UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

NO. 20-2179

Libertarian Party of Connecticut, et al

v

Ned Lamont, et al

Brief of Appellants

August 13, 2020

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Oral argument will assist the Court in ascertaining facts that may not immediately be clear on the record. This matter involves a substantial amount of evidence and documentation that the Parties have sufficient referential index for which to point to.

JURISDICTIONAL STATEMENT

Plaintiff-Appellant brought suit against This Court has jurisdiction pursuant to 28 U.S.C. §1292(a)(1) in that it involves, "...granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions..." This also involves an elections matter pertaining to both State and Federal offices for which elections will occur in November of this year.

STATEMENT OF ISSUES ON APPEAL

A. Does the Ballot Access Scheme Invented by Executive Order 7LL impose an unconstitutionally undue burden on the Appellants?

B. Was the Appellee Ned Lamont authorized to implement Executive Order 7LL?

INTRODUCTION

After locking the Appellants out of State Court and rendering conventional ballot access drives illegal by executive order, Appellee Ned Lamont then created a further impossible task. That task was to complete a ballot drive using the most expensive, least efficient means he could conceive of – and he required all minor parties in Connecticut to expend many thousands of dollars to technologically retool to meet that challenge after the majority of the ballot drive season had passed.

This system is entirely unlike any other because Connecticut's is unique – as are the Appellees' never-ending serious of last minute, vague and confusing executive orders.

The Appellees were locked out of court by executive orders in March (when these issues should have been decided), subjected to laws making ballot petitioning illegal until May, and then given the impossible task of retooling for an electronic drive – without the means or time to do do prior to the August deadline.

STATEMENT OF THE CASE

This matter comes to the Second Circuit as a consequence of the District Court's (Hall, J) denial of the Plaintiffs' motion for temporary injunction seeking to place all Libertarian Candidates on the November 2020 General Election Ballot without having to petition. The Plaintiffs-Appellants and Defendant-Appellees were, prior to the COVID-19 emergency orders issued by Governor Lamont, in State Court seeking a temporary injunction relating to ballot access matters (Misbach et al v Merrill), which was scheduled for a hearing on March 16, 2020. That hearing was canceled by Executive Orders. The Plaintiffs were locked out of State Court and simultaneously forbidden by the executive orders from in-person ballot petitioning in March, bringing all political activity and association to a halt. The Plaintiffs filed suit in Federal Court as a response, seeking an injunction placing all Libertarian Candidates on the ballot because COVID-19 and the Governor's Executive Orders made the act of running a ballot drive functionally impossible and unsafe for candidate who were elderly or had preexisting conditions (Appellant Harold

Harris is 73). The Appellee, Denise Merrill (Secretary of State) issued a memo on March 28, 2020 encouraging the Appellee Ned Lamont (Governor) to simply place all minor party candidates on the ballot. Ned Lamont did not do that. Instead, and without any warning or advance notice to either the Court or the Parties, he issued an executive order on May 11, 2020 (7LL) purporting to create a brand new ballot petition scheme that, purportedly, eliminated paper and reduced burden.

The Parties (including Intervenor Independent Party of Connecticut) adequately briefed the issue and made an extensive record documenting how inefficient, costly and problematic this scheme was – a scheme that never existed under State law anywhere in this Circuit and had never been tried. The Minor Party Plaintiffs simply did not have the overhead, software infrastructure or means to implement such a system at the last minute, more than halfway into the ballot drive season and after having lost many weeks as a consequence of the Executive Orders rendering in-person ballot petition efforts a criminal act.

The Trial Court found that 7LL adequately balanced compelling state interests and was a reasonable accommodation, and therefore denied the motion for temporary injunction on June 27, 2020. This appeal timely followed on July 10, 2020.

STANDARDS OF REVIEW

While the Court and the Parties agreed that the Anderson-Burdick Framework applied (Anderson v. Celebrezze, 460 U.S. 780 (1983) and Burdick v. Takushi, 504 U.S. 428 (1992). See Yang v. Kosinski, 960 F.3d 119, 127 (2d Cir. 2020), this also involves that the Second Circuit review the matter under an abuse of discretion and clearly erroneous standards because the analysis was substantially fact-driven, and the Appellants had submitted numerous affidavits and exhibits outlining the core steps and processes involved in the ballot petitioning process. The Appellants submit that the District Court misapprehended the burden that not only the petitioning process had imposed in addition to being locked out of an existing state court case that would have resolved the matter – but also the four corners of Executive Order 7LL itself, which did not actually allow

social media circulation (as the State purported) due to requiring retention of emails and did not allow electronic signatures due to allowing only an image or copy for signatures submitted, meaning paper must actually exist. The Appellants also provided a more than adequate record describing the most efficient method of petitioning – person-toperson in front of grocery stores and public spaces – which had been made illegal, impossible and impracticable by COVID-19 and the Executive Orders. The Appellants further submit that the totality of the circumstances require analysis under Williams v. Rhodes, 393 U.S. 23 (1968) in that what the Governor had ordered prevented all meaningful competition of political parties during the COVID-19 outbreak for the reason that the Democratic and Republican have automatic ballot access.

This being an appeal of a denial of a temporary injunction, the Appellants assume the Court's familiarity with those standards of review that require a showing of: (1) irreparable harm absent injunctive relief; (2) no other adequate remedy at law; (3)a likelihood of success on the merits; and (4)lack of harm to the public interest

SUMMARY OF THE ARGUMENT

The Appellants continue to suffer irreparable harm from an ordinarily oppressive framework that purposefully and impermissibly excludes, overburdens and eliminates competition before the voters can evaluate their options. In essence, this system picks the candidates the voters may choose from – and no compelling state interest could exist such that it would be allowed. Such a system is antithetical to the concept of government by and for the people if the people themselves do not get to choose.

Executive Order 7LL taken in conjunction with existing ballot access laws and other Executive Orders only reinforced that notoriously obvious end. 7LL was not as the Appellees' counsel sold it to the Trial Court – it required the creation of far more paper and did not allow social media circulation at all. It also purposefully excluded indigent, disabled and elderly electors from the process while overtly being antithetical to the public health interests Appellee Merrill had suggested should be protected simply by placing all minor parties on the ballot without petitions.

The Appellants, who must administer this process laid out by the Appellees, were beset with an impossible, Sisyphean task.

Necessary facts will follow where appropriate.

ARGUMENT

A. Executive Orders 7LL Built a Far More Unconstitutionally Burdensome Scheme than the Existing Petition Laws

1. What EO 7LL Actually Says Departs from Ned Lamont's Representations of it on the Record

EO 7LL states, in relevant part: "Notwithstanding sections 9-453a to 9-453o of the General Statutes, a petitioning signature shall be accepted as valid without attestation of the circulator or acknowledgment otherwise required if: (i) a registered voter signs a petition containing only his or her signature that is returned by U.S. mail to the candidate and later to the town clerk of the municipality or the Secretary of the State by the applicable deadline, or (ii) a registered voter signs a petition containing only his or her signature, which signature may be scanned or photographed electronically, and returned to the candidate by electronic mail and later to the town clerk of the municipality or the

Secretary of the State by the applicable deadline along with a copy of the email demonstrating the electronic transmission of the petition by the registered voter."

EO 7LL *also* states, in relevant part: "If more than one signature is on a petition page, all the requirements of 9-453a to 9-453o of the General Statutes must be satisfied..."

There is no "social media" circulating option as the State represented – nor could there be as the language within the four corners of 7LL don't permit it. The specific requirements for an email chain to be retained for each individual signature and later submitted, in addition to the requirement for physical petition pages to exist somewhere, don't work within the construct of social media – each email must be retained and it is impossible to know or track all shares of a social media post. Moreover, and for the reasons to be demonstrated,the necessary paper and record-keeping requirements necessarily multiply exponentially beyond that of a normal ballot drive.

2. Specific, Unique and Oppressively Unusual Burdens Imposed by 7LL

Plaintiff Harris (age 73), and otherwise being forced to currently solicit signatures in person as he can to the extremely limited extent permitted by Executive Orders, tried in-person, mail and electronic means of circulating.

ECF 30-1, the application for temporary injunction in the State Court case, Misbach et al v Merrill et al, illustrated the extreme burden presented during a *normal* ballot drive. The record is sufficient with the declarations of Mr. Harris, Daniel Reale, Douglas Lary, Michael Telesca and John Mertens that 7LL was burdensome and inefficient beyond that of the normal petitioning process.

Harold Harris "...prepared 140 letters with petitions and prepaid postage including return postage, 140 going to Greens and Libertarians and another 400 going to registered Independents..." and was "...unable to set up a stylus or other type of electronic signature software mechanisms to take advantage of 7LL...". ECF 61-1 Ten signatures out of the some 270 he

needed took four hours of labor and a lap time of seven days to acquire. Id. Doing this the normal way (which was both illegal and impossible) would have cost Mr. Harris a total of $8.82. Id. Instead, it cost him several thousand dollars. It took Harris about a month just to get his page after applying for it in April. The record further reflects that, when he got it, the instructions were for him to still collect the normal amount of signatures.

The affidavit of Appellant Reale, as chair of the State Libertarian Party, indicated that 7LL presented an IT burden and a paper creation burden that the Libertarian Party could not meet as of May 11, 2020 when the Executive Order issued, would likely not meet due to the financial blow COVID-19 dealt to the Party's donors, limited the number of candidates the Party could field, and still failed to take into account the time via mail petition pages would take to return to circulators (ECF 61-2). 7LL also does not take into account petitioners, signers or candidates to are elderly, blind or deaf, cutting them entirely out of the elections process. (ECF 61-2) Reale notes that location like senior and community centers (now excluded) have been critical to signature

gathering. The declaration of Douglas Lary, election monitor for NECOG, further echoes the impossible burden the process places on the Green Party (like the Libertarian Party). For his example of the third Congressional District, it would require town clerks to review 851 individual PDF files (ECF 61-3), which would, by extension, require 851 sheets of paper to exist with 851 backup emails printed and on paper, to also exist. Of Course, the Green Party also was in no position to procure (let alone design or build) the software to make 7LL possible. (ECF 61-3)

The inefficiencies, burden and paperwork issues are echoed by the declarations of John Mertens and Michael Telesca.

The individuals submitting declarations have, among them, half a century of ballot petitioning experience. Paid Petitioners, necessary individuals to make a ballot drive work, were rendered "nonessential" , and as all the evidence on the record indicates, in person circulation was by far the most expeditious.

The declaration of Ted Bromley advanced by the State is entirely unavailing – this individual has no

demonstrated petitioning, direct mail, political campaign or any other relevant first hand knowledge or experience. His declaration was pure speculation designed to make Governor Lamont's orders stick in a manner directly contrary to the advice of his own Secretary of State.

The burden and expense of this entirely new scheme 7LL cut out of whole cloth rendered all new political contenders indigent by virtue of never possibly having enough resources on the day of its rollout to comply. It ran afoul of CGS §-904a, which indicates as to forms, " The Secretary shall give to any person requesting such form one or more petition pages, suitable for duplication, as the Secretary deems necessary.", and in this case, it would include electronic forms.

Governor Lamont, willfully disregarding the advice of his own secretary of State, issued an order excluding elderly candidates, circulators and those without the means to physical or electronic means participate, to sign or to have knowledge the petitions even existed. He did the same thing to blind, deaf and disabled electors and would be circulators.

3. An Injunction Should Have Issued Under These Grounds

The Plaintiffs all demonstrated irreperable harm absent relief in that this process could never be complied with. Especially with the State Courts locked down by Executive Order – there truly was no other adequate remedy at law. There was a clear likelihood of success on the merits – 7LL has proved and had at the time of the ruling subject to this appeal impossible. Finally, the Governor's actions substantially impaired the public interest by excluding the indigent, the blind, the deaf, the disabled and everyone else who wanted to participate in the process of self government.

B. Ned Lamont Had No Authority to Implement 7LL in its Impossible, Unworkable Form Contrary to the Public Health Interests Claimed

1. The Merrill Memorandum

Appellee Lamont acted contrary to public health, thus acting in violation of §28-9 and the memorandum circulated by Appellee Denise Merrill Stating all minor parties should place on the ballot. As of March 28, 2020, many days prior to the roll out of 7LL, she not only wrote that it was clearly too dangerous to have in-person

voting, but also that, "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." (ECF 2-1) Indeed, Plaintiff Reale had adamantly written to both Defendants and the Attorney General making this very suggestion on March 24, 2020. (ECF 2-3)

The Governor specifically waited as long as he could and then cast the Plaintiffs into an underclass of their own, having to collect physical signatures in order to produce *any* numbers.

CGS §28-9(b)(1) states, in relevant part, "...the Governor may modify or suspend in whole or in part, by order as hereinafter provided, any statute, regulation or requirement or part thereof whenever the Governor finds such statute, regulation or requirement, or part thereof, *is in conflict with* the efficient and expeditious execution of civil preparedness functions or *the*

protection of the public health..." The Governor wilfully and recklessly disregarded that portion of the statute by defying his own Secretary of State's recommendations and then deliberately acting inconsistent with those by setting candidates on the inevitable path of attempting in-person circulation contrary to his other orders. He then, of course, approved measures that didn't even require Democrats and Republicans to leave their homes in order to participate in their government.

2. Existing, Unmodified Law Nullifies the Signature Checking Process

As noted, the process of 7LL requires, "...a registered voter signs a petition containing only his or her signature, which signature may be scanned or photographed electronically, and returned to the candidate by electronic mail and later to the town clerk of the municipality or the Secretary of the State by the applicable deadline along with a copy of the email demonstrating the electronic transmission of the petition by the registered voter..." CGS §9-453k(d) states, "(d) Such town clerk shall certify on each such page the date upon which it was submitted to the town clerk by the

circulator or the Secretary of the State and the number of names of electors on such petition page, which names were on the registry list last-completed or are names of persons admitted as electors since the completion of such list..."

Therein lies the poison pill for all 7LL ballot drives – there are no actual backs of pages to endorse under 7LL. The Governor's wilful purpose is to exclude all competition to his own political party from ever challenging him or being in any position to ever challenge him.

3. An Injunction Should Have Issued Under These Grounds

There is irreparable harm absent injunctive relief. A fundamental core free speech activity has been compromised by an impossible series of executive orders. There is no other adequate remedy at law; Connecticut is under the one-man rule of a governor who closed state courts off to suits against him. There is an extraordinary likelihood of success on the merits – 7LL constitutes a profound abuse of power like no other. The public interest is also harmed absent injunctive relief –

this abuse of power ran directly contrary to the public health interests as the Governor's own Secretary of State reported to him.

CONCLUSION

The Plaintiffs should never have been locked out of a state court case by executive order. The Governor should have followed his own Secretary of State's advice.

Instead, the Governor knowingly excluded disabled, elderly and blind voters and candidates alternative to those of his party's. He treated them differently under the law than Democrats and Republicans, who now no longer even have to leave the house to make their choices in self government effectuated.

The injunction should have issued as described and called for by the Secretary of State herself.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B).

1.Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B), the brief contains 3,079 words.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the foregoing was sent via email to the following counsel and parties of record on or before this 13th Day of August, 2020 via PACER's ECF system, and by US Mail first class, postage prepaid:

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