UNITED STATES CIRCUIT OF APPEALS
FOR THE SECOND CIRCUIT

LIBERTARIAN PARTY OF CONNECTICUT **CA NO 20-2179**
HAROLD HARRIS
DANIEL REALE

VS

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

PETITION FOR REHEARING EN BANC

The undersigned Appellant, Daniel Reale, moves for rehearing of this Court's opinion rendered on an expedited basis, en banc per Rule 40 as follows:

I. Relevant Background

This is a time-sensitive elections matter. The record very clearly reflects that Appellee Denise Merrill instructed Appellee Ned Lamont that all candidates for Minor Parties in Connecticut be placed on the ballot, by executive order, without petitions and to answer what they collectively deemed a strong public health need and emergency.

Appellee Ned Lamont met that emergency by denying the request and fashioning an order his counsel specifically represented to this Court and the Trial Court according to what it did not do. **The Appellee Lamont did not actually have his counsel file the affidavit of Theodore Bromley until 9:52 PM the night before the Appellants' application for temporary injunction was to be heard**. There was no time, opportunity or ability to challenge it, and it makes claims that

distinctly conflict with the years of collective experience of Declarants from the Libertarian, Independent and Green Parties who actually have real world, demonstrated ballot access experience. Theodore Bromley does not, and nowhere on the record does he indicate any first-hand knowledge of the claims he makes in terms of the feasibility of petitions.

Per usual, the clock ran, and as indicated by the undersigned, by way of a notice purportedly filed on behalf of six non-party leaders of the General Assembly.

Had that notice not been filed and proceedings delayed, this matter would have sooner arrived for this Court to correct a grave injustice obtained by mistake, surprise and outright ambush on the Appellants. This occured after the Appellants were already ousted from their scheduled day in court on March 16, 2020 in a state case, and the Appellees again ran the clock from that point.

Overall, the result is wrong, unconscionable and inequitable.

II. Bases for Rehearing En Banc

1. This Court and the record before it concerned the question of subject matter jurisdiction, specifically, mootness. As the information provided by the undersigned in his expedited motion to decide this appeal indicated, ballots would be released and made available to absentee voters on October 2, 2020. The Elections Calendar indicated they were to be printed starting on September 15, 2020. If this Court denied to grant the relief sought, it moots the

entire underlying case. This Court must decide whether subject matter jurisdiction is operative so as to ensure whether the opinion conforms to this Circuit's doctrines re mootness.

2. The underlying judgment challenged on appeal was obtained by surprise, ambush and a literal running of the clock. The Opinion does not appear to make any reference whatsoever to Denise Merrill's March 2020 memo instructing the Appellee Ned Lamont that there was no compelling public health interest keeping Libertarians off the ballot. She said there should have been a requirement of zero signatures. It is a matter of Plain Error that should be rectified in the event this Court is of the view that it does have subject matter jurisdiction. In this sense, the case involves half the State Senate, numerous General Assembly Representative positions and Four Congressional Districts during a (*hopefully*) one-time election governed by One-Man Executive Order guidelines – a question of exceptional importance.

III. Argument Warranting Rehearing

A. Mootness

A strong possibility exists as to this matter now being moot and practical relief having been so long delayed that it is now unobtainable. The Appellees will claim inability to recall printed ballots, reprogram machines and

re-issue new ballots in order to timely meet Election Day deadlines, which is unavoidably confusing in an election involving an unprecedented number of absentee ballots sent in the name of public safety.

"If events that occur subsequent to the filing of a lawsuit or an appeal deprive the court of the ability to give the plaintiff or appellant meaningful relief, then the case is moot and must be dismissed." *See Al Najjar v. Ashcroft*, 273 F.3d 1330, 1336 (11th Cir. 2001) (per curiam) All courts, including this one, are bound to resolve and address subject matter jurisdictional issues however they occur, no matter how raised or by whom, and resolve them before proceeding with the merits.

B. A Grave Injustice Capable of Repetition Yet Evading Review

The exception to the mootness doctrine is that a matter is capable of repetition but evading review. See, for example, *Weinstein v. Bradford*, 423 U.S. 147, 148–49 (1975) (discussing a "capable of repetition, yet evading review" exception to mootness); *see also* Roe v. Wade, 410 U.S. 113, 125 (1973) (discussing how "[p]regnancy provides a classic justification for a conclusion of nonmootness," as a nine-month term for pregnancy could easily end before the end of litigation, yet can be repeated again if the woman becomes pregnant again).

This is the classic case of ballot access struggles and injustices – and taken to extreme with the Appellee's sector rules banning crowds, requiring social distancing and in general rendering impossible the only possible means of actually gathering signatures – all in defiance of the Secretary of State's reasonable request that no petitions actually be required.

The record below is clear: a ballot drive requires much time, organization and money. It requires, on a party scale, an effort that no one campaign or candidate can facilitate, and for a multitude of up and down ticket offices. Those efforts require resources and professionals to be brought out of state. Those efforts never coalesce until late April, at a minimum (due to the petitioner market always being scarce on help). The deadline is the first week of August, and as the record demonstrates, not even the Democratic National Committee could meet the burden imposed on Libertarians. The official ruling of whether or not a candidates is on the ballot comes mid September (usually, by mail), and that's about when ballots are printed.

Yet, we arrive back here, again. The *Anderson-Burdick* framework ignores the practical, fact driven realities – ones upon which Theodore Bromley was neither fit, informed, knowledgeable or cognizant to sufficiently testify upon.

Rather than acknowledge what was for all purposes deemed sound

public health advice from the Secretary of State (who indicated the Appellants had in deed shown a modicum of support in the past justifying her solution), the Governor chose to ignore it, and treat the Appellants differently under the law than Democrats and Republicans, who would never need to leave the house to participate in the process. He didn't want even the chance or risk of candidates in the General Assembly who would oppose his policies, let alone a ballot access framework designed to pick winners and losers before the contest has even started.

IV. Conclusion

With all due respect, this Appellant respectfully and sincerely submits that this Court overlooked important yet controlling factual errors that have resulted in a very clear Plain Error, in addition to a controlling need to examine whether or not this Court or the Trial Court still have subject matter jurisdiction, or had it as of the time of the opinion subject to rehearing en banc.

Accordingly, rehearing should be granted *en banc*, and especially so because Four Congressional Districts' worth of ballot access hang in the balance, and the voters in those districts will be absolutely disenfranchised.

Dated this 5th Day of October, at Plainfield, Connecticut

APPELLANT,
DANIEL REALE,
/s/ Dan Reale
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was transmitted to Maura Murphy Osborne via Maura.MurphyOsborne@ct.gov, Edward Bona via edward-bona@comcast.net and a copy of the foregoing was also transmitted via first class mail, postage prepaid, to:

Ethan Alcorn
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/s/ Dan Reale
Daniel Reale

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CAPTION:

Libertarian Party of CT et al

v.

Ned Lamont, et al

CERTIFICATE OF SERVICE*

Docket Number: 20-2179

I, Daniel Reale (print name), hereby certify under penalty of perjury that on October 5, 2020 (date), I served a copy of petition for rehearing en banc (list all documents)

by (select all applicable)**

___ Personal Delivery

X United States Mail

___ Federal Express or other Overnight Courier

___ Commercial Carrier

X E-Mail (on consent)

on the following parties:

Name	Address	City	State	Zip Code
Edward Bona	via ECF, edward-bona@comcast.net			
Maura Murphy-Osborne	via ECF, Maura.MurphyOsborne@ct.gov,			
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*A party must serve a copy of each paper on the other parties, or their counsel, to the appeal or proceeding. The Court will reject papers for filing if a certificate of service is not simultaneously filed.

**If different methods of service have been used on different parties, please complete a separate certificate of service for each party.

10-5-20
Today's Date

/s/ Dan Reale
Signature

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