

IN THE STUDENT SUPREME COURT            )  
  )  
  )  
Action No. 09 SSC 008                    )  
  )  
Taylor HOLGATE,                            )  
  )  
PLAINTIFF                                    )  
  )  
versus                                        )  
  )  
Peter GILLOOLY,                            )  
in his capacity as Chair                 )  
of the Board of Elections,                )  
  )  
DEFENDANT                                    )

TRANSCRIPT  
of  
TRIAL

A trial was conducted in the above captioned matter at 7:30 PM on March 17, 2010 in the Kenan Courtroom in Van Hecke-Wettach Hall. The transcript of this trial is set forth herein. Some words and pauses are omitted for the sake of clarity and because the recording was not of sufficiently high quality to permit further detail.

Chief Justice HODSON called the Court to order at 7:31 PM. All justices and parties were present. Justices Analise Jenkins and Christopher Phillips were sworn in as Associate Justices of the Student Supreme Court of the University of North Carolina at Chapel Hill in accordance with the Student Code.

Chief Justice HODSON: We are here tonight in 09 SSC 008, *Holgate v. Gillooly*. As previously discussed by the parties, we will begin with the plaintiff's facts of the case followed by the defendant's facts, then in the plaintiff wishes to rebut any factual information - if you call any witnesses, of course, you'll be able to cross-examine them, and if you wish to present any additional evidence at the conclusion of that, we'll allow you to do so, and then we'll move on to legal arguments. All right. Are the plaintiffs ready to go?

Mr. DAVIES: These are the facts that the plaintiffs would like to present. The student body elections were held on February -

Chief Justice HODSON: I'm sorry; can you tell us who you are?

Mr. DAVIES: Yeah, I'm sorry. My name is Erik Davies. I'm the counsel for the plaintiff.

Chief Justice HODSON: Thank you.

Mr. DAVIES: The facts of the case we'd like to present are as follows. The student body elections were held on February 9, 2010. As mandated in the Student Code, the Board carried out two tests of the election system prior to election day. On February 2, Mr. Gillooly confirmed in an e-mail to Rick Kinney at ITS that there were reports of incorrect districts in the system - registered in the system. The Board of Elections didn't ensure that all voting technology functioned properly as per Title VI, Section 302(H), the section that mandates the Board of Elections obtain a letter from ITS a week before an election to confirm that necessary computer systems are acceptably secure for conduction the said election. Every ballot cast on Student Central carried a preface that if a student casts a ballot with incorrect information listed, then that student would be in violation of the Honor Code. Taylor Ann Holgate, my client, ran for a seat in District 5, Greek Housing, of Student Congress. Paper ballots were available at the Board of Elections office, but the Board did not adequately publicize paper ballots or voting procedure. Students were advised to verify that their housing information was listed correctly with the UNC Department of Housing. On the day of the election, two students submitted Remedy tickets to ITS stating that their ballot information was listed incorrectly. Mr. Gillooly also submitted a Remedy ticket stating that several students had approached him about not being able to vote in the proper district. The Board of Elections contacted *The Daily Tar Heel* in the middle of election day to state that if housing information was not correctly listed on the ballot, then students should go to the Board of Elections to vote - the Board of Elections office, excuse me. *The Daily Tar Heel* posted a notification of this on its Webpage. An e-mail from Jon Curtis, who works at the Carolina Union Activities Board, confirms that the number of student affected by this problem cannot be evidenced, or at least it is unknown how many. And now I'd like to present the e-mails that we submitted to the file. We e-mailed all the relevant parties these e-mails, and I'd like to read a couple passages from these. These are taken - I'll say who sent which e-mails. February 2<sup>nd</sup>, from Pete Gillooly to Rick Kinney: "Hey Rick, looks like the second test election was a success. Had a couple of reports of incorrect districts but no other problems." Rick Kinney's February 3<sup>rd</sup> response: "There's apparently some problem with local addresses fed to SIS the other night," which I believe is the voting system, "If I understand what was going on, it should have been corrected last night. I will follow up on that to make sure that everything is okay. Don't forget to drop off the form that says you've completed testing, moved the election into production, and done the proper

testing [unintelligible] sometime before next week." And then later on it says: "Oh, and don't forget about the Remedy ticket for the real election." Then, February 9<sup>th</sup>, the day of the election, from Rick Kinney to Mr. Gillooly: "About the only thing you can do" - after students had submitted some problems - "About the only thing you can do is have them contact the housing office to update their address, but it won't happen in time for this election." This was in response to Mr. Gillooly's Remedy ticket, and this e-mail was written at 11:57AM on the day of the election. This is also from Rick Kinney to Mr. Gillooly on February 9<sup>th</sup>: "I received one ticket about the incorrect districts displayed, which is related to the incorrect local address in SIS. I directed them to the Board of Elections to complete a paper ballot. I also told them that they should contact the housing office to get their address updated." Then, February 9<sup>th</sup>, from a Remedy ticket which I believe - we got this e-mail from public records, and I believe that this was submitted by Mr. Gillooly or someone on the Board of Elections: "Several students have approached me and said that the wrong districts are appearing when the log on to Student Central. Namely, people who are in District 3 are seeing options for only 4, 5, and 6. I responded that this is not a voting system problem and rather - that rather their info is classified incorrectly in the Student Central database." Then this is February 12<sup>th</sup>, from Jon Curtis at Kewab [phonetic] to Mr. Gillooly and several other people: "The *DTH* article is off-base. What they were told from ITS Deborah Ba - Beller [phonetic], was that 296 students could have been prevented from casting votes successfully. Apparently, that was the number of errors that ITS found in its system. That I'm awa" - and then later on it says, "That I'm aware of, there is no way of knowing if any or all of those 296 students tried to vote. However, you might want to contact Ms. Beller [phonetic] to see if there's a way to cross-index those students with those who tried to vote." And then he attached a copy of the Title VI section of the Student Code and highlighted sections relevant to campus re-elections. And then he suggested that they "send out a mass e-mail asking for feedback or anecdotes from individuals that encountered the problem and/or decided not to vote given the problem. Again, on this matter, I feel quite strongly that deciding not to vote is something that they chose to do of their own volition and that they must own their responsibility for choosing that action." And then finally, a February 13<sup>th</sup> e-mail from Jon Curtis to Mr. Gillooly: "I guess that my only concern at this point lies in questions raised as to the steps that the Board of Elections took. I highlighted what appear to be the appropriate items that should have been covered pre- and post-election." And that is all the evidence we'd like to present at this time.

Chief Justice HODSON: Okay. Thank you.

Mr. GOULD: May it please the Court. Justices, my name is Kris Gould. I am the Student Solicitor General and counsel for the defendant Pete Gillooly and the Board of Elections. Before moving onto the facts, I would like to remind the Court that per the decision at the pre-trial hearing, there will not be arguments under section 403(H) of the Code or section 511 of the Code. Section 403(H) -

Chief Justice HODSON: We're aware of that.

Mr. GOULD: All right. Regarding the facts in question today, the issues really come down to, and really the only alleged problem with the way the Board of Elections conducted its election, was the lack of a letter from ITS stating that the election was secure. So the facts in question today, or the facts that are relevant today, are in regards to that letter, as well as in the actual vote totals that were ca - the actual votes cast in the election. Regarding that letter, the letter dealt with the security of the election. It does not deal with whether or not addresses are properly kept in the University Registrar's system. The Board of Elections has no control over what addresses are kept in the University Registrar's system. So whether or not that letter was obtained, it would not have affected any of the alleged problems that occurred on election day. Now, in terms of preparing for the election, because that's ultimately what that letter details, the Board of Elections did conduct two test elections, one on January 26, 2010 and the other on February 2, 2010, the two Tuesdays preceding the election. In both of these elections, the results were successful. There were, as plaintiff acknowledged, a few cases where there was an incorrect district noted. Now the way to address that is for a student to correct their address with the University Registrar or with housing. The Board of Elections has no control over addressing that issue. There were not a sufficient number of problems such that there were concerns about the elections moving forward. Now, in terms of the actual election that took place, ITS did have two Remedy tickets from that day [unintelligible] with their problems with the voting: one from an incorrect district, but we don't know that district was District 5 which is the district in question today, and one from a student who was incorrectly classified in terms of their class. And so only two students reported to ITS that they were unable to vote in the election. Now, the plaintiff lost her race by 25 votes, so it's very important to understand the nature of voting in the election and the potential of the election and whether or not there could have been a difference of

25 votes. Once again, ITS received only two complaints on election day. After the election, ITS ran a rec - ran a course of their rec - ran their records against those of housing, and they found that there were 296 inconsistencies and that's where we get this 296 number - potential students who could have tried to vote and might have had their district incorrectly shown through the software. So there's a maximum of 296 students. Now, we don't know if any of these students tried to vote. About 27,000 students at the campus here at UNC, all of which are eligible to vote.

Chief Justice HODSON: If you don't object, I'd like to ask a clarification question.

Mr. GOULD: Sure.

Chief Justice HODSON: Of these inconsistencies, do you know how these inconsistencies show? How does ITS -

Mr. GOULD: I don't know. I know they ran their records against those of housing; that's my understanding, and that there were 296 students where there was a difference between the address that ITS had in their records and those of the housing office.

Chief Justice HODSON: So this isn't from the actual election software?

Mr. GOULD: No.

Chief Justice HODSON: This is just ITS comparing potentially people who may only not have...

Mr. GOULD: That's correct. And I believe that's a number that was - that the *DTH* received and that's how they received it.

Justice JENKINS: And do they not characteristically do that before an election?

Mr. GOULD: I know they run certain tests. Do you know if they run those tests prior to an election?

Mr. GILLOOLY: I honestly don't know, I mean, one of the other problems that came up is that they were transferring all the information to the new system.

Mr. GOULD: That's true. There is a new overarching software system that the University's moving towards, and that may have

been - and some of the transition may have led to some of those problems.

Chief Justice HODSON: Okay. Thank you.

Mr. GOULD: So there are 296 potential people who not have been able to properly vote in the election out of 27,000 students at the University. We said we don't know how many, if any, of those 296 tried to vote. There's 27,000 students at the University; the number of students that voted that day was 8,093, so about 30% of the student body voted. So in terms of trying to decide whether or not -

Chief Justice HODSON: Sorry, what was the percentage again?

Mr. GOULD: About 30%.

Chief Justice HODSON: 30%.

Mr. GOULD: Just under 30%. In terms of trying to decide whether or not the issues with the residences could have affected the outcome of the election, we can look at that 30% and say that of those 296, based on the averages, about 30% would have attempted to vote in that election. 30% of those 296 is 89 students. Now, District 5 covers only Greek housing. There were a total of 402 votes cast in District 5 - 397 for the actual candidates on the ballot, 402 total, which includes write-in ballots. 402 out of the 8,093 is just under 5%. So about 5% of those who voted in the election voted in District 5. So if 5% of those 89 students who might have tried to vote were from District 5, we're talking about less than five potential students affected, far less than the 25 vote margin. Even if we assume that every single one of those 296 students tried to vote, 5% of that 296 is less than 15 students, still far less than that 25 vote margin. So in terms of the facts affecting the case today, the real issue at hand is whether or not a letter was received that dealt with the security of the voting software. It would not have highlighted any concerns about the residences that students had and whether those were accurately in the system as well as the votes cast in the election and even those student who might have been disenfranchised, looking at the numbers, it would not have affected the outcome of this race.

Chief Justice HODSON: We'll allow plaintiff's counsel to rebut if there's no objection.

Mr. DAVIES: I would like to rebut only one aspect of the defendant's argument which was in the pre-trial hearing, the

Chief Justice asked us not to argue the 25-student loss, and I took that to mean -

Chief Justice HODSON: I meant you can't argue that -

Mr. DAVIES: It's a violation of the code?

Chief Justice HODSON: Correct.

Mr. DAVIES: Okay. I just wanted to say that I don't think - where the facts are concerned, I don't think this is a question of how many people lost, but whether the Board exercised due discretion in determining whether or not to call for a re-election when it observed its responsibilities under section 501.

Chief Justice HODSON: All right. We'll get to that when you [unintelligible]. Well, in that case, that closes the factual portion of the case. Of course, you'll both be presenting your legal arguments now. As you do that - when I say that closes the factual portion of the case just the evidence. Of course, you can argue facts in your legal argument if you need to, but you'll only be able to present what you presented in the factual portion. All right, Mr. Davies. We'll hear from you.

Mr. DAVIES: May it please the Court. The Student Code protects the rights of individuals belonging to the UNC student body. When an extension of Student Government does not observe the Student Code, the Supreme Court may ensure that the rights of the students are upheld and may act as the final arbiter in determining whether or not the Student Government acted lawfully. Tonight, the Court will see that when the Board of Elections administered student body elections on February 9, 2010, it did not uphold its duty to "monitor the online election, verify the results, and ensure that the process was not corrupted" as per Title VI, Section 501(A). If the Board of Elections does not uphold its responsibilities as outlined by Title VI, Section 501 and its post-election verification of results as detailed by Title VI, Section 602, then the Student Supreme Court is empowered to call for a re-election as per Title VI, Section 403(L) and Section 602(A). The Board did not exercise proper discretion in ensuring security of the voting process or determining whether a re-election should be held, and therefore the Court faces necessary grounds to remand the results of the election.

Justice PHILLIPS: I have a question real quick.

Mr. DAVIES: Yes.

Justice PHILLIPS: Where does 602(A) specify the Supreme Court at all?

Mr. DAVIES: It says - I believe it reads - oh, excuse me, I meant 602(K) (1).

Justice PHILLIPS: Oh, okay.

Mr. DAVIES: Excuse me. It is - yeah, I wrote that wrong. And that section reads, "After certification of returns for a particular race, a re-election may only be declared by the Supreme Court." The plaintiff accepts that a student must shoulder the burden of responsibility if he or she chooses not to cast a vote in a campus election. However, the evidence shows that many students did not make this choice. Rather, they were uninformed of their voting options. Yes, students did technically have the ability to cast paper ballots listing the correct residence information, but the Board did not advertise the availability of these ballots as the Code requires. Instead, the Board simply advertised the ballots by calling *The Daily Tar Heel* in the middle of the campus election, some time around noon. The *DTH* posted a notification on its Website, meaning that only individuals who read the *DTH's* Website during the academic day would have known about an alternative to voting on Student Central. As evidenced by e-mail correspondence, the Board was well aware of the problem at least one week in advance of the election of incorrect residential information being listed in the system. Yet no further steps were taken to advertise, remedy, or avoid the problem in the general election. Students would have been able to correct their housing information in that week of time, which the plaintiffs have dismissed as, you know, just a piece of paper certifying that the - that the system works.

Justice PHILLIPS: I have a quick question.

Mr. DAVIES: Yeah.

Justice PHILLIPS: It says - in the title that you're arguing your legal argument under, "monitoring the online election, verifying the results, and ensuring the process was not corrupted" meaning the actual election itself. So the Board of Elections, under no - from my understanding of the Code - has to send out that e-mail that says you need to correct your residency info. Having your residency info in the system is just a basic understanding of UNC students. It shouldn't - it shouldn't be up to the Board of Elections to nanny the UNC student body to change all their stuff so that there can be free and fair elections.

Mr. DAVIES: Well, are you familiar with Section 508 under -

Justice PHILLIPS: I believe Section 508 was not in your -

Mr. DAVIES: It was not. So we'll continue.

Chief Justice HODSON: I'm sorry -

Mr. DAVIES: Okay. I just want to say I don't think it's nannying in that case, but I'm not arguing on that premises. Let's see, where was I? Instead, the Board waited to address the problem on election day, when it was impossible to change the housing information in enough time. The other alternative for students in this situation would have been for students to cast an online ballot, but what reasonable student would cast a ballot knowing that doing so would constitute a violation of the campus Honor Code? The students -

Chief Justice HODSON: If it's a violation of the Honor Code but you want to vote, why not e-mail ITS? If you're that determined to vote...

Mr. DAVIES: I - I mean - I can't answer for that.

Chief Justice HODSON: Okay. That's fine.

Mr. DAVIES: I would just think people would seek out paper ballots but they didn't really know how to. Anyways, does that answer your question? Okay.

Chief Justice HODSON: Or e-mail the Board? Why not take some affirmative steps?

Mr. DAVIES: I don't - I, uh -

Chief Justice HODSON: Is your opinion that the Board is obligated to make sure the people...

Mr. DAVIES: ...are aware of their voting options.

Chief Justice HODSON: All right.

Mr. DAVIES: The Student Supreme Court is empowered to call for a re-election in these circumstances. Section 501 carries the subheading "Responsibilities of the Board." The evidence is sufficient to show that ITS itself did not have confidence - total confidence in the voting system. It was aware of the problems of incorrect residential information, yet the Board

opted to proceed with the election without sufficiently advertising other voting options. Therefore, it did not ensure that the process was not corrupted. If the Board does not uphold its Code-mandated responsibilities, then the Supreme Court is empowered to ensure that the Code is observed and that the Board acts lawfully. Section 602(K)(1) established the Court's ability to call for a re-election, and Section 403(L) establishes its ability to "determine the validity of our protest." Indeed, this protest is valid because the Board did not take the proper steps to ensure a fair election of all the candidates. There's no way that a candidate could have held the Board responsible for adhering to the Code, so it is the province of the Supreme Court to do so in its stead. We are not asking for special treatment, but we are asking for the Court to ensure that the Code is observed by the UNC Student Government. And for these reasons, we respectfully request that the Court invalidate the results of the District 5 campus election.

Chief Justice HODSON: All right, Mr. Davies, just to make sure that the Court fully understands -

Mr. DAVIES: Yes.

Chief Justice HODSON: Your argument is that the Board of Elections failed to ensure that the process was not corrupted because they failed to make students aware of their voting options?

Ms. HOLGATE: And it didn't correct problems that it knew about beforehand.

Mr. DAVIES: Yes. I mean, I feel like the latter is more relevant to our complaint but also, you know, in the facts that I've presented, I do believe, yes, students are oblig - students have the right to know their voting options.

Chief Justice HODSON: And you - your complaint, you also talked about failing to secure the letter from ITS. Do you sort of lump that under the "correct problems beforehand?"

Mr. DAVIES: I feel that - I feel that obtaining this letter from ITS would have allowed students who are determined to vote to change their housing information. If you look at the e-mail correspondence, you see that -

Chief Justice HODSON: How would a letter do that?

Mr. DAVIES: I'm sorry?

Chief Justice HODSON: How would obtaining a letter from ITS allow the students -

Mr. DAVIES: I think that - I think the Board would have publicized, you know, the findings of the test election and the students could have had time to correct their housing information.

Justice JENKINS: But the Board knew about other problems with housing, correct? And they didn't do anything to correct that, right?

Mr. DAVIES: The other problems being...?

Justice JENKINS: Weren't there - didn't you say in the second test there were sev - a couple reported that were incorrect and the Board knew about them?

Mr. DAVIES: Yes, there was an e-mail on February 2<sup>nd</sup> where I believe Mr. Gillooly does say that there was a couple reports and it - there's no specific number -

Justice JENKINS: And the Board did nothing to fix that? They -

Mr. DAVIES: There's no ev - there's no indication that they did.

Justice JENKINS: Then what causes you to believe that if they received a letter from ITS that they would have done anything to publicize this?

Mr. DAVIES: I mean, I - I -

Justice PHILLIPS: Here - here's what I find from this e-mail. It says that "several students have approached me and said that the wrong districts are appearing when they log on to Student Central." And this is from, your problem ticket sender UNC PTR. It says, "I responded that this is not a voting system problem and rather their info is classified incorrectly in Student Central database." So what I infer from that is they responded to the students and told them to correct their things. So any student who was interested in voting and found that their district wasn't listed and sent this e-mail had the information so that they can correct it so that they can vote in the correct district. Is that correct?

Mr. DAVIES: Well, but the information provided was that you go to housing.

Justice PHILLIPS: Sorry. No factual questions.

Mr. DAVIES: Shall I - shall I respond?

Chief Justice HODSON: If you don't object. If you don't want to answer, you don't have to.

Mr. DAVIES: I would like to answer. Justice Phillips, the answer is that housing -

Chief Justice HODSON: Take your time. We're not in any rush.

Mr. DAVIES: The response that housing - the response that ITS provided was to go to - was to change your housing information. It was not about, you know, a paper ballot. That's my response.

Justice HARDEN: Is perhaps your focus on this letter more towards your argument that under 501(A) with the particular responsibilities where you're referring to discretion stuff, because we're not arguing discretion under 511, but that that symptom - but that this is a symptom of not taking due discretion in general, that the letter is perhaps evidence of what you are contending is a pattern of behavior regarding the problems with the election system?

Mr. DAVIES: Yeah, I don't think - I don't think that my argument is about the letter, but the letter is rather part of the greater problem in the board's exercise of due consideration.

Justice HARDEN: Okay.

Chief Justice HODSON: All right. We'll hear from the defense.

Mr. GOULD: May it please the Court. The nature of the exclusion at the pre-trial hearing - the Court said it would hear arguments on two points: when section 501(A) called for the Court to require a re-election and then whether the Board of Elections violated 501(A). I do want to clarify a couple things real quick. First of all there's been - the allegation was made by plaintiff's counsel that ITS did not believe the election was ready to move forward and was concerned about the technical difficulties. But if you refer to the packet of e-mails that I - that plaintiff's counsel introduced during the presentation of the facts, if you look, I believe, to the final e-mail, it's an e-mail dated Saturday, February 13, 2010 reads: "Hi Peter. I've officially to confirm there were no reported outages, performance, or security-related issues with ITS equipment

supporting the spring 2010 student election. There were two tickets submitted related to incorrect districts being displayed due to incorrect student local address in the SIS database and one due to student classification of IS that isn't addressed in assigning classification to be sent to the voting software. Please let me know if you have any further questions."

Chief Justice HODSON: What's the date of that e-mail again?

Mr. GOULD: On - I believe it's on Saturday, February 13, 2010.

Chief Justice HODSON: And the election was the Ninth?

Mr. GOULD: The election was the Ninth. So this is following up after the elections. So regarding whether the software was ready to proceed with the election, it was and functioned properly. The issues at hand are related to the addresses. Now, once again, there's two issues. There's the letter which was discussed before - whether or not that letter in any way was in violation and would have affected things, and once again, it deals with the security. The letter only would establish that the voting system was secure, and that e-mail that I just read to you states the voting system functioned properly and was secure. The other issue that he raises is publicizing the voting system, specifically provisional ballots. But the Code doesn't require anywhere that provisional ballots be made available. In fact, if you reference Section 511 of the Code -

Chief Justice HODSON: Title VI?

Mr. GOULD: Section 510 of Title VI. It says: "The availability of provisional ballots does not necessarily prevent an election from being invalidated in the effect of technical difficulties. It's at the Board's discretion to allow for provisional ballots, and in this case, in this election, the Board did allow for provisional ballots, and when issues were raised to the Board's attention, they did the best thing they could on election day to publicize that fact in advertising that through *The Daily Tar Heel*. Therefore, the Board of Elections didn't violate any part of Title VI by not advertising the provisional ballots seven days in advance of the election. It in fact took actions outside of their responsibilities, going beyond their responsibilities, and advertising them that day to try to make students aware of it that were having issues.

Justice HARDEN: Counsel -

Mr. GOULD: Yeah.

Justice HARDEN: -- do you mind if I ask you two questions? In regards to the e-mail where there was issues with the election -

Mr. GOULD: Right.

Justice HARDEN: Also in the e-mail packet they had a very similar e-mail for elections that happened in January and there they noted that there were no tickets related to the election and then with the e-mail from the same gentleman, I believe his name was Jerry - unfortunately, the way that this was submitted, it was in backwards reverse order.

Mr. GOULD: Right.

Justice HARDEN: It just kind of - that kind of strikes me as that that is a standard format e-mail that they will send out unless there is some absolutely huge problem that they're aware of. Given the fact that this was something where in another e-mail they say that they can't guarantee that all systems will be available because it's being implied to me that they're saying that the Board of Elections did not start the test process in as much time as ITS would prefer in the e-mail dated from January 19<sup>th</sup>, Tuesday, at 10:57 AM. I just wanted to kind of point that out because it strikes me as it was started too late.

Mr. GOULD: Well, regarding the e-mail from January 19<sup>th</sup>, the test perhaps says it was run on two different dates within the two week period preceding the election and what the Code requires is that the test process or test software be held open to the public for two days during a two week period preceding the election. That's in Section 5 - if I can find it here; in a second I'll tell you exactly where it is - Section 508(B) says: "Testing the computer voting software. The computer voting program must be established at least seven days prior to an election and must be held open to the public for beta testing at least two days verifying its operability." So I take that back. What it requires is that it be made available one week, and he held separate elections on the two Tuesdays preceding the election so two weeks in advance so in fact was ahead of schedule.

Justice HARDEN: So you don't - you don't contend then, obviously that under 501(A), ensuring the process is not corrupted, when they're having notice from ITS that this is being started late enough in the game that we can't guarantee that everything will go smoothly that that is not a violation of some sort of due discretion of ensuring that the election process is not corrupted?

Mr. GOULD: Now they met the procedures for testing the election under the Code and in fact held the test elections earlier than required under the Code. In regards to the other question you had about the e-mails maybe seeming like a form e-mail: well, it's a form - if it is a form e-mail, then it would be so because they didn't see any major issues with the software. If they saw any problems, then they obviously would not have sent a form e-mail that said that everything went smoothly.

Justice HARDEN: I guess I'm just troubled by the e-mail from Mis - from your client where he said he had several - and there is no definition of how many; it could have been more - compared to ITS saying they only got two tickets. I can imagine students - and it's obviously not my place to say what students were doing, but I can imagine that students might come up to him and ask a question and then they might not also - and those same students might not also think that they should e-mail ITS *per se*. Also I understand that it was a rainy day and to say that they're - you know, honestly, I don't know how many students do read the *DTH* online during the day when there's class, so, I'm just kind of more understanding this case more, not frankly about this letter as a legal argument but as a discretion issue under 501(A) and a broader term, and I think that - that taken in with the Board of Elections still saying that there are several students, and I'm just kind of wondering how big this problem could have been, especially when they say that they can't, but where it helps you - where they cannot tell how many of the 296 students didn't vote as opposed to at the same time, they can't tell if 296 students tried to vote and actually couldn't, I just feel like there are -

Mr. GOULD: I think there's a few important questions there. First of all, the burden in this proceeding really lies with the plaintiff in demonstrating in the key issues that there was a violation of Section 501(A) and that because of that violation, the Court should call for a re-election. So in terms of demonstrating that votes really should have been cast in that district, that burden really lies with the plaintiff. But the other thing - Section 5 - you know - Section 501 really is, you know, it's the beginning of Article V of the Code and it lays out some general guidelines. It says, you know, so (A) says: "responsible for monitoring online election, verifying results, ensuring the process was not corrupted." If you read through the rest of Title - of Article V, excuse me, within Title VI of the Code, that's what - this is how they do that. This is how they take the steps to make s - to monitor the election system, to verify the results, and ensure that the process was not corrupted. It deals with if they have polling stations, how they

have to be maintained, how they deal with referenda on the ballot, which students are eligible to vote, how they deal with write-in candidates, senior class officers, how the names are listed on the ballot, there's the procedures for testing the election. So 501(A), you know, really what we're talking about, if there's a violation, it really wouldn't be with Section 501(A), because Section 501(A) is more of an overarching introduction to this Article of the Code. So if there's a violation, it needs to be to one of these terms that falls below it, one of these other sections in the Code. So maybe it would have been, you know, had they not conducted test elections, maybe there was a violation because that didn't occur, but they did conduct the test elections, so that's really what the issue is. It's not holding the Board to a standard that's not written into the Code. It's looking at the standards that are in fact written into the Code and saying, "Did the Board follow them?" and that's really the issue, so we're determining, you know, going back to what the Court asked us to look to today, what's the Court's standard in, you know, in calling for a re-election under Section 501(A), and I don't really think it's under Section 501(A). I think it's under Article V of the Code and the standard that the Board of Elections uses for determining when to call for a re-election is if they think it compromised the integrity of the election - some action, whether it's campaign violation, technical difficulties, compromised the integrity of the election, or affected the outcome of the election. And that's the standard that the Court - that the Board of Elections uses in affirming that there weren't such irregularities in the course of an election when they decide to certify the results, so that's really the standard that the Court needs to use if there is, in fact, a violation within Article V of the Code. Now, we maintain that there were no violations within Article V of the Code. If you look through the procedures and look what it asks you to do in Article V, the plaintiff hasn't pointed to anything within Article V -

Chief Justice HODSON: Are you advocating for a *de novo* standard or abuse - sorry.

Mr. GOULD: I'm sorry?

Chief Justice HODSON: You wanted the standard to be compromising the integrity or affected outcome of the election. Would you say that that's *de novo* or abuse of discretion?

Mr. GOULD: You know, I think you need to grant discretion to the Board of Elections because it's very important that the Board of Elections be allowed to conduct their job. They already made the

decision that they didn't feel it compromised the integrity of the election or that the - that they didn't feel it compromised the integrity of the election and they didn't feel it affected the outcome of the election, so I think the Court does need to give some discretion to that body. But, more, you know, back to the point, the plaintiff hasn't pointed to one thing in Article V where it says the Board of Elections is required to do this and show that they didn't do it. They've made two points, one of which comes out of Article III; that's fine, that's the issue with the letter, saying that they didn't get the letter from ITS, but as ITS stated after the election, the voting system was secure! So it didn't comp - it couldn't have compromised the integrity of the election because the voting system was, in fact, secure, and it couldn't have affected the outcome of the election, once again, because the voting system was, in fact, secure. So the only thing that leaves them with, the only thing they've argued really, is that they didn't publicize the provisional ballots. But nowhere in Title VI does it require the Board of Elections to have provisional ballots. They can have provisional ballots, and they did, and they publicized them when they realized there might potentially be a problem, but they didn't violate anything specifically in Article V. So in going back and saying, "Did that compromise the integrity of the election?" No, because there's no violation here; there's nothing that the Board did wrong. And in terms of affecting the outcome of the election, we went through the votes earlier. We talked about a maximum of 296 students that were affected, but even, you know, if we crunch the numbers, we say about 30% of the student body voted and then of that percentage about 5% voted in District 5, which is the race in question, the plaintiff lost by 25 votes. There's only five - that would only be five - that would be less than five votes if we say 30% of those people voted. Even if all of those people voted, then it's an issue of 15 votes, still not enough. Even if every single one of those people voted for her, it wouldn't be enough.

Justice JENKINS: But that's working with your fractions - the 30% divided, and then dividing that again according to districts so -

Mr. GOULD: But that's assuming that every single one of those 296 students voted.

Justice JENKINS: Tried to vote.

Mr. GOULD: It still doesn't have enough.

Justice JENKINS: Why do you divide that across the districts? What if it was 296 all in District 5? How can you say that it's only 15?

Mr. GOULD: There were only -

Justice JENKINS: How do you know that there were only a certain amount?

Mr. GOULD: There were only 402 votes cast in District 5. That would be almost 80%, or, excuse me, almost 75% --

Justice JENKINS: But that's probability. You don't know, I mean, for a fact that it was or wasn't that way.

Mr. GOULD: Just based on - I can't say to an absolute fact that that couldn't have happened because there certainly, I believe there would be close to 700 people living in District 5, but it would be highly unlikely and in terms of saying did this, could this have affected the outcome of the election, the Board of Elections - that's too high a standard for the Board of Elections to have. It's too high of a standard for the Court to ask the Board of Elections to have. There's always some issues with some, you know, with any election the Board of Elections conducts. There's going to be some people who log in and for whatever reason can't vote and there's going to be some violation that occurs and they have to say, "How many votes could this really have affected?" And if you're going to say that, you know, look at the maximum, that's really too high of a standard and you're not going to have elections go through because there's always going to have to have these challenges.

Chief Justice HODSON: Anything further?

Mr. GOULD: No, that's all.

Chief Justice HODSON: Thank you. Mr. Davies, did you want to rebut any legal arguments?

Mr. DAVIES: I do. Okay, sorry, thank you. Okay, first I would just like to allude to the February 13<sup>th</sup> e-mail that defendant's counsel referenced as verification that the election process was not corrupted - actually, I'm sorry, it's not - it's not the February 13<sup>th</sup> one, the very last e-mail in the file which is from Jerry Bland. You know, I - I just want to call into question - he said there were no reported outages, performance, or security - security-related issues, and yet she does report at least three, not two, three problems in the system, so I would just like to

note that for the Court. Also, I wanted to say that, something that my client raised to me while we were listening is that when barriers to voting are different to different students, those students are disenfranchised. Tonight we seem to be operating under the standard that students have to be very desperate to vote when you would think that the barriers would be equal for each student to vote, logging on to my computer and voting or going to the Board of Elections and casting a provisional ballot and that they would have complete information about how to do that.

Chief Justice HODSON: But your client is a candidate. I don't understand your argument. How was she disenfranchised?

Mr. DAVIES: I'm sorry, I'm just messing up the term "disenfranchisement." Anyways, I also want to point to the question of numbers that defendant's counsel has raised. He's narrowed it down to about five students, but in - in one of the e-mails which I've been flipping through to try to find, hence all the shuffling of paper, on the February 9<sup>th</sup> Remedy ticket that I believe was submitted by Mr. Gillooly - the problems are isolated in Districts 3 - 3, 4 and 5 - 3 - it affects the numbers in 3, 4, 5 and 6. So if I take the 296 students who may have been affected in this election and we divide it by three - about three for the one-third of students who voted we get about 98 - about 98 students and lower a little bit for the proportion of students that voted and then between those four districts, the 98 people, about 100, it's almost 25 votes. So I don't think -

Chief Justice HODSON: Wait, where are you - why are you dividing by four?

Mr. DAVIES: I'm dividing by four because it's between four districts.

Chief Justice HODSON: Then that's -

Justice JENKINS: But didn't it actually say that mainly students in District 3 only had the option for 4, 5, and 6 so that wouldn't have been a problem for your candidate.

Mr. DAVIES: But it might have affected the people who casted ballots - they might have casted is what I - I think I'm suggesting. If they - and we don't know what proportion of District 3 was allotted to District 5. Also the - the defendant's counsel correctly noted that the burden of proof lies on the plaintiff to demonstrate, you know, that a violation of the Code occurred, but, you know, there's really only so much we can do

prove what the Board of Elections didn't do. I would just like to note that. Finally, I want to say that if the defendant's counsel takes to be as he said overarching, it seems that it would open up the doors for us to cite any section that wasn't originally in the complaint in Sec - in Article V in the Student Code. You know, Section - I do believe Section 501(A) is legitimate grounds for an appeal because, you know, it does encompass all of Article V as it talks about - about the responsibilities of the Board. So do you have any questions?

Justice PHILLIPS: I do.

Mr. DAVIES: Okay.

Justice PHILLIPS: In accordance with your argument against the defense, you said that 501 - 501(A) is a suitable argument to - one that we should issue a re-election

Mr. DAVIES: I do.

Justice PHILLIPS: When, as you go through Article V, you have all these sections that list off the different things that the Board of Elections did do and there's a specific section that lists technical difficulties, 511. So -

Chief Justice HODSON: We're not talking about 511. They failed to cite that in the initial complaint and we're not talking about it.

Justice PHILLIPS: Okay. Thank you.

Mr. DAVIES: So, no further questions? Okay, thank you.

Justice HARDEN: I just wanted to know because it wasn't - it was included in the plaintiff's complaint, it was not - my understand of the section they cited a - just as further evidence that the Board of Elections - 602(A), and it actually deals with post-election procedure, but I just wanted to know if you had anything to say about that at all. I know that it's [unintelligible], and obviously the Board of Elections was aware of some irregularities - students themselves had come up to the defendant and noticed them to him. Was there any argument you had as - as to that at all? I'm not - I'm not going to read it for you but, you know -

Mr. DAVIES: Sure.

Justice HARDEN: -- to go over that Code again. I'd be interested in hearing more about that because it's included in your complaint.

Mr. DAVIES: Sure. Let me find the relevant section in here that relates to -

Justice HARDEN: I mean, if you don't have anything that relates to -

Mr. DAVIES: No, yeah, I - I'm not sure I do. I will say just on Article VI in general, it is post-election procedures and if - if there are technical difficulties found the Board is - the Board has the discretion to decide whether a re-election should be called and in that case I - I believe somewhere which I - I don't know exactly where it is in here, it - you would speak with the candidates that might have been affected in your determination to call for a re-election, and, so, that didn't - that didn't happen, but I guess that's not the prime basis of our argument as well, but thank you for bringing it up.

Justice HARDEN: All right. I was just curious if you had anything on that.

Mr. DAVIES: No, I -

Justice JENKINS: I have a clarification question: So of the 296 possible students that ITS found errors matching their list and housing's list, it is possible that some of these students voted for people in the wrong district because they went online to vote and were registered for the wrong district but they could have voted in the wrong district? Is that true? Or did none of them vote?

Mr. DAVIES: To my knowledge - to my knowledge, it was just students who would have been affected by the in - inconsistency in the information listing, so we don't know how many of those students voted, but I do believe, being in District 3, you could vote although if you were -

Justice JENKINS: For someone in 5 although you didn't live there?

Mr. DAVIES: I believe so. Yes. I believe you can select that if that's what your residential information falls under and voting in District 5. But on - on pain of violation of the Honor Code.

Chief Justice HODSON: I'm going to allow Justice Phil - I thought that Justice Phillips was going to ask for an argument under

Section 511; he's not. I'm going to allow him to ask his question.

Justice PHILLIPS: Sorry. What I was going to clarify is that the argument that the defense made was that you could go through and find an area where the Board of Elections specifically did not follow their duties, right? But then again - but you chose Section 501(A) on the basis of what?

Mr. DAVIES: That the Board has a responsibility to make sure that all students have equal access to voting - voting procedures and legal ballots.

Justice PHILLIPS: And the issuing of provisional ballots on the Board of Elections, doesn't that show the intention of doing that? But doesn't that show that they are following their duties as best as they can?

Mr. DAVIES: Not if they don't advertise it. I mean, do you even know where the Board of Elections office is?

Justice PHILLIPS: It's in the Student Government Suite.

Mr. DAVIES: Yeah, I mean, I - I assume it is, but I don't actually know where it is located in it.

Justice PHILLIPS: Okay.

Justice JENKINS: I wouldn't say the average student knows.

Justice HARDEN: I didn't know.

Justice JENKINS: I didn't know.

Mr. DAVIES: In any case - in any case, that would - your - your argument presumes that students know where it is and that they just have all the information about the provisional ballots. I mean, I think -

Justice PHILLIPS: I'm - I'm not arguing with you about -

Mr. DAVIES: Okay.

Justice PHILLIPS: -- about where the students got their information or how they're getting their information. I'm arguing on the fact that the Board of Elections took action so this isn't - this isn't an issue of them not doing their duty; this is just

them not doing their duty to suit your standards. Is that correct?

Mr. DAVIES: My - when you say my standards -

Chief Justice HODSON: The standards you've articulated.

Mr. DAVIES: The standards I've articulated -

Justice PHILLIPS: Yes.

Mr. DAVIES: - are those of the Code. And if - if we're saying 501(A) is a general umbrella argument, is a general umbrella clause for the rest of Article V, I think I could rebut that on top of providing the provisional ballots, you also have to publicize the voting procedure in 508(C).

Justice JENKINS: And that would somehow be inserted under the general language of - I guess to me the most place for it to be would be "ensuring that the process was not corrupted," that not only would they - if they choose to take provisional ballots, which they have the discretion not to, but if they did because of some sort of irregularity, that it should have been advertised, perhaps other than - do you contend that that the *DTH* is not -

Chief Justice HODSON: I'm reading Section 508(C) and it says: "The Board of Elections must publicize the voting procedures seven days prior to the election. The Board of Elections may use any form of media deemed appropriate to publicize the voting hours and process of voting, including a listing of the polling places and location of and procedure for provisional ballots." So it's your opinion that that's included in the seven days prior?

Mr. DAVIES: Yes, and I - I believe I would say that the only steps taken to publicize were sending an e-mail or calling - getting in contact with the *DTH* in the middle of the election and having them post something on their Website. I'm sorry; could you rephrase the question you had asked?

Justice JENKINS: Oh, I think it was more of me just making a statement to make sure I understood what was going on. I wasn't really - you agreed with me so I assume that I understood.

Mr. DAVIES: Yeah, yeah.

Justice JENKINS: What I was -

Mr. DAVIES: I just wanted to say that I feel that publicizing voting procedure is part and parcel of ensuring a fair process under 501(A).

Justice PHILLIPS: Is there, in your opinion, and this is a - this is a hypothetical question, of course, if you were on the Board of Elections, what other way would you have aggregated listservs of all the e-mails of students participating in the election and sent out an e-mail like that? Where could you have gotten that information from?

Mr. DAVIES: I'm sorry; send out an e-mail like what?

Justice PHILLIPS: So, the Board of Elections deemed that *The Daily Tar Heel* publication is widely read throughout the University, was the best way to get this information out. Is there a better way?

Mr. DAVIES: There is.

Justice PHILLIPS: Okay.

Mr. DAVIES: First of all, I want to say that, you know, that *The Daily Tar Heel* is a widely read publication -

Justice PHILLIPS: But not the Website.

Mr. DAVIES: But not the Website. I just want to point that out. Second, the e-mail correspondence refers to some ability to send a mass e-mail. Now, it doesn't specify to whom that mass e-mail is, but I - I feel like that's maybe an INFORMATIONAL e-mail to the student body. It's referenced multiple times in the e-mail correspondence that someone does have access to - let - let me find one for you.

Mr. GOULD: Can I - I want to point out an error that I made that I think you need to be aware of because I made this error in my argument and I apologize for jumping up now, but I think I spoke that provisional ballots were not required by the Code and I think there is a reading that could say that they are and I wanted to make sure that was brought to your attention because I think I did potentially misspeak on that.

Chief Justice HODSON: Please, could I -

Mr. GOULD: Okay. Section 508(A).

Chief Justice HODSON: 508(A)?

Mr. GOULD: I'm looking at 508(A), third sentence down, or third line down, second half of the line, so I think I did misspoke. Now, those provisional ballots were advertised on the Board of Elections Website in advance so I maintain that they took all proper steps, but I do want to make sure that that wasn't misconstrued and that I didn't misspeak.

Chief Justice HODSON: When were they advertised on the Board's Website?

Mr. GOULD: We don't know.

Justice HARDEN: I have a - is it okay since you're talking about it, is it okay if I ask him a question real quick about it?

Mr. GOULD: I apologize -

Justice HARDEN: Regarding the provisional ballots that were made available -

Mr. GOULD: Yeah.

Justice HARDEN: -- it was my understanding that they did not have any district maps or anything, and then my question would be for the - for a student who are already having trouble being in the correct district because of their address mismatch, is it reasonable to assume that off the top of their heads somehow otherwise that students would know their district they would be able to cast a valid ballot if they did go to provisional, which would seem to me, if not, then perhaps that would be an issue with those provisional ballots and that perhaps the Board of Elections [unintelligible].

Mr. GOULD: What I would say is the Code doesn't require that when you look at that [pause for approximately ten seconds] I would say the way the ballots - the ballots were hung outside the door outside the Board of Elections' office. Next to the ballots was a copy of the Code - the part of the Code which listed the way, I believe - it was at least a listing of the way that the ballots were made up - that the districts were made up. So it was not printed on the actual ballots, but it was easily accessible from where the ballots were.

Justice JENKINS: And one more question. And how did the BoE publicize that provisional ballots were available?

Mr. GOULD: Publicized on the Website and then later on, on election day through the *DTH*.

Justice JENKINS: And you don't know about how far in advance it was put on the Website, the BoE Website?

Mr. GOULD: I don't. I'm sorry.

Justice JENKINS: Because it requires seven days in advance, so that seems to be important to me. Do you know if it was more than seven?

The DEFENDANT: I - I honestly don't remember.

Mr. GOULD: The issue remains, you know, in terms of, you know, whether or not a violation occurs, then was it such a violation that would compromise the integrity of the election or - and we're still talking about the, you know, the vote totals...

Mr. DAVIES: And I calculate the vote totals to maybe be as much as 25 students, which was the margin in question. I'm sorry.

Chief Justice HODSON: I'm sorry. Do you have anything more?

Mr. DAVIES: Sure. No, I mean, I'd just like to say, I mean, the last thing I'd like to argue before taking any more questions you have is that -

Chief Justice HODSON: We're already done with questions now, but go ahead.

Mr. DAVIES: Okay, sure. The last thing I'd like to say is, you know, it - it sounds like what the defendants are asking for is a voter with an exceptional knowledge of the process. They know where the Board of Elections is, they know the URL to the Website, that they know their district, and that they have this, you know, carnal craving such that they'll, you know, like, check their e-mail throughout the day before voting closes to see, you know, if ITS will get back to them, which they did, but if ITS will get back to them, and, you know, it just seems kind of like a literacy test to me that certain people should be privileged to have easier access to ballots than other people.

Chief Justice HODSON: But I don't that, you know, you all, you log onto Student Central, you technically have the same access and when you get to the point where you're not able to vote, and then you have to make a decision, I mean, are you going to vote or are you not? Well, you couldn't do it through Student Central and it's unfortunate, oh no, what else can I do? I mean, you're

just - you're exercising your civic duty here, you know, it's - it's your civic right to vote. I can't - why -

Justice PHILLIPS: There's a thing from Jon Curtis also that addresses this. It says: "One final thought that I have is that the BoE [unintelligible] all the candidate groups, set up an alias e-mail account and send out a mass e-mail for feedback or anecdotes from individuals that tried to vote but encountered a problem. Again, on this latter, I feel quite strongly that deciding not to vote is something they choose to do of their own volition and that they must own their responsibility for choosing that action.

Mr. DAVIES: Yes, and they must also own their responsibility for potentially violating the Honor Code, and I would - I would argue that by not casting a Student Central ballot, they were honoring their responsibility. I'm sorry; was that missing your question?

Justice PHILLIPS: No, it wasn't.

Chief Justice HODSON: That - that's fine.

Mr. DAVIES: And I just want to say one other thing which is that I would think that if it's advertised, however loosely or solidly, if it's advertised that I will have access to Student Central ballots between the hours of, I don't know, 8 and 9, between two times, that if I log on at 8:30 PM before the 9:00 deadline that's - that's again, hypothetical, that I would be able to cast a lawful ballot.

The PLAINTIFF: I don't know if I'm allowed to say anything.

Chief Justice HODSON: No, you're not.

The PLAINTIFF: No? I'm sorry.

Mr. DAVIES: Can she say anything through me?

Chief Justice HODSON: I'll tell you what. We'll let you talk.

The PLAINTIFF: Voting is supposed to take five minutes, and it's supposed to be not a very big part of your day, and as somebody who's been just a voter before, you log on, you vote, it's over. When it becomes an issue where you have to send e-mails to other offices on campus that you may or may not be aware of or go to an office that you might not even know exists the hurdle to voting -

Chief Justice HODSON: I'm sorry. I - I, you know what, if we're going to do this - I'm sorry, I'm doing my Title III Rolodex right now. You're making a legal argument? You're making a factual argument? That should have been limited to the case-in-chief. You should have called her as a witness at that time. We can't take her -

Mr. DAVIES: That's fine. Any other questions?

Chief Justice HODSON: I'm sorry, it's just - and I know I cut you off twice but I don't think there are any other questions. I just - I have one. Defense counsel brought up Section 508; it's not alleged in your complaint.

Mr. DAVIES: Are you asking for a reaction?

Chief Justice HODSON: What - why -

Mr. DAVIES: Sure. I would just say -

Chief Justice HODSON: Do you consider 508 rolled up into your argument - the argument you made earlier?

Mr. DAVIES: The defense counsel made the argument that all of Article V is rolled up into 501(A), so therefore, yes, I do believe 508(C) is rolled into the argument on the grounds of 501(A).

Chief Justice HODSON: Okay, that's fine. All right, thank you very much.

Mr. DAVIES: Thank you.

Chief Justice HODSON: Anything - I - all right, well, hearing the plaintiff's rebuttal, nothing else appearing, we will adjourn. The Court will go into conference now. Our decision will not be announced until it's finalized, but that - that the written opinion, it does, I mean, remember we're all students, and it does take us some time to write the opinions. It'll probably be out in a week and a half would be the earliest. We don't - typically we don't announce the results until we've finished the opinion in the case because there's still a possibility the Board can call a re-election. There's just not any pressing time limits here in this case. All right. Thank you all.

AT WHICH TIME, THE TRIAL WAS ADJOURNED.

Transcript of Trial in *Holgate v. Gillooly*, No. 09 SSC 008  
March 17, 2010

I certify that the above transcript is a true and accurate representation of the trial in *Holgate v. Gillooly*, No. 09 SSC 008.

/s/ Michael R. Gordon  
Michael R. Gordon  
Chief Clerk  
University of North Carolina at Chapel Hill Student Supreme Court