

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

LIBERTARIAN PARTY OF	:	NO. 20-2179
CONNECTICUT,	:	
HAROLD HARRIS,	:	
and DANIEL REALE	:	
	:	
	:	
v.	:	
	:	
	:	
NED LAMONT, GOVERNOR	:	
OF CONNECTICUT and	:	
DENISE MERRILL,	:	
SECRETARY OF THE STATE	:	JULY 24, 2020

**DEFENDANT APPELLEE’S OPPOSITION TO PLAINTIFF  
APPELLANTS’ MOTION TO EXPEDITE APPEAL**

**I. PRELIMINARY STATEMENT**

Plaintiff Appellants, the Libertarian Party of Connecticut (“Libertarian Party”) and two candidates affiliated with the Libertarian Party—Harold Harris and Daniel Reale—(collectively “Libertarian Party Plaintiffs” or Plaintiffs) seek expedited consideration of their appeal on the sole ground that it involves the 2020 election<sup>1</sup>. This Court

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<sup>1</sup> Plaintiffs also seek expedited consideration of an issue that they did not brief below and therefore waived—the constitutionality of Conn.

should deny Plaintiffs' motion for expedited review of the district court's denial of their motion for preliminary injunction because Plaintiffs have made not shown here or below that Connecticut's generous ballot access laws for minor parties, as modified by Executive Order 7LL for the 2020 election, severely burden their constitutional rights. On a record of nonexistent harm, expedited review is inappropriate. The district court's 37-page decision was well-reasoned and within the Court's sound discretion. Furthermore, the deadline for achieving ballot access in Connecticut has not yet arrived and Plaintiffs may in fact succeed in gaining ballot access by the August 7<sup>th</sup> petitioning deadline. Indeed, lead Plaintiff Dan Reale has automatic ballot access for the federal office for which he intends to run.

Plaintiffs' claims are essentially a facial challenge to Connecticut's ballot access scheme. As such, their action could have been commenced at a time which would not work the disruption to the already ongoing 2020 election in Connecticut Plaintiffs seek here. That statutory

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Gen. Stat. § 28-9. Their appeal on this issue of state law should not be considered and should most certainly not be expedited.

scheme was significantly modified for the 2020 election by Governor Lamont's Executive Order 7LL addressing the COVID-19 pandemic and Plaintiffs have largely ignored those modifications.

Plaintiffs' facial challenge to Connecticut's generous 1% ballot access statutory scheme most likely will continue to be pressed by them beyond November and can be addressed in an orderly manner and on a full record in one of the two courts they have challenges pending. At this stage, Plaintiffs have made no showing that they should be permitted to jump the line of the many important matters pending before this Court so as to be heard immediately on an interlocutory appeal regarding a ballot access scheme that has been dramatically relaxed due to COVID-19 and about which Plaintiffs have put on scant evidence of harm.

## **II. BACKGROUND**

Plaintiffs seek to enjoin enforcement of Connecticut's election statutes that require minor party candidates seeking to appear on the ballot for a general election to obtain the signatures of 1% of voters from the prior election for that office.

In October 2019, Plaintiff brought a facial challenge to these generous minor party ballot access statutes in the Connecticut Superior Court. *See Misbach v. Merrill*. Docket No. HHD-CV-19-6118097-S (Conn. Super. 2019) (Schuman, J.) available at <http://civilinquiry.jud.ct.gov/CaseDetail/PublicCaseDetail.aspx?DocketNo=HHDCV196118097S> (last viewed July 24, 2020). In March 2020, the Connecticut Superior Court postponed its scheduled preliminary injunction hearing due to the Connecticut Judicial Branch's cessation of most court operations due to the COVID-19 pandemic<sup>2</sup>. Plaintiffs filed a new action in the United States District Court for the District of Connecticut in April 2020 alleging largely the same claims, albeit altered to address the impact of COVID-19 pandemic on in-person petitioning. On May 7, 2020, Governor Lamont issued Executive Order 7LL substantially modifying Connecticut's petitioning method to permit electronic petition circulation and dispensing with the need for an in-person witness of a signature if only one person signed the petition form.

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<sup>2</sup> Connecticut's Judicial Branch has since reopened and it has resumed hearing civil matters, including election matters, remotely and issuing written decisions.

Beginning in April 2020, District Court Judge Janet Hall presided over several telephonic status conferences, one motion conference, granted at least six parties' motions to intervene. She set the briefing schedule Plaintiffs' requested and agreed to and thereafter conducted a three hour preliminary injunction hearing via Zoom.gov on June 22, 2020. The District Court issued its 37-page decision denying preliminary injunctive relief five days later on Saturday, June 27, 2020. ("the Ruling").

### **III. DISTRICT COURT RULING**

The District Court's Ruling denying Plaintiffs' motion for preliminary injunction was well-reasoned, thorough and adhered to the established "Anderson-Burdick framework" applicable to most ballot access challenges. Ruling at 28. Of particular relevance to this motion to expedite is the District Court's finding that Plaintiffs failed to establish that Connecticut's statutory scheme, which "requires a modicum of support for an individual candidate to appear on the ballot," Ruling at 32, imposed a severe burden on Plaintiffs' First Amendment rights to associate with voters through the ballot. Ruling at 28 ("Based on the record before the court, the moving plaintiffs have failed to

clearly show that the challenged statutes severely burden their rights.”). The District Court noted the paucity of the Libertarian Party Plaintiffs’ evidence proffered by them in support of their motion for preliminary injunction. Plaintiffs offered “only two affidavits from its candidates averring how the state’s modified petitioning laws severely burden ballot access”. Ruling at 21. The District Court found the Libertarian Party Plaintiff’s scant evidence to be “insufficient to persuade the court that in-person petitioning is impossible, particularly in light of the evidence before the court of successful in-person petitioning.” *Id.* at 22. Beyond Plaintiffs’ two anecdotal affidavits, the Libertarian Party Plaintiffs adduced no evidence that the other methods for petitioning made available by the Governor’s Executive Order 7LL—electronic circulation of petitions and in-person petition signatures without a witness—were somehow too burdensome for them to achieve, in some instances less than 100 signatures over 7 plus months, or that they had even attempted the new methods. Ruling at 7 (“Under Executive Order 7LL, a registered voter may submit a signed petition form, without a witness, by mail or electronic means to the candidate.”).

#### IV. ARGUMENT

An appeal is appropriately expedited when it is of significant or great public concern, or the status quo is jeopardized and must be preserved or some irreparable harm will come from delaying resolution. This is not such a matter. Indeed, throughout the pendency of this case the moving Libertarian Party Plaintiffs' have demonstrated a lack of diligence in seeking to comply with Connecticut's ballot access scheme. They have failed to demonstrate, or even allege, their diligent efforts to use all of the methods or time afforded them under the statutes to gain the minimal signature number 1% of the prior vote total for the offices for which they seek wish to run. Their studied apathy may be an attempt to fabricate a more convincing claim of unconstitutional harm or simply the result of ineffectualness but, either way, it should not entitle them to command the expedited attention of this Court. Plaintiffs' lack diligent efforts to comply with Connecticut's ballot access scheme should not be a license to step over other parties awaiting review by this Court for matters of equal or even greater public and personal importance.

Plaintiffs were accorded a full and fair opportunity below to make a showing of an unconstitutionally severe burden imposed upon them by Connecticut's ballot access laws. At the hearing held nearly three months after filing their action, they responded with two insufficient affidavits devoid of objective data or information that mostly ignored new methods for gaining ballot access applicable to their claims. The District Court correctly found their evidence lacking and declined to grant the extraordinary relief of enjoining the operation of Connecticut's electoral scheme in the midst of a presidential, congressional and state election cycle during a global pandemic and ordering Plaintiffs be placed on the ballot without any requirement to petition. This Court should follow the District Court's approach and permit Plaintiffs' claims to proceed in the normal course and allow the parties to proceed on a normal briefing schedule during what has already been a remarkably challenging election cycle. While also preparing for and administering an August primary election and planning for the general election in November, Connecticut officials have already had to defend multiple election lawsuits in its state superior court, the Connecticut Supreme



Court and the three federal district court cases, with four or more months remaining in election cycle.

**V. CONCLUSION**

For the foregoing reasons, the Defendant Appellees respectfully request that Plaintiffs Appellants' Motion to Expedite this appeal be denied and the matter be handled on the regular docket under a normal briefing schedule.

Respectfully Submitted,

DEFENDANTS APPELLEES,

DENISE MERRILL,  
SECRETARY OF THE STATE, and  
NED LAMONT, GOVERNOR OF  
CONNECTICUT

WILLIAM TONG  
ATTORNEY GENERAL

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**CERTIFICATION OF SERVICE**

I hereby certify that, on July 24<sup>th</sup>, 2020, I electronically filed the foregoing with the Clerk of the court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. A copy of the foregoing was also mailed electronically to the self-represented and intervening parties listed below. Parties may access this filing through the CM/ECF system.

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