**UNITED STATES DISTRICT COURT**
**DISTRICT OF CONNECTICUT**

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| **LIBERTARIAN PARTY OF CONNECTICUT ET AL.,** | ) | **CIVIL ACTION NO. 3:20-CV-00467 (JCH)** |
| **v.** | ) | |
| **DENISE MERRILL, SECRETARY OF STATE NED LAMONT, GOVERNOR OF CONNECTICUT** | ) | **May 19, 2020** |

**MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION BY INDEPENDENT PARTY AND MICHAEL TELESCA**

In normal times, ballot access for minor parties and their endorsed candidates is difficult but not impossible. A path exists, not as open as it could or should be, but nonetheless not wholly unrealistic. The health emergency has changed everything. The narrow path to ballot access for minor parties is now blocked. Traditional petitioning is foreclosed. Governor Lamont's Executive Order 7LL does not come close to doing enough to provide a meaningful alternative. Connecticut's laws under the present circumstances are severe burdens on the rights of association of the Independent Party of Connecticut, candidates that it would endorse, and voters who would support them. In the absence of a compelling state interest to which the restrictions are narrowly tailored, this Court should hold that the ballot access laws unconstitutionally infringe on first amendment rights and order meaningful relief to ensure that Connecticut voters have choices.

## I. BALLOT ACCESS FOR MINOR PARTY CANDIDATES

### a. Minor Parties can obtain ballot access in the first instance by petitioning, and then based on electoral performance.

The Independent Party of Connecticut (IP) is a minor party in Connecticut as defined by Conn. Gen. Stat. § 9-374. *See generally Independent Party of CT – State Central v. Merrill*, 330 Conn. 689-90, 703-09 (2019) (describing recognition of statewide Independent Party). It was formed in order to provide an alternative to the two major parties and its candidates have won several municipal elections. (Ex. A, Telesca Dec. ¶ 4). Michael Telesca is its chairman and a registered voter who has been affiliated with the party since 2003. (*Id.* ¶ 3). Presently there are four minor parties in Connecticut, meaning that a voter can register as a party member in any town in the state: Green Party, Independent Party, Libertarian Party, Working Families Party.[1]

Although voters anywhere in the state can *register* as minor party members for these four parties, they cannot necessarily *vote* for candidates endorsed by these minor parties. Minor parties cannot nominate candidates by convention for all offices, as can the two major parties. Rather, they can only nominate by convention or other means under their by-laws for races in which a candidate of that minor party received at least 1% of the vote *for that particular office* in the prior election. Conn. Gen. Stat. § 9-372(6). Conn. Gen. Stat. § 9-451 provides that "[t]he nomination by a minor party of any candidate for office. . . and the selection in a municipality by a minor party of town committee members or delegates to conventions may be made in the manner prescribed in the rules of such party, or alterations or amendments thereto, filed with the Secretary of the State in accordance with section 9-374." (*See also* Ex. A, Telesca Dec. ¶ 6). In

[1] Conn. Secretary of the State, *Minor Parties in Connecticut* (available at https://portal.ct.gov/SOTS/Election-Services/Political-PartiesTown-Committe-Rules/Minor-Parties-in-Connecticut); Ex. A, Telesca Dec. ¶ 5.

other words, Conn. Gen. Stat. § 9-451 allows minor parties to nominate candidates for a particular office "in the manner prescribed in the rules of such party" only if the minor party had a candidate for that office in the prior election who received at least one percent of the vote.[2] If they are allowed to nominate by party rules, the nominations are to be filed with the Secretary of the State by September 2, 2020.[3] If a minor party did not have a candidate for that office in the prior election, or if the candidate received less than one percent of the vote, then a minor party candidate can obtain ballot access only by petitioning under the rules in Conn. Gen. Stat. §§ 9-453a et seq.

So, after Ralph Nader received over 1% of the vote for president on the Independent Party line in 2008, the party was able to nominate by convention a candidate for president in 2012 and it was recognized as a statewide party. *See Independent Party of CT – State Central*, 330 Conn. at 703-09. However, when its candidate for president in 2012 failed to receive 1% of the vote, it lost the ability to nominate a candidate by convention in 2016 and did not have a candidate for president in that year. But in 2018, IP-endorsed candidates received over 1% of the statewide vote for governor, secretary of the state, attorney general, comptroller and treasurer, for the 4th and 5th congressional districts, 28 of 36 state senate seats, and approximately 84 of 151 House seats in 2018. (Ex. A, Telesca Dec. ¶ 7). Accordingly, for those specific Congressional and General Assembly seats, in 2020 the Independent Party can nominate by convention under

[2] Major parties, on the other hand, are allowed to nominate by convention regardless of the vote total of their candidate for that office in the prior election, even if the did not nominate a candidate.

[3] SOTS 2020 Election Calendar, https://portal.ct.gov/-/media/SOTS/ElectionServices/Calendars/2020Election/2020-Calendar.pdf?la=en

its by-laws. For President, and all other Congressional and General Assembly seats, it must nominate by petition.

Petitioning rules are found at Conn. Gen. Stat. §§ 9-453a to 9-453u. Petition forms are available from the Secretary of the State's office on the first business day of the year of the election, this year January 2. The forms are on 8-1/2 by 14-inch paper. The front includes the name of the candidate and the town where signers live, and includes columns for signatures, names, addresses, and dates of birth; the back includes the acknowledgement of the circulator. (Ex. A, Telesca Dec. ¶ 9). Separate petition forms are required for each office (except presidential electors and state offices as defined in § 9-372, which are irrelevant for purposes of this election cycle). The person circulating the petition must witness the voter's signature in person and certify to that on the petition. Conn. Gen. Stat. § 9-453j.

In order to be placed on the ballot as a petitioning candidate, whether as a minor party candidate or anyone else, voters equaling one percent of the votes cast for that office at the preceding election, or 7500, whichever is less, must sign the petition. Conn. Gen. Stat. § 9-453d. Voters must sign, print their name and address, and provide their dates of birth for their signatures to be valid. Conn. Gen. Stat. § 9-453a. By law, *id*., the form must contain the following:

WARNING
IT IS A CRIME TO SIGN THIS PETITION
IN THE NAME OF ANOTHER PERSON
WITHOUT LEGAL AUTHORITY TO DO SO
AND YOU MAY NOT SIGN THIS PETITION
IF YOU ARE NOT AN ELECTOR.

The Secretary of the State publishes a table of the number of valid signatures required for each office on her website. (Ex. C).[4] For president, 7500 valid signatures are required. For representatives in Congress, from 2703 to 2892 are required. For state senate, 74 to 528 are required depending on the district. Signatures must be submitted to the town clerks (who often refer them to registrars of voters, § 9-453*l*) in the town where the signers reside for certification. Conn. Gen. Stat. § 9-453i. Parties and candidates try to obtain far more than the minimum number of signatures required to allow for invalid or disqualified signatures; the Independent Party and its candidates' goal is to obtain fifty percent more than the number required. (Ex. A, Telesca Dec. ¶ 8).

Although petitions for minor party candidates were available beginning on January 2, although there generally is little petitioning activity until warmer weather allows effective petitioning when groups may be outside and door-to-door petitioning can be done during daylight hours. (*Id*. ¶ 10). Under the statute petitions must be filed for certification by August 5, 2020.[5] Town clerks have two weeks to review the petitions, then must forward the petitions to the Secretary of the State. *Id*. § 9-453n. The town clerk must certify each name individually and certify that the signer is eligible to vote in the involved election, and that the date of birth of the signer on the petition matches the date of birth in voter records. *Id*. § 9-453k.[6] The Secretary of the State then examines the forms for compliance with § 9-453o. In the case of petitioning candidates who wish to run as endorsed candidates of existing minor parties, "the Secretary shall

[4] https://portal.ct.gov/-/media/SOTS/ElectionServices/Nominating_Petitions_Info/2020/2020-Nominating-Petition-Signature-Requirement.pdf?la=en
[5] SOTS 2020 Election Calendar, https://portal.ct.gov/-/media/SOTS/ElectionServices/Calendars/2020Election/2020-Calendar.pdf?la=en
[6] Accordingly, Connecticut has no presumption of validity of petition signatures; they must be certified individually. Some states presume them valid and will review them only upon a challenge.

approve the petition only if it meets the signature requirement and if a statement endorsing such candidate is filed in the office of the Secretary by the chairman or secretary of such minor party not later than four o'clock p.m. on the sixty-second day before the election," *id.* § 9-453o(b), this year September 2, 2020.[7]

**b. Ballot Access During the Health Emergency**

After declaration of the health emergency and stay at home orders on March 20, 2020, Secretary Merrill on March 28, 2020, sent a memorandum to Gov. Lamont, legislative leaders, and others, telling them "we have an urgent need to adjust our method of allowing candidates to petition on to both the August primary election ballot and the November general election ballot." (Ex. D, Merrill Memorandum). She explained that for petitioning candidates for the general election – including those endorsed by minor parties for offices for which it did not have automatic ballot access – and primary challengers, "[b]oth of those processes require, by law, direct person to person contact in order to collect the signatures, the signatures to be delivered to registrars or town clerks in town halls that are now largely closed, verification by local election workers who are currently largely working from home, delivery to my office, and tabulation by workers in my office who are also largely working from home." (*Id*.) She concluded, with emphasis added, "[g]iven the nature of the coronavirus, both petitioning processes present an opportunity for the virus to spread *and are not feasible on the timeline required by statute*." (*Id*.). She proposed a reasonable alternative, insofar as the Independent Party is concerned: "For the general election, my recommendation is to again eliminate any path to ballot access via

[7] SOTS 2020 Election Calendar, https://portal.ct.gov/-/media/SOTS/ElectionServices/Calendars/2020Election/2020-Calendar.pdf?la=en

petitions as a minor party or petitioning candidate for the November general election ballot. Instead, grant automatic ballot access for all races in November to any third parties that already have statewide ballot access, currently the Green Party, the Independent Party, the Libertarian Party, and the Working Families Party." (*Id.* at 2-3).

According to a media report, "[h]er proposals drew a cool response, and as a result Merrill wrote a short follow-up letter to Lamont and legislators on April 9, saying: 'From the feedback I have received, it is my understanding that those suggestions, for a variety of reasons, are not viable. That said, if you would like to develop alternative ideas, I am available to assist you.'" [8] The "variety of reasons" has not been publicly revealed.

On May 11, 2020, six weeks after Secretary Merrill raised the issue, Gov. Lamont issued Executive Order 7LL, finding "there exists a compelling interest in reducing the risk of transmission of COVID-19 among candidates seeking election, their supporters who are seeking to contact potential voters and the public at large." (Ex. E). The order further stated:

> WHEREAS, the process of qualifying for ballot access through in-person petitioning as required under Title 9 of the General Statutes is a basic and vital requirement of our state constitution[9] and our election laws, the purpose of which is to ensure that voters have the opportunity to choose among viable candidates who have qualified for the ballot based on a minimum threshold of support, and to promote an election that is orderly, fair and transparent; and
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> **WHEREAS,** the COVID-19 pandemic may make it more difficult for candidates to meet the existing statutory petitioning requirements because fewer people are going outside or to public places and some people may be less willing to have in-person interactions with candidates or their supporters; and

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[8] Lender, *Candidates Gathering Signatures for Ballot Endangered by COVID-19, Lawsuit Says; Election Official Proposes Dropping Requirement This Year*, Hartford Courant (Apr. 24, 2020) (available at https://www.courant.com/politics/government-watch/hc-pol-lender-petitioners-endangered-by-covid19-20200424-xswmuykztza3rptxw2uvawtlhe-story.html).

[9] The state constitution is silent on the issue of ballot qualification. Petitioning for ballot qualification is not mentioned in it, only in Title 9 of the General Statutes.

> **WHEREAS,** reducing the number of in-person interactions that might otherwise occur if no modifications were made to the existing petitioning statutes may help further reduce the potential transmission of COVID-19 during the ongoing public health emergency. . . .

Executive Order 7LL made the following changes for the 2020 election cycle insofar as they concern the claims raised in this case. First, the number of petition signatures required for ballot access under § 9-453d was reduced by thirty percent, from 1% to 0.7% of the votes for that office in the prior election or, for president, from 7500 signatures to 5250. Second, the deadline for submitting signatures was extended by two days, from August 5, 2020, to August 7, 2020.[10] Third, a petition signature will be counted without acknowledgement by a circulator if it is mailed or delivered electronically to the candidate who then files the document with the town clerk. If more than one signature is on a page, however, then the complete formalities from Conn. Gen. Stat. § 9-453a to § 9-453o must be met including notarization (although remote notarization will be permitted). The order also states that it is not meant to preclude petitioning by traditional means (although petitioning by traditional means would appear to violate other orders, and Secretary Merrill herself said not traditional petitioning within existing time limits was "not feasible").[11]

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[10] A two-day extension for the minor parties seems trivial, and it is. However, primary challenges to party-endorsed candidates have only fourteen days to gather signatures.

[11] The process leading to Gov. Lamont's order may provide a clue as to why Secretary Merrill's March 28, 2020, proposals were not accepted. "Senate Republican leader Len Fasano of North Haven said that all four caucuses — Democrat and Republican — in the state House of Representatives and Senate discussed the issue with Lamont's staff, state elections officials, and the attorney general's office before Lamont issued his order in an attempt to improve the process during a once-in-a-generation health emergency. 'This was a collaborative effort,' Fasano said Wednesday. 'It may not be the best, but given the circumstances we have, it is the best we could come up with at this time.'" Keating, *Lamont executive order changes signature rules for political candidates trying to get on ballots*, Hartford Courant (May 13, 2020) (available at https://www.courant.com/coronavirus/hc-news-coronavirus-political-candidates-signatures-20200513). The executive order makes identical changes for minor party nominations and for

Last week, the Secretary of the State made available a memorandum explaining how she would implement Executive Order 7LL. (Ex. F). It appears to track the executive order's language substantively. It states that petition signatures may be gathered by mail, email, or social media. It also describes how they are to be gathered by candidates and filed as a single electronic package with local clerks.[12]

## II. STANDARD FOR PRELIMINARY INJUNCTION

primary challenges to party-endorsed candidates, such as, in this cycle, members of the General Assembly. It is unlikely that legislators are deeply concerned about ballot access for minor parties, particularly since it is not unusual that some of the minor parties have regularly cross-endorsed major party candidates and, to the knowledge of the undersigned, no candidate in recent memory has lost a close election for General Assembly due to votes going to a minor party candidate who was running in opposition to both major party candidates. Easing rules for primary challenges to party-endorsed General Assembly candidates, on the other hand, may present a different set of concerns. There are at least three state senate races where a possible primary challenge to an incumbent is being considered have been publicly reported. However, the question of whether minor party candidates have a modicum of support -- at least where their party has statewide recognition -- is a different issue from ballot access for primaries. Secretary Merrill's approach as to minor parties was endorsed in a different context in *Green Party v. N.Y. State Bd. of Elections*, 389 F.3d 411, 422 (2d Cir 2004) ("By placing statewide candidates on the ballot in the 2002 election, all of the plaintiffs [political parties] have demonstrated a 'modicum of support' sufficient to overcome the state's broad latitude in controlling frivolous party registration of tiny fractional interests," because "the ability to meet the requirements for placing a candidate on the statewide ballot is enough of an indication of support to overcome the state's interest in preventing voter confusion.").

[12] The submission of materials to town clerks by email raises a cybersecurity concern. Due to malware, phishing and hacking concerns, the U.S. Cybersecurity and Infrastructure Security Agency (CISA) of the Department of Homeland Security (DHS), and the U.S. Treasury Financial Crimes Enforcement Network (FinCEN), have cautioned state and local government officials to be wary of opening unsolicited attachments even from known senders. CISA has issued particular warnings regarding the increased threat of cyberattacks such as phishing during the current pandemic. DHS designed elections infrastructure as "critical" in recognition that "its incapacitation or destruction would have a devastating effect on the country." (Ex. H). Presumably this has been considered by Connecticut authorities and all 169 town clerks.

Interim injunctive relief "is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). "A party seeking preliminary injunctive relief must establish: (1) either (a) a likelihood of success on the merits of its case or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in its favor, and (2) a likelihood of irreparable harm if the requested relief is denied." *Time Warner Cable, Inc. v. DIRECTV, Inc*., 497 F.3d 144, 152-53 (2d Cir. 2007). As this Court has observed:

> If a party seeks a mandatory injunction, i.e., an injunction that alters the status quo by commanding the defendant to perform a positive act, he must meet a higher standard. "[I]n addition to demonstrating irreparable harm, '[t]he moving party must make a clear or substantial showing of a likelihood of success' on the merits, . . . a standard especially appropriate when a preliminary injunction is sought against government." *D.D. ex rel. V.D. v. New York City Bd. of Educ*., 465 F.3d 503, 510 (2d Cir. 2006) (citations omitted). Such a heightened standard is also applicable where "the issuance of an injunction will render a trial on the merits . . . partly meaningless, either because of temporal concerns . . . or because of the nature of the litigation, say, a case involving the disclosure of confidential information." *Tom Doherty Associates, Inc. v. Saban Entertainment, Inc*., 60 F.3d 27, 35 (2d Cir. 1995) (citing *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1026 (2d Cir. 1985), *overruled on other grounds, O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 n.2, 107 S. Ct. 2400, 96 L. Ed. 2d 282 (1987)).

*Does 1 et al. v. Enfield Pub. Schools*, 716 F. Supp. 2d 172, 183-84 (D. Conn. 2010) (Hall, J.). *See also Libertarian Party of Conn. v. Bysiewicz*, 2008 U.S. Dist. LEXIS 97970, at *6 (D. Conn. Dec. 2, 2008); *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985) (mandatory injunctions should be entered "only upon a clear showing that the moving party is entitled to the relief requested, or where extreme or very serious damage will result from a denial of preliminary relief").

## III. CONNECTICUT'S STATUTES REGULATING BALLOT ACCESS AS MODIFIED BY EXECUTIVE ORDER 7LL, IN THE CONTEXT OF THIS DECLARED HEALTH EMERGENCY SEVERELY BURDEN FIRST

**AMENDMENT RIGHTS AND ARE NOT NARROWLY TAILORED TO FURTHER A COMPELLING STATE INTEREST.**

**A. Connecticut Severely Burdens First Amendment Rights by Requiring Petition Signatures for Endorsed Candidates of Recognized Minor Parties Under the Present Circumstances.**

"A State's broad power to regulate the time, place, and manner of elections 'does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens.'" *Eu v. San Francisco County Democratic Cent. Comm*., 489 U.S. 214, 222 (1989) (quoting *Tashjian* v. *Republican Party of Connecticut*, 479 U.S., 208, 217 (1986)). "[T]he right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast for one party … at a time when other parties are clamoring for a place on the ballot." *American Party of Texas v. White*, 415 U.S. 767, 781 n.11 (1974). "Laws restricting a party's ballot access thus burden two rights: 'the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms.'" *Libertarian Party of Ill. v. Scholz*, 872 F.3d 518, 523 (7th Cir. 2014) (quoting *Williams v. Rhoades*, 393 U.S. 23, 30 (1968)).

"Ballot access restrictions that unduly 'limit the field of candidates from which voters might choose' may be unconstitutional. *Anderson v. Celebrezze*, 460 U.S. 780, 786-87, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983)." *Maslow v. Bd. of Elections*, 658 F.3d 291, 297 (2d Cir. 2011).[13] To determine whether Connecticut's ballot-access restrictions violate the First and

[13] As *Maslow* noted, "the Supreme Court has focused almost exclusively on the 'field of candidates available for voters to choose from at a general election, not the field vying for a party's nomination." *Id*. (citing *New York State Board of Elections v. Lopez Torres*, 552 U.S. 196, 207 (2008); *Norman v. Reed*, 502 U.S. 279 (1992) (addressing signature requirement for new parties to appear on general election ballot); *Munro v. Socialist Workers Party*, 479 U.S.

Fourteenth Amendments, this Court must apply the balancing test set forth in *Anderson*, 460 U.S. at 789 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992). Rather than bright-line rules, under the *Anderson/Burdick* test:

> it is useful to look to "a more flexible standard" in which "the rigorousness of our inquiry into the propriety of a state [action] depends upon the extent to which a challenged [action] burdens First and Fourteenth Amendment rights." *Id*. at 434. When such "rights are subjected to severe restrictions, the [action] must be narrowly drawn to advance a state interest of compelling importance"; but when such rights are subjected to less than severe burdens, "the State's important . . . interests are generally sufficient to justify the restrictions." *Id*. (internal quotation marks and citations omitted); *see also Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983) (directing courts to balance "the character and magnitude of the asserted injury" against "the precise interests put forward by the State as justifications for the burden imposed"); *accord Schulz v. Williams*, 44 F.3d 48, 56 (2d Cir. 1994).

*Monserrate v. N.Y. State Senate*, 599 F.3d 148, 155 (2d Cir. 2010); *see also Price v. New York State Bd. of Elections*, 540 F.3d 101, 109 (2d Cir. 2008) ("where the burden imposed by the law is non-trivial, we must weigh the State's justification against the burden imposed."); *Common Cause/New York v. Brehm*, 2020 U.S. Dist. LEXIS 4911, at *69-*70 (S.D.N.Y. Jan. 10, 2020) (Nathan, J.).

Under the *Anderson/Burdick* test, the level of scrutiny varies on a sliding scale with the extent of the injury. When, at the low end of the scale, the law "imposes only 'reasonable, nondiscriminatory restrictions' upon First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions."

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189 (1986) (addressing requirement that small-party candidates receive minimum number of blanket primary votes to appear on general election ballot); *Anderson*, 460 U.S. at 782 (addressing filing deadline for presidential candidates to appear on general election ballot); *American Party of Texas v. White*, 415 U.S. 767 (1974) (addressing convention and signature requirements for small parties to appear on general election ballot); *Jenness v. Fortson*, 403 U.S. 431, 91 S. Ct. 1970, 29 L. Ed. 2d 554 (1971) (addressing signature requirement for independent candidates to appear on general election ballot); *Williams*, 393 U.S. at 29 (addressing signature requirement for small parties to appear on general election ballot).

*Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788, 788-89 n.9). But when the law places "severe" burdens on the rights of political parties, candidates, or voters, "the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Id*. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)); *see also Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 451 (2008) ("Election regulations that impose a severe burden on associational rights are subject to strict scrutiny, and we uphold them only if they are 'narrowly tailored to serve a compelling state interest.'").

In ballot access cases, "[t]he Constitution requires that access to the electorate be real, not 'merely theoretical.'" *American Party of Texas*, 415 U.S. at 783 (1974) (quoting *Jenness* v. *Fortson*, 403 U.S. 431, 439 (1971)). "In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters." *Bullock v. Carter*, 405 U.S. 134, 143 (1972). State law must "afford[] minority political parties a real and essentially equal opportunity for ballot qualification." *Id.* at 788. While the Supreme Court has upheld ballot access laws if they make it neither "impossible or impractical" to qualify, *American Party of Texas*, 415 U.S. at 783, "[t]he Supreme Court has said that if state law grants 'established parties a decided advantage over any new parties struggling for existence and thus place[s] substantially unequal burdens on both the right to vote and the right to associate' the Constitution has been violated, absent a showing of a compelling state interest." *Green Party v. N.Y. State Bd. of Elections*, 389 F.3d 411, 419-20 (2d Cir. 2004).

The plaintiff bears the burden of proof on the first step in the *Anderson/Burdick* test, establishing (1) the extent of the burden caused by the regulation or law at issue. The defendant bears the burden of (2) identifying its interest in the regulation and (3) the extent to which that interest justifies that state regulation. *Burson v. Freeman*, 504 U.S. 191, 199 (1992); *Nader v.*

*Brewer,* 531 F.3d 1028, 1039-40 (9th Cir. 2008); *Lopez Torres v. New York State Bd. of Elections,* 462 F.3d 161, 203 (2d Cir. 2006) ("the burden of demonstrating that the current scheme reasonably serves the asserted interests falls on defendants"), *rev'd on other grounds* 552 U.S. 196 (2008); *Patriot Party v. Allegheny Cnty. Dept. of Elections*, 95 F.3d 253, 267-68 (3d Cir. 1996*)*.

### 1. Protected Rights Are Unreasonably Burdened When State Laws Freeze Ballot Access.

Connecticut's signature requirements burden "two different, although overlapping kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams v. Rhodes,* 393 U.S. 23, 30 (1968). "Both of these rights, of course, rank among our most precious freedoms." *Id*. The right of association, which includes the "right of citizens to create and develop new political parties," is obviously diminished if a party can be kept off the ballot. *Norman*, 502 U.S. at 288; *see also Illinois State Board of Elections v. Socialist Workers Party,* 440 U.S. 173, 184 (1979). Ballot-access restrictions also implicate the right to vote because in Connecticut, except for local referenda in some towns, "voters can assert their preferences only through candidates or parties or both." *Lubin v. Panish*, 415 U.S. 709, 716 (1974). "It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues." *Id*. A campaign is a platform for the expression of policy views, and a candidate "serves as a rallying point for like-minded citizens." *Anderson*, 460 U.S. at 787-88.

States may require candidates to demonstrate "a significant modicum of support" before allowing them access to the general-election ballot, so that the ballot does not become unmanageable. *Jenness* v. *Fortson*, 403 U.S. 431, 442 (1971). However, restrictions that

"operate[s] to freeze the political status quo" are severe and warrant strict scrutiny. *Martin*, 649 F.3d at 685 (quoting *Jenness*, 403 U.S. at 438). Likewise, "a law severely burdens voting rights if the burdened voters have few alternate means of access to the ballot," and such a "law impermissibly restricts 'the availability of political opportunity.'" *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 921 (6th Cir. 1998) (quoting *Anderson*, 460 U.S. at 789). "The hallmark of a severe burden is exclusion or virtual exclusion from the ballot." *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 574 (6th Cir. 2016).

**2. The State is Effectively Precluding In-Person Petitioning for Ballot Access So the Most Effective Method for Gathering Signatures is Not Available.**

This case does not present the question whether Connecticut's ballot access statutes for minor party candidates on their face are unconstitutionally burdensome. They are restrictive, to be sure, although less restrictive than those for primary candidates for the major parties. But there is no need at this time to consider a facial challenge to the statutes. Rather, this case presents the question whether the preclusion of a core first amendment activity – in-person petitioning to obtain voter signatures for ballot access -- with the alternatives allowed by Executive Order 7LL -- unconstitutionally burden first amendment interests *under the particular circumstances* present in Connecticut at this time.

The starting place must be that traditional petitioning is, in Secretary Merrill's words, "not feasible." (Ex. D, at 2). Gov. Lamont's executive stay home and social distancing orders – as sensible as they may be – effectively preclude a core first amendment activity, in-person petitioning.

Petitioning is "core political speech," because it involves "interactive communication concerning political change." *Buckley v. American Constitutional Law Foundation, Inc*., 525

U.S. 182, 186 (quoting *Meyer v. Grant*, 486 U.S. 414, 422 (1988)). First Amendment protection for such interaction is "at its zenith." *Id. See also Nader v. Blackwell*, 545 F.3d 459, 474 (6th Cir. 2008). *Meyer* explained why petitioning (in the context of seeking signatures for a ballot initiative) is core protected speech:

> The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change. Although a petition circulator may not have to persuade potential signatories that a particular proposal should prevail to capture their signatures, he or she will at least have to persuade them that the matter is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate. This will in almost every case involve an explanation of the nature of the proposal and why its advocates support it. Thus, the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as "core political speech."

*Meyer*, 486 U.S. at 421-22.[14] Petitioning is "the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication." *Meyer*, 486 U.S. at 424. "In-person petitioning is important to the Independent Party because it allows a give and take and a discussion of ideas, it allows us to answer voters' questions, and it helps us to persuade voters that they should give a third party a try." (Ex. A, Telesca Dec. ¶ 11). As the political director of the Alliance Party, a national third party with which the Independent Party of

[14] As *Meyer* observed:

> "'The securing of sufficient signatures to place an initiative measure on the ballot is no small undertaking. Unless the proponents of a measure can find a large number of volunteers, they must hire persons to solicit signatures or abandon the project. I think we can take judicial notice of the fact that the solicitation of signatures on petitions is work. It is time-consuming and it is tiresome -- so much so that it seems that few but the young have the strength, the ardor and the stamina to engage in it, unless, of course, there is some remuneration.'"

*Meyer*, 486 U.S. at 423-24 (quoting *State* v. *Conifer Enterprises, Inc.*, 82 Wash. 2d 94, [104,] 508 P.2d 149[, 155] (1973) (Rosellini, J., dissenting)). The Independent Party generally uses volunteers has used paid circulators in part for statewide and Congressional races.

Connecticut is affiliated, Timothy P. Cotton, states, "In person petitioning allows interactive communication between the voter and the petitioner regarding both the political views of the candidate, the need to provide alternatives to the two-party system, and assurance that the request for the voter's signature and date of birth is legitimate." (Ex. B, Cotton Dec. ¶ 5).[15] "Candidates typically gather these signatures door-to-door, or in high-traffic public places like outside malls, grocery stores, crowded school or community events, public rallies, or places of worship." *Esshaki v. Whitmer*, Civ. No. 2:20-cv-10831, 2020 U.S. Dist. LEXIS 68254, at *19 (E.D. Mich. April 20, 2020), *aff'd in part and reversed in part*, No. 20-136, 2020 U.S. App. LEXIS 14376 (6th Cir. May 5, 2020).

Petitioning has not been identified as an essential business in the state's stay-home order, Executive Order 7H (Mar. 20, 2020), so it appears that working as a petitioner has been unlawful for a significant portion of the petitioning period for petitioning candidates and is likely to continue to be for the foreseeable future. Further, as "in-person interactions in social, recreational, athletic, business and entertainment settings also continue to pose a risk of transmission of COVID-19, measures to limit such interactions must also be extended for several weeks." Executive Order 7X (Apr. 10, 2020). "As I understand Governor Lamont's executive orders, we are presently precluded from directly approaching voters closer than six feet to obtain signatures, but direct contact is required to effectively petition." (Ex. A, Telesca Dec. ¶ 12). "The Secretary of the State appears to agree in her March 28, 2020 memorandum, as she states that petitioning requires, 'by law, direct person to person contact in order to collect the

[15] Cotton is working with Telesca and the Independent Party of Connecticut to achieve ballot access in Connecticut for the Alliance Party's endorsed candidate for President, Roque de la Fuente. (Ex. B, Cotton Dec. ¶ 1). He is a 30-year professional political operative specializing in field operation strategies at levels ranging from Town Council to President, "implementing successful strategies to meet each campaign's individual needs and obstacles." (*Id.* ¶ 2).

signatures, the signatures to be delivered to registrars or town clerks in town halls that are now largely closed, verification by local election workers who are currently largely working from home, delivery to my office, and tabulation by workers in my office who are also largely working from home. Given the nature of the coronavirus, both petitioning processes present an opportunity for the virus to spread and are not feasible on the timeline required by statute." (*Id.*). Accordingly, insofar as in-person petitioning is a core first amendment right, the executive orders undeniably severely burden it.

Regardless of the executive orders, it is simply not reasonable for petition signature requirements designed for normal times to govern access to the ballot in a global pandemic caused highly communicable infectious disease. "Given the nature of the coronavirus, both petitioning processes present an opportunity for the virus to spread *and are not feasible on the timeline required by statute*." (Ex. D, at 2, Merrill Memorandum) (emphasis added). More than five months after the virus arrived in America, the pandemic remains a public health crisis without any modern equivalent, and the situation remains unpredictable. Much is still unknown about the nature of the virus, its transmission, and its effects. There is still no vaccine, no cure and treatment protocols are still being developed. Because it has been shown that one can carry and spread the virus without any apparent symptoms, every encounter with another person—particularly a stranger—poses a risk of infection. And because it is not altogether clear how long the virus can survive on various surfaces, touching a pen, a clipboard, or a piece of paper that has recently been touched by another person also poses a risk of infection.

Circulating a petition during this crisis risks the health and safety not only of the person requesting the signature but also the health and safety of the person who is signing the petition, the signer's family, and potentially the entire community. Candidates, including incumbents,

who quite reasonably and in good faith waited until warmer weather to begin or scale up signature-gathering efforts will be denied a spot on the ballot. Their supporters will not have an opportunity to "band together in promoting among the electorate candidates who espouse their political views." *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000).

Accordingly, while Executive Order 7LL seems to allow the continued use of traditional petitioning, and Secretary Merrill asserts that it is still allowed if done consistently with "social distance protocols" without explaining how that might work (Ex. F), there can be no serious dispute that traditional petitioning is not available – or "not feasible" in Secretary Merrill's words. (Ex. D). Direct contact is the key to effectively petition. (Ex. A, Telesca Dec. ¶ 12). "In-person petitioning appears not to be allowed under current Connecticut law, but even if it is, it is highly unlikely to successfully obtain the required number of signatures. Leaders have encouraged citizens to avoid in-person contact as much as possible. People will be hesitant to accept papers from strangers and will not likely answer a door knock from an unknown masked stranger." (Ex. B, Cotton Dec. ¶ 6). "[U]ntil a vaccine is available, voters are likely to continue practicing social distancing and avoiding any physical hand contact with other persons or objects." *Libertarian Party of Ill. v. Pritzker*, 2020 U.S. Dist. LEXIS 71563, at *16 (N.D. Ill. Apr. 23, 2020).

Under typical conditions, candidates' abilities to obtain a significant number of signatures from voters in their community would be a valid indication that they have earned the "modicum of support" required to appear on the ballot. *Jenness*, 403 U.S. at 442. But today, candidates' abilities to collect the requisite signatures by traditional means speaks only to their willingness to violate the state's directives while potentially jeopardizing the health of the very constituents they hope to represent. Secretary Merrill on March 28 quite correctly concluded that petition

gatherers going door to door could potentially spreading coronavirus. (Ex. D, at 3). "[I]f a candidate seeks to obtain signatures on nomination papers in the traditional ways, he or she reasonably may fear that doing so might risk the health and safety not only of the person requesting the signature but also of the persons who are signing, of the families with whom they live, and potentially of their entire community." *Goldstein v. Secretary of the Commonwealth*, 484 Mass. 516, 526, 125 N.E.3d 560 (2020). "Suffice it to say that, during the state of emergency, the traditional venues for signature collection are unavailable: few people are walking on public streets in town centers; malls are closed, as are all but essential businesses; restaurants provide only take-out food or delivery; public meetings, if held at all, are conducted virtually; and the vast majority of people are remaining at home." *Id.*

But to the extent that Connecticut law regulates ballot access through acquiring in-person or "wet" signatures, requiring them without an alternative that is not more burdensome plainly would be unconstitutional. To our knowledge, every federal court that has addressed signature requirements so far has found that in-person or "wet" signature requirements for ballot-access impose severe burdens on candidates' rights during the time of this pandemic. *See Garbett v. Herbert,* Civ. No. 2:20-cv-245-RJS, 2020 U.S. Dist. LEXIS 75853, at *33 (D. Utah Apr. 29, 2020) ("On balance, considering the current pandemic and the totality of the State's emergency measures to combat it, Utah's ballot access framework as applied this year imposed a severe burden on Garbett's First Amendment rights. In light of nearly all public events being canceled, orders for people to stay six feet apart and to stay home, and the extraordinary impact on nearly all aspects of everyday life, it is difficult to imagine a confluence of events that would make it more difficult for a candidate to collect signatures."); *Libertarian Party of Ill. v. Pritzker*, Civ. No. 1:20-cv-2112, 2020 U.S. Dist. LEXIS 71563, at *12 (N.D. Ill. Apr. 23, 2020) ("The

combined effect of the restrictions on public gatherings imposed by Illinois' stay-at-home order and the usual in-person signature requirements in the Illinois Election Code is a nearly insurmountable hurdle for new party and independent candidates attempting to have their names placed on the general election ballot."); *Esshaki v. Whitmer*, Civ. No. 2:20-cv-10831, 2020 WL 1910154 at *19 (E.D. Mich. April 20, 2020) ("The reality on the ground for Plaintiff and other candidates is that state action has pulled the rug out from under their ability to collect signatures."), *aff'd in part and reversed in part*, No. 20-136, 2020 WL 2185553 at *1 (6th Cir. May 5, 2020) ("The district court correctly determined that the [ballot-access restrictions] imposed a severe burden on the plaintiffs' ballot access, so strict scrutiny applied…").

One state court that applies an analogous framework similarly found a severe burden. *See Goldstein v. Secretary of the Commonwealth*, , 484 Mass. 516, 125 N.E.3d 560, 571 (2020); *see also Faulkner v. Va. Dep't of Elections*, 2020 Va. Cir. LEXIS 70, at *3 (Va. Cir. Ct. Mar. 25, 2020) ("In normal circumstances, a signature requirement in order for an individual to be placed on the ballot is a light burden. However, the circumstances as they exist in the Commonwealth o Virginia and across the United States are not normal right now. Under these circumstances, and as applied to the Plaintiff, and necessarily to all other Republican candidates for the 2020 primary election ballot for U.S. Senate in Virginia, the burden imposed by Va. Code § 24.2-521(1) is significant, as it precludes them from freely associating at the highest level with the political party of their choice.") (citations omitted).

### 3. Executive Order 7LL Does Not Remedy the Severe Burden on Plaintiffs' Right to Petition.

We do not quarrel with the governor's decision to enter orders that effectively preclude in-person petitioning in favor of public health – few reasonable people during this crisis would sign traditional petitions upon approach by a circulator anyway. But that is not the issue.

Connecticut's laws require petition signatures for certain minor party candidates. Having precluded the core first amendment right of in-person petitioning to gain ballot access, Executive Order 7LL simply substitutes one serious burden for another.

The Supreme Court has already considered the question of alternatives to severely burdening first amendment rights in a petitioning case involving whether the state could preclude paid petitioners. *Meyer*, 486 U.S. at 424. The state argued that there were "other avenues of expression" available, just as the state may argue here that there are other means for minor parties to obtain ballot access apart from direct in-person petitioning. The Court declined that argument:

> That appellees remain free to employ other means to disseminate their ideas does not take their speech through petition circulators outside the bounds of First Amendment protection. Colorado's prohibition of paid petition circulators restricts access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication. That it leaves open "more burdensome" avenues of communication, does not relieve its burden on First Amendment expression. *FEC* v. *Massachusetts Citizens For Life, Inc.*, 479 U.S. 238 (1986). Cf. *Citizens Against Rent Control* v. *Berkeley*, 454 U.S. 290, 296, 299, 70 L. Ed. 2d 492, 102 S. Ct. 434 (1981). The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.

*Meyer*, 486 U.S. at 424.

The alternative in Secretary Merrill's March 28, 2020, would certainly pass constitutional muster as to the minor parties. But those in Executive Order 7LL do not. In short, they are unproven, expensive, and highly unlikely to lead to successful minor party ballot access. "Executive Order 7LL allows for signatures to be sought and received by mail or electronically. Either of these would be extremely burdensome and unlikely to lead to successfully qualifying for ballot access at least for minor parties." (Ex. B, Cotton Dec. ¶ 7).

The threshold problem is one of procedures and experience. None of the executive branch and legislative leaders who collaborated to issue Executive Order 7LL have ever had to

petition for ballot access – they are members of major parties. Cotton, the political director of the Alliance Party, describes the problem:

> 8. First and most importantly, there is no experience with or "playbook" for obtaining petition signatures by mail or electronically. Successful ballot access campaigns are built on tried and true practices like petitioning door-to-door, in public spaces, and where large numbers of people are present. So far as I know, nowhere in the United States prior to this emergency allowed electronic signatures for statewide candidates except Arizona, and that process is hosted directly on the Secretary of the State's website. Put simply, without experience a successful electronic petition drive at the numbers required in Connecticut could only succeed, if at all, with months of planning, evaluation and training.
>
> 9. Voters are not accustomed to signing petitions electronically and reasonably may be skeptical of the authenticity of such a request, particularly where Connecticut requires the voter to provide personal identifying information including date of birth.
>
> 10. We cannot switch from the expectation of traditional petitioning to electronic petitioning this quickly, if we could at all. We do not have the infrastructure to do so. If a minor party had months to prepare for this with consultants experienced in direct mail or electronic advertising with the significant resources required, we might be able to craft some sort of process, train staff or volunteers, and at least evaluate the possibility. But we do not. It simply is not feasible to set up a process likely to lead to a successful result in the time allowed.

(Ex. B, Cotton Dec. ¶¶ 8-10).

Executive Order 7LL allows sending and receiving petitions by mail. This option is far more expensive than in-person signature gathering, and highly unlikely to be successful without a massive expenditure of funds that minor parties simply do not have and even then would probably not work. Simply put, it requires too much of potential signers. *See* Lowenstein & Stern, *The First Amendment and Paid Initiative Petition Circulators: A Dissenting View and A Proposal*, 17 Hastings Const. L.Q. 175, 206 (1989) ("Direct mail is much more expensive than paid petition circulators. Recipients are not likely to sign and return the petitions . . . . Whereas the course of least resistance in a shopping mall may be to sign when asked, signing and returning a petition by mail takes significantly more effort than throwing away the solicitation

letter."). "There is no Connecticut experience with petitioning by mail or electronically, as it has never been allowed. However, it is highly unlikely to be successful as face-to-face petitioning is often the only way that a canvasser can encourage and answer questions of a voter, and assure a voter that the request is legitimate." (Ex. A, Telesca Decl. ¶ 14).

Direct mail is a relatively ineffective means of communication compared to in-person. A extraordinarily successful mail campaign is one that generates a 5% response rate, and according to the industry the average is 4.4%. (*Id.* ¶ 15). Other industry data suggests a lower figure when mail to businesses and consumers are separated. "According to a 2012 report issued by the Direct Marketing Association, the average response rate for a direct mail letter sent to an existing customer list is 3.4 percent. The same type of direct mail piece sent to a list of people who were not yet customers yields an average 1.2 percent response rate." [16] Of course, this data is in the context of asking people to do something simple – call a vendor, write a check, or something of that nature, in which the offer can provide a financial incentive to respond. It has never been done in the context of petitioning, asking a voter to fill out and sign a form with personal information, place it in a stamped envelope and mail it. "Envelope-sized direct mail letters achieve a 3.4 percent response rate when mailed to a house [existing customer] list, and a 1.28 percent response rate when mailed to a prospect list."[17] There would be additional

[16] Grunert, The Average Success Rate of Direct Marketing, AZ Central (available at https://yourbusiness.azcentral.com/average-success-rate-direct-marketing-21267.html) (last accessed May 15, 2020). Other data are similar. "The response rate to direct mail pieces is 3.7%, as opposed to 2% mobile, 1% email, 1% social media, and 0.2% internet display." Ballentine, Ultimate Guide to 2016 Online and Direct Marketing Statistics (available at https://www.ballantine.com/ultimate-guide-2016-marketing-statistics/) (last accessed May 15, 2020).

[17] *Id.* "The average person receives 16 pieces of traditional direct mail per week. For every 16 pieces of direct mail marketing received, adults receive about 1 personal or business envelope. More than half of unsolicited direct mail is thrown out without being opened." https://bmsdirectinc.com/direct-mail-statistics/.

expense for other offices, as under state law petitions can only list one office. And, amazingly, only one signature can be on a petition returned by mail. This means that every voter in a household would have to get a separate petition, multiple pieces of mail to one address.

A party or candidate could possibly send out more than one petition in a single mailing, but that would only increase the expense and risk overwhelming voters. For example, a party might send petitions to a voter in a town where it does not already have ballot access for any race. There would be separate petitions for president, U.S. Representative, state senator, state house, and registrar of voters. Five separate petitions would have to be signed and returned to the party, where they would have to be sorted by candidate and by town. Under these circumstances, a 5% return rate undoubtedly would be wildly optimistic.

"[I]n the context of the COVID-19 pandemic, the efficacy of a mail-based campaign is unproven and questionable at best. Conducting an effective mail campaign in the current environment presents a significant hurdle. Such a mail-only signature gathering campaign assumes both a fully operational postal service and a public willing to walk to the mailbox, open physical envelopes, sign a petition, and deposit the envelope back into a mailbox or make a trip to the Post Office. Today, sadly, ample reasons exist to question the plausibility of each of those assumptions." *Esshaki*, 2020 U.S. Dist. LEXIS 62854, at *17-*18. "Getting voters to return signatures by mail in normal times is difficult. In these unprecedented circumstances, the efficacy of a mail-only signature gathering campaign is simply an unknown. Forcing candidates—through little fault of their own—to rely on the mails as their only means of obtaining signatures presents a formidable obstacle of unknown dimension." *Id*. at *18. In short, "[p]etitioning by mail to obtain the number of signatures required under state law simply is not feasible for a minor party." (Ex. A, Telesca Decl. ¶ 17).

Apart from effectiveness is the expense. No minor party – and probably no major party in Connecticut – could afford the type of direct mail operation that could lead to meeting Connecticut's statutory requirements even as modified by Executive Order 7LL. Of course, the major parties are not required to do so, even if they did not have a candidate receive 1% of the vote for the office in the prior election (where, for example, one major candidate ran without major party opposition, the other major party may nominate without petitioning). One estimate for a mail campaign only for access to the line for President would exceed $150,000. (Ex. B, Cotton Dec. ¶ 11). At that level, the per-signature cost to obtain 5750 valid signatures would be $26.08, compared to $2 or $3 per valid signature from traditional petitioning and a total cost of around $30,000 for 10,000 signatures if in-person petitioning was allowed. (*Id*. ¶¶ 11-12). If responses were closer to industry averages, the expense would be much higher. "In order to obtain, say, 5250 *valid* signatures, if we got a 5% return rate we would have to send out 157,000 pieces of direct mail in order to aim for 7875 total signatures to account for invalid names." (*Id.* ¶ 16). The cost for such a mailing would be at least $1 per letter and perhaps $2, so the per-signature cost would between $30 and $58. (*Id*. ¶ 17). For every 1% drop in the return rate, the cost would increase by tens of thousands of dollars. And this expense would apply for *every office*, in varying amounts.

Requiring candidates "to allocate additional campaign resources to gather signatures" without a compelling reason "can be an injury to First Amendment rights." *Nader*, 545 F.3d at 472. *Esshaki* carefully considered the expense of petitions by mail which one candidate showed would be prohibitively expensive. "A $ 34,500 expense is a significant financial burden for any congressional campaign. Further, the unforeseen nature of such an expense here surely magnifies its burden: no candidate, at the time they initially declared for office, could have

anticipated that at the end of March, just when in-person signature collecting might be expected to be ramping up, there would arise the sudden need to switch to a mail-only signature campaign. *Esshaki*, 2020 U.S. Dist. LEXIS 62854, at *16. "While Plaintiff is not entitled to free access to the ballot, the financial burden imposed by an unforeseen but suddenly required mail-only signature campaign is far more than an incidental campaign expense or reasonable regulatory requirement. For any candidate other than those with unusually robust financial means, such a last-minute requirement could be prohibitive." *Id.* at *17.

Although modest expense alone may not be a severe burden, extreme financial costs particularly when coupled with an unreasonable time frame under which petitions must be sent, signed, and returned additionally serves to unconstitutionally deny candidates a place on the ballot. This is undoubtedly true where, as here, there is no ability to use a less expensive method gather signatures – like petitioning by volunteers, which the Independent Party has done for years. *Lubin*, 415 U.S. at 718 (holding that $ 701.60 filing fee is an unconstitutional burden on indigent candidate with no alternative mechanism to get his name on the ballot); *Belitskus v. Pizzingrilli*, 343 F.3d 632, 644 (3rd Cir. 2003) ("if a ballot access scheme, such as the one here, imposes a mandatory filing fee but fails to provide an alternative means of ballot access, such as signature collection, that scheme constitutes a severe burden on the rights of indigent candidates and their supporters."). "Under the present law as modified by the executive order, there is no alternate way to obtain ballot access for a statewide candidate for a cost that would be feasible for the Independent Party of Connecticut." (Ex. B, Cotton Dec. ¶ 13).

As to electronic petitions, the process created by the executive order is, to put it mildly, untried and unworkable. "Again, this has never been tried before so the implementation is

uncertain. I am not familiar with any software available that would make this feasible." (Ex. A, Telesca Dec. ¶ 18; *see also* Ex. B., Cotton Dec. ¶ 8).

There are reasons why no state allows parties and candidates to petition electronically. The Massachusetts Supreme Judicial Court recently held "there are too many issues and unanswered questions to allow us confidently to impose a remedy that would transform a nomination system that required "wet" signatures into one that permitted a broad range of electronic signatures, including a printed name. To name just a few, there are the inherent time constraints discussed supra; there are potential logistical, legal, and cyber-security related concerns; and, of course, there is the fact that local and State governments are already operating under severe constraints, and often with skeletal staffing, due to the pandemic." *Goldstein*, 484 Mass. at 531.[18]

As we understand the executive order, one way to seek signatures is to send emails to potential signers. Candidates may also distribute petitions by other forms of social media. The signer may print out the form, sign it (one at a time), and either mail it back to the candidate or scan it and email it back to the candidate. If it is emailed back, the candidate must retain and file

[18] The court did order the Secretary to investigate one type of electronic signature: "Specifically, the Secretary proposes that we order that candidates seeking to be on the ballot for the September 1 primary election be allowed to scan and post or otherwise distribute their nomination papers online. Voters may then download the image of the nomination papers and either apply an electronic signature with a computer mouse or stylus, or print out a hard copy and sign it by hand. The signed nomination paper can then be returned to the candidate, or a person working on the candidate's behalf, either in electronic form (by transmitting the "native" electronic document or a scanned paper document) or in paper form (by hand or mail)." *Id.* at 531. (The Massachusetts Secretary of the Commonwealth's implementation memorandum is attached as Exhibit G.) It is not clear, at least to the undersigned, whether Executive Order 7LL would not allow electronic signatures by mouse or stylus or what software would be needed to support it. Further, the signature requirements in Massachusetts are much lower than in Connecticut for General Assembly seats, and are 10,000 for a statewide office in a much larger state. Still, the court reduced those requirements by 50%. *Id.* at 531.

with the town clerk not only the petition, but also the email. There is no provision to allow for purely electronic signatures. The signer may also add an electronic signature to the form and email it back to the candidate.

But the response rate for email solicitations is abysmally low, far below that for direct mail. (Ex. A, Telesca Decl. ¶ 19). The Direct Mail Association estimates that it is 0.12%. (*Id.*). Companies in the email business claim that it is higher. Mailchimp claims that only 22.94% of "political" emails are "opened", and only 2.37% will result in the recipient clicking on a link. Mailchimp, *Email Marketing Benchmarks by Industry* (available at https://mailchimp.com/resources/email-marketing-benchmarks/) Of course, that is the claimed rate for only clicking a link. There simply are no data for how many people might click on a link, download a petition, sign the petition and email it back – because no state in the United States has allowed it. There is no infrastructure, policy, experience, or software that would support such an effort.

And remember that the Connecticut petition requires the signer's date of birth for identification purposes. Conn. Gen. Stat. § 9-453a. It is very hard to conceive of even 0.2% of persons getting an email from a largely unknown sender asking them to download a form, fill it out, sign it, provide their addresses and dates of birth taking the time (and risk) of sending back a form with their date of birth to that unknown sender. "That is against everything that we are told in terms of email or social media security." (Ex. A, Telesca Dec. ¶ 21). In fact, the federal government has specifically warned of the increased risk of "phishing" episodes during this pandemic. (Ex. H).

To be successful, a party or candidate would probably have to send out hundreds of thousands or millions of emails. (Ex. A, Telesca Dec. ¶ 22). The cost would be out of reach of

the Independent Party. (*Id.*; Ex. B, Cotton Dec. ¶ 11). *See also Garbett*, 2020 U.S. Dist. LEXIS 75853, at *31 ("the per signature cost of collecting signatures remotely is exponentially higher than collecting them in person, despite being much less effective"); *see also Libertarian Party of Ill. v. Pritzker*, 2020 U.S. Dist. LEXIS 71563, at *15 (in light of closure of public places "Illinoisans may have limited access to the Internet or a printer, or may even be wary of opening mailed petitions").

Executive Order 7LL also allows distribution of petition forms by social media, "but again this is an entirely unknown process with absolutely no track record here of success." (Ex. A, Telesca Dec. ¶ 23; *see also* Cotton Dec. ¶ 8). The same security concerns with email would be present. "Further, the lack of experience by volunteers will hinder success. We have no infrastructure, experience or resources that would support this, as we had no reason to before now – we were counting on in-person petitioning." (Ex. A, Telesca Dec. ¶ 23). In short, "we don't have the technological or organizational capability to set up this kind of campaign in the time available." (*Id.*). As to cost, "[n]o one can say what the cost of an effective social media campaign to obtain petition signatures would be with precision, because it's never been done, but it is almost certainly beyond our means," (*id.*), but Cotton again estimates it would probably exceed $150,000 – just for the single Presidential petitions. (Ex. B, Cotton Dec. ¶ 11).[19]

The only state that has a system allowing electronic petitions is Arizona – but it allows petition signatures on the Secretary of the State's own website, securely and safely, "from the comfort of [their] home[s] or anywhere [I]nternet access is available" with no need for paper or

[19] While the Independent Party of Connecticut has a website, this far in advance of the election it usually draws about 500 visits monthly. There is no way to determine how many of those are from Connecticut voters. (Ex. A, Telesca Dec. ¶ 24).

scanned signatures. *Goldstein*, 484 Mass. at 531 n.16. While that might be reasonable, it seems unlikely that could be implemented here by the Secretary of the State in time – because implementation of a electronic petitioning system would take time, planning, and expertise.

There are obvious shortcomings of requiring minor parties to nominate for dozens of offices only by petitioning in light of the current health emergency. "Suffice it to say that, during the state of emergency, the traditional venues for signature collection are unavailable: few people are walking on public streets in town centers; malls are closed, as are all but essential businesses; restaurants provide only take-out food or delivery; public meetings, if held at all, are conducted virtually; and the vast majority of people are remaining at home." *Goldstein,* 484 Mass. at 526. "[T]he unprecedented—though understandably necessary—restrictions imposed on daily life by the Stay-at-Home Order, when combined with the ballot access requirements of [Michigan law], have created a severe burden on Plaintiff's exercise of his free speech and free association rights under the First Amendment, as well as his due process and equal protection rights under the Fourteenth Amendment*." Esshaki*, 2020 U.S. Dist. LEXIS 62854, at *20.

The same is true here. "If this plan [under Executive Order 7LL] is allowed to remain in place, I strongly doubt that any minor party candidates will be able to qualify for any offices, but certainly not Independent Party of Connecticut candidates for president or Congress, and likely not for General Assembly seats. It is just too many required signatures, in too short a period of time, using unproven techniques." (Ex. A, Telesca Dec. ¶ 28). "I believe that under the present circumstances the petition requirements for minor party candidates will lead to no candidates affiliated with the Independent Party of Connecticut qualifying for the November ballot by petition." (Ex. B, Cotton Dec. ¶ 14). *See Garbett*, 2020 U.S. Dist. LEXIS 75853, at *33 ("Although the State plainly acted in good faith by making remote signature gathering possible,

the State's measures were insufficient to relieve the severe burden candidate Garbett confronted.").

Similarly this Court should find that Connecticut's ballot access laws, under the circumstances, severely burden the first amendment rights of the Independent Party of Connecticut, the candidates who they would endorse, and their supporters.

### B. Connecticut's Laws Are Not Narrowly Tailored to Further a Compelling State Interest.

Because Connecticut's petition requirements impose a severe burden on minor parties, the State must prove that they are narrowly drawn to further a compelling state interest. No matter how legitimate or even compelling a state's electoral interests may appear, a court must evaluate whether the interests are "*in the circumstances of this case*, compelling." *California Democratic Party*, 530 U.S. at 584 (emphasis in original). Although it remains to be seen what interests, if any, the Secretary of the State will assert to justify enforcement of the signature requirements under these circumstances, the state has no compelling interest in preventing unaffiliated and minor-party candidates from running for office by enforcing insurmountable barriers. Given that the defendants have the burden on these points, we may wait until a reply brief to respond to defendants' identified interests that its claims are furthered by the challenged ballot restrictions. But a few preliminary comments will be offered here.

The Supreme Court held in *Storer v. Brown,* 415 U.S. 724, 736 (1974), that a state has a "compelling" interest in "the stability of its political system." But the Court held more recently that this interest does not extend so far as to permit a state to protect existing parties from competition with independent or minor-party candidates. *Anderson*, 460 U.S. at 801-02. Indeed, "[c]ompetition in ideas and governmental policies is at the core of our electoral process and of the First Amendment Freedoms." *Id.* at 802 (quoting *Williams*, 393 U.S. at 32).

The Supreme Court has recognized that states have an important interest in minimizing the potential for voter confusion caused by "laundry list" ballots, which it described as ballots with more than 12 candidates for a single office. *See Lubin*, 415 U.S. at 715-18. But there is no danger of that here. There are only four statewide minor parties, and few unaffiliated candidates are likely to try to petition onto the ballot under even reduced petitioning requirements. Moreover, the Independent Party demonstrated in the 2018 statewide election that it has more than a modicum of support when its endorsed candidates received over 1% of the vote for all five statewide constitutional offices. "By placing statewide candidates on the ballot in the 2002 election, all of the plaintiffs [political parties] have demonstrated a 'modicum of support' sufficient to overcome the state's broad latitude in controlling frivolous party registration of tiny fractional interests," because "the ability to meet the requirements for placing a candidate on the statewide ballot is enough of an indication of support to overcome the state's interest in preventing voter confusion." *Green Party v. N.Y. State Bd. of Elections*, 389 F.3d 411, 422 (2d Cir 2004). It is perhaps for this reason that the Secretary of the State proposed allowing the four minor parties to nominate candidates without petitioning for this cycle. (Ex. D).[20]

Even if the state's interests were compelling, the state has failed to use narrowly tailored means of advancing those interests during the pandemic. A state must utilize "the least drastic means" to achieve its electoral interests, with this tailoring requirement being "particularly important where restrictions on access to the ballot are involved." *Ill. State Bd. of Elections v.*

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[20] In the absence of ballot clutter, which the Secretary of the State has already effectively conceded would not be a problem, it is not clear what compelling state interest would be at issue. There were seven different party lines on the 2018 ballot for governor, plus a write-in candidate. There was no outcry of ballot clutter or voter confusion.

*Socialist Workers Party*, 440 U.S. 173, 185 (1979). Connecticut, however, insists on applying rules that make it virtually impossible for minor party candidates to petition onto the ballot under the circumstances, for reasons that have nothing to do with the underlying state interests.

The most reasonable alternative insofar as the Independent Party is concerned, and the one that will be interesting to see how the state disavows, is Secretary Merrill's sensible, practical and feasible proposal that already-existing minor parties be allowed to nominate for the general election pursuant to their by-laws. The Independent Party already may do that for two of the five Congressional races, 28 of 36 state senate seats, and approximately 84 of 151 House seats. It cannot for president, three Congressional seats, and the balance of the General Assembly seats. Under her proposal, the Independent Party could nominate for the other seats as prescribed by its by-laws. "For the general election, my recommendation is to again eliminate any path to ballot access via petitions as a minor party or petitioning candidate for the November general election ballot. Instead, grant automatic ballot access for all races in November to any third parties that already have statewide ballot access, currently the Green Party, the Independent Party, the Libertarian Party, and the Working Families Party." (Ex. D, Merrill memorandum at 2-3). She did not suggest that doing so would weaken "compelling" state interests; presumably she would have said so if she thought that it did. Instead, she wrote that this "would address the public health emergency and prevent petition gatherers from going door to door and potentially spreading coronavirus, while at the same time preserving Connecticut's democratic tradition of allowing challengers access to the primary and general election ballots."

We accept that at the time it was not her decision to make. But now the constitutionality of the executive order is squarely in play. Since strict scrutiny applies to the signature gathering laws under the present circumstances, it is hard to ignore that she has offered a narrowly tailored,

less burdensome alternative than that ordered in Executive Order 7LL. This Court should adopt it.

Regrettably, the state lost valuable time after she raised the issue on March 28, 2020. The state apparently failed to respond to the Secretary of the State's concerns for six weeks – during which the minor parties were entirely prevented from petitioning – after she raised the drastic need for changes. That delay effectively shortened the time available to petition under the changed rules. We readily concede that state leadership had other pressing matters on their agendas, but Secretary Merrill laid out easy to implement (and fair) alternatives, at least as to the minor parties, that presumably did not harm state interests or she would not have proposed them. Instead, valuable time to implement alternatives was wasted. Any hardship from that delay belongs to the state, not to the petitioning candidates. If there is insufficient time for some of the alternatives without extraordinary effort, the delay should compel extraordinary effort. But by failing to adopt meaningful changes, the state will effectively bar many Independent Party-endorsed candidates from appearing on the ballot.

**IV. The plaintiffs will suffer irreparable harm in the absence of a preliminary injunction.**

Harm is irreparable for purposes of a preliminary injunction when "it cannot be undone through monetary means." *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328 (5th Cir. 1981). "[W]here a First Amendment right has been violated, the irreparable harm requirement for the issuance of a preliminary injunction has been satisfied." *Green Party v. N.Y. State Bd. of Elections*, 389 F.3d 411, 418 (2d Cir. 2004). Further, harms that touch upon the constitutional and statutory rights of political parties, candidates, and voters are generally not compensable by money damages and are therefore considered irreparable. *See, e.g., Elrod v. Burns*, 427 U.S. 347 373 (1976) (plurality opinion); *League of Women Voters v. North Carolina*,

769 F.3d 224, 247 (4th Cir. 2014); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986); *Ga. State Conference of the NAACP v. Fayette Cnty. Bd. Of Comm'rs*, 118 F. Supp. 3d 1338, 1347 (N.D. Ga. 2015). Part of the reason for this treatment of political and voting harms is the special importance of the right to vote in the American democratic tradition:

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

*Reynolds v. Sims*, 377 U.S. 533, 561-62 (1962); *accord Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.").

Part of the reason first amendment violations in the election context amount to irreparable injury is also practical: a court cannot undo all the effects of an unconstitutional election. Tremendous practical advantages accrue to those who win even tainted elections, and a court simply has no way to re-level the playing field. *See, e.g., League of Women Voters of N.C.*, 769 F.3d at 247 ("Courts routinely deem restrictions on fundamental voting rights irreparable injury" because "once the election occurs, there can be no do-over and no redress.").

In this case, the irreparable nature of the injuries is obvious. Money cannot compensate the plaintiffs for the loss of their opportunity, as a political party and a voter, to play an important part in our democracy. *See Anderson*, 460 U.S. at 794 (discussing importance of "political figures outside the two major parties"); *Socialist Workers Party,* 440 U.S. at 185- 86 (discussing "the significant role that third parties have played in the political development of the Nation"). If Independent Party candidates do not appear on the ballot for some offices in the 2020 cycle, its candidates will be forced to petition for access to those seats in 2022 (for General Assembly) and

2024 (for president). The harm will continue to resonate for years. This factor therefore weighs in favor of granting the preliminary injunction.

"Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 1, 15 (1971). Indeed, "[i]n shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow. Moreover, in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable." *Lemon v. Kurtzman,* 411 U.S. 192, 200 (1973) (citation and footnote omitted).

> [T]he district court has the power to order the state to take steps to bring its election procedures into compliance with rights guaranteed by the federal Constitution, even if the order requires the state to disregard provisions of state law that otherwise might ordinarily apply to cause delay or prevent action entirely. . . . To the extent that [state] law makes compliance with a provision of the federal Constitution difficult or impossible, it is [state] law that must yield.

*Judge v. Quinn,* 624 F.3d 352, 355-56 *(7th Cir. 2010) (quoting Judge v. Quinn*, 387 F. App'x 629, 630 (7th Cir. 2010)).

In this case, as noted above, the most sensible, practical, and reasonable remedy – the one most narrowly tailored to further the state's interest in avoiding voter confusion and ballot clutter – is the one proposed by Secretary Merrill. The Independent Party has endorsed candidates for over twenty years; its candidates have achieved the required modicum of support. It is in a similar position as the Green Party was in *Green Party v. N.Y. State Bd. of Elections*, 389 F.3d 411, 422 (2d Cir 2004). "By placing statewide candidates on the ballot in the 2002 election, all of the plaintiffs [political parties] have demonstrated a 'modicum of support' sufficient to overcome the state's broad latitude in controlling frivolous party registration of tiny fractional interests," because "the ability to meet the requirements for placing a candidate on the statewide

ballot is enough of an indication of support to overcome the state's interest in preventing voter confusion." *Id*. *See also Libertarian Party of Ill. v. Pritzker*, 2020 U.S. Dist. LEXIS 71563, at *14 ("The parties' agreed order,[21] permitting ballot access for previously-qualifying new party and independent candidates, and loosening the statutory signature requirements for other new party and independent candidates, establishes a measurable standard that the State can use to determine which candidates are eligible to be placed on the ballot in the unique context of this election.").

Allowing the Independent Party of Connecticut to nominate candidates consistent with its by-laws will not lead to ballot clutter or unduly harm any other legitimate state interest. It will protect the first amendment rights of the Independent Party, its endorsed candidates, and the voters who would support them.

THE PLAINTIFF,

By_____/s/_____
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[21] After the judge found a first amendment violation, she asked the parties to submit proposed orders. This part of the order was agreed upon by the parties after the finding of violation.

## CERTIFICATION

This is to certify that on the 19th day of May, 2020, the foregoing document was served in accordance with the Federal Rules of Civil Procedure, and/or the District of Connecticut's Local Rules, and/or the District of Connecticut's rules on Electronic Service upon the following parties and participants:

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