Republican Leadership will meet on Monday, June 23, at 9:00 a.m. in Rooms 201-203, LOB.

Gene G. Chandler, Speaker

### NOTICE

There will be a Republican Caucus on Tuesday, **June 24** at 8:45 a.m. in Representatives Hall.  
Rep. David W. Hess, Majority Leader

193. Such an inclusion in one bill seemed to be a prudent move to eliminate one more study. However, the two subject matters of "establishing a professional malpractice claims study commission" and "establishing a commission to identify medical errors and their causes" were just not compatible to fly together on one bill. Consequently, both the study commissions have now been incorporated in HB 287, with two distinct commissions with two specific responsibilities.

Rep. Henry P. Mock

**HB 288-FN**, imposing a criminal penalty for the dissemination of certain materials without consent. The Senate eliminated the sentence in RSA 646:9, III of the House version (i.e., "or of another person voluntarily engaging in sexual activity while in his or her presence without the expressed consent of the other person or persons who appear in the photograph or video tape.") This was agreeable to the House conferees after it was explained that private investigators are sometimes hired by clients to gain evidence of suspected infidelity of a spouse. The Senate version also adds the paragraph that was introduced in the original bill, but deleted by the House because of privacy concerns. After a lengthy discussion, it was decided that this portion of the bill should be reinserted. It grants immunity to any otherwise lawful activities as outlined in this paragraph.

Rep. William V. Knowles

**HB 303**, relative to life, accident, and health technicals.

This bill makes certain technical corrections and clarifies the minimum standards for claim review and denials in the laws relating to the external review process for health insurance. The Committee of Conference amendment corrects two typos and adds another eligibility category for those who are displaced workers who qualify under the federal trade adjustment act and who need to be covered in the high-risk pool.

Rep. John B. Hunt

**HB 310**, establishing a commission to study child support issues.

The House conferees accepted all Senate amendments except paragraphs VI and VIII. The Senate agreed to eliminate paragraph VI and proposed a change to paragraph VIII which makes it acceptable to the House. The change deletes "improved and" from paragraph VIII and substitutes "the merit of."

Rep. Thomas I. Arnold

**HB 316-FN**, relative to insurance coverage for anesthesia for child dental care.

The original bill was to raise the age at which a child may get insurance coverage to have a dental procedure done in a hospital. The Senate had added a "health insurance mandate commission" to this bill. The House conferees requested that this commission come in next year as a separate bill. The Senate concurred and receded to the House's position.

Rep. John B. Hunt

**HB 323**, relative to the task force on family law.

The bill extends the time for the task force on family law established in 2002 to November 1, 2004. The Senate version kept the final reporting date the same as the House, but added the requirement of a preliminary report due November 1, 2003. The House conferees agreed that the Senate language was an acceptable addition to the House bill.

Rep. Edward P. Moran

**HB 332-FN**, relative to the use of prerecorded telephone messages by candidates and political committees. The bill regulates the use of "prerecorded political messages." The House version requires that the message contain information about who is calling, on who's behalf is the call being made, and who is paying for the message. The bill also prohibits calls to individuals who are registered on the federal "do not call" list. The Senate has asked for a clarification to expand responsibility for the message to those who "knowingly cause" the message to be delivered. The Committee of Conference has agreed that the required information must be delivered in the first thirty (30) seconds on the message, and that the penalty shall be \$5,000 administrative fine for the first incident plus a violation of the Consumer Protection Act.

Rep. Paul D. Spiess

**HB 336-L**, relative to the development and adoption of the school administrative unit budget.

The House conferees agreed to accept the Senate amendment. The amendment adds an enabling requirement so that the voters must first agree they want to vote on the School Administrative Unit budget rather than leaving the vote with the School Administrative Unit Board. The amendment also excludes cities from the bill as originally intended, but not excluded due to an oversight.

Rep. John R.M. Alger

**HB 357-FN**, relative to child support insurance settlement intercept.

The bill deals with the interception of certain insurance settlements to satisfy past-due child support. A compromise amendment specifies that the exemption of living expenses is limited to 185% of the self-support reserve defined in RSA 458-C:2, X. Attorneys fees are exempt only if incurred to obtain the settlement.

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS  
216-2011-CV-00786

SUPERIOR COURT

William L. O'Brien

v.

New Hampshire Democratic Party and  
Raymond C. Buckley, Chairman

**DEFENDANT BUCKLEY'S OBJECTION TO PLAINTIFF'S FIRST  
REQUEST FOR ADMISSION UNDER RULE 54**

NOW COMES the defendant, Raymond C. Buckley, by and through his attorney, and hereby objects to the plaintiff's First Request For Admission Under Rule 54, and requests that said First Request For Admission be denied.

IN SUPPORT THEREOF, Raymond Buckley states as follows:

1. Plaintiff William L. O'Brien has filed a Plaintiff's First Request For Admission Under Superior Court Rule 54 in which he makes a request for four separate and distinct admissions.

2. All of the admissions requested are requests that selected excerpts from what the plaintiff represents to be legislative history of the statute in question, be admitted to be a true and complete copy of the selected excerpts of the 2003 Record of the New Hampshire House of Representatives action on HB 332-FN, and a true and complete copy of the New Hampshire State Senate Journal for June 20 and 24, 2003.

3. This is not a proper function of a request for admission under the rule.

4. Superior Court Rule 54 provides in pertinent part that any party "desiring to obtain admission of the signature on or the genuineness of any relevant document or of

any relevant facts which he believes not to be in dispute, may . . . file an original request therefore with the Clerk . . ."

5. The instant case is not a situation in which the defendant, Raymond Buckley, would have any control over the records as to whether or not the selected excerpts chosen by the plaintiff, and attached to his Request For Admission, are indeed true and correct selected excerpts taken out of context of part of the House and Senate Journal records for the New Hampshire State Legislature.

6. In order for defendant Raymond Buckley to ascertain whether these proposed selected excerpts are in fact true and correct would require defendant Raymond Buckley to perform, at his own expense, a search of the legislative history of the New Hampshire House of Representatives and New Hampshire State Senate. It is not the purpose of Superior Court Rule 54 to require an opposing party to go out and do research to ascertain whether documents, otherwise solely within the control of a third party not a party to the litigation, are in fact genuine documents. The resolution of the issue of whether the proffered are the correct genuine documents would properly be the subject of the custodian or other keeper of the records of the New Hampshire House of Representatives or the New Hampshire State Senate, or other appropriate New Hampshire State office.

7. In order to properly either admit or deny the request for admissions would require the defendant to undertake considerable action to ascertain the genuineness of the documents. In preparing his requests for admission, the plaintiff must have undertaken some considerable action himself to secure his proffered documents. It is incumbent upon the plaintiff, if he believes that such are relevant at the trial, to introduce those documents properly.



8. Moreover, it is the position of defendant Raymond Buckley that the legislative history of a statute is actually irrelevant if the statute's interpretation is plain on its face. It appears from the Request For Admission that the plaintiff is attempting to prove, as part of his case in chief, what a particular statute may mean. This is properly the function of the Court to decide what a statute means.

WHEREFORE, defendant Raymond Buckley hereby objects to the plaintiff's Request For Admission and requests that such Request For Admission be denied.

Respectfully submitted,  
Raymond Buckley  
By his attorney

March 1, 2012

---

Gregory J. Ahlgren  
NH Bar #: 267

I hereby certify that I have on this date forwarded a copy of this Objection to Charles Douglas, Esquire and James Craig, Esquire.

---

Gregory J. Ahlgren  
Attorney At Law  
529 Union Street  
Manchester, NH 03104  
(603)669-6117

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.  
NORTHERN DISTRICT

SUPERIOR COURT

Docket # 216-2011 CV-00786

William L. O'Brien

v.

New Hampshire Democratic Party  
and  
Raymond C. Buckley, Chairman

**OBJECTION TO PLAINTIFF'S FIRST REQUEST FOR ADMISSION  
UNDER RULE 54**

NOW COMES the Defendant, New Hampshire Democratic Party, by and through its attorneys, Craig, Deachman & Amann, PLLC, and states the following:

1. The Defendant objects to Plaintiff's Request for Admission as it requires the Defendant to perform a legislative history.
2. That, upon information and belief, the Plaintiff can have the keeper of the records of each of the presented documents assert that each of the documents is a true and complete copy of the document presented.

WHEREFORE, the Defendant, New Hampshire Democratic Party, respectfully requests that the Honorable Court:

- A. Order that Defendant not be required to otherwise reply to Plaintiff's First Request for Admission Under Rule 54; and
- B. Order such further relief deemed just.

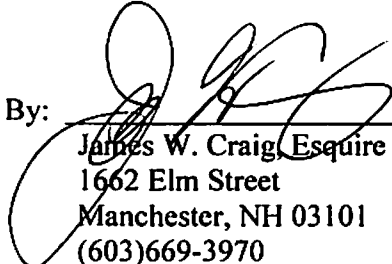
Respectfully submitted,

NEW HAMPSHIRE DEMOCRATIC PARTY  
By Its Attorneys,

CRAIG, DEACHMAN & AMANN, PLLC

Dated: March 7, 2012

By:



James W. Craig, Esquire (NH Bar #183)  
1662 Elm Street  
Manchester, NH 03101  
(603)669-3970

**CERTIFICATE OF SERVICE**

I hereby certify that on this 7<sup>th</sup> day of March, 2012, a copy of the foregoing *Objection to Plaintiff's First Request for Admission Under Rule 54* has been forwarded to Charles C. Douglas, Esquire and Gregory J. Ahlgren, Esquire.



James W. Craig, Esquire

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.  
NORTHERN DISTRICT

SUPERIOR COURT

William L. O'Brien

v.

New Hampshire Democratic Party and  
Raymond C. Buckley, individually and as Chairman

Docket No. 11-CV-786

**PLAINTIFF'S SECOND SET OF REQUESTS FOR ADMISSIONS**  
**PURSUANT TO SUPERIOR COURT RULE 54**

NOW COMES the plaintiff, William L. O'Brien, by and through his attorneys, Douglas, Leonard & Garvey, P.C., and requests that the defendants admit the following facts:

**Request for Admission No. 1:** Please admit that Raymond Buckley sent the E-mail attached hereto at Tab 1.

**Request for Admission No. 2:** Please admit that Raymond Buckley was aware of the requirements of RSA 664:14-a, I prior to September 13, 2010.

**Request for Admission No. 3:** Please admit that New Hampshire Democratic Party Executive Director Mike Brunelle was aware of the requirements of RSA 664:14-a, I prior to September 13, 2010.

**Request for Admission No. 4:** Please admit that Mike Brunelle drafted a script for use in a "robo call" that read as follows:

This is State Democratic Chair Ray Buckley calling with the important news that current Republican Bill O'Brien has asked to join the Democratic Party's ticket for the November elections.

If he succeeds tomorrow, we expect Bill O'Brien will embrace the Democratic Party's platform, support President Obama, national health care reform and stand up for gay marriage, and protect a woman's right to choose and our agenda to move New Hampshire and America forward.

Once again, we wanted you to know before you vote tomorrow that Bill O'Brien has asked to join the Democratic ticket and our progressive agenda. Thank you so much.

**Request for Admission No. 5:** Please admit that Raymond Buckley read the script described in Request No. 4 above into an audio recording.

**Request for Admission No. 6:** Please admit that the New Hampshire Democratic Party paid Broadcast Solutions to send the message recorded by Raymond Buckley as described in Requests Nos. 4 and 5 above telephonically to 456 New Hampshire households.

**Request for Admission No. 7:** Please admit that the audio recording made by Raymond Buckley and the New Hampshire Democratic Party as described in Requests Nos. 4 and 5 did not provide the name of the candidate or of any organization that Raymond Buckley was calling on behalf of.

**Request for Admission No. 8:** Please admit that the audio recording made by Raymond Buckley and the New Hampshire Democratic Party as described in Requests Nos. 4 and 5 did not provide the name of the person or organization paying for the delivery of the message.

**Request for Admission No. 9:** Please admit that the audio recording made by Raymond Buckley and the New Hampshire Democratic Party as described in Requests Nos. 4 and 5 did not provide the name of the fiscal agent for the organization paying for the message.

Respectfully submitted,  
WILLIAM L. O'BRIEN  
By his attorneys,  
DOUGLAS, LEONARD &  
GARVEY, P.C.

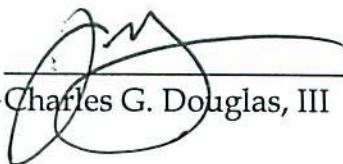
Date: June 6, 2012

By:

  
Charles G. Douglas, III, Bar #669  
6 Loudon Road, Suite 502  
Concord, NH 03301-5321  
(603) 224-1988

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been mailed by first-class mail this 6th day of June, 2012 to James W. Craig, Esq., at 1662 Elm Street, Manchester, NH 03101; and Gregory J. Ahlgren, Esq., 529 Union Street, Manchester, NH 03104.

  
Charles G. Douglas, III

From: <RepBuckley@aol.com>  
Date: Mon, Sep 13, 2010 at 10:53 PM  
Subject: NHDP Auto Calls to GOP voters in O'Brien district  
To: dean. [REDACTED] ksullivan@wadleighlaw.com  
Cc: MBrunelle@nhdp.org

Dean and Kathy,

Below is the script of an auto call that we did to the Republican voters informing them that Bill O'Brien was asking to join the Democratic ticket.

Needless to say O'Brien is losing his mind. If Mike is still up he can send you an email O'Brien sent out earlier this evening.

Have fun,  
Ray

Raymond Buckley, State Chair\*  
NH Democratic Party  
105 North State Street  
Concord, NH 03301

603-225-6899  
www.nhdp.org

\*Also President of the Association of State Democratic Chairs and Vice Chair of the Democratic National Committee

***This is State Democratic Chair Ray Buckley calling with the important news that current Republican Bill O'Brien has asked to join the Democratic Party's ticket for the November elections.***

***If he succeeds tomorrow, we expect Bill O'Brien will embrace the Democratic Party's platform, support President Barack Obama, national health care reform and stand up for gay marriage, and protect a woman's right to choose and our agenda to move NH and America forward.***

***Once again, we wanted you to know before you vote tomorrow that Bill O'Brien has asked to join the Democratic ticket and our progressive agenda. Thank you so much.***

8/10/2011

000044

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS  
216-2011-CV-00786

SUPERIOR COURT

William L. O'Brien

v.

New Hampshire Democratic Party and  
Raymond C. Buckley, Chairman

**DEFENDANT RAYMOND C. BUCKLEY'S ANSWER TO PLAINTIFF'S  
SECOND SET OF REQUESTS FOR ADMISSIONS PURSUANT  
TO SUPERIOR COURT RULE 54**

NOW COMES the defendant, Raymond C. Buckley, by and through his attorney, and hereby answers the Plaintiff's Second Set Of Requests For Admissions Pursuant To Superior Court Rule 54 by stating as follows:

1. Request for admission #1: ADMITTED.
2. Request for admission #2. The defendant, Raymond C. Buckley, can neither admit nor deny the request because there is a legal dispute between the parties as to what RSA 644:14-a actually requires. Raymond Buckley's awareness of what the statute requires is, based upon information and belief, different from what plaintiff William L. O'Brien believes that the statute requires. Therefore, for the purposes of this request for admission, the request is DENIED.
3. Request for admission #3: This is a request for admission not appropriately directed at defendant Raymond C. Buckley, but rather at the NH Democratic Party. The defendant Raymond C. Buckley is not aware of what Michael Brunelle was aware of regarding RSA 664-:14-a, I prior to September 13, 2010. Therefore, for the purposes of



this request for admission, the request is DENIED.

4. Request for admission #4: This is a request for admission not properly submitted to defendant Raymond C. Buckley, but rather should be properly submitted to the NH Democratic Party. Whatever Mike Brunelle was or was not doing as executive director of the Democratic Party was done on behalf of the Democratic Party. Therefore, for the purposes of this request for admission, the request is DENIED.

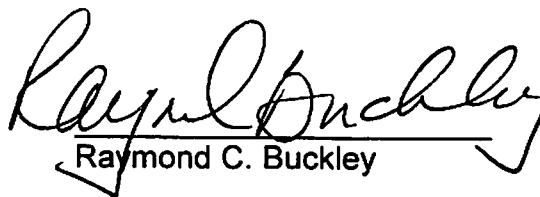
5. Request of admission #5: ADMITTED.

6. Request for admission #6. ADMITTED only in part in that it is the understanding of Raymond C. Buckley that the NH Democratic Party did indeed pay, but to the extent that the request for admission involves and assumes facts not otherwise in evidence it is DENIED.

7. Request for admission #7: DENIED.

8. Request for admission #8: DENIED.

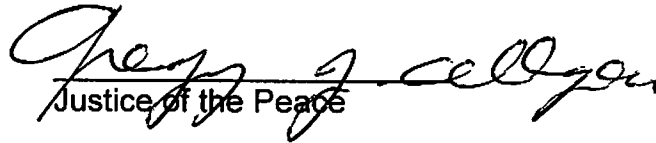
9. Request for admission #9: DENIED as the question is not applicable and assumes incorrect facts about fiscal agents.

  
Raymond C. Buckley

STATE OF NEW HAMPSHIRE  
HILLSBOROUGH, SS

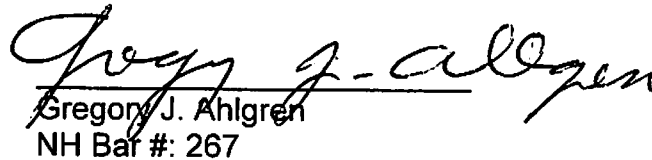
Personally appeared the above named Raymond C. Buckley on this 19<sup>th</sup> day of June, 2012, and made solemn oath that the above was true to the best of his knowledge, information and belief.

GREGORY J. AHLGREN  
Justice of the Peace - New Hampshire  
My Commission Expires February 18, 2014

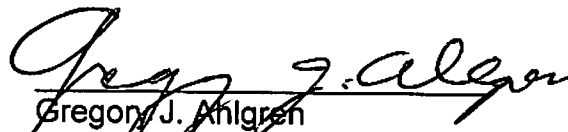
  
Justice of the Peace

Respectfully submitted,  
Raymond C. Buckley  
By his attorney

June 29, 2012

  
Gregory J. Ahlgren  
NH Bar #: 267

I hereby certify that I have on this date forwarded a copy of this Answer To Plaintiff's Second Set Of Request For Admissions Pursuant To Superior Court Rule 54 to Charles Douglas, Esquire.

  
Gregory J. Ahlgren  
Attorney At Law  
529 Union Street  
Manchester, NH 03104  
(603)669-6117

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.  
NORTHERN DISTRICT

SUPERIOR COURT

Docket # 216-2011 CV-00786

William L. O'Brien

v.

New Hampshire Democratic Party  
and  
Raymond C. Buckley, Chairman

**DEFENDANT NEW HAMPSHIRE DEMOCRATIC PARTY'S ANSWERS TO  
PLAINTIFF'S SECOND SET OF REQUESTS FOR ADMISSION PURSUANT TO  
SUPERIOR COURT RULE 54**

NOW COMES the Defendant, New Hampshire Democratic Party, by and through its attorneys, Craig, Deachman & Amann, PLLC, and states the following:

1. Request for Admission No. 1 is ADMITTED.
2. Defendant has no information regarding Request for Admission No. 2 and directs the Plaintiff to Mr. Buckley's response.
3. The Defendant, N.H. Democratic Party, can neither admit nor deny the Request because there is a legal dispute between the parties as to what RSA 644:14-a, I actually does require. Plaintiff's Request presumes that there can be only one understanding of RSA 644:114-a, I.
4. Request for Admission No. 4 is ADMITTED.
5. Please direct this Request to Raymond Buckley.

6. Request for Admission No. 6 is ADMITTED in that the N.H. Democratic Party paid Broadcast Solutions to send the message recorded by Raymond Buckley. All other allegations are DENIED.

7. Request for Admissions No. 7 is DENIED.

8. Request for Admission No. 8 is DENIED.

9. Request for Admission No. 9 is DENIED.

Respectfully submitted,

NEW HAMPSHIRE DEMOCRATIC PARTY  
By Its Attorneys,

CRAIG, DEAGHMAN & AMANN, PLLC

Dated: July 5, 2012

By: 

James W. Craig, Esquire (NH Bar #183)  
1662 Elm Street  
Manchester, NH 03101  
(603)669-3970

**CERTIFICATE OF SERVICE**

I hereby certify that on this 5<sup>th</sup> day of July, 2012, a copy of the foregoing *Defendant New Hampshire Democratic Party's Answers to Plaintiff's Second Set of Requests for Admission Under Rule 54* was mailed via First Class, U.S. Mail, postage prepaid, to Charles C. Douglas, Esquire and Gregory J. Ahlgren, Esquire.

  
James W. Craig, Esquire

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.  
NORTHERN DISTRICT

SUPERIOR COURT

Docket # 216-2011 CV-00786

William L. O'Brien

v.

New Hampshire Democratic Party  
and  
Raymond C. Buckley, Chairman

**DEFENDANT NEW HAMPSHIRE DEMOCRATIC PARTY'S ANSWERS TO  
PLAINTIFF'S SECOND SET OF REQUESTS FOR ADMISSION PURSUANT TO  
SUPERIOR COURT RULE 54**

NOW COMES the Defendant, New Hampshire Democratic Party, by and through its attorneys, Craig, Deachman & Amann, PLLC, and states the following:

1. Request for Admission No. 1 is ADMITTED.
2. Defendant has no information regarding Request for Admission No. 2 and directs the Plaintiff to Mr. Buckley's response.
3. The Defendant, N.H. Democratic Party, can neither admit nor deny the Request because there is a legal dispute between the parties as to what RSA 644:14-a, I actually does require. Plaintiff's Request presumes that there can be only one understanding of RSA 644:14-a, I.
4. Request for Admission No. 4 is ADMITTED.
5. Please direct this Request to Raymond Buckley.

6. Request for Admission No. 6 is ADMITTED in that the N.H. Democratic Party paid Broadcast Solutions to send the message recorded by Raymond Buckley. All other allegations are DENIED.

7. Request for Admissions No. 7 is DENIED.

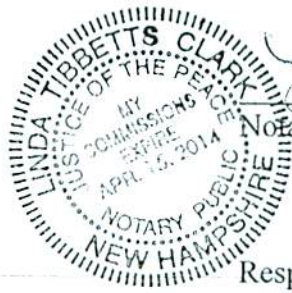
8. Request for Admission No. 8 is DENIED.

9. Request for Admission No. 9 is DENIED.

  
Kathleen Sullivan

STATE OF NEW HAMPSHIRE  
HILLSBOROUGH, SS.

Personally appeared the above-named Kathleen Sullivan on this 6<sup>th</sup> day of July, 2012, and made solemn oath that the above is true to the best of her knowledge, information, and belief.



  
Notary Public/Justice of the Peace

Respectfully submitted,

NEW HAMPSHIRE DEMOCRATIC PARTY  
By Its Attorneys,

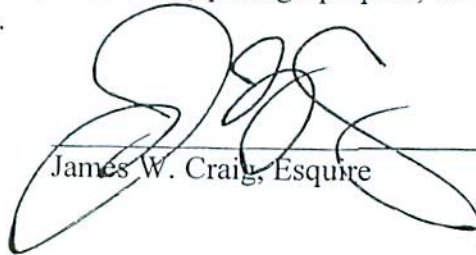
CRAIG, DEACHMAN & AMANN, PLLC

Dated: July 6, 2012

By:   
James W. Craig, Esquire (NH Bar #183)  
1662 Elm Street  
Manchester, NH 03101  
(603)669-3970

**CERTIFICATE OF SERVICE**

I hereby certify that on this 6<sup>th</sup> day of July, 2012, a copy of the foregoing *Defendant New Hampshire Democratic Party's Answers to Plaintiff's Second Set of Requests for Admission Under Rule 54* was mailed via First Class, U.S. Mail, postage prepaid, to Charles C. Douglas, Esquire and Gregory J. Ahlgren, Esquire.



James W. Craig, Esquire

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS  
216-2011-CV-00786

SUPERIOR COURT

William L. O'Brien

v.

New Hampshire Democratic Party and  
Raymond C. Buckley, Chairman

**DEFENDANT BUCKLEY'S MOTION FOR SUMMARY JUDGMENT  
AND AFFIDAVIT WITH CERTIFIED COPIES**

NOW COMES the defendant, Raymond C. Buckley, by and through his attorney, and hereby moves this Honorable Court to grant summary judgment against the plaintiff, William L. O'Brien, and to enter final judgment in favor of the defendant, Raymond C. Buckley.

IN SUPPORT THEREOF, Defendant Raymond C. Buckley states as follows:

1. The plaintiff, William L. O'Brien, is an individual who has brought a statutory cause of action under RSA 664:14-a against the New Hampshire Democratic Party and Raymond C. Buckley, New Hampshire Democratic Party Chairman, on the theory that RSA 664:14-a grants to him, as a political candidate, a private cause of action for damages.

2. Mr. O'Brien seeks damages in this case of \$1,182,000.00 against both the New Hampshire Democratic Party and Raymond C. Buckley.

3. The gravamen of the issue is that on or about September 13, 2010, the day before the 2010 New Hampshire State Primary Election, a pre-recorded telephone political message was forwarded to approximately 394 registered Republicans in State Representative District 4 ("the District"), under the direction of the New Hampshire



Democratic Party and Raymond C. Buckley as its chairman. The background of this case is that the District had four seats in the New Hampshire Legislature. Each party held a primary in September, and the top four finishers in each party would appear on the November general election ballot. The Republican primary featured five candidates running for the four seats, whereas the Democratic side had only three registered candidates. The fourth nominee for the Democratic Party on the November ballot would, therefore, be the individual receiving the highest number of write-in votes in the Democratic Party primary election. Mr. O'Brien, a registered and incumbent Republican representative, mailed out a post card to registered Democratic voters in which he did not identify himself as a Republican, and asked Democrats to write him in on the Democratic ballot. Had Mr. O'Brien been successful, and achieved the highest write-in total in the Democratic Party primary, he would have appeared as both a Democrat and Republican on the general election ballot, thereby virtually assuring himself of electoral victory.

4. The plaintiff claims that the pre-recorded message stated:

"This is State Democratic Chair Ray Buckley calling with the important news that current Republican Bill O'Brien has asked to join the Democratic party's ticket for the November elections.

If he succeeds tomorrow, we expect Bill O'Brien will embrace the Democratic party's platform, support President Obama, National Health Care Reform and stand up for Gay Marriage, and protect a Women's Right To Choose and our agenda to move New Hampshire and America forward.

Once again, we wanted you to know before you vote tomorrow that Bill O'Brien has asked to join the Democratic ticket and our progressive agenda. Thank you so much."

5. The plaintiff, William L. O'Brien, alleges that this pre-recorded message violated the requirements of RSA 664:14-a, and that based on that violation he, as a political

candidate, is entitled to damages which he calculates at \$3,000.00 per call. (The statute provides for a penalty of \$1,000.00 or actual damages, whichever is greater, and as the plaintiff cites no actual monetary damages he relies on the \$1,000.00 figure. Under RSA 664:14-a IV (b) "if the Court finds that the act or practice was a willful or knowing violation of this section, it shall award as much as 3 times, but not less than 2 times, such amount." This is how Mr. O'Brien arrives at his calculated figure of \$1,182,000.00.)

6. This Court should grant summary judgment for two reasons: First, the plaintiff has no standing under RSA 664:14-a to bring an action, and second, even if the plaintiff has standing to bring an action under the statute, the facts as plead by the plaintiff do not establish that the plaintiff suffered any injury caused by the defendant's actions. No genuine issue of material fact exists as to whether the defendant caused injury to the plaintiff.

#### **I. Standing**

7. The plaintiff lacks standing to bring a cause of action, because the statute was intended to protect voters' rights to privacy, not to protect the individuals who may be mentioned in the calls. When considering whether a party has standing to bring a suit the courts focus on whether a claimant suffered a legal injury that the law was designed to protect against. *Roberts v. General Motors Corp.*, 138 N.H. 532, 538 (1994). In the case at bar, Mr. O'Brien, as a candidate, was not the individual intended to be protected by the statute, nor was the injury he alleges an injury that the statute was designed to protect against.

8. The history of the statute is significant. In response to citizen complaints regarding the receipt of pre-recorded political telephone messages, known as "robo calls,"

several members of the New Hampshire State Legislature crafted legislation in an effort to place restrictions on these so-called robo calls without infringing on the messengers' free speech rights. The complaints mostly were that these calls were annoying, received in people's homes at inopportune times, and often contained information from which the receiver of the call could not ascertain who or what organization was placing the call.

9. As a result of the complaints House Bill 332-FN was introduced by Representatives Spiess, Dokmo, Hess and Bergin, and Senator Below.

10. According to the official House of Representatives Committee hearing notes the official Analysis states, in full, that "[t]his bill requires that certain identifying information accompany prerecorded political telephone messages. This bill also requires that recipients of such messages be permitted to place themselves on a do not call list." [see attached house bill.]

11. The House Committee on Election Law's Legislative Hearing Minutes from the hearing on HB 332-FN summarize the testimony of the bill's sponsors as well as other supporters.

12. During Representative Hess' presentation of this bill he pointed out specifically line 15, Section D, "and stated that at the present time there is no 'do not call' list" for pre-recorded political messages.

13. Rick Newman of Nottingham, New Hampshire, also spoke in support of the bill. He expressed the desire for "this committee to find a way to make his life easier by making a 'no call list.'"

14. Also speaking in favor of the bill was former State Representative Peter Bragdon of Milford, New Hampshire who, although admitting that he used such a phone

service himself during the previous election, had been under the impression "that New Hampshire had a 'no call' list." "He further suggested amending the 'do not call' bill to add political advertising."

15. Representative Paul Spiess, the prime sponsor of HB 332-FN, submitted written testimony in support of his bill. [See attached]. In his letter dated January 29, 2003, which he both submitted to the committee and read from at the committee hearing he said in pertinent part:

I found the employment of this technology and the frequency of these calls to be excessive and offensive. I believe that they interfered with *my rights to privacy and the quiet enjoyment of my home*. I found the content of some of the messages to be unethical and the purpose of others to disparage the position and reputation of a political opponent. In almost every instance, I was unable to determine who made the recording, who paid for the message, and which political candidate (if any) they were endorsing.

While I respect the right of freedom of speech, I believe that there is a *counter-balancing right to privacy*. If it were within my power, I would put an outright ban on all prerecorded political messages. I have no problem with the practice of a candidate or volunteers taking their time and energy to make a personal call to a registered voter. I have a significant concern with allowing the unregulated use of prerecorded messages sent out in mass by automatic dialing systems on a repetitive basis to individuals who are unaware who is behind the call.

This concern is shared by many of my constituents. I have never before experienced such a spontaneous visceral negative reaction to anything, like I received from voters to this practice. My friends and neighbors confronted me repeatedly as they entered and left the polls complaining about these calls. *They were flat out annoyed*, and put off by both the practice and the content. At a time when we had legitimate cause for concern about voter apathy, I would suggest that we can not afford to allow practices, which continue to alienate voters.

[emphasis added]

16. It is clear from all of this testimony that the statute is designed to protect the

right of privacy of citizens in their own homes, and to safeguard citizens from receiving these annoying calls unless certain identifying requirements are met.

17. There is no allegation, and no evidence, that Mr. O'Brien received any of these robo calls. Instead, he makes his claim under the language of RSA 664:14-a IV (b) which provides that "any person injured by another's violation of this section may bring an action for damages. . ." He relies on the term "any person" in an effort to grant to himself plaintiff status in this case even though he never received any of these calls. He apparently bases his claim on the fact that he is mentioned (along with several other individuals and political issues) in the content of the message.

18. When read in isolation, the words "any person" may tend to indicate that Mr. O'Brien should be able to bring a claim. However, when read together with the rest of the section, and considering the legislative intent, the words "any person" do not include Mr. O'Brien. Read in context, "any person" refers to individuals receiving, or having their privacy violated by, one of the violating robo calls. Therefore, Mr. O'Brien, in his capacity as the subject of the phone call is not protected by the statute, and does not have standing to bring a civil action under the statute.

19. Moreover, Mr. O'Brien argues that although he was not a recipient of this call he was "injured" by it, a pre-condition under RSA 664:14-a IV (b) in order to be able to bring a cause of action under this statute.

20. The sole basis of his so-called "injury" is found in his answer to interrogatory question Number 6 propounded by the New Hampshire Democratic Party. That interrogatory and answer states in full:

6. Please state in detail, in your own words, a full and complete description of the alleged "injury" that you suffered as a result of the defendant's alleged violation of New Hampshire RSA 664:14-a.

ANSWER: My constituents were not able to know that what was being said about me was untrue because the call was made and paid for by the Democratic Party. My constitutional right to a fair election was interfered with by the defendant's [sic] wrongdoing."

21. The statute was created to protect individuals' rights to privacy. Because the harm that Mr. O'Brien alleges is unrelated to the harm the statute protects against, Mr. O'Brien does not have standing.

**II. The plaintiff was not "injured," a requirement under RSA 664:14-a IV (b) to sustain a cause of action, and even if he were, he was not "injured by" the defendant's alleged statutory violation as similarly required**

22. Even if Mr. O'Brien has standing, summary judgment should still be granted in favor of Defendant Raymond C. Buckley because the facts, as plead by Mr. O'Brien, do not establish that he suffered an injury, or that any injury he did suffer was caused by the defendant's alleged violation of the statute.

23. In order to maintain a civil cause of action in New Hampshire a plaintiff must receive some sort of injury or suffer some sort of damage. A plaintiff is not allowed to allege and prove an injury to a third party to whom the plaintiff does not owe a fiduciary or other duty in order to trigger his own cause of action. Mr. O'Brien can not claim that he was injured, as he does in this case, because "*my constituents were not able to know. . .*" If the constituents of District 4 were somehow "not able to know" something, then only they may have received the "injury" that the statute requires as a pre-condition to bringing a lawsuit. Mr. O'Brien is not allowed to allege his constituents' alleged injury to seek damages to compensate himself.

If it is indeed true as he states in his interrogatory answers, that “my constituents were not able to know that what was being said about me was untrue because the call was made and paid for by the Democratic party” then the alleged untruthfulness of the call’s content had nothing to do with the failure to say who was paying for it. For this Court to ultimately allow judgment for the plaintiff would be to adopt, as a holding, that as a matter of law any message put out by the New Hampshire Democratic Party is, in all cases, “untrue.” Although William O’Brien and others like him might actually believe such, this Court should not and can not so hold as a matter of law.

24. William L. O’Brien further alleges that “my constitutional right to a fair election was interfered with . . .”

25. However, he offers no explanation as to how his “constitutional right to a fair election” was interfered with. Even if it were, he makes no allegation, nor could he, that he was in any way “injured” thereby.

26. In the District’s Republican State Primary there were five candidates running for four seats. These candidates were O’Brien, Condra, Holden, Kucmas and Mead. The top four finishers in each party would proceed to the general election ballot in November.

27. In the final vote tally Mr. O’Brien not only won a nomination to the general election ballot, he actually led the Republican field with the highest total number of votes in the race with 1,197. [See attached certified election results]. After winning the September Republican primary he was also victorious in the general election in November. Having been elected to the General Court in the November 2010 general election, he was then elected Speaker of the New Hampshire House of Representatives, a position he currently holds.

28. As he was the highest vote getter in the 2010 Republican primary, and as he "won" the November general election, he can not claim that he was in any way "injured" by the political message sent out on September 13, 2010, the day before the Republican primary.

29. It is certainly foreseeable at this point that the plaintiff, reading this motion, may now attempt to scramble and make some sort of constrained argument that had this political message not gone out he might have gotten an *even higher* vote total in the 2010 Republican primary. However, elections in New Hampshire are not like tournament golf, an excellent vote count on one election day can not carry over to compensate for a weaker electoral showing on some subsequent day. The fact remains that Mr. O'Brien ran for office, and won his election, thereby suffering no injury.

30. Furthermore, there is no "causation" between the alleged violation (even assuming *arguendo* for the purpose of this motion that there was a violation - a fact disputed by the defendants) and the "injury." Even if Mr. O'Brien were entitled to bring this cause of action despite not having received any of the calls, it is not enough to simply show that there was a violation and that he had an injury. He has to show that it was the violation itself that *caused* the injury (see statutory language of RSA 664:14-a IV (b) that requires that in order to be a plaintiff one has to have been "injured *by* another's violation"), as opposed to the content in the telephone call itself. Causation is not only a requirement in any civil case in New Hampshire, it is specifically mandated by this statute.

31. It is apparent that Mr. O'Brien himself realizes that he has no basis to believe that he was in any way "injured," let alone injured by the failure to set forth certain allegedly required magic words in the political message. His answer to Interrogatory



Number 11, set forth below, itself constitutes a judicial admission to this effect:

11. Please list completely any and all actual damages that you claim to have suffered as the result of the defendants' alleged violation of NH RSA 664:14-1.

**ANSWER:** *I will never know* how many of the 394 violations by the defendants resulted in my losing votes that I had spent months attempting to earn by talking with my neighbors. That lost effort as a result of the untruthful statements made during those 394 violations is virtually impossible to calculate, which is the reason that the statute establishes a floor of \$1,000.00 per violation or, as applicable here, given the knowing or willful violations by the defendants, \$3,000.00 per violation, plus the cost of the suit and attorney's fees."

[emphasis added]

32. If the plaintiff "will never know" how many, if any, of the 394 violations resulted in losing votes, he can not meet his burden of proof, even assuming that his constrained interpretation of the statute is otherwise accurate: that a candidate winning an election by less than a desired plurality constitutes a compensable injury under the law.

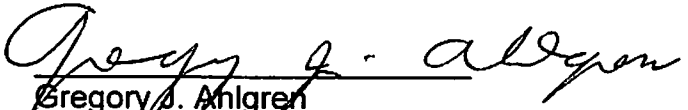
33. While the statute does provide a dollar value that can be used in calculating damages, those damages are available only to a "person injured by another's violation" of RSA 664:14-a IV. In his interrogatory answer Mr. O'Brien stated that he "will never know" if he were injured, even under his interpretation of the statute. Since Mr. O'Brien admits that he will never know how or if he were injured, he is unable to prove any injury, and therefore is not entitled to damages.

WHEREFORE, for all of these reasons, Defendant Raymond C. Buckley respectfully requests that this Honorable Court grant summary judgment against the plaintiff, and enter judgement for Defendant Raymond C. Buckley.

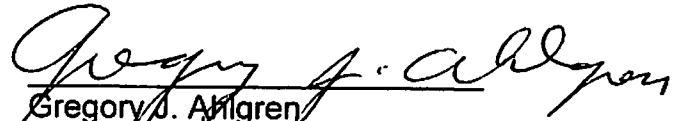
Respectfully submitted,  
Raymond C. Buckley

By his attorney

July 9, 2012

  
Gregory J. Ahlgren  
NH Bar #: 267

I hereby certify that I have on this date forwarded a copy of this Motion to Charles Douglas, Esquire and James Craig, Esquire.

  
Gregory J. Ahlgren  
Attorney At Law  
529 Union Street  
Manchester, NH 03104  
(603)669-6117

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS  
216-2011-CV-00786

SUPERIOR COURT

William L. O'Brien

v.

New Hampshire Democratic Party and  
Raymond C. Buckley, Chairman

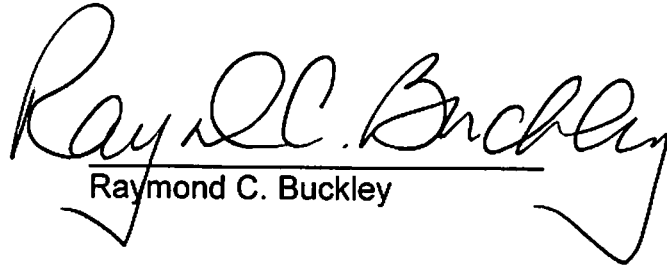
**DEFENDANT BUCKLEY'S AFFIDAVIT**  
**AND CERTIFIED COPIES**

I, Raymond C. Buckley, being under oath, do depose and say as follows:

1. I have reviewed the motion for summary judgment and all facts contained therein are true to the best of my knowledge, information and belief.
2. Attached to this affidavit is a true and correct copy of the Democratic Party's Interrogatory Number 6, together with Mr. O'Brien's answer thereto.
3. Attached to this affidavit is a true and correct copy of the Democratic Party's Interrogatory Number 11, together with Mr. O'Brien's answer thereto.
4. Attached to this affidavit is a true and correct copy of HB 332-FN.
5. Attached to this affidavit is a true and correct copy of the House Committee on Election Laws' Legislative Hearing Notes on HB 332-FN.
6. Attached to this affidavit is a true and correct copy of the House Committee on Election Laws' Legislative Hearing Minutes on HB 332-FN.
- 7 Attached to this affidavit is a true and correct copy of Representative Paul Speiss' letter dated January 29, 2003 which was submitted and from which he read to

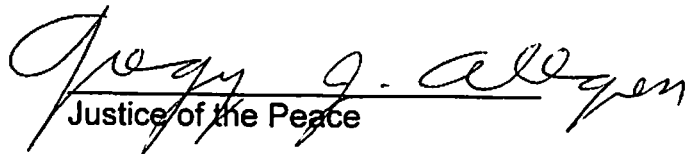
the committee that day.

8. Attached to this affidavit is a true, correct and certified copy of the 2010 House District 4 election results.

  
Raymond C. Buckley

STATE OF NEW HAMPSHIRE  
HILLSBOROUGH, SS

Personally appeared the above named Raymond C. Buckley on this 8<sup>th</sup> day of July, 2012 and made solemn oath that the above was true to the best of his knowledge, information and belief.

  
Justice of the Peace

**GREGORY J. AHLGREN**  
Justice of the Peace - New Hampshire  
My Commission Expires February 18, 2014

5. Have you ever been involved in, or named a party to, any other civil lawsuit during the past twenty (20) years? If so, please provide the names and addresses of the parties involved, the names and addresses of any attorneys involved, the nature of the lawsuit, when and where such suit was brought, and its present status.

**ANSWER:**

Objection. The information sought by this interrogatory is overly broad, unduly burdensome, irrelevant and not likely to lead to the discovery of admissible evidence. No prior litigation involved election laws.

6. Please state in detail, in your own words, a full and complete description of the alleged "injury" that you suffered as a result of the Defendant's alleged violation of N.H. RSA 664:14-a.

**ANSWER:**

My constituents were not able to know that what was being said about me was untrue because the call was made and paid for by the Democratic Party. My constitutional right to a fair election was interfered with by the defendant's wrongdoing.

7. Please state in detail, in your own words, a full and complete description of the Defendant's behavior or actions that you allege to have violated N.H. RSA 664:14-a.

**ANSWER:**

In 2010, I was running for re-election and had requested Democratic write-in votes in the September 14, 2010, primary so that I could appear on the ballot in the November cycle for elections as both (R)epublican and (D)emocrat, which is done predominantly in the smaller towns of New Hampshire from time to time. There is nothing wrong about what I was seeking to do but it clearly irritated Mr. Buckley who

11. Please list completely any and all actual damages that you claim to have suffered as a result of the Defendant's alleged violation of N.H. RSA 664:14-1.

ANSWER:

I will never know how many of the 394 violations by the defendants resulted in my losing votes that I had spent months attempting to earn by talking with my neighbors. That lost effort as a result of the untruthful statement made during those 394 violations is virtually impossible to calculate, which is the reason that the statute establishes a floor of \$1,000 per violation or, as applicable here, given the knowing or willful violations by the defendants, \$3,000 per violation, plus the cost of the suit and attorney's fees.

# Bill as Introduced

HB 332-FN - AS INTRODUCED

2003 SESSION

03-0076

03/09

HOUSE BILL

**332-FN**

AN ACT

relative to the use of prerecorded telephone messages by candidates and political committees.

SPONSORS:

Rep. Spiess, Hills 47; Rep. Dokmo, Hills 47; Rep. Hess, Merr 37; Rep. Bergin; Hills 47; Sen. Below, Dist 5

COMMITTEE:

Election Law

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ANALYSIS

This bill requires that certain identifying information accompany prerecorded political telephone messages. This bill also requires that recipients of such messages be permitted to place themselves on a do not call list.

-----  
Explanation:

Matter added to current law appears in *bold italics*.

Matter removed from current law appears [~~in brackets and struck through~~].

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.



STATE OF NEW HAMPSHIRE

*In the Year of Our Lord Two Thousand Three*

AN ACT relative to the use of prerecorded telephone messages by candidates and political committees.

*Be it Enacted by the Senate and House of Representatives in General Court convened:*

1 1 New Section; Political Advertising; Prerecorded Political Messages. Amend RSA 664 by  
2 inserting after section 14 the following new section:

3 664:14-a Prerecorded Political Messages.

4 I. In this section, "prerecorded political message" means a prerecorded audio message delivered  
5 by telephone by:

6 (a) A candidate or political committee; or

7 (b) Any person when the content of the message expressly or implicitly advocates the  
8 success or defeat of any party, measure, or person at any election, or contains information about any  
9 candidate or party.

10 II. No person shall deliver a prerecorded political message unless the message contains, or a  
11 live operator provides, the following information:

12 (a) The name of the person who recorded the message.

13 (b) The name of any organization or organizations the person is calling on behalf of.

14 (c) The name of the person paying for the delivery of the message.

15 (d) How the recipient may place his or her telephone number on a do not call list, or  
16 otherwise request that no further prerecorded political messages be delivered by the person to the  
17 recipient telephone number.

18 III. No person shall deliver a prerecorded political message to any telephone number on the  
19 person's do not call list, or to any telephone number which has otherwise been the subject of a  
20 request that no further prerecorded political messages be delivered by the person to the telephone  
21 number.

22 IV. Violators of this section shall not be subject to penalties under RSA 664:21, V, but shall  
23 be subject to a civil penalty of \$250 per incident up to a total of \$50,000.

24 2 Effective Date. This act shall take effect January 1, 2004.

**HB 332-FN - AS INTRODUCED**  
**- Page 2 -**

LBAO  
03-0076  
1/10/03

**HB 332-FN - FISCAL NOTE**

**AN ACT** relative to the use of prerecorded telephone messages by candidates and political committees.

**FISCAL IMPACT:**

The Department of Justice states this bill will increase state expenditures by an indeterminable amount in FY 2004 and each year thereafter. There will be no fiscal impact on state, county, and local revenue or county and local expenditures.

**METHODOLOGY:**

The Department states this bill establishes a civil penalty for violations of RSA 664:14-a regarding prerecorded political messages as inserted by this bill. The Department states enforcement of the penalty has the potential to involve the agency in additional litigation. Costs would include the production of documents, research, travel, overtime for support staff, and additional caseloads for attorneys. Exclusive of staff time, the cost of litigation averages \$2,388 for civil cases and \$1,351 for criminal cases. In addition, any increase in the number of complaints to the agency will increase both workload and the priority in which they are handled. The Department cannot project the number of instances in which the Department will become involved because of an alleged failure by a candidate or committee to abide by the requirements of this bill, therefor, cannot estimate the fiscal impact at this time.

# Hearing Minutes

HOUSE COMMITTEE ON ELECTION LAW

PUBLIC HEARING ON HB 332-FN

**BILL TITLE:** relative to the use of prerecorded telephone messages by candidates and political committees.

**DATE:** {January 29, 2003

**LOB ROOM:** 308      **Time Public Hearing Called to Order:** 10:04am

**Time Adjourned:** 10:50am

(please circle if present)

**Committee Members:** Reps. Stritek, Dickinson, Flanagan, Reeves, Kennedy, Drisko, Dionne, Whalley, Vaillancourt, Luebker, Flayhan, Cady, Dery, Borsetti, Infantine, Clemons, Buckley, D. Cote, Konye, Splaine and Weed.

**Bill Sponsors:** Rep. Spiess, Rep. Dokmo, Rep. Hess, Rep. Bergin, Sen. Below

TESTIMONY

\* Use asterisk if written testimony and/or amendments are submitted.

\* Rep. Spiess, prime sponsor, spoke in support of this legislation and provided written testimony.

Rep. Vaillancourt questioned Line 15, Section D. He asked if the call would now be longer. Rep. Spiess stated that with all the information needed when calling it will be discouraging to the caller.

Rep. Buckley asked Rep. Spiess if he was aware that other states had similar law. Rep. Spiess responded in the affirmative.

Rep. Hess, representing himself and House Leadership stated that he, leadership and particularly the Speaker of the House strongly supports this legislation. He referenced Line 15, Section D and stated that at the present time there is no "do not call" list. If the FN is a problem then amend the bill to have the violator pay the state's fees from prosecution as well.

Sen. Below, co-sponsor, spoke in support of this legislation. He read an email that he had received from an opponent of the bill. Sen. Below gave a brief explanation of what happened throughout his and his opponent's campaign. He stated that he wants disclosure on who is paying for the call. No name is needed, not at the beginning but within 60 seconds. He stated that \$250 per incident is not enough. Suggested it should be \$5000.

Rep Bergin, co-sponsor and proud supporter, feels that the candidate should be the one at the end of the message saying who he/she is with in his or her own voice. He feels that the candidate might be a little more reluctant to violate this legislation. He also agrees with Sen. Below on the amount of the fine.

**Rick Newman, Nottingham NH, spoke in support of this legislation. He would like this committee to find a way to make his life easier by making a "no call list".**

**Former State Rep. Peter Bragdon, Milford NH, spoke in support of this legislation. He admitted that he used this phone service during the last election. He thought that New Hampshire had a "no call" list. He also thought that New Hampshire had a law to cover these phone calls. He suggested that a disclaimer should be at the beginning of the call, who's paying, etc. He further suggested amending the "do not call" bill to add political advertising. He noted that RSA 664-15 already has an fine existing structure. He stated that he felt that callerID should not be blocked that a real number should be displayed.**

**Rep. Buckley asked Mr. Bragdon if he felt that the caller's number ID should be the calling company or the candidate's number. Mr. Bragdon responded by stating that the number should be that of the company.**

**Chairman Stritch recessed this hearing until 12:00noon on February 12, 2003.**

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K O M Dionne', with a long horizontal line extending to the right.

Kimberley O M Dionne, Clerk

# Testimony

HOUSE COMMITTEE ON ELECTION LAW

PUBLIC HEARING ON HB 332

**BILL TITLE:** relative to the use of prerecorded telephone messages by candidates and political committees.

**DATE:** February 04, 2003

**LOB ROOM:** 308      **Time Public Hearing Called to Order:** 12:00pm

**Time Adjourned:** 12:11pm

(please circle if present)

**Committee Members:** Reps. ~~Stritch~~ Dickinson, ~~Flanagan~~ ~~Reeves~~ Kennedy, ~~Drisk~~ Dianne, Whalley, Vaillancourt, ~~Cuebker~~ Flayhan, Cady, Derby, ~~Dorsett~~ ~~Infantine~~, Clemons, ~~Buckley~~ D. Cote, Konys, Splaine and Weed.

**Bill Sponsors:** Rep. Spiess, Rep. Dokmo, Rep. Hess, Rep. Bergin, Sen. Below

TESTIMONY

\* Use asterisk if written testimony and/or amendments are submitted.

Orville B. Fitch, II, representing the Attorney General's Office, spoke in support of this bill. He affirmed that there have been many complaints at the Attorney General's Office. He stated that the Attorney General's Office would like there to be an administrative fine. He further stated the Attorney General's Office desires that the penalties be well defined and is not in favor of any particular political phone call bill, but feels that one is needed.

Rep. Buckley stated that he would like to see an investigation by the Attorney General's Office to find all possibilities and loopholes.

Rep. Kennedy asked Mr. Fitch if there could be a criminal penalty. Mr. Fitch responded by stating that that is up to the legislature.

Rep. Dokmo, co-sponsor, spoke in support. She feels that this bill would aid in voter education on candidates. She stated that this bill will not stop all offenders but is a great start. She further stated that it gives teeth to enforcers of the law.

Rep. Infantine asked Rep. Dokmo if she would have a problem with not having to give real name. Rep. Dokmo responded by stating that she would have to think about this but feels that the real name should have been given.

Rep. Buckley asked Rep. Dokmo if the company or the individual is the offender. Rep. Dokmo responded by stating that if the committee needs to use another bill to define this, then that is fine.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Andrew L. Dorsett', written in a cursive style.

Andrew L. Dorsett, Clerk pro-tem



Testimony of Representative Paul Spiess  
Prime Sponsor HB332-FN  
Before the House Election Law Committee  
January 29, 2003

Thank you Mr. Chairman and members of the committee,

My name is Paul Spiess, representing Hillsborough 47, the towns of Amherst and Milford. I have brought this bill to the Legislature for consideration because of my shock, dismay and outrage over the use of pre-recorded telephone messages by various political factions during the last primary and general election. This is a relatively new technology, which I believe was employed to its full effect for the first time during this last election cycle.

I found the employment of this technology and the frequency of these calls to be excessive and offensive. I believe that they interfered with my rights to privacy and the quiet enjoyment of my home. I found the content of some of the messages to be unethical and the purpose of others to disparage the position and reputation of a political opponent. In almost every instance, I was unable to determine who made the recording, who paid for the message, and which political candidate (if any) they were endorsing.

While I respect the right of freedom of speech, I believe that there is a counterbalancing right to privacy. If it were within my power, I would put an outright ban on all pre-recorded political messages. I have no problem with the practice of a candidate or volunteers taking their time and energy to make a personal call to a registered voter. I have a significant concern with allowing the unregulated use of pre-recorded messages sent out in mass by automatic dialing systems on a repetitive basis to individuals who are unaware who is behind the call.

This concern is shared by many of my constituents. I have never before experienced such a spontaneous visceral negative reaction to anything, like I received from voters to this practice. My friends and neighbors confronted me repeatedly as they entered and left the polls complaining about these calls. They were flat out annoyed, and put off by both the practice and the content. At a time when we have legitimate cause for concern about voter apathy, I would suggest that we cannot afford to allow practices, which continue to alienate voters.

This bill is intended to place a regulatory structure over the use of this technology. First, it defines what is a "prerecorded political message". Second, it prescribes what information must be provided at a minimum in each message. Third, It prohibits the delivery of prerecorded political messages to any telephone number that has been placed on a "do not call" list. And finally it provides for monetary penalties for breach of the statute.

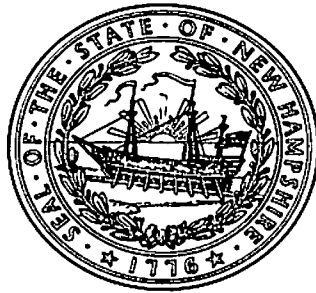
A companion bill to HB 332 has been submitted by representative Dokmo, HB 364-FN, which will require the registration of any individual or organization that uses automatic dialing systems within the state. I believe that bill will be before you shortly.

I hope that you share my concern over the use of prerecorded political messages and automated dialing systems, and that you will see the value of creating a regulated environment for this practice.

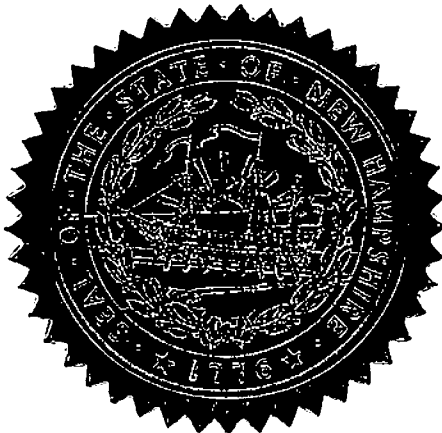
Thank you for your time and consideration, and I would be pleased to answer your questions.

# State of New Hampshire

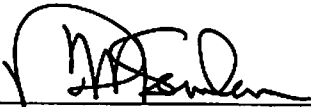
Office of Secretary of State



I, David M. Scanlan, Deputy Secretary of State of the State of New Hampshire do hereby certify that attached is a true copy of the official results from the 2010 State Primary Election for State Representative – Hillsborough County District No. 4 as recorded in this office.



*In Testimony Whereof*, I hereto set my hand and cause to be affixed the Seal of the State, at Concord, this ninth day of April, 2012.

  
\_\_\_\_\_

*Deputy Secretary of State*

## 2010 STATE PRIMARY ELECTION

### REPUBLICAN

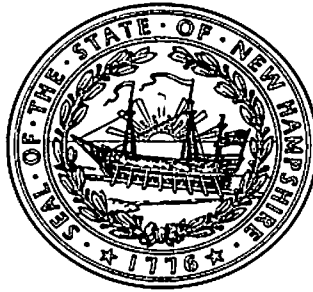
Hillsborough District No. 4 (4)	O'Brien, r	Condra, r	Holden, r	Kucmas, r	Mead, r			
Lyndeborough	142	122	178	91	136	1	1	
Mont Vernon	271	185	196	122	294		2	
New Boston	447	238	402	324	456			
Temple	113	68	90	46	85	2		
Wilton	224	299	213	138	218			
<b>TOTALS</b>	<b>1,197</b>	<b>912</b>	<b>1,079</b>	<b>721</b>	<b>1,189</b>	<b>3</b>	<b>3</b>	

### DEMOCRATIC

Hillsborough District No. 4 (4)	Groh, d	Daler, d	French, d	Jencks (w-in)	Condra, r	Holden, r	O'Brien, r	Mead, r
Lyndeborough	86	88	74	33	1	2	-	-
Mont Vernon	117	127	104	48	-	-	5	4
New Boston	205	205	211	126	-	1	3	2
Temple	110	117	84	67	-	-	-	-
Wilton	202	210	166	77	-	-	-	-
<b>TOTALS</b>	<b>720</b>	<b>747</b>	<b>639</b>	<b>351</b>	<b>1</b>	<b>3</b>	<b>8</b>	<b>6</b>

# State of New Hampshire

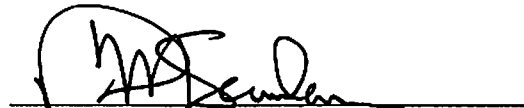
Office of Secretary of State



I, David M. Scanlan, Deputy Secretary of State of the State of New Hampshire do hereby certify that attached is a true copy of the official results from the 2010 General Election for State Representative – Hillsborough County District No. 4 as recorded in this office.



*In Testimony Whereof*, I hereto set my hand and cause to be affixed the Seal of the State, at Concord, this ninth day of April, 2012.

  
Deputy Secretary of State

## 2010 GENERAL ELECTION

### HILLSBOROUGH COUNTY

District No. 4 (4)	O'Brien, r	Condra, r	Holden, r	Mead, r	
Lyndeborough	364	371	421	362	
Mont Vernon	609	528	575	631	
New Boston	1,226	1,091	1,167	1,234	
Temple	314	285	299	285	
Wilton	746	817	758	705	
<b>TOTALS</b>	<b>3,259</b>	<b>3,092</b>	<b>3,220</b>	<b>3,217</b>	
	Jencks, d	Daler, d	French, d	Groh, d	Scatter
Lyndeborough	250	288	233	282	4
Mont Vernon	405	436	405	396	11
New Boston	883	775	865	708	5
Temple	268	326	270	289	3
Wilton	573	672	569	656	6
<b>TOTALS</b>	<b>2,379</b>	<b>2,497</b>	<b>2,342</b>	<b>2,331</b>	<b>29</b>

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.  
NORTHERN DISTRICT

SUPERIOR COURT

William L. O'Brien

v.

New Hampshire Democratic Party and  
Raymond C. Buckley, individually and as Chairman

Docket No. No. 11-CV-786

**PLAINTIFF'S OBJECTION TO THE DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT**

NOW COMES the plaintiff, William L. O'Brien, and hereby objects to the Defendants' Motion for Summary Judgment and cross-moves for Summary Judgment in his favor. In support thereof, the plaintiff states:

1. The defendant's Motion for Summary Judgment should be denied. Summary Judgment should be granted in favor of the plaintiff.

2. The defendants do not dispute that their conduct violated the requirements of RSA 664:14-a. They instead argue that despite their unlawful conduct, the plaintiff does not have standing to bring a claim for damages under RSA 664:14-a, IV (b) because he is not a "person" within the meaning of the statute, and did not suffer any "injury." Both of the defendants' arguments are without merit.

3. The plaintiff is a "person" within the plain and ordinary meaning of the word as used in the statute, and he suffered a cognizable injury as a result of the defendants' deceptive and misleading robo-call, which was made more deceptive and misleading by the defendants' failure to clearly and officially identify the source of the message (i.e., those responsible for paying for it be disseminated to 394 N.H. voters).

4. Because the defendants do not dispute that their conduct was unlawful, and because the plaintiff is an "injured person" within the meaning of RSA 664:14-a, IV (b), he is entitled to judgment as a matter of law in his favor.

5. A Memorandum of Law setting forth the above arguments in greater detail has been filed contemporaneously with this Motion and is incorporated herein by reference.

WHEREFORE, the plaintiff respectfully requests that the Honorable Court:

- A. Deny the defendants' Motion for Summary Judgment;
- B. Grant the plaintiff's Cross-Motion for Summary Judgment; and
- C. Grant such other and further relief as the Court deems just and equitable.

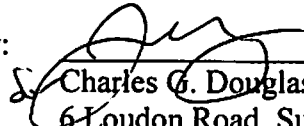
Respectfully submitted

WILLIAM O'BRIEN

By his attorneys,  
DOUGLAS, LEONARD  
& GARVEY, P.C.


Dated: August 7, 2012

By:

  
\_\_\_\_\_  
Charles G. Douglas, III (#669)  
6 Loudon Road, Suite 502  
Concord, NH 03301  
(603) 224-1988

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been mailed this 14 day of August, 2012, to James W. Craig, Esq., counsel for the N.H. Democratic Party, and Gregory J. Ahlgren, Esq., counsel for Raymond Buckley.

  
\_\_\_\_\_  
Charles G. Douglas, III



THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.  
NORTHERN DISTRICT

SUPERIOR COURT

William L. O'Brien

v.

New Hampshire Democratic Party and  
Raymond C. Buckley, individually and as Chairman

Docket No. No. 11-CV-786

**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF  
HIS OBJECTION TO THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT  
AND HIS CROSS-MOTION FOR SUMMARY JUDGMENT ON LIABILITY**

NOW COMES the plaintiff, William L. O'Brien, and hereby submits this memorandum of law in support of his Objection to the Defendants' Motion for Summary Judgment and his Cross-Motion for Summary Judgment on Liability.

**I. Introduction:**

This case arises out of the willful and deceptive violations of New Hampshire election law committed by the defendants against the plaintiff in the context of his 2010 campaign to be re-elected to the New Hampshire House of Representatives. There is no genuine issue of material fact concerning the acts committed by the defendants. The defendants' actions clearly constitute violations of New Hampshire's election laws (RSA 664:14-a, II), and the plaintiff is therefore entitled to judgment as a matter of law on liability. The defendants do not appear to meaningfully dispute that their conduct violated the requirements of RSA 664:14-a in their Motion for Summary Judgment. Their assertions that the plaintiff does not have standing and suffered no cognizable injury are without merit. The plaintiff was an injured person within the meaning of the statute and is entitled to judgment as matter of law in his favor on liability.

## II. Facts:

Plaintiff William L. O'Brien is a New Hampshire State Representative who currently serves as Speaker of the New Hampshire House. He is a Republican representing District 4 in the New Hampshire House. Declaration at ¶ 6.

In 2010, Plaintiff O'Brien was running for re-election and had requested Democratic write-in votes in the September 14, 2010, primary so that he could appear on the ballot in the November cycle for elections as both (R)epublican and (D)emocrat. Declaration at ¶ 7. This election strategy has historically been used from time to time by New Hampshire candidates, and is done predominantly in the smaller towns of New Hampshire. See Id. There is nothing illegal or "wrong" in what Mr. O'Brien was attempting to do.

However, the Plaintiff's write-in campaign clearly irritated Defendant Raymond Buckley, who is the Chair of the New Hampshire Democratic Party. Mr. Buckley apparently did not want Mr. O'Brien to have the appellation of both R and D after his name on the November ballot. In an interview recorded by an investigator employed by the New Hampshire Attorney General's Office, Mr. Buckley admitted his personal offense at Representative O'Brien's post-card campaign strategy:

Because of the agenda that he pushed it was particularly appalling that he would send out such a misleading post card saying, you know, to write him in. Nowhere did it mention that he was an incumbent Republican legislator. Nowhere on that post card did it say that this would put him on both sides of the ballot so he wouldn't have to worry about his election in November, he could focus entirely on supporting his other radical right candidates. So, it was particularly offensive....

Transcript of Buckley Interview, Ex. 1 at p. 3.

The New Hampshire Democratic Party (hereinafter "NHDP") and Mr. Buckley were responsible for causing a prerecorded political audio message, as defined in RSA 664:14-a, I, to

be delivered to residents of New Hampshire on September 13, 2010, the day before the primary. In his interview with the A.G.'s investigator, Mr. Buckley admitted recording the message. See Id. at p. 4; see also E-Mail from Raymond Buckley to Dean Barker, Ex. 2. The audio message contained the recorded voice of the Chairman Buckley, giving the following message:

This is State Democratic Chair Ray Buckley calling with the important news that current Republican Bill O'Brien has asked to join the Democratic Party's ticket for the November elections.

If he succeeds tomorrow, we expect Bill O'Brien will embrace the Democratic Party's platform, support President Obama, national health care reform and stand up for gay marriage, and protect a woman's right to choose and our agenda to move New Hampshire and America forward.

Once again, we wanted you to know before you vote tomorrow that Bill O'Brien has asked to join the Democratic ticket and our progressive agenda. Thank you so much.

Id. at pp. 6-7. Mr. Buckley also admitted to the investigator that the recording was done on behalf of and with the approval of the N.H. Democratic Party:

MM. .... So, it because of that what we just talked about, that post card, that the Democratic Party decided to have some type of response to that.

RB: Right.

Id. at p. 6.

The audio message recorded by Chairman Buckley failed to contain "[t]he name of the person or organization paying for the delivery of the message, and the name of the fiscal agent, if applicable" as required by RSA 664:14-a, II (b) (emphasis added).

The message was recorded for use in automated telephone calls made by Broadcast Solutions. See Id. at p. 8; Broadcast Solutions E-Mail Report & Invoice, Ex. 3. The NHDP provided Broadcast Solutions with an electronic list of 456 telephone numbers of New Hampshire residents to call. See Id. On September 13, 2010, Broadcast Solutions delivered the

prerecorded political message to those telephone numbers, reaching at least 394 New Hampshire households. See Id.

The conduct of the Defendants described above was investigated by the New Hampshire Attorney General's Office, resulting in an enforcement action being filed against the New Hampshire Democratic Party. On August 29, 2011, the Democratic Party agreed to pay the State a penalty of \$5,000 for violating the election laws. See Consent Agreement, Ex. 4.

### III. Standard of Review:

“Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” RSA 491:8. The opponent of a motion for summary judgment “may not rest upon mere allegations or denials of his pleadings....” Id. Rather, the party opposing the motion “has the burden of contradicting the proponent’s affidavits; otherwise the facts stated in them will be deemed admitted for the purpose of the motion.” Johns-Manville Sales Corp. v. Barton, 118 N.H. 195, 197 (1977).

The opposing party must “set forth specific facts showing the existence of a genuine issue for trial.” Id. (emphasis added). It is well-settled that mere denials, “unaccompanied by facts which would be admissible in evidence to contradict [the moving party’s] affidavit, are not sufficient to raise a genuine issue of material fact.” Community Oil Co. v. Welch, 105 N.H. 320, 322 (1964) (emphasis added).

### IV. ARGUMENT:

#### A. The Plaintiff is Entitled to Summary Judgment on Liability Because There Is No Dispute That the Defendants Violated New Hampshire Election Laws.

RSA 664:14-a, II provides as follows:

No person shall deliver or knowingly cause to be delivered a prerecorded political message unless the message contains, or live operator provides, within the first 30 seconds of the message, the following information:

- (a) The name of the candidate or of any organization the person is calling on behalf of.
- (b) The name of the person or organization paying for the delivery of the message and the name of the fiscal agent, if applicable.

RSA 664:14-a, I defines a “prerecorded political message” as a:

.... Prerecorded audio message delivered by telephone by:

- (a) A candidate or political committee; or
- (b) Any person when the content of the message expressly or implicitly advocates the success or defeat of any party, measure, or person at any election, or contains information about any candidate or party.

It is beyond dispute that the prerecorded message made by defendant Buckley, and disseminated to 394 New Hampshire households by the New Hampshire Democratic Party, was a “prerecorded political message” within the meaning of RSA 664:14-a, I. The message was delivered by telephone using political party chairman Buckley’s voice, and was paid for by the New Hampshire Democratic Committee, bringing it within part (a) of the definition. See Buckley Interview Transcript at pp. 6-8, Ex. 1; Buckley Email, Ex. 2. In addition, the message itself implicitly advocated the defeat of plaintiff O’Brien in the primary, by sarcastically suggesting that he was not a proper candidate to be running as a write-in Democratic candidate, because his political views differed from the Democratic Party line. The message also contains “information about a candidate” in that it explains that plaintiff O’Brien was attempting to secure a spot on the Democratic Party primary ballot. The defendant’s prerecorded political message therefore falls within section (b) of the definition as well.

It is also beyond dispute that the prerecorded political message paid for and disseminated by the defendants failed to comply with the requirements of RSA 664:14-a, II. The entire text of the message was:

This is State Democratic Chair Ray Buckley calling with the important news that current Republican Bill O'Brien has asked to join the Democratic Party's ticket for the November elections.

If he succeeds tomorrow, we expect Bill O'Brien will embrace the Democratic Party's platform, support President Obama, national health care reform and stand up for gay marriage, and protect a woman's right to choose and our agenda to move New Hampshire and America forward.

Once again, we wanted you to know before you vote tomorrow that Bill O'Brien has asked to join the Democratic ticket and our progressive agenda. Thank you so much.

See Buckley Interview Transcript at pp. 6-7, Ex. 1. This statement does not identify the name of the person or organization that defendant Buckley was calling on behalf of. While defendant Buckley identifies himself as the "State Democratic Chair," he does not state whether his message is being made on the Democratic Party's behalf, or if he is just expressing his own personal opinions.

More importantly, the message provides no clue as to who paid for it to be disseminated, and clearly does not identify any fiscal agent. The message as delivered to 394 New Hampshire households therefore indisputably violates the requirements of RSA 664:14-a, II, and the plaintiff is entitled to judgment as a matter of law on the defendant's liability for violating New Hampshire election law.

**B. The Plaintiff is an "Injured Person" Within the Meaning of RSA 664:14-a, IV (b).**

RSA 664:14-a, IV (b) provides a civil remedy for damages for persons injured by conduct like that of the defendants in this case. This section states:

Any person injured by another's violation of this section may bring an action for damages and for such equitable relief, including an injunction, as the court deems necessary and proper. If the court finds for the plaintiff, recovery shall be in the amount of actual damages or \$1,000, whichever is greater. If the court finds that the act or practice was a willful or knowing violation of this section, it shall award as much as 3 times, but not less than 2 times, such amount. In addition, a prevailing plaintiff shall be awarded the costs of the suit and reasonable attorney's fees, as determined by the court....

(emphasis added).

1. **The Plaintiff is a "Person" Within the Meaning of the Statute.**

The defendants' assertion that Speaker O'Brien is not a "person" within the meaning of RSA 664:14-a, IV(b) is clearly without merit. The defendant's contention that the term "any person" is limited only to voters who receive robo-calls violating the disclosure requirements of the statute finds no support in the language of the statute itself. "When examining the language of [a] statute, we ascribe the plain and ordinary meaning of the words used." Fog Motorsports No. 3, Inc. v. Artic Cat Sales, Inc., 159 N.H. 266, 268 (2009). Legislative intent may only be gleaned "from the statute as written and [we] will not consider what the legislature might have said or add language that the legislature did not see fit to include." Id.

The language of the statute permits "any person" who is injured by a violation of its terms to bring a civil action. The defendants' interpretation effectively reads the "plain and ordinary meaning" of the word "any" out of the statute. The plain and ordinary meaning of the word "any" is: "1. One, no matter which, from three or more; 2. *Every*." American Heritage Dictionary (1987), at p. 31 (emphasis added). It is therefore clear that the plaintiff is included in the category of "any person(s)" injured by a violation of the statute, because the statute was intended, by its plain language, to encompass every person injured by a violation of its terms. See Id.

**2. The Plaintiff Suffered an “Injury” within the Meaning of the Statute.**

The defendant’s argument that Mr. O’Brien suffered “no injury” as a result of their violation of RSA 664:14-a is equally without merit. The defendants’ robo-call was inherently misleading and deceptive, and was aimed at Mr. O’Brien personally. Failure to clearly identify the actual source of message (i.e., who was responsible for paying for it), compounded the deceptiveness. That deceptiveness as to the actual source of the message caused an injury to the plaintiff.

It is not a coincidence that RSA 664:14-a’s civil remedies provision is a virtual word-for-word copy of the equivalent section from New Hampshire’s Consumer Protection Act, RSA 358-A:10. That is because RSA 664:14-a is very much a “consumer protection act” itself, albeit of a more specialized nature. Whereas RSA 358-A seeks to prohibit unfair and deceptive conduct in the commercial marketplace, RSA 664:14-a seeks to prohibit unfair and deceptive conduct in the electoral marketplace of ideas. Notably under RSA 358-A, business owners, who are very much the analog of political candidates under RSA 664:14-a, have standing to sue for violations of the CPA. See Eastern Mountain Platform Tennis, Inc. v. Sherwin Williams Co., Inc., 40 F.3d 492 (1994) (Tab 5). Mr. O’Brien, as a candidate injured by the defendant’s unfair and deceptive violation of RSA 664:14-a, has standing to sue for damages under this section.

The robo-call disseminated to 394 New Hampshire households injured the plaintiff because, by not having a clear and official statement as to who was responsible for its content, potential voters receiving the call were likely to be confused as to the true source of the information and in what context it should be viewed. While defendant Buckley identified himself as the voice delivering the message and gave his title as “State Democratic Chair,” a typical voter would be unlikely to know exactly who Raymond Buckley was, whether it was



truly his voice, and whether he was actually associated with the State Democratic Party or authorized to speak on its behalf, or whether he might in some way be connected to Speaker O'Brien.

Actual recipients of the defendant's robo-calls were confused about both the meaning of the message and who was behind it. Sandra Kent is a voter from Speaker O'Brien's District who received one of the robo-calls. She was confused about the legitimacy of the message and its source, and called Speaker O'Brien's residence for clarification about the meaning of the robo-call. See Affidavit of Sandra Kent, Ex. 6. The Attorney General's office also spoke to another voter named Linda Anderson, who expressed confusion and alarm about the message and called Representative Frank Holden about it. See A.G.'s Investigation Report, Ex. 7 at p. 6.

The official disclaimers required by RSA 664:14-a, II are intended to eliminate this type of voter confusion. Requiring disclosure of the official source of the information protects not only the voters themselves from misleading information, but also the political candidates from being misleadingly portrayed as a result of the source of statements about them being unclear. It stands to reason that voters are better able to judge the credibility and intent of political messages when the persons or institutions paying for them are clearly and officially identified. Notably, the legislative history cited by the defendants supports the conclusion that this is one of the precise forms of injury that RSA 664:14-a was intended to combat:

I found the content of some of the messages to be unethical and the purpose of others to disparage the position and reputation of a political opponent. In almost every instance, I was unable to determine who made the recording, who paid for the message, and which political candidate (if any) they were endorsing.

Testimony of Rep. Paul Spiess from Public Hearing on BH 332-FN (Appended as an Exhibit to the defendant's Motion).

The defendants' willful failure to disclose those responsible for financing their robo-call in this case therefore injured Mr. O'Brien because, without a clear and official statement of its source, voters were likely to be confused about the veracity of, and reasons for, the statements being made about him. Defendant Buckley admits that his message was sarcastic and "tongue-in-cheek," which made it all the more important that voters be informed of its official source via the disclaimers required by RSA 664:14-a.

The fact that voters cannot judge the credibility and have certainty about the source of a message concerning him is a direct injury to Mr. O'Brien, regardless of the fact that he ultimately won the election. Nowhere in the statute does it require that a voter ultimately decide to vote against a candidate who is the subject of a violation of the Act, in order to show an "injury." Nothing in the statute requires proof of significant "actual damages" in order for a plaintiff to qualify as an "injured person." See RSA 664:14-a, IV. Having information disseminated about the plaintiff that is misleading and confusing, and made more so because it was not clearly and officially tied to a specific source is an injury *in and of itself*, even if such an injury would otherwise only entitle a plaintiff in his position to "nominal damages."

"Nominal damages" are a mere token, signifying that the plaintiff's rights were technically invaded even though the plaintiff cannot prove any loss or damage." Griffith v. State of Colo., Div. of Youth Services, 17 F.3d 1323, 1327 (10<sup>th</sup> Cir. 1994) (Tab 8). Nominal damages present an "exception to the general rule. They are recoverable whenever there has been a breach of a legal duty or invasion of a legal right and no actual damage resulted or was proved." Pugliese v. Town of Northwood Planning Board, 119 N.H. 743, 751 (1979). "The allowance of nominal damages is generally based on the ground that every injury, from its very nature, legally imports damage, or that the injury complained of would, in the future, be evidence in favor of the

wrongdoer....” 22 Am.Jur.2d Damages § 9 (2012). “Nominal damages are awarded to vindicate rights, not to compensate for resulting injuries.”

The inclusion of a statutory liquidated damages provision like that contained in RSA 664:14-a and RSA 358-A is itself a recognition that damages may be nominal or incalculable – but that regardless of how slight the injury, the type of conduct at issue is to be strongly discouraged by presuming damages, so that candidates’ and voters’ rights to clean elections can be vindicated, regardless of whether significant actual damages are provable. See Pugliese, 119 N.H. at 751. See also Beckstead v. Nadeau, 155 N.H. 615 (2007) (showing of “actual damages” not required for an award of statutory minimum fees and attorneys’ fees under the Consumer Protection Act). After all, according to the American Heritage Dictionary, the definition of “injury” is as synonymous with simple “injustice” as it is with concrete harm or damages.

Permitting the defendants’ to violate a statute intended to protect the integrity of the electoral process, without meaningful consequence, would be an injustice. The “state’s and the public’s interest in election integrity extends beyond controlling direct corruption to minimizing damage to the integrity of the dynamic and multifaceted marketplace of ideas that drives a candidate election.” 26 Am.Jur. 2d Elections, § 455 (2012). A message that is delivered in such a way as to be misleading and confusing as to its source and underlying message is contrary to the “legitimate aim of honesty and fairness in election campaigns.” Id.

As a candidate who was the subject of a misleading robo-call campaign that was likely to (and actually did) cause confusion among his constituents, regarding both its message and its source (see, e.g., Affidavit of Sandra Kent, Ex. 6), the plaintiff was an “injured person” within the meaning of RSA 664:14-a, and is therefore entitled to judgment as a matter of law in his favor.

**CONCLUSION**

For the reasons set forth above, the Court should deny the defendants' Motion for Summary Judgment, and Grant Summary Judgment in favor of the plaintiff on liability.

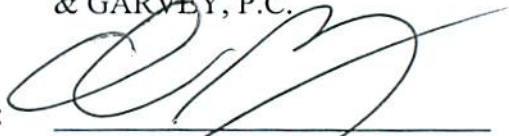
Respectfully submitted

WILLIAM O'BRIEN

By his attorneys,  
DOUGLAS, LEONARD  
& GARVEY, P.C.

Dated: August 7, 2012

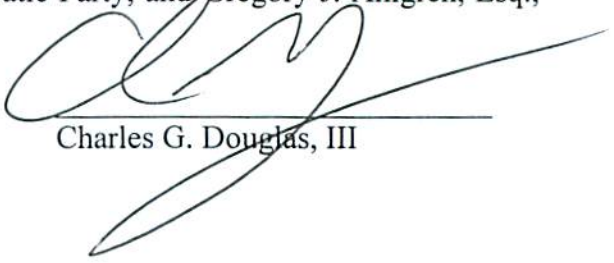
By:



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been mailed this 7<sup>th</sup> day of August, 2012, to James W. Craig, Esq., counsel for the N.H. Democratic Party, and Gregory J. Ahlgren, Esq., counsel for Raymond Buckley.



Charles G. Douglas, III

**August 10, 2011 Interview of Raymond Buckley by Investigator Mark Myrdek**

*MM: Mark Myrdek*

*RB: Ray Buckley*

MM: Today's date is Aug 10, 2011; the time is 9:59 in the morning. We are at the AG's office in the conference room. The person I am interviewing today is Chairman Raymond Buckley of the Democratic Party. My name is Mark Myrdek I'm an investigator here with the AG's office. Prior to going on tape, Chairman Buckley, you agreed to allow this to be recorded?

RB: Yes.

MM: And we know we've had meetings, a couple of meetings in the past probably -- over the past month regarding this case and you are here today under subpoena for this interview and to produce any records or documents you may have concerning this case. Did you in fact locate any documents?

RB: I did not.

MM: Ok. And we've been back with another interview with Mike Brunell earlier this week. We've also discussed the other day with you the fact that Broadcast Solutions did send us some materials that they had.

RB: Correct.

MM: Which we think may have --

RB: Everything they had.

MM: -- at least met somewhat of the burden that was placed on the party. And we have those here today and we can refer to those later on if we have to. So, why don't we start off with by kind of letting you describe what happened in this case and as

I've said before we've had discussions about this case earlier in that we know that the reason you had Broadcast Solutions place these mobile calls was in response to some type of a political ad that Mr. O'Brien had put out prior to the election.

RB: Correct. Prior to the primary.

MM: The primary. And we know that it was on or about Sept. 13 given the records that we have.

RB: Mm-hmm.

MM: Because we know that the actual primary was on the 14<sup>th</sup>.

RB: Yes, it was the Monday and I believe it was mid-afternoon. The calls went out - usually you try to do an auto call in mid-afternoon because people don't tend to be home and they get the machines and leave a message on the machines, which I find more effective than when somebody picks up the phone and hears that its an auto call they generally just hang up. I certainly do. I think that most voters do as well. The reason that the auto call was done was instead of a post card is that we were unaware of the post card that Representative O'Brien had mailed and had arrived in people's post office box or their homes that Monday morning. You know, I served in the NH Legislature from 1986 to 2004, and served on the House of Election Law Committee for 8 of those years and was very involved in election law for many of those years, but even prior to being in the legislature I worked for the House of Representatives in the Dem. Office. I absolutely revere the institution of the NH House. Now in 2004, I ran for the executive counsel and left the House. What happened in 2004 was that an Atty., a gentleman by the name of Bill O'Brien from Mont Vernon, got himself elected and put on the election law

committee so he was on right after I left. Now, I had never heard of him, which is somewhat unusual if somebody is a leader in the Republican Party I not only have heard of them, but I usually would know them. But right away he started making headlines for the sort of parliamentary and very partisan and political and mean spirited attacks that just simply didn't exist in NH. Not by a reputable person anyways. So, it was a little surprising that I would heard of some of the stuff that he would do. He lost the election his election in 2006, and came back in 2008, and continued to try to cause havoc on the floor of the House, disrespect the institution, disrespect the membership, always pushing an agenda that seemed to be much more about getting headlines and political power than actually accomplishing anything. You know, one of the first things I learned back when I was a teenager and first started working for the Legislature was that the respect of your colleagues, both Democrats and Republicans was paramount to being an effective Legislator. Because of the agenda that he pushed it was particularly appalling that he would send out such a misleading post card saying, you know, to write him in. No where did it mention that he was an incumbent Republican legislator. No where on that post card did it say that this would put him on both sides of the ballot so he wouldn't have to worry about his election in November, he could focus entirely on supporting his other radical right candidates. So, it was particularly offensive that he was not being honest. And so, my first reaction was well we can't do a mail piece, sending out a press release isn't going to do anything, let's do a tongue and cheek auto call. I believe Michael, somebody in the office, drew something up I took a look at it and thought it was quite

humorous and said let's go. We contacted Buzzy, who has been my auto call guy since 2000. I think it was actually 2001 is when I first started using him, but maybe it was 2002. And he has been very reliable, very professional in our -- I didn't see a tag line on there that was paid for but that's not unusual that there are -- been multiple instances over the past decade where I would receive a script but it's not me reading it but it would be somebody -- "this call is paid for by the New Hampshire Democratic Committee." So, if there wasn't a not a tag line on there it certainly was not by design. Clearly, the call is from me, it's my voice. Anyone who had ever heard my voice would recognize that was my voice. I start right off by acknowledging, this is Ray Buckley, Chair of the NH Democratic Party. So, there was no intent in any way of hiding the purpose of the call, the nature of the call or who was paying for the call. I think that if you look at the script you very clearly can determine that this is clearly a call from the Democratic Party. It did not come from any other source. I don't recall ever seeing an ad by any third party or even any candidate that has a Democratic Party chair or the Republican Party chair in it. It's just simply that you might have a call that is from another high elected official or somebody who is a neighbor saying you know, "please vote for our good friend, and neighbor blank, blank," or "hi, this is gov. blank please join me in supporting blank for office." But to have the State party chair on either side make the call that's not generally helpful for either the Republican Party or the state party chair make such an auto call. It wasn't to assist any one particular candidate because there were multiple candidates running for office. And actually I don't actually say in the script not to vote for him. It says in the



script that well, he's running and I just wanted to let you to know that if he is seeking Democratic support that must mean that he is endorsing the Democratic platform. As I said - tongue and cheek manner. Clearly, Bill O'Brien does not endorse the Democratic platform on any issue. We have a big section of our platform about civility and clearly Bill O'Brien does not agree with any sort of civility in government.

MM: Ok. I'll go back and just refer to a couple of things...

RB: Sure.

MM: ... you talked about in your interview here. The first thing I'll show you is an e-mail that we received. It's an e-mail that comes in from Blue Hampshire Politics, which is a fairly common website people would go to and it shows, as you talked about it a post card or a posting from Mr. O'Brien and this what I am showing you now. Is this what you are referring to when you say this is what you wanted to respond to this?

RB: Yes. If you look at the front piece it has a picture of him, it says William O'Brian for State Representative. It says "write in," it just lists the other three Democratic candidates that are on the ballot and asking the people to register. In no way on the front cover does it acknowledge that he is an incumbent Republican State Legislator. If you look on the back side, once again "please write in William O'Brien for State Representative," and then he talked about all this kind of generic messages about - ironically the first thing he says is create jobs, which is ironic in the sense that he hasn't addressed creating jobs since he got re-elected, but you will see there that no where does it say Republican, no where does he say

that he is an incumbent legislator. It is all this sort of generic message that a casual voter if not knowing who he is, which is that they think that he is a good Democrat asking to be written in. It was offensive to many people in that district when we started receiving the calls that they received that post card.

MM: And the other piece of paperwork that I'll show you here and I'll actually put this on the record. I'll read this from the record. So, it because of that what we just talked about, that post card, that the Democratic Party decided to have some type of response to that.

RB: Right.

MM: So, someone at the office as you said Mike, or somebody and Mike has come in and said that he thinks he is the one that actually wrote up the script.

RB: If he didn't he - I mean he OK's as the Executive Director, he was the last person to have seen it.

MM: And he presented you with a script for this phone call that was going to be made. And I'll - for the record I will just read the script what I have here and will show it to you. You have seen this before.

RB: Yeah.

MM: Tell me if this is correct: "This is State Democratic Chair Ray Buckley calling with important news that current Republican Bill O'Brien has asked to join the Democratic Party's ticket for the November elections. If he succeeds tomorrow we will expect Bill O'Brien will embrace the Democratic Party's platform, support President Barack Obama, national healthcare reform, and stand up for gay marriage, and protect a woman's right to choose and our agenda to move New

Hampshire and America forward. Once again, we wanted you to know before you vote tomorrow that Bill O'Brien has asked to join the Democratic ticket and our progressive agenda. Thank you so much." Is that what you recall as being the script that you read from that day?

RB: I believe so and certainly to the best of my memory it is exactly the script.

MM: Ok. And you will acknowledge in here that as far as what he has here that there is no mention of who paid for this message.

RB: Right. It starts right off this is State Democratic Chair Ray Buckley, which clearly identifies that it is me. As I mentioned to you earlier, I think that one of the reasons that I may not have even occurred to me to double check or triple check is that several years ago there was an incidence where the candidate not having their listed their fiscal agent on a piece of mail, but it had there was a note from that candidate with that candidate's signature on it and I showed it to the Secretary of State and he said his ruling would be that the disclaimer of the fiscal agent would not be necessary then because the point of having the fiscal agent is to say that it was it came from the candidate's committee and that clearly having the candidate's signature, the person's address on there, that it showed that it was coming from the candidate, so if somebody wanted to complain or had an issue with that post card, they would know who to go. And that's clearly the case with this call as well. It starts right off "this is State Democratic Chair Ray Buckley." It's in my voice, absolutely no question about it being a professional voice.

[Laughter]

MM: So, just to clarify that you feel as though you made no attempts to hide obviously who was making the call and that it's obvious that this call is – is in support of the Democratic Party.

RB: Right.

MM: It's made from the Democratic Party and that's the purpose for the call.

RB: Right.

MM: So, after approving this and getting it written in some form you then called Broadcast Solutions...

RB: Yes.

MM: ... as we talked about earlier. Mr. Cohen then put out these calls and as our records indicate those these calls went out between 3pm and 4:30pm.

RB: Ok. So, it was later that what I thought.

MM: On the 13<sup>th</sup>. That's the records that we have from Mr. Cohen that he gave us.

RB: Those records that he always provide are accurate....

MM: We have a total of 456 calls that were attempted.

RB: And a total price of?

MM: Well, let's see...

RB: It's \$100. Yeah.

MM: \$100. And it gives a breakdown in here as to how many were received, how many are dropped, so to speak. Do you recall ever sending this script out – script out to anybody else other than calling Mr. Cohen?

RB: Sure. There was a thread on Blue Hampshire about Bill O'Brien trying to masquerade as a Democrat and so I let them know that we had done the call and sent what I had as the script.

MM: And how would you have sent it out?

RB: By e-mail.

MM: E-mail. I will show you a couple of e-mails that I have. One is from Mr. Dean Barker who I spoke to yesterday and he – in fact this is the one I was waiting to print off before we came in today. He sent me this e-mail that you sent to him on, let's see, this is Monday, Sept. 13 at 10:53 pm is the time is right on there. You check that. It's right at the top here. Would that be an e-mail to refresh your recollection?

RB: Yeah. I mean. Yeah it's Dean. I sent, I often forward things to – Dean was the managing editor of NH and Kathy Sullivan is our former State Chair and the current Democratic National Committee woman, who is also is a common poster, is what they used as the term and I cc'd it to Mike Brunell and it just – I can read it if you'd like, yeah....

MM: No, I don't think there is any need. We'll just have that in the record. I just wanted to show it to you, that I am going to make that part of the –

RB: And as you can see this was clearly a non-public e-mail, but the fact that I never said that we're, you know, trying to hide that it was from us or the script that we did to the voters that Bill O'Brien was asking to join the Democratic ticket.

[Unintelligible] You know.

MM: So, that script that we just put on the record, that we read, that's the same script that you attached to this e-mail.

RB: Mm-hmm. Yes.

MM: And how would you have, would you have typed that out or attached that separately?

RB: I would not have typed it. Somehow cut and pasted it. [Laughter]

MM: Ok. And then I'll show you one other e-mail that I got. Mr. Hafer.

RB: Yup.

MM: According to Mr. Barker, Mr. Barker then sent it to Mr. Hafer, Mike Hafer, over at Blue Hampshire, who just happened to be the person who was editing or doing the articles at that time and he showed me the article, the e-mail, that he got from Mr. Barker, which indicates pretty much the same thing with the same script. You'd agree, the same wording that he has here and that's what he used when we referred to this article that we received in the complaint from Mr. O'Brien.

RB: And once again, even in Dean's e-mails to Mike Hafer there was no there is no wording that would imply that there was any attempt to try to hide who was making the call and, uh, why.

MM: And we referred to this earlier on the bill but that Democratic Party would have paid Broadcast Solution –

RB: Absolutely, it would have....

MM: -- as noted in the paperwork. Is there anything else that you think that I should know for the record on this case other than what we've talked about so far?

RB: No. I mean there was – Let me reiterate that there was absolutely no thought, no idea, no suggestion that we in any way tried to do anything that would mislead anyone receiving that call. If we were to do that, certainly would not have said it was calling from me. You know, a call like that, I've never done it, but I've certainly been a recipient of them, it would be from a different voice. Which is why I put the bill in about impersonating a candidate that it is illegal to make auto calls when you're impersonating a candidate. I've seen all of that over the decades – Well, we've only been doing auto calls since 2000 was the first time New Hampshire really started doing auto calls. But, if, you know, I still question whether or not my use of my saying this is Ray Buckley, Democratic Chair qualifies as the disclaimer as said right in the first, you know, few seconds of the call, but even if that's not considered a disclaimer there was absolutely was no intent in any way of deceiving or purposely not including the paid for tag line on the disclaimer. It would have been very natural for it to be added on and if it was left off it was an absolute innocent mistake and not made – I'm not even sure, you know, who you would – Would you blame us for not double checking, would you blame Buzzy for not adding it on? You know, I don't know. But, I still think that the call certainly was within the letter of the law of saying who it was from, clearly coming from the Democratic Party, which of course paid for its own calls.

MM: I have nothing further at this point, so the time now is 10:19 am and this interview will be terminated.

**Myrdek, Mark**

**From:** Dean Barker [REDACTED]  
**Sent:** Tuesday, August 09, 2011 3:29 PM  
**To:** Myrdek, Mark  
**Subject:** Fwd: NHDP Auto Calls to GOP voters in O'Brien district

Hi Mark,

Here is the email I received from Ray Buckley on the evening of 9/13. The text from the script below is what I then passed to Mike Hoefler the following morning.

Dean Barker

----- Forwarded message -----

**From:** <RepBuckley@aol.com>  
**Date:** Mon, Sep 13, 2010 at 10:53 PM  
**Subject:** NHDP Auto Calls to GOP voters in O'Brien district  
**To:** dean. [REDACTED] ksullivan@wadleighlaw.com  
**Cc:** MBrunelle@nhdp.org

Dean and Kathy,

Below is the script of an auto call that we did to the Republican voters informing them that Bill O'Brien was asking to join the Democratic ticket.

Needless to say O'Brien is losing his mind. If Mike is still up he can send you an email O'Brien sent out earlier this evening.

Have fun,  
Ray

Raymond Buckley, State Chair\*  
NH Democratic Party  
105 North State Street  
Concord, NH 03301

603-225-6899  
www.nhdp.org

\*Also President of the Association of State Democratic Chairs and Vice Chair of the Democratic National Committee

***This is State Democratic Chair Ray Buckley calling with the important news that current Republican Bill O'Brien has asked to join the Democratic Party's ticket for the November elections.***

***If he succeeds tomorrow, we expect Bill O'Brien will embrace the Democratic Party's platform, support President Barack Obama, national health care reform and stand up for gay marriage, and protect a woman's right to choose and our agenda to move NH and America forward.***

***Once again, we wanted you to know before you vote tomorrow that Bill O'Brien has asked to join the Democratic ticket and our progressive agenda. Thank you so much.***



**Myrdek, Mark**

**From:** Buzzy Cohn [buzzy@broadcastsolutions.net]  
**Sent:** Monday, August 08, 2011 11:21 AM  
**To:** Myrdek, Mark  
**Cc:** 'Ryan Mahoney'; 'Michael Brunelle'  
**Subject:** FollowUp: NHDP September 13, 2010 AutoCall  
**Importance:** High  
**Sensitivity:** Confidential

Good Morning Mark,

Per our telephone conversation this morning, I am providing to you the results report as well as the invoice. As discussed I have copied my client so they are aware of their proprietary information that I'm sending to you.

Sincerely,

**Buzzy Cohn**  
 Phone: 301-444-4455  
 Email: buzzy@broadcastsolutions.net

**BroadcastSolutions**  
 FAX · EMAIL · VOICE MESSAGING

www.BroadcastSolutions.net

**From:** Buzzy Cohn [mailto:buzzy@broadcastsolutions.net]  
**Sent:** Monday, September 13, 2010 5:20 PM  
**To:** 'Michael Brunelle'  
**Subject:** Results: NHobrien

BS-New Hampshire Dems  
 GOTV\_13SEPT\_NHobrien  
 13-Sep-10 3:00 PM - 13-Sep-10 4:30 PM  
 Penetration 86.40%

	Attempted	456	100.00%
	Not Attempted	0	0.00%
	Filtered	0	0.00%
<b>Total Available</b>		<b>456</b>	<b>100.00%</b>
<b>Messages Delivered</b>	Live Person	157	34.43%
	Answering Machine	237	51.97%
	Inbound	0	0.00%
	<b>Subtotal</b>	<b>394</b>	<b>86.40%</b>
<b>Messages Not Delivered</b>	Busy	6	1.32%
	No Answer	26	5.70%
	Hang Up on Machine	0	0.00%
	Undelivered Machine	7	1.54%
	Not Connected	0	0.00%
	Bad Number	23	5.04%
	<b>Subtotal</b>	<b>62</b>	<b>13.60%</b>
<b>Total Attempted</b>		<b>456</b>	<b>100.00%</b>

~ Thank You ~  
 We have raised over \$60,000 since 2007

**BroadcastSolutions**  
FAX • EMAIL • VOICE MESSAGING

**INVOICE**

Account Number: 1257 New Hampshire  
**Payment Due: \$ 100.00**

Invoice Date: 10/01/10  
 Invoice Period: September 2010

Amount Paid: \_\_\_\_\_

Billed To:

-----  
 New Hampshire Democratic Party  
 Attn: Mike Brunelle mbrunelle@nhdp.org  
 603-225-6899

Remit Payment To:

-----  
 Broadcast Solutions  
 Attn: Buzzy Cohn - Account Receivable  
 13806 Goosefoot Terr.  
 Rockville, MD 20850

Service utilized: **VoiceBroadcastSolutions**

Date	WAVname	WAVsec	Units	Calls	Amount
09/13/2010 15:56:45 EDT	13SEPT_NHobrien	32	0.6	544	*
				Total	* \$100

\* This fee is a reflection of a monthly minimum only when services are rendered.  
 It does not reflect pricing that has been contractually extended in the past or in the future.

**Payment due upon receipt.**

**Please wire funds to:**

Account #: 113-430737-3 Routing ABA#: 255071981  
 Bank Address: Chevy Chase Bank 7501 Wisconsin Ave., Bethesda, MD 20814

Thank You!

Buzzy Cohn  301-869-5005  [buzzy@broadcastsolutions.net](mailto:buzzy@broadcastsolutions.net)

RELEASED BY: Michael A. Delaney, Attorney General  
DATE: August 30, 2011  
SUBJECT: New Hampshire Democratic Party to Pay \$5,000 Under Consent Agreement For Prerecorded Political Message Complaint  
RELEASE TIME: IMMEDIATE  
CONTACT: Anne M. Edwards, Associate Attorney General  
(603) 271-1119

Attorney General Michael Delaney announced today his Office has reached a consent agreement with the New Hampshire Democratic Party ("Democratic Party") following a complaint that it was responsible for the delivery of a prerecorded political message in a manner that violated New Hampshire law. Under the terms of the consent agreement, the Democratic Party will pay the State \$5,000 to settle the dispute.

Under New Hampshire law, a prerecorded political message is defined as:

A prerecorded audio message delivered by telephone by:

- (a) A candidate or political committee; or
- (b) Any person when the content of the message expressly or implicitly advocates the success or defeat of any party, measure, or person at any election, or contains information about any candidate or party.

RSA 664:14-a, I.

While prerecorded political messages are legal in New Hampshire, no person shall deliver, or knowingly cause to be delivered, a prerecorded political message unless the message contains, or a live operator provides, within the first 30 seconds of the message, the following information:

- (a) The name of the candidate or of any organization or organizations the person is calling on behalf of.
- (b) The name of the person or organization paying for the delivery of the message and the name of the fiscal agent, if applicable.

RSA 664:14-a, II.

An investigation by the Attorney General's Office established that the Democratic Party was responsible for knowingly causing the delivery of a prerecorded political message, featuring the voice of Party Chair Raymond Buckley making statements about Speaker William O'Brien, to 394 New Hampshire households on September 13, 2010, and that the message failed to contain the disclosures required by RSA 664:14-a, II.

Attorney General Delaney said: "An essential element of our democracy is vigilant enforcement of New Hampshire's election laws. My Office will continue to vigorously investigate election related complaints, and initiate civil or criminal enforcement actions against those who violate New Hampshire's election laws."

More information about filing elections related complaints can be found on the Attorney General's Website at <http://doj.nh.gov/elections>.

657350

MICHAEL A. DELANEY, ATTORNEY GENERAL  
STATE OF NEW HAMPSHIRE

V.

NEW HAMPSHIRE DEMOCRATIC PARTY

CONSENT AGREEMENT

NOW COME the parties, the State of New Hampshire (the "State"), by the Attorney General, and the New Hampshire Democratic Party (the "NHDP") and hereby agree to the following in settlement of the violations and claims asserted by the State in this case.

BACKGROUND

1. This Consent Agreement is entered into by and between the State and the NHDP to resolve the State's claims for an alleged violation of the New Hampshire prerecorded political message statute, RSA 664:14-a. The NHDP disputes that it violated the statute, and its execution of this Consent Agreement is not an admission of any violation.

2. A prerecorded political message is defined under New Hampshire law as:

A prerecorded audio message delivered by telephone by:

- (a) A candidate or political committee; or
- (b) Any person when the content of the message expressly or implicitly advocates the success or defeat of any party, measure, or person at any election, or contains information about any candidate or party.

RSA 664:14-a, I. Under the statute,

No person shall deliver or knowingly cause to be delivered a prerecorded political message unless the message contains, or a live operator provides, within the first 30 seconds of the message, the following information:

- (a) The name of the candidate or of any organization or organizations the person is calling on behalf of.
- (b) The name of the person or organization paying for the delivery of the message and the name of the fiscal agent, if applicable.

RSA 664:14-a, II.

3. The State alleges that the NHDP was responsible for causing a prerecorded political (audio) message, as defined in RSA 664:14-a, I, to be delivered to residents of New Hampshire on September 13, 2010. The audio message contained the recorded voice of the Chair of the NHDP, Ray Buckley, giving the following message:

This is State Democratic Chair Ray Buckley calling with the important news that current Republican Bill O'Brien has asked to join the Democratic Party's ticket for the November elections.

If he succeeds tomorrow, we expect Bill O'Brien will embrace the Democratic Party's platform, support President Obama, national health care reform and stand up for gay marriage, and protect a woman's right to choose and our agenda to move NH and America forward.

Once again, we wanted you to know before you vote tomorrow that Bill O'Brien has asked to join the Democratic ticket and our progressive agenda. Thank you so much.

The State further alleges that by being responsible for causing the delivery of these prerecorded political messages, the NHDP violated RSA 664:14-a, II, in that the audio message failed to contain "[t]he name of the person or organization paying for the delivery of the message, and the name of the fiscal agent, if applicable" as required by RSA 664:14-a, II (b). Accordingly, the State alleges that the NHDP was responsible for knowingly causing the subject prerecorded political messages to be delivered in a manner that violated New Hampshire law. The NHDP alleges that Chairman Buckley properly identified himself and the State Democratic Party.

4. The audio message that gave rise to this Consent Agreement was spoken over the telephone by Ray Buckley and recorded by Broadcast Solutions. The NHDP provided Broadcast Solutions with an electronic list of 456 telephone numbers of New Hampshire residents to call. On September 13, 2010, Broadcast Solutions delivered the

prerecorded political message to the telephone numbers. However, 62 of the deliveries did not reach either a live person or an answering machine.

5. The NHDP was responsible for knowingly causing the delivery of the prerecorded political messages by Broadcast Solutions to 394 New Hampshire households on September 13, 2010.

6. RSA 664:14-a, IV states that violations of RSA 664:14-a "shall result in a civil penalty of \$5,000 per violation." RSA 664:14-a, IV.

7. This Consent Agreement is executed to settle this disputed matter and resolve any potential liabilities to the State arising from the NHDP knowingly causing the delivery of the September 13, 2010 message without further litigation or proceedings.

**CIVIL PENALTY**

8. The NHDP agrees to pay a total penalty of \$5,000 to the State for violating RSA 664:14-a, II.

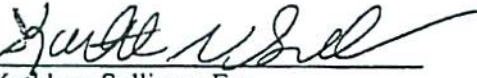
9. All penalty payments shall be paid by check drawn in the name of "Treasurer, State of New Hampshire," and mailed to the Office of the Attorney General, 33 Capitol Street, Concord, New Hampshire 03301, Attn: Assistant Attorney General Matthew G. Mavrogeorge.

10. The effective date of this Consent Agreement shall be the date on which the Office of the Attorney General executes it.

11. This Consent Agreement shall be construed in accordance with the laws of the State of New Hampshire.

FOR THE NEW HAMPSHIRE  
DEMOCRATIC PARTY


Dated: August 29<sup>th</sup>, 2011

By:   
Kathleen Sullivan, Esq.  
Wadleigh, Starr, and Peters, LLC  
95 Market Street  
Manchester, NH 03101  
(603) 206-7272

FOR THE STATE OF NEW HAMPSHIRE

MICHAEL A. DELANEY  
ATTORNEY GENERAL

Dated: August 29<sup>th</sup>, 2011

By:   
Matthew G. Mavrogeorge  
Assistant Attorney General  
33 Capitol Street  
Concord, New Hampshire 03301-6397  
(603) 271-3650

657351



AUG 07 2012

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.  
NORTHERN DISTRICT

SUPERIOR COURT

William L. O'Brien

v.

New Hampshire Democratic Party and  
Raymond C. Buckley, individually and as Chairman

Docket No. No. 11-CV-786

**AFFIDAVIT OF SANDRA KENT**

NOW COMES Sandra Kent, who upon her oath does depose and say:

1. I am an adult resident of the State of New Hampshire, residing in the Town of Mont Vernon.

2. I am aware that William O'Brien is the State of New Hampshire House Representative for my House District.

3. I recall receiving an automated call just prior to the State Primary election in September, 2010.

4. I do not recall the substance of the message in the automated call, but I do recall that I was confused by what it was saying and who it was from. One part, most confusing, said that O'Brien would be running on the Democrat ticket. The message seemed to make claims about Speaker O'Brien that did not make sense to me based on what I know about him.

5. I did not know who the person making the automated call was. I did not recognize his voice, his name, or his affiliation. I recall that the message claimed

something about the State Democratic Party. I was not sure whether to believe it or not because of the way it was delivered.

6. I do not recall if there was any sort of official statement of who was responsible for disseminating the automated call, and I found that confusing as well. The message seemed random and difficult to put into context.

7. The call concerned me because it was confusing about what it was trying to say and who it was from, so I called Speaker O'Brien's wife to let her know that I received the call and to see if she knew anything about it.

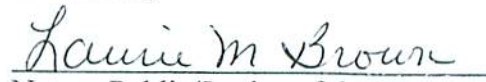
FURTHER THE AFFIANT SAYETH NOT

  
Sandra Kent

STATE OF NEW HAMPSHIRE  
HILLSBOROUGH, SS.

On this 6<sup>th</sup> day of August, 2012, Sandra Kent personally appeared before me and gave solemn oath that the foregoing is true and accurate to the best of her knowledge and belief.

Before me,

  
Notary Public/~~Justice of the Peace~~

**LAURIE M. BROWN**  
NOTARY PUBLIC  
State of New Hampshire  
My Commission Expires  
July 28, 2015

## ELECTION COMPLAINT INVESTIGATION REPORT

To: Associate Attorney General Anne Edwards, Chief of Staff  
Assistant Attorney General Matt Mavrogeorge, Civil Bureau  
From: Investigator Mark Myrdek  
Re: Complaint by Representative William O'Brien against the New  
Hampshire Democratic Party and its Chairman Raymond Buckley  
Case #: 201088415  
Date: August 10, 2011

### **I. Complaint**

In a complaint submitted via email to this office on September 15, 2010, then Representative William O'Brien ("Speaker O'Brien") alleged that the New Hampshire Democratic Party and its Chairman Raymond Buckley violated RSA 664:14-a by being responsible for calls containing a prerecorded political message that lacked the statutorily required disclosures, including the name of the person or organization paying for the delivery of the message.

### **II. Issue(s):**

Did the subject prerecorded political message violate RSA 664:14-a?

### **III. Statute(s):**

#### **664:14-a Prerecorded Political Messages. –**

I. In this section, "prerecorded political message" means a prerecorded audio message delivered by telephone by:

(a) A candidate or political committee; or

(b) Any person when the content of the message expressly or implicitly advocates the success or defeat of any party, measure, or person at any election, or contains information about any candidate or party.

II. No person shall deliver or knowingly cause to be delivered a prerecorded political message unless the message contains, or a live operator provides, within the first 30 seconds of the message, the following information:

(a) The name of the candidate or of any organization or organizations the person calling on behalf of.

(b) The name of the person or organization paying for the delivery of the message and the name of the fiscal agent, if applicable.

III. No person shall deliver or knowingly cause to be delivered a prerecorded political message to any telephone number on any federal do not call list.

IV. (a) A violation of this section shall result in a civil penalty of \$5,000 per violation.

(b) Any person injured by another's violation of this section may bring an action for damages and for such equitable relief, including an injunction, as the court deems necessary and proper. If the court finds for the plaintiff, recovery shall be in the amount of actual damages or \$1,000, whichever is greater. If the court finds that the act or

practice was a willful or knowing violation of this section, it shall award as much as 3 times, but not less than 2 times, such amount. In addition, a prevailing plaintiff shall be awarded the costs of the suit and reasonable attorney's fees, as determined by the court. Any attempted waiver of the right to the damages set forth in this paragraph shall be void and unenforceable. Injunctive relief shall be available to private individuals under this section without bond, subject to the discretion of the court. Upon commencement of any action brought under this section, the clerk of the court shall mail a copy of the complaint or other initial pleadings to the attorney general and, upon entry of any judgment or decree in the action, shall mail a copy of such judgment or decree to the attorney general.

Source. 2003, 258:1, eff. Jan. 1, 2004.

#### **IV. Interview(s):**

On June 28, 2011, at 1138 hours, I went to the New Hampshire Democratic Party Headquarters in Concord and met with

**Representative Michael Brunelle**  
**Executive Director of the NH Democratic Party**  
**(Tel. 225-6899; Cell 545-5046)**

and

**Raymond Buckley**  
**Chairman of the NH Democratic Party**  
**(Tel. 225-6899)**

Initially I was only going to speak with Representative Brunelle, however, upon my arrival he took me in to meet Chairman Buckley in his office. I began by telling Representative Brunelle that the Attorney General's Office received a complaint from

**Speaker William O'Brien**

on September 15, 2010, alleging that Chairman Buckley had made calls with a prerecorded political message about him just prior to the September 14, 2010 State Primary Election. I showed Representative Brunelle the email that this office had received from Speaker O'Brien. The email contained a copy of an Internet blog post with what appeared to be the script of the subject message. The post was made on the website [www.bluchampshire.com](http://www.bluchampshire.com) by

**Mike Hofer**



I explained to Representative Brunelle that it appeared as if the blog contained the exact wording from a script read by Chairman Buckley in the subject prerecorded political message. Representative Brunelle told me that he remembered writing the script for these calls and that it was done in response to postcards sent out by then Representative O'Brien just prior to the September 14, 2010 Primary Election. I showed Representative Brunelle a copy of the postcard sent out by Speaker O'Brien that was printed from the Blue Hampshire website. Representative Brunelle confirmed that this was an example of the postcards that triggered the response from Chairman Buckley. Representative Brunelle then showed Chairman Buckley the email from Speaker O'Brien that contained what appeared to be the wording used in the subject prerecorded political message and the printout of the postcard sent by Speaker O'Brien. Chairman Buckley acknowledged that he was familiar with both and responded "yes" when Representative Brunelle asked him if he remembered making the calls. I showed Representative Brunelle a copy of RSA 664:14-a and explained to him that this statute may have been violated because according to the script contained in the post on the Blue Hampshire site, the message fails to identify who paid for the delivery of the message. Representative Brunelle said that he was familiar with the statute and that he has written hundreds of these messages. He explained that he was "under the gun in this case" because the election was very close and they had to get a response to Speaker O'Brien's postcards out quickly. Representative Brunelle acknowledged that the script in the blog/email did not contain any mention of who paid for the message. He added, "that may have been an oversight."

I asked Representative Brunelle if he was the author of the script used by Chairman Buckley to record the subject prerecorded political message. Representative Brunelle replied that he was the person who wrote the script and that a subsequent call would have been made to

**Buzzy Cohn**  
**Broadcast Solutions**  
**Washington D.C.**  
**(Tel. 301-444-4455)**

at a company in Washington, D.C. called Broadcast Solutions. Representative Brunelle said the calls would have gone out to phone numbers given electronically to Broadcast Solutions by the New Hampshire Democratic Party from an online database. Representative Brunelle guessed that 200 calls were made. When I asked him if he still had the script that he wrote, he said that he did not know whether he had a copy of it in his file or if Broadcast Solutions had a copy of it. I explained to Representative Brunelle that I needed a copy of the script, the number of calls that were made and any other documentation that he has regarding these calls. Representative Brunelle said that he would research his files and make a call to Washington, D.C. to determine what was available. My meeting with Representative Brunelle and Chairman Buckley ended with the understanding that they would obtain the information I requested and that it would be forwarded to me as soon as possible.

On July 5, 2010, I placed a call to Representative Brunelle asking if he had received any of the documents that I requested. He told me that he had searched all the files at his office, but that he could not locate the script that was used or any documentation regarding how many calls were made. Representative Brunelle said that he still had not contacted Buzzy Cohn at Broadcast Solutions to see what they had on file. I again asked Representative Brunelle if he could make that call. He replied that he would contact me when he had an answer.

On July 28, 2011, at 1040 hours, I met with

**Ryan Mahoney**  
**New Hampshire Democratic Party**

This meeting took place at the party headquarters in Concord. I met with Mr. Mahoney after learning that Representative Brunelle was no longer working for the party and that Mr. Mahoney was assuming some of his duties. I explained to Mr. Mahoney that I was investigating this case and that I needed to obtain information. I reviewed this case with him and explained that I needed someone from the party to obtain whatever information Broadcast Solutions had regarding the prerecorded political messages that were delivered in September 2010. Mr. Mahoney told me that he would contact Broadcast Solutions and get me whatever information they had on file.

On August 4, 2011, at 1024 hours, I served Representative Brunelle with a subpoena from Assistant Attorney General Matt Mavrogeorge compelling him to appear at the Attorney General's Office on August 10, 2011, for the purpose of providing testimony and documents pertaining to this case. Representative Brunelle agreed to appear for an interview the next day, August 5, 2011, because he was leaving the State for his new job on August 10, 2011. He indicated he would continue to try to obtain any documents we requested by August 10, 2011, as ordered in the subpoena.

On August 5, 2011, at 1105 hours,

**Representative Brunelle**

appeared at the Attorney General's Office for his interview. He was accompanied by

**Attorney Robert Backus**

who is representing him in this case. Representative Brunelle agreed to have the interview recorded and he was told that the focus of this interview was to determine what knowledge he had regarding the prerecorded political message made by Chairman Buckley in response to post cards sent out by Speaker O'Brien in September 2010.

Representative Brunelle told me that in September 2010, he was the Executive Director of the New Hampshire Democratic Party. He said that prior to the September 14, 2010 Primary Election, the Democratic Party became aware of a postcard sent out by Speaker

William O'Brien, asking voters to write him in as a candidate for State Representative in the Democratic Primary Election. Representative Brunelle said that it was only a day or two prior to the election when they learned of this postcard, and so the party had very little time to respond. He explained that he wrote out a script that was going to be recorded by Chairman Buckley and used in a robo-call to inform voters of Speaker O'Brien's misrepresentation that he was a Democrat. Representative Brunelle said that after he wrote the script he gave it to Chairman Buckley who made a call to Broadcast Solutions for the purpose of putting out the robo-calls.

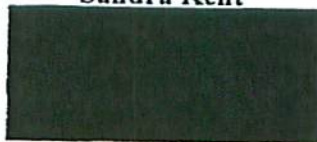
Representative Brunelle said that he has done this very same thing "hundreds" of times and that he was familiar with the statute governing these types of calls. I showed him the email sent by Speaker O'Brien that contained a copy of blog post that included the alleged script used for the prerecorded political message. Representative Brunelle told me that the wording in the script looked like what he had written in September 2010. However, he could not be "100% sure" without having the original script that he wrote to compare it to. Representative Brunelle said that he could not find the script in his files, but that he believed that he had given it to Chairman Buckley. Representative Brunelle could not remember whether he included the statement regarding who paid for the calls in the original script. He said that all of the calls were made on behalf of the New Hampshire Democratic Party.

Representative Brunelle said that he initially thought that about 200 calls were made. He said that the phone numbers supplied electronically to Broadcast Solutions for the purpose of making the calls were taken off an interactive database at the Democratic Party's office. The recorded interview with Representative Brunelle is in the file on two disks.

On August 5, 2011, at 1509 hours, I served a subpoena from Assistant Attorney General Matt Mavrogeorge in hand to Ryan Mahoney of the New Hampshire Democratic Party. The subpoena was for the party to produce documents relating to this complaint to the Attorney General's Office by August 10, 2011. Mr. Mahoney said that he would attempt to provide any documents by that date.

On August 5, 2011, at 1415 hours, I spoke with

**Sandra Kent**



Ms. Kent was listed in the email from Speaker O'Brien to the Attorney General's Office as being a person who received the prerecorded from Chairman Buckley. Ms. Kent told me that she did not have a recording of the call and that she did not remember what exactly was in the recorded message she received. She said that her only concern after she received the call was that the message was from the Democrats speaking against

Speaker O'Brien. After receiving the call, she decided to send an email to Speaker O'Brien's wife, informing her of the call she received.

On August 8, 2011, at 1212 hours, I served a subpoena and correspondence from Assistant Attorney General Matt Mavrogeorge, in hand to Chairman Buckley. The subpoena instructed him to appear at the Attorney Generals Office on August 11, 2011, to provide testimony and documents relating to this case. Chairman Buckley asked if he could appear on August 10, 2011, at 1000 hours because of a scheduling conflict. I agreed to conduct the interview at that time. Chairman Buckley was again reminded him to bring any documents related to this case as specified in the subpoena.

On August 8, 2011, at 1305 hours, I spoke with

**Linda Anderson**



Ms. Anderson was also listed by Representative O'Brien as a person who received one of the subject calls. Ms. Anderson told me that after she received the call she called

**Representative Frank Holden**

and informed him about the call, which appeared to be negative towards Speaker O'Brien. Ms. Anderson did not keep a recording of the call and she could not tell me much about it other than she felt the Republican Party needed to know what was being said in the call. She said she did not know who else might have received the call, but that she would contact me if she learned of someone who did.

On August 8, 2011, at 1105 hours, I received a call from

**Buzzy Cohn**

in response to an email that I had sent asking him to call me. Mr. Cohn confirmed that Broadcast Solutions had sent out a prerecorded message about William O'Brien for the New Hampshire Democratic Party and that the calls took place on September 13, 2010. When I asked Mr. Cohn if he had the recording of the subject message he informed me that he no longer had a recording of the call because all calls are purged from the system within 60 days after they are made. He told me that the phone numbers called were also purged and that this is all standard procedure for calls made by his company. Mr. Cohn said that he did not have a copy of the script used for the subject message because the client called his company and a recording was made over the telephone. He said he does not make it a practice to keep the scripts of recordings such as this on file.

Mr. Cohn said that he had copies of the invoice for the calls and a report with a breakdown of the calls. He sent these documents to me via an email. The report from Mr.



Cohn indicated that 456 calls were attempted on September 13, 2010, but that 62 of those calls were not received for various reason listed in his report. Mr. Cohn said that typically calls like this are made earlier in the day. However, his records indicated these calls were made between 3:00 p.m. and 4:30 p.m. on September 13, 2010. He told me that the service provided to the New Hampshire Democratic Party, which has been a client since 2002, totaled \$100.00. The report and invoice provided by Mr. Cohn are attached with this report.

On August 8, 2011, at 1610 hours, I spoke over the phone with

**Michael Hoefer**

Mr. Hoefer was the person who made the post containing the script on [www.bluehamphshire.com](http://www.bluehamphshire.com) that was contained in the complaint made by Speaker O'Brien. I asked Mr. Hoefer how he obtained the wording of the script for his post that he wrote on September 14, 2010. Mr. Hoefer told me that he makes many posts for the Democratic Party after he receives them. Mr. Hoefer said that he never spoke directly with anyone from the New Hampshire Democratic Party about the calls, and that he made his post after he received an email from a colleague that contained the script in it. Mr. Hoefer identified the colleague as

**Dean T. Barker**



Mr. Hoefer forwarded me the email (attached to this report) that he had received from Mr. Barker and he gave me Mr. Barker's contact information. Mr. Hoefer said that he believed that Mr. Barker received the script directly from Chairman Buckley.

On August 9, 2011, at 1528 hours, I received a phone call from

**Dean T. Barker**

Mr. Barker said that he received my email and that he had spoken with Mr. Hoefer regarding this investigation. Mr. Barker said that he is an avid blogger and that he often gets information for his posts from the Democratic Party and its Chairman Buckley. Mr. Barker said he usually speaks with Chairman Buckley two or three times a month. However, he states that he never spoke directly with Chairman Buckley about this matter, and that he only received an email from Chairman Buckley late in the evening on September 13, 2010. Mr. Barker said the email he received from Chairman Buckley contained what appeared to be the script used for the audio message delivered in response to the postcard sent out by Speaker O'Brien. Mr. Barker said that he forwarded the email from Chairman Buckley to Mr. Hoefer so that he could do a post about it on [www.bluehamphshire.com](http://www.bluehamphshire.com). Mr. Barker subsequently forwarded me the email (attached to this report) sent to him by Chairman Buckley.

On August 10, 2011, at 0959 hours, I interviewed

**Chairman Raymond Buckley**

The interview took place at the Attorney Generals Office. Before the interview began, Chairman Buckley to it being recorded.

Chairman Buckley told me that the Democratic Party decided to respond to a postcard sent out by then Representative O'Brien just days prior to the September 14, 2010 State Primary Election. Chairman Buckley said that the party felt that the postcard was misleading voters and so they decided to have some calls made with a message trying to inform voters about what Speaker O'Brien was attempting to do. Chairman Buckley said that he believed Representative Brunelle drafted the script that that he read for a recording by Broadcast Solutions, which and sent out the message the day before the election. Chairman Buckley said that after he approved the script that was written he called Broadcast Solutions and recorded the message over the phone.

On the record, I read the script that had been supplied to us by Speaker O'Brien in his complaint. Chairman Buckley said that to the best of his recollection that was the message he recorded. Chairman Buckley acknowledged that the message did not contain wording explaining who paid for the message. He pointed out that the message begins by him introducing himself and whom he is representing. Chairman Buckley said that there was no intent on his part, or anyone else, to deliberately withhold that information or to mislead anyone. Chairman Buckley said that he thought it was clear who was responsible for the recorded message and that obviously the Democratic Party paid for it.

Chairman Buckley told me that he did send an email to

**Dean Barker**

and

**Attorney Kathy Sullivan**

with the script cut and pasted into the email. I showed Chairman Buckley the email, containing the script that I had received from Mr. Barker. Chairman Buckley acknowledged that this was the email that he had sent to Mr. Barker. He said he often sends out information from the party in this fashion so that people can be informed or to get a message out. Chairman Buckley said he did not locate the script, or any other information, in his files. I showed Chairman Buckley the report and the invoice that I had received from Buzzy Cohn at Broadcast Solutions. After reviewing the information he agreed that it was accurate. He indicated that the party has utilized Broadcast Solutions since 2001 or 2002. The recorded interview with Chairman Buckley is in the file on a disk.

## V. Documents & Recordings:

- 1.) Copy of an email sent to the Attorney General's Office on Sept. 15, 2010, by Speaker William O'Brien alleging a violation of RSA 664:14-a by the New Hampshire Democratic Party and its Chairman Raymond Buckley.
- 2.) Copy of the [www.bluenewhampshire.com](http://www.bluenewhampshire.com) post by Mike Hoefler.
- 3.) Copy of RSA 664:14-a.
- 4.) Subpoenas issued to Representative Michael Brunelle, the New Hampshire Democratic Party and its Chairman Raymond Buckley.
- 5.) Report and receipt from Broadcast Solutions regarding the prerecorded political messages sent out for the New Hampshire Democratic Party on Sept. 13, 2010.
- 6.) Copy of an email sent to Mike Hoefler by Dean Barker on Sept. 14, 2010
- 7.) Copy of email sent to Dean Barker from Chairman Buckley on Sept. 13, 2010.
- 8.) 2 CD recordings of an interview with Representative Brunelle on August 8, 2011.
- 9.) CD recording of an interview with Chairman Buckley on Aug. 10, 2011.

## VI. Finding(s) / Recommendation

I was unable to obtain a recording of the subject prerecorded political message or a copy of the actual script for the message written by Representative Brunelle. However, it is highly likely, based on the investigation, that the script that was supplied by Chairman Buckley in an email to Dean Barker was a verbatim copy of the script written by Representative Brunelle. Mr. Hoefler did not change any wording to the script when he included it in his post on [www.bluehampshire.com](http://www.bluehampshire.com). It was taken verbatim from the email forwarded to him by Mr. Barker.

The subject message is a prerecorded political message under RSA 664:14-a, I(b) because it is "a prerecorded audio message delivered by telephone by . . . [a]ny person when the content of the message . . . contains information about any candidate," in this case, then Representative O'Brien who was running for reelection. The script in the email exchange does not include the required disclose the name of the person or organization paying for the delivery of the message. Accordingly, the subject message violates RSA 664:14-a, II(b).

I recommend assessing a civil penalty to the Democratic Party because it knowingly caused the delivery of the subject message. I would also consider assessing a civil penalty against Broadcast Solutions for actually delivering the subject message.

Respectfully submitted,



Mark J. Myrdek  
Investigator

652320

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.  
NORTHERN DISTRICT

SUPERIOR COURT

William L. O'Brien

v.

New Hampshire Democratic Party and  
Raymond C. Buckley, individually and as Chairman

Docket No. No. 11-CV-786

**AFFIDAVIT OF JASON R.L. MAJOR**

NOW COMES Jason R.L. Major, who upon her oath does depose and say:

1. I am an attorney employed by the law firm of Douglas, Leonard & Garvey, P.C., representing the plaintiff in the above-captioned case.

2. Attached hereto as Exhibit 1 is the transcription of an audio recording of an interview of Raymond Buckley taken by Investigator Mark Myrdek of the New Hampshire Attorney General's Office. I personally compared the transcription to the audio recording and believe that it is a true and accurate transcription of the conversation between Investigator Myrdek and Mr. Buckley. The audio recording was obtained by plaintiff's counsel via RSA 91-A.

3. Attached hereto as Exhibit 2 is a true and complete copy of an e-mail from Raymond Buckley that was included in the Attorney General's file concerning its investigation of the defendants' violation of RSA 664:14-a, that was obtained by plaintiff's counsel via RSA 91-A.

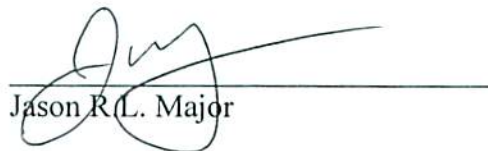
4. Attached hereto as Exhibit 3 is a true and complete copy of an e-mail and invoice generated by Broadcast Solutions explaining its dissemination of the "robo-call"

commissioned by the defendants. These documents were included in the Attorney General's investigative file concerning its investigation of the defendants' violation of RSA 664:14-a, that was obtained by plaintiff's counsel via RSA 91-A.

5. Attached hereto as Exhibit 4 is a true and complete copy of a press release issued by the N.H. Attorney General's office and a Consent Decree between the defendant's and the State of New Hampshire, that were included in the Attorney General's file concerning its investigation of the defendants' violation of RSA 664:14-a, that was obtained by plaintiff's counsel via RSA 91-A.


6. Attached hereto as Exhibit 7 is a true and complete copy of Investigator Mark Myrdek's investigative report. The report was included in the Attorney General's file concerning its investigation of the defendants' violation of RSA 664:14-a, that was obtained by plaintiff's counsel via RSA 91-A.

FURTHER THE AFFIANT SAYETH NOT

  
Jason R.L. Major

STATE OF NEW HAMPSHIRE  
MERRIMACK, SS.

On this 4<sup>th</sup> day of August, 2012, Jason R.L. Major personally appeared before me and gave solemn oath that the foregoing is true and accurate to the best of his knowledge and belief.

Before me,  
  
Notary Public/Justice of the Peace  
My comm. expires 5-12-15

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS  
216-2011-CV-00786

SUPERIOR COURT

William L. O'Brien

v.

New Hampshire Democratic Party and  
Raymond C. Buckley, Chairman

**DEFENDANT RAYMOND BUCKLEY'S OBJECTION TO PLAINTIFF  
WILLIAM L. O'BRIEN'S CROSS-MOTION FOR SUMMARY JUDGMENT  
TOGETHER WITH SUPPORTING AFFIDAVIT**

NOW COMES the defendant, Raymond C. Buckley, by and through his attorney, and hereby objects to Plaintiff William O'Brien's Cross-Motion For Summary Judgment and requests that said Cross-Motion For Summary Judgment be denied, and that Defendant Buckley's original Motion For Summary Judgment now be granted.

IN SUPPORT THEREOF, Defendant Raymond C. Buckley states as follows:

1. Defendant Raymond C. Buckley properly filed a Motion For Summary Judgment that contained certain facts in the case that are uncontroverted. This Motion For Summary Judgment was properly supported by affidavit as required by Court rules.

2. The plaintiff, William O'Brien, has filed a document which he titles an Objection To The Defendant's Motion For Summary Judgment and a Cross-Motion For Summary Judgment. However, although the so-called objection and cross-motion contain a number of factual allegations, many of the crucial factual allegations are not supported by oath or affirmation as is required for the Court to rule upon a Motion For Summary Judgment. As such, they are not properly before the Court.

3. That issue aside, the factual allegations made in the plaintiff's objection and cross-motion are not correct. In paragraph 2, the plaintiff incorrectly asserts that "the defendants do not dispute that their conduct violated the requirements of RSA 664:14-A." The plaintiff fails to state any evidence to support this incorrect assertion. What the plaintiff most certainly is not relying upon are any of the pleadings in this case. Raymond C. Buckley does indeed dispute that his conduct violated the requirements of RSA 664:14-A, and has always so disputed. Even a casual reading of paragraph 30 of Defendant Buckley's original Motion For Summary Judgment reveals that Raymond Buckley denies any violation. In arguing that there was no causation between the alleged violation and the plaintiff's claimed injury, Defendant Buckley specifically set forth his denial when he asserted that there was no causation "even assuming *arguendo* for the purpose of this motion that there was a violation - *a fact disputed by the defendants.*" [emphasis added]. What was meant by Defendant Buckley when he asserted that he disputed that there was a violation of the statute was that the allegation that there was a violation of the statute was disputed by the defendants. "Disputed" means that Defendant Buckley does not agree that there was a violation of the statute. Just so it is clear, Defendant Buckley denies that there was any violation of the statute at issue in this case. Should this case have proceeded to trial, the testimony would have been that the defendants complied both with the intent and the letter of the statute. For Plaintiff O'Brien to claim that the defendants have conceded a violation of RSA 664:14-A is the litigation equivalent of some journeyman jogger-plodder claiming to have run a 2:52 marathon when in actuality he never ran one under four hours.

4. Plaintiff O'Brien also misinterprets Defendant Buckley's contention that William O'Brien is not "a person" within the meaning of the statute. For the purposes of these

motions Defendant Buckley concedes that William L. O'Brien is "a person," but rather disputes that he is a person who has been "injured."

5. The only allegation in the plaintiff's objection and cross-motion under oath that comes even remotely close to alleging an injury to the plaintiff appears in Attachment 6 to his Objection To Defendant's Motion For Summary Judgment in the form of an affidavit of one Sandra Kent, who essentially alleges that although she does not recall the message in the phone call she does recall that she was confused by it [see paragraph 4 of Affidavit Of Sandra Kent].

6. This affidavit actually supports Defendant Raymond Buckley's position all along as articulated in his Motion For Summary Judgment. Plaintiff William O'Brien is not allowed to allege confusion by a third party as constituting *his* required injury. No where in her affidavit does Sandra Kent say that as a result of receiving the phone call did she not vote for Mr. O'Brien as the result of her perception that the requirements of RSA 664:14-a were violated. (This is aside from the additional issue that even if Sandra Kent did claim she did not vote for Candidate O'Brien he still was not injured since he won his 2010 primary with the highest vote total). This situation would be as if William O'Brien were driving down the street and believed that he thought he saw Raymond Buckley run a stop sign 100 yards up the road and strike another vehicle. The fact that somebody else was possibly struck does not grant to Mr. O'Brien plaintiff status, since he would have to have been the person injured by the alleged (in this case) statutory violation of Mr. Buckley. Just so it is clear, Defendant Raymond C. Buckley denies, (in the metaphor outlined above) that he ran the stop sign.

7. No where in either Plaintiff O'Brien's objection to Defendant Buckley's Motion For Summary Judgment, nor in his Cross-Motion For Summary Judgment, does he describe



how he, William O'Brien, suffered a cognizable injury. If Mr. O'Brien was not injured, as even he himself apparently concedes, he may not maintain a cause of action, regardless of what the minimum statutory threshold of damages would be. The minimum statutory threshold of damages only applies to people who are injured, which by omission of any contrary affidavit Mr. O'Brien concedes that he was not. Instead, he continues to argue that some constituents may have been injured and therefore he should get money.

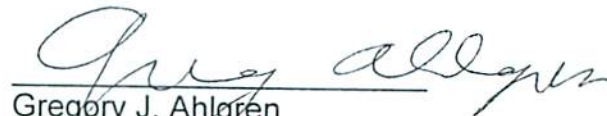
WHEREFORE, Defendant Raymond C. Buckley hereby answers the plaintiff's Objection To Defendant Buckley's Motion For Summary Judgment, and further objects to the plaintiff's so-called Cross-Motion For Summary Judgment, and requests that said cross-motion for summary judgment be denied and that his own dispositive motion be granted.

Respectfully submitted,  
Raymond Buckley  
By his attorney

September 6, 2012

  
Gregory J. Ahlgren  
NH Bar #: 267

I hereby certify that I have on this date forwarded a copy of this Objection to Charles Douglas, Esquire and James Craig, Esquire.

  
Gregory J. Ahlgren  
Attorney At Law  
529 Union Street  
Manchester, NH 03104  
(603)669-6117

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS  
216-2011-CV-00786

SUPERIOR COURT

William L. O'Brien

v.

New Hampshire Democratic Party and  
Raymond C. Buckley, Chairman

**AFFIDAVIT OF RAYMOND C. BUCKLEY**

I, Raymond C. Buckley, being under oath, do depose and say as follows:

1. My name is Raymond C. Buckley.
2. I reviewed all the facts contained in the accompanying response to the plaintiff's Objection To Defendant's Motion For Summary Judgment and Cross-Motion For Summary Judgment. All of the facts contained in the attached response are true to the best of my knowledge, information and belief.
3. I absolutely dispute that my conduct violated the requirements of RSA 664:14-a. I fully complied with the requirements of RSA 664:14-a.

  
Raymond C. Buckley

STATE OF NORTH CAROLINA

Personally appeared the above named Raymond C. Buckley on this 4 day of September, 2012, and made solemn oath that the above was true to the best of his knowledge, information and belief.



  
Notary Public/Justice of the Peace

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.  
NORTHERN DISTRICT

SUPERIOR COURT

Docket No. 216-2011-CV-00786

William L. O'Brien

v.

New Hampshire Democratic Party and  
Raymond C. Buckley, Chairman

**DEFENDANT NEW HAMPSHIRE DEMOCRATIC PARTY'S  
OBJECTION TO PLAINTIFF'S CROSS MOTION FOR SUMMARY  
JUDGEMENT**

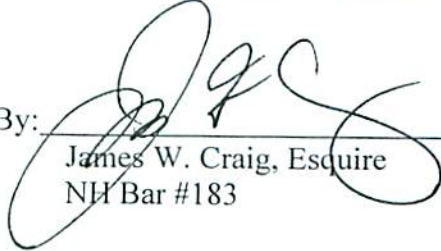
NOW COMES the New Hampshire Democratic Party, by and through its attorneys Craig, Deachman and Amann, and respectfully states that there are no separate allegations against the Democratic Party aside from those made against Raymond Buckley, therefore the New Hampshire Democratic Party adopts and incorporates the objections made by Mr. Buckley in his Objection of September 6, 2012.

Respectfully submitted,

NEW HAMPSHIRE DEMOCRATIC PARTY  
By and Through Its Attorneys,  
CRAIG, DEACHMAN & AMANN, PLLC

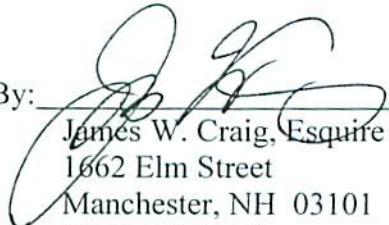
September 7, 2012

By: \_\_\_\_\_

  
James W. Craig, Esquire  
NH Bar #183

I hereby certify that I have on this date forwarded a copy of this Objection to Charles Douglas, Esquire and Gregory J. Ahlgren, Esquire.

By: \_\_\_\_\_



James W. Craig, Esquire  
1662 Elm Street  
Manchester, NH 03101  
(603) 669-3970

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.  
NORTHERN DISTRICT

SUPERIOR COURT

William L. O'Brien

v.

New Hampshire Democratic Party and  
Raymond C. Buckley, individually and as Chairman

Docket No. No. 11-CV-786

**REPLY TO DEFENDANTS' OBJECTION TO THE PLAINTIFF'S  
CROSS-MOTION FOR SUMMARY JUDGMENT**

NOW COMES the plaintiff, William O'Brien, by and through his attorneys, Douglas, Leonard & Garvey, P.C., and hereby submits his Surreply to the Defendants' Motions for Summary Judgment and, in support thereof, states as follows:

1. The defendants' assertion that the plaintiff relies on facts not supported by sworn affidavit is inaccurate and nothing more than misdirection. The material facts alleged by the plaintiff in his Memorandum of Law in Support of his Objection to the Defendants' Motions to Dismiss are contained either in defendant Raymond Buckley's own interview testimony, in written communications he authored, or official government documents. The accuracy and authenticity of those documents is sworn to in the Affidavit of Counsel set forth as Exhibit 6 to the plaintiff's Memorandum.

2. Notably, the defendants do not state with any particularity which factual allegations are supposedly without sworn factual support, and do not make any attempt to dispute any of the allegedly unsupported facts. Nor could they, since they would be hard pressed to dispute that it is Mr. Buckley's voice on the audio CD, or that the statements contained in the E-mails and other communications relied upon by the plaintiff were not

authored by him or are inaccurate in any material way. The defendant's assertion on this point is an obvious red herring. The plaintiff's factual assertions are properly supported.

3. As stated in the plaintiff's Objection to the defendant's Motion for Summary Judgment, there is no requirement under RSA 664:14-A that a candidate in the plaintiff's position lose an election or lose votes to meet the definition of an "injured person" under that section.

4. The defendants' robo-call was inherently misleading and deceptive, and was aimed at Mr. O'Brien personally. Failure to clearly identify the actual source of message (i.e., who was responsible for paying for it), compounded the deceptiveness of the message, because actual recipients of the defendant's robo-calls were confused about both the meaning of the call and who was behind it. See Affidavit of Sandra Kent, Ex. 6 to Plaintiff's Memorandum of Law in Support of Cross-Motion for Summary Judgment; A.G.'s Investigation Report, Ex. 7 to Plaintiff's Memorandum at p. 6.

5. The fact that voters like Ms. Kent and Ms. Anderson could not judge the source and credibility of a message concerning the plaintiff is a direct injury to Mr. O'Brien, regardless of whether he ultimately won the election. RSA 664:14-a does not require that a voter ultimately decide to vote against a candidate who is the subject of a violation of the Act, in order to show an "injury" to the candidate.

6. Moreover, nothing in the statute requires proof of significant "actual damages," such as loss of an election or a certain percentage of votes, in order for a candidate to qualify as an "injured person." See RSA 664:14-a, IV. Allowing misleading and confusing information to be disseminated about a candidate is injurious. Such messages are made even more injurious when they are not clearly and officially tied to a

specific source. The dissemination of such misleading and unclearly attributed messages constitute an injury to the candidate *in and of itself*, that entitles a person in the plaintiff's position to at least "nominal damages."

7. A liquidated damages provision like that contained in RSA 664:14-a is clearly a legislative recognition that damages in circumstances like those presented in the instant case may be incalculable or nominal. Our State Legislature has nonetheless decided that even such incalculable or nominal injuries should be compensated to strongly discourage the type of conduct at issue in this case. See Pugliese v. Town of Northwood, 119 N.H. 743, 751 (1979). In light of that legislative policy decision, permitting the defendants' to violate a statute intended to protect the integrity of the electoral process, without meaningful consequence, would be an injustice.

WHEREFORE, the plaintiff respectfully requests that the Honorable Court:

- A. Deny the defendants' Motion for Summary Judgment;
- B. Grant the plaintiff's Cross-Motion for Summary Judgment as to liability;  
and
- C. Grant such other and further relief as the Court deems just and equitable.

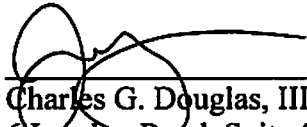
Respectfully submitted

WILLIAM O'BRIEN

By his attorneys,  
DOUGLAS, LEONARD  
& GARVEY, P.C.

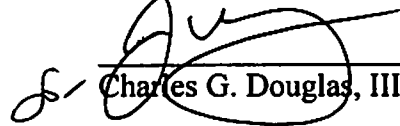
Dated: September 17, 2012

By:

  
Charles G. Douglas, III (#669)  
6 Loudon Road, Suite 502  
Concord, NH 03301  
(603) 224-1988

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been mailed this 17th day of August, 2012, to James W. Craig, Esq., counsel for the N.H. Democratic Party, and Gregory J. Ahlgren, Esq., counsel for Raymond Buckley.

  
\_\_\_\_\_ Charles G. Douglas, III



STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.  
NORTHERN DISTRICT

SUPERIOR COURT

William L. O'Brien

v.

New Hampshire Democratic Party  
Raymond C. Buckley

No. 11-C-786

**ORDER**

Plaintiff's writ in this case contains a single cause of action alleging a violation of RSA 664:14-a, Prerecorded Political Messages. Presently before the court are defendant Buckley's motion for summary judgment<sup>1</sup> and the plaintiff's cross-motion. The court held a hearing on October 25, 2012. After consideration of the pleadings and applicable law, the court finds and rules as follows.

**Background**

The following facts are undisputed.<sup>2</sup> Plaintiff William O'Brien is a New Hampshire State Representative who represents Hillsborough County District No. 4. Mr. O'Brien is a member of the Republican Party who is the former Speaker of the House.

In 2010, Mr. O'Brien ran for reelection. District 4 had four seats in the New Hampshire Legislature. Each party held a primary in September, with the top four finishers appearing on the November general election ballot.

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<sup>1</sup> While the New Hampshire Democratic Party did not specifically join in Buckley's motion, at oral argument it expressed its agreement with that motion.

<sup>2</sup> The facts are drawn from the parties' pleadings and accompanying exhibits.

There were five republican candidates in the Republican Party primary who were running for four seats. The Democratic Party primary featured three democratic candidates for four seats. Thus, Mr. O'Brien requested "[d]emocratic write-in votes in the September 14, 2010, primary so that he could appear on the ballot in the November cycle for elections as both (R)epublican and (D)emocrat." (Writ ¶ 7.)

Defendant Raymond Buckley is the Chairman of the co-defendant New Hampshire Democratic Party. The plaintiff alleges that on September 13, 2010, the day before the primary, the defendants caused a prerecorded political audio message to be delivered to 394 households. The message stated:

This is State Democratic Chair Ray Buckley calling with the important news that current Republican Bill O'Brien has asked to join the Democratic Party's ticket for the November elections.

If he succeeds tomorrow, we expect Bill O'Brien will embrace the Democratic Party's platform, support President Obama, national health care reform and stand up for gay marriage, and protect a woman's right to choose and our agenda to move New Hampshire and America forward.

Once again, we wanted you to know before you vote tomorrow that Bill O'Brien has asked to join the Democratic ticket and our progressive agenda. Thank you so much.

(Def.'s Mot. Summ. J. ¶ 4.) The message did not contain the name of the person or organization paying for the delivery of the message or name of any fiscal agent.

Mr. O'Brien won a nomination to the general election ballot in the Republican Party primary. In doing so, he received the highest total number of votes in the race. He did not win a nomination to the general election ballot in the

Democratic Party primary. Thereafter, in November, Mr. O'Brien won the general election.

On September 12, 2011, Mr. O'Brien filed the present action under RSA 664:14-a, seeking \$1,182,000.00 in damages. Thereafter on July 10, 2012, defendant Buckley moved for summary judgment, arguing, *inter alia*, that the plaintiff lacks standing. The plaintiff filed a cross-motion for summary judgment, contending he is an injured party and there is no genuine issue of material fact that the defendants violated the statute. The court considers each argument in turn.

#### Standard of Review

The court decides "summary judgment rulings by considering the affidavits and other evidence in the light most favorable to the non-moving party." Mbahaba v. Morgan, 163 N.H. 561, 568 (2012) (citation omitted). "If this review does not reveal any genuine issues of material fact, i.e., facts that would affect the outcome of the litigation, and if the moving party is entitled to judgment as a matter of law" then summary judgment is proper. Id.; see also RSA 491:8-a, III (2010). Here, the facts of the case are undisputed, and the primary issue is interpretation of the statute.

#### Analysis

The court first considers whether the plaintiff has standing to bring this claim under RSA 664:14-a, II (2004). "The general rule for standing is that a party may bring suit when 'the party [has] suffered a legal injury against which the law was designed to protect.'" Billewicz v. Ransmeier, 161 N.H. 145, 149 (2010) (internal quotations and citations omitted). "The plaintiff bears the burden of

sufficiently demonstrating a right to claim relief.” Exeter Hosp. Med. Staff v. Board of Tr. of Exeter Health Res., Inc., 148 N.H. 492, 495 (2002); see also Libertarian Party of N.H. v. Sec’y of State, 158 N.H. 194, 195 (2008) (stating that “a party’s standing is a question of subject matter jurisdiction, which may be addressed at any time”). Here, the parties disagree about whether the statute was designed to protect the plaintiff.

RSA 664:14-a, II provides that “[n]o person shall deliver or knowingly cause to be delivered a prerecorded political message unless the message contains, or a live operator provides, within the first 30 seconds of the message . . . [t]he name of the candidate or of any organization or organizations the person is calling on behalf of . . . [and] [t]he name of the person or organization paying for the delivery of the message and the name of the fiscal agent, if applicable.” A “prerecorded political message’ means a prerecorded audio message delivered by telephone by . . . a candidate or political committee . . . .” RSA 664:14-a, I(a). “Any person injured by another’s violation of this section may bring an action for damages . . . .” RSA 664:14-a, IV(b) (emphasis added).

Defendant Buckley contends that the statute was designed to protect only the recipient of the phone calls, not the candidate. The plaintiff claims that under the plain and ordinary meaning of the words used in the statute he is clearly an “injured person.”

The interpretation of a statute is a matter of law. Goodreault v. Kleeman, 158 N.H. 236, 252 (2009). The court will consider the statute as a whole and construe the language in accordance with its plain and ordinary meaning. Id. If

the "statute's language is plain and unambiguous, [the court] need not look beyond it for further indication of legislative intent, and . . . will not consider what the legislature might have said or add language that the legislature did not see fit to include." Id. at 253. By contrast, if the statute is ambiguous, the court will look to the legislative history to aid its analysis. Id.

The phrase "any person injured" is not defined by statute. The court finds the phrase is susceptible to two reasonable interpretations. "[U]se of the word 'any' generally evidences that a statute should include a broad array of potential plaintiffs." Roberts v. General Motors Corp., 138 N.H. 532, 536 (1994). Further, the New Hampshire Supreme Court has interpreted such language in the context of the Consumer Protection Act quite broadly. LaChance v. U.S. Smokeless Tobacco Co., 156 N.H. 88, 94 (2007). Read in this context, a person mentioned in the prerecorded message could be considered an injured party, and thus have standing to sue.

On the other hand, prerecorded political messages are delivered by telephone, which presupposes only two parties: the person delivering the message, and the person receiving the message. The statute does not mention persons who are the subject matter of the phone call and places conditions only upon the person delivering the message. The statute also prohibits persons from knowingly delivering such messages to any telephone number on the "Do Not Call" list. RSA 664:14-a, III. This suggests the statute was designed to protect only the persons receiving the phone call, the potential voters. Accordingly, the

court finds the language of the statute is ambiguous and will look to the legislative history to aid its analysis.

The cause of action set out in RSA 664:14-a was created by the legislature in 2004 in response to significant “use of pre-recorded telephone messages by various political factions during the [2004] primary and general election.” *An Act Relative to the Use of Prerecorded Telephone Messages by Candidates and Political Committees: Hearing on HB 332-FN Before the H. Comm. on Election Law*, (N.H. 2003) (testimony of Rep. Spiess, Prime Sponsor). The law was “intended to place a regulatory structure over the use of” automatic dialing systems to send out pre-recorded political messages. *Id.* According to Representative Spiess, there was great “concern” over these automatic phone calls. He testified before the House Election Law Committee that:

This concern is shared by many of my constituents. I have never before experienced such a spontaneous visceral negative reaction to anything, like I received from voters to this practice. My friends and neighbors confronted me repeatedly as they entered and left the polls complaining about these calls. They were flat out annoyed, and put off by both the practice and the content. At a time when we have a legitimate cause for concern about voter apathy, I would suggest that we cannot afford to allow practices, which continue to alienate voters.

*Id.*

Against this backdrop, it is clear the statute was designed to protect the privacy of persons receiving these automated phone calls, not persons mentioned in the phone message. Accordingly, because the plaintiff has not alleged that he received a phone call from the defendants, he lacks standing to assert a cause of

action under RSA 664:14-a. The court need not reach the parties' remaining arguments.

While the defendant's pleading is titled motion for summary judgment, that portion of the motion which challenges the plaintiff's standing is more accurately characterized as a motion to dismiss for lack of subject matter jurisdiction.

Because the court finds that the plaintiff does not have standing to bring this lawsuit, it GRANTS the motion and dismisses the lawsuit. Additionally, while the New Hampshire Democratic Party did not specifically join defendant Buckley's motion, see fn. 1, supra, this order applies to that defendant as well. In short, because Mr. O'Brien does not have standing, there is no subject matter jurisdiction.

**SO ORDERED.**

December 21, 2012



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David A. Garfunkel  
Presiding Justice