No. 22-449

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Andy Gottlieb, Lorna Chand, Richard Lacourciere, Jason W. Bartlett, and Robert Halstead,

Plaintiffs-Appellants,

v.

Ned Lamont, Governor of the State of Connecticut; Denise Merrill, Secretary of the State of Connecticut; and the Democratic State Central Committee,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

Appellants' Brief

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JURISDICTIONAL STATEMENT

Plaintiffs-Appellants Andy Gottlieb, Lorna Chand, Richard Lacourciere, Jason W. Bartlett, and Robert Halstead sued under 42 U.S.C. § 1983. The District Court for the District of Connecticut had jurisdiction over their claims under 28 U.S.C. §§ 1331 & 1343. The District Court granted Defendants-Appellees' motion for summary judgment and entered judgment on February 8, 2022. Plaintiffs-Appellants timely filed a notice of appeal from the decision. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. First and Fourteenth Amendment challenges to laws that impose barriers to ballot access are assessed through the "*Anderson-Burdick*" framework, *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), by which the court determines whether the laws impose a "severe" burden on the candidates and voters or only a non-trivial burden, and then weighs the burden against the State's justifications for the law. Did the district court err in concluding that:

(a) Connecticut's ballot access laws are not severe, and

(b) Connecticut's interest in these laws outweighs their burdens?

2. Did the district court err in determining that Connecticut's requirement of more signatures per day for state senate races than for higher offices required no justification, because "'[t]he Constitution does not prohibit legislatures from enacting stupid laws,'" *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 209 (2008) (Stevens, J., concurring)?

STATEMENT OF THE CASE

This is a civil rights case challenging Connecticut's requirements for access to the primary ballot and seeking injunctive relief. The district court, (Hall, J.), granted the defendants' motion for summary judgment, and the plaintiffs appeal.

Andy Gottlieb's Efforts for Ballot Access

Plaintiff-Appellant Andy Gottlieb ran for the 12th State Senate District covering all of Branford, North Branford, Guilford, Madison, Killingworth, and portions of Durham, Connecticut, as a member of the Democratic Party. Mr. Gottlieb was a lifelong resident of the 12th Senate District and had joined the Democratic Party on his 18th birthday. The 12th Senate District had become an "open seat" in 2018 with the State Senator Ted Kennedy Jr.'s decision not to seek re-election.[1]

Mr. Gottlieb did everything he could to qualify for ballot access in a Democratic Party primary for state senate. He wasted no time, kept abreast of political developments, and made himself known to local Democrats, attending Town Committee meetings and meeting with local leaders. He

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[1] These facts, which were undisputed, are taken from the Plaintiffs' Rule 56 Statement of Material Facts, ECF No. 69-2.

volunteered extensively in local elections. In recognition of those efforts, he became a member of his local Democratic Town Committee (DTC) well in advance of the election.

But nomination by party nominating convention, one of two methods of primary ballot access in Connecticut, was impossible for Mr. Gottlieb. Mr. Gottlieb reached out to top Democratic figures in his hometown about the party nominating convention. But he received no response from two of them, and a decidedly hostile response from another. Mr. Gottlieb persisted in reaching out to other Democratic figures in his district, despite the hostile response from party insiders.

Mr. Gottlieb spoke before Democratic Town Committees and contacted individual delegates, oftentimes receiving no response. At a party convention, despite his efforts, he received only one vote out of 55, from Plaintiff-Appellant Lorna Chand.

Mr. Gottlieb was therefore forced to gather petition signatures to access the primary ballot. Connecticut offers petition signature gathering as its only alternative to primary ballot access by party nominating convention.

Under Connecticut's ballot access laws, Mr. Gottlieb needed to collect signatures from 1,014 registered Democrats in the 12th Senate District in 14

late-spring days. Mr. Gottlieb assembled an all-volunteer team of 10 people. Mr. Gottlieb circulated petitions for himself for several hours every day. Signatures were collected by going door-to-door using the Democratic voter file as a guide, and by canvassing public events or busy areas in the district.

Mr. Gottlieb's campaign turned in 1,120 signatures, 982 of which were deemed valid by the registrars.

He fell short of ballot access by 32 signatures. JA31.

The record before the district court included many other examples of the difficulty candidates face in gathering petition signatures. The process did not become any easier amid the COVID-19 pandemic. *Id*.

Connecticut's Lack of Primaries

Because Mr. Gottlieb fell short by 32 signatures, the 12th Senate District had no primary for the office of state senator in 2018. It had no primary in 2020 either. In fact, in 2020, more than 95% of Connecticut's state and federal races faced no primary challenge. JA71.

Connecticut's lack of competitiveness extends to federal races. No sitting U.S. representative has ever faced a primary challenge in Connecticut history. JA72. Connecticut is the last state to never have a

congressional primary of an incumbent. *Id.* Forty-five states have had a primary against an incumbent congressmember since 2014. *Id.*

Overall, in 2020, Connecticut was last in the nation, with only 4.2% of available offices having primary elections. JA71. 2020 was no aberration. Connecticut was third-to-last in 2018, last in 2016, and second-to-last in 2014. JA70.

Connecticut's 4.2% is a fraction of the national average of 20.4%. JA71. Nationally, incumbents are even more likely to face primaries (23%); in Connecticut, that number is even lower (2.8%). *Id.*

Connecticut's Ballot Access Laws

Connecticut was the last state in the nation to establish primary elections for political offices. In 1955, by Public Act 51, the State allowed primaries if candidate were able to obtain more than 20% of the delegate vote at a party nominating convention. JA72.

From 1955 to 2002, only one person ever qualified for a primary against an incumbent running for U.S. House, U.S. Senate, or statewide office in Connecticut, when Lieutenant Governor Robert Killian unsuccessfully challenged Governor Ella Grasso in the 1978 Democratic Party primary.

In 2002, United States District Judge Peter Dorsey of the District of Connecticut struck down the 1955 law as unconstitutional because it placed an undue severe burden on voters' and candidates' First and Fourteenth Amendment rights without justification. *Campbell v. Bysiewicz*, 213, F.Supp.2d 152, 156 (D.Conn. 2002) (Dorsey, J.).

In response to the Court's decision, the State of Connecticut enacted Public Act 03-241, the ballot access laws that are the subject of this appeal.

Public Act 03-241 allowed candidates for statewide and federal offices to obtain ballot access by (1) receiving at least 15% of the delegate vote at a party nominating convention; or (2) by circulating a petition and gathering signatures. JA32.

Candidates for U.S. House, U.S. Senate, and statewide offices are required to gather two percent of enrolled party members' signatures in their district or statewide in 42 days. Candidates for state representative and state senator are required to gather five percent of enrolled party members' signatures in their district in 14 days. *Id.*

The 2020 Election and District Court Proceedings

This case was filed on May 6, 2020. On May 11, Defendant-Appellee Governor Lamont issued Executive Order 7LL, which extended the deadline to submit petition signatures by two days, eliminated the in-

person signature requirement, and reduced the number of signatures required to qualify for primary ballot access by thirty percent. JA33.

On May 12, the Plaintiffs-Appellants filed a motion for preliminary injunction, arguing that Governor Lamont's modifications did not do enough to relieve the severe burden of Connecticut's primary ballot access laws. On June 5, 2020, the district court held a hearing and heard oral argument. On June 8, the district court denied the preliminary injunction, in a reported decision, *Gottlieb v. Lamont*, 465 F.Supp.3d 41, 45 (D.Conn. 2020) (Hall, J.).

Plaintiffs did not appeal, but instead proceeded to discovery and cross-motions for summary judgment. Governor Lamont's Executive Order 7LL expired in advance of the 2022 election cycle. JA33.

The District Court's Summary Judgment Opinion

The district court's ruling denying plaintiffs' motion for summary judgment and granting defendants' motion for summary judgment is located at JA28-JA60. At summary judgment, the district court weighed the claims against Connecticut's ballot access laws without any modification by Executive Order. Examining the requirements, the district court concluded that candidates were required to gather up to 36 signatures per day to run for state representative, up to 126 signatures per day to run for

state senator, and up to 90 signatures per day to run for U.S. House of Representatives. JA53.

The district court noted, however, that "[t]he evidence . . . as to how difficult these thresholds would be to obtain is disputed." *Id.* As the district court observed, evidence in the record suggested that highly skilled volunteers working all day may be able to gather only six or seven valid signatures. JA54. Evidence pointed to significant challenges in petition signature gathering caused by the COVID-19 pandemic. JA53-54.

The district court made certain assumptions to determine the difficulty of meeting the requirements. According to the district court, candidates, working 14 or 42 straight full days, could gather 20 valid signatures each day; and non-candidates could gather 10 each day. JA54. Based on this assumption, the district court reasoned, candidates for state senate, for instance, would be required to enlist at least eleven volunteers to work 14 straight days for seven hours each day (154 volunteer-shifts or 1,087 volunteer-hours) to obtain ballot access for a primary. *Id.*

Despite these obstacles, the district court concluded that Connecticut's ballot access restrictions were not "severe." JA54-JA55.

Relying on the decision of the Supreme Court of the United States in *Lopez Torres*, 552 U.S. at 205, the district court went on to conclude that

"even had petitioning itself imposed a severe burden on plaintiffs, they still could not show that the election scheme overall did as well," JA57, because, the district court held, Connecticut's method of ballot access by convention "is adequate standing alone," *id*.

Because the district court concluded that the laws impose only a reasonable and nondiscriminatory burden on voters and candidates, the court concluded that the laws were justified by the state's asserted interests: in "conducting orderly, fair, and transparent elections," JA58, ensuring that candidates have "a significant modicum of support," *id*., and in "temper[ing] the destabilizing effects of party-splintering and excessive factionalism." JA59.

The court therefore granted Defendants-Appellees' motion for summary judgment and denied Plaintiffs-Appellants' motion for summary judgment. JA59-JA60.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment *de novo*, construing the evidence in the light most favorable to the party against which summary judgment was granted and drawing all reasonable inferences in its favor. *Halo v. Yale Health Plan, Dir. of Benefits & Records Yale*

Univ., 819 F.3d 42, 47 (2d Cir. 2016). Each of the issues in this case fall under that rubric.

SUMMARY OF ARGUMENT

Since 1955, when Connecticut was the last state to establish primary elections, Connecticut primary voters have never had the opportunity to vote for a challenger against an incumbent member of the U.S. House of Representatives. The district court erred because Connecticut's ballot access laws are severe for the burdens they impose on voters and candidates.

A State has the right to ensure that candidates for primary office have a significant modicum of support. But a State cannot limit avenues to the ballot so severely that virtually no one can obtain access. Connecticut's ballot access laws are more than just a national outlier. Connecticut's ballot access laws are a violation of our national constitutional guarantees under the First and Fourteenth Amendments.

ARGUMENT

I. The district court erred because Connecticut's ballot access laws are severe

Connecticut's ballot access laws are "severe" because both avenues of ballot access – the Convention Route and the Signature-Gathering Route –

virtually exclude all but the most well-connected and well-resourced candidates from access to the primary ballot.

A. Primary ballot access by party nominating convention is severely burdensome on candidates and voters

The Convention Route imposes severe burdens on candidates and voters. In the 47 years during which the Convention Route was the only available method for primary ballot access, very few candidates were able to make the ballot. Mr. Gottlieb – and the other Plaintiffs-Appellants – considered the Convention Route to be impossible. Neither Mr. Gottlieb nor his co-plaintiff, Jason Bartlett, were even provided with complete lists of the delegates for the party nominating conventions, let alone time and an opportunity to engage the convention delegates in persuasion.

Rules particular to Connecticut's Convention Route distinguish this case from *Lopez Torres*, in which primaries were available for the selection of convention delegates, 552 U.S. at 204. In Connecticut, primaries for convention delegate were abolished in 2003.

In practice, the convention delegates for party nominating conventions for most offices in Connecticut are chosen by one person or a limited few, perhaps in consultation with the incumbents for the office itself. As a result, to have a meaningful opportunity to gain access by the Convention Route, candidates would be required to run a slate of

candidates for membership in the town committees that elect officers that determine the delegates at party conventions. As Plaintiffs-Appellants argued in the district court, requiring candidates to run in two sets of elections simply to obtain ballot access in a primary is the epitome of a severe burden on candidates and voters.

B. The number of signatures required in a short period for primary ballot access is severely burdensome on candidates and voters

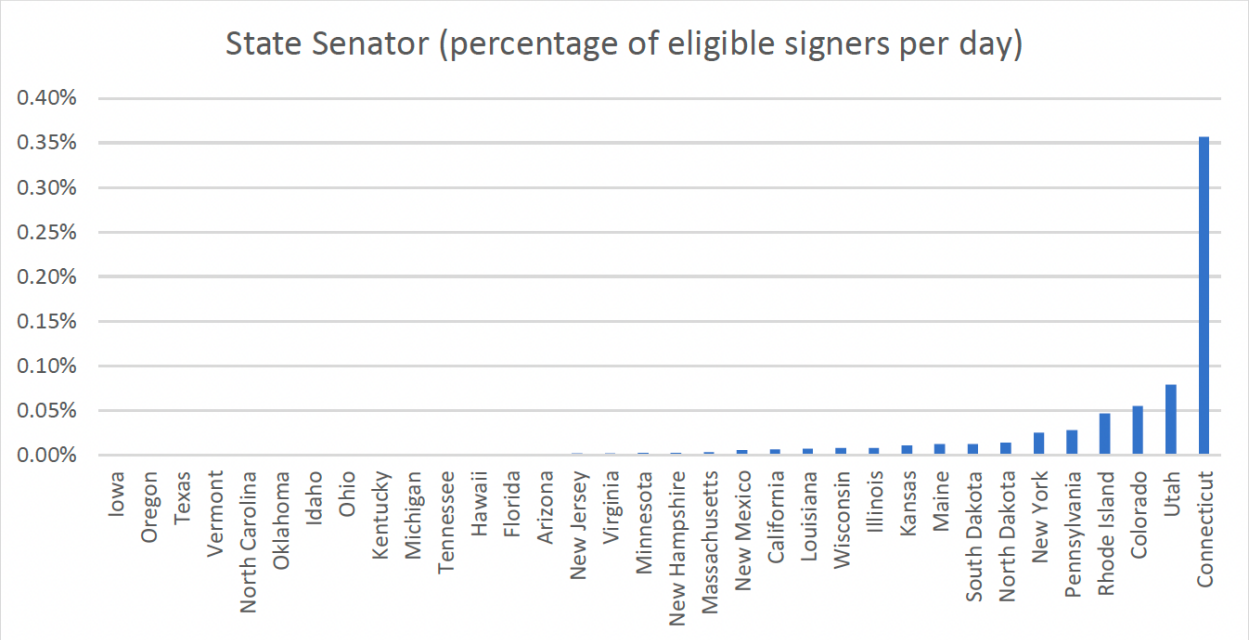
The district court concluded that Connecticut's requirements of up to 36 signatures per day for state representative candidates, up to 126 signatures per day for state senate candidates, and up to 90 signatures per day for U.S. House candidates, were reasonable and not severe burdens on voters and candidates. But viewing the record in the light most favorable to the party against which summary judgment was granted, Plaintiffs-Appellants raise at least a genuine dispute of material fact as to whether these requirements are "severe."

Connecticut's requirements for petition signatures are of a magnitude and character stricter than any requirements upheld by the Supreme Court of the United States for local or statewide offices:

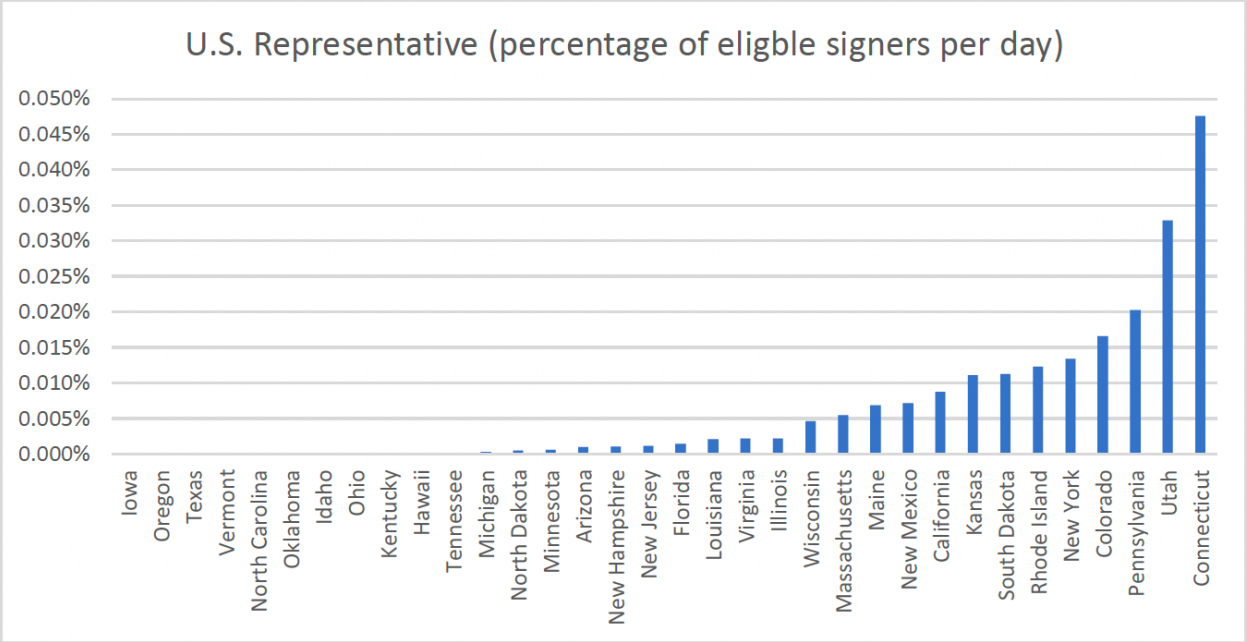
- 5% of eligible voters in 180 days; *Jenness v. Fortson*, 403 U.S. 431, 438 (1971);

- 1% of eligible voters in 55 days, and another requirement of no more than 500 signatures in 30 days (17 signatures per day), *American Party of Texas v. White*, 415 U.S. 767, 782-84 (1974);
- 500 signatures in 37 days to become a convention delegate (less than 14 signatures per day), *Lopez Torres*, 552 U.S. at 204;

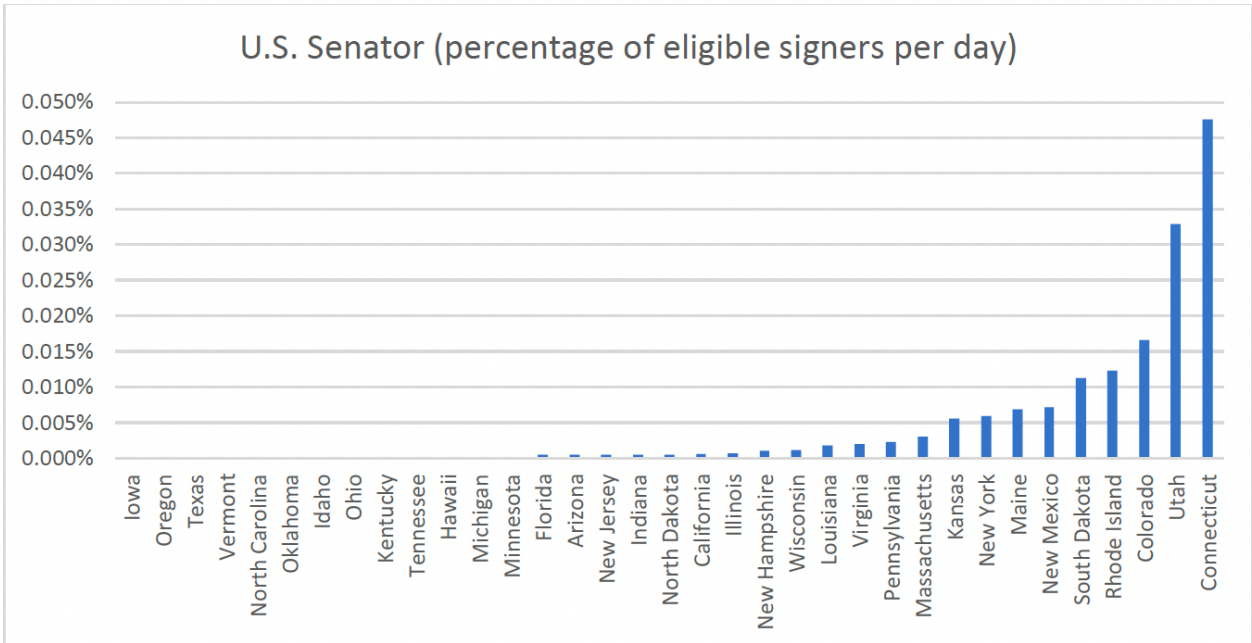
Indeed, evidence before the district court demonstrated that Connecticut's requirements for petition signatures are the most burdensome requirements in the nation; for instance, for the office of state senator:



JA66. The same is true for the office of U.S. Representative (see figure on next page):



JA67. The same is also true for U.S. Senator:



JA68. Additional charts showing the same for the offices of state representative and for all statewide offices in Connecticut were also presented to the district court.

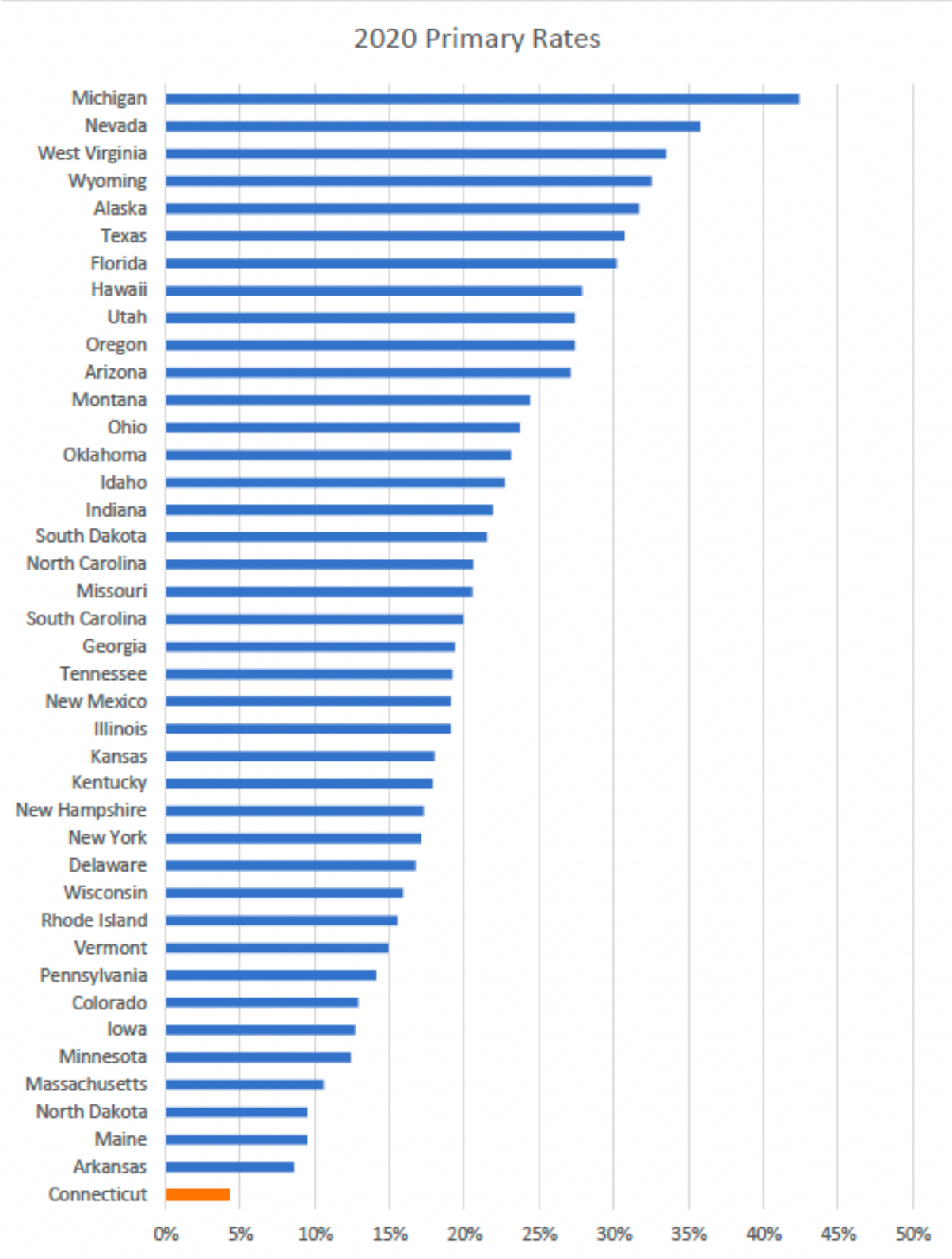
In concluding that Connecticut's requirements for signature gathering are not "severe," the district court made a number of assumptions that failed to view the record in the light most favorable to the party against which summary judgment was granted.

First, the district court assumed that candidates could gather 20 signatures per day for each day of the signature-gathering period and volunteers could gather 10 signatures per day for each day of the signature-gathering period, to determine how many volunteers a candidate would need to obtain ballot access in a district. JA54. This downplayed record evidence that, during the COVID-19 pandemic, even the most experienced campaigners and canvassers were able on some days to gather only six or seven petition signatures. *Id.*

Additionally, as Mr. Gottlieb noted in his declaration before the district court, "not all volunteers can devote several hours a day to petition circulating on all 14 days," JA75. As Mr. Gottlieb noted, even if volunteers had available time on nights and weekends, at least some time during a working weekday would need to be sacrificed for volunteers to validate their identity during the limited business hours when volunteers are allowed to submit signatures. *Id.* All of this is compounded by the difficulties posed by gathering petition signatures during a pandemic. *Id.*

Ignoring these barriers to volunteers' participation, the district court concluded it imposes no severe burden to enlist eleven volunteers to work seven-hour shifts for 14 straight days, or to enlist seven volunteers to work seven-hour shifts for 42 straight days. JA54-57. But evidence in the record showed that these are severe burdens that exclude virtually all but the most well-resourced candidates. *See, e.g.*, JA70.

The district court said its conclusion was "buttressed" by the number of candidates who had petitioned onto primary ballots in Connecticut in recent years. But the district court's conclusion failed to take into account the large absolute number of offices in Connecticut and therefore failed to view these numbers in the light most favorable to the party against which summary judgment was granted. The 14 non-endorsed candidates noted by the district court as obtaining primary ballot access in 2020 resulted in only 4.2% of available offices having primary elections. JA70. Connecticut's 4.2% primary rate was dead-last in the country in 2020. As demonstrated in the chart reproduced on the next page, JA70, Connecticut's 4.2% primary rate was not only the worst in the nation but a national outlier, nearly half the rate of the next-worst state in the nation, Arkansas:


2020 Primary Rates
Michigan
Nevada
West Virginia
Wyoming
Alaska
Texas
Florida
Hawaii
Utah
Oregon
Arizona
Montana
Ohio
Oklahoma
Idaho
Indiana
South Dakota
North Carolina
Missouri
South Carolina
Georgia
Tennessee
New Mexico
Illinois
Kansas
Kentucky
New Hampshire
New York
Delaware
Wisconsin
Rhode Island
Vermont
Pennsylvania
Colorado
Iowa
Minnesota
Massachusetts
North Dakota
Maine
Arkansas
Connecticut
0%
5%
10%
15%
20%
25%
30%
35%
40%
45%
50%

Although the district court observed the raw numbers of candidates who obtained primary ballot access in other years, the court failed to observe the low rates of primaries. For instance, the court failed to observe that the number of offices up for re-election every two years in Connecticut is enormous—with two party primaries for each of 169 registrars of voters, 151 state representatives, 36 state senators, 5 statewide offices, 5 congressional offices, and in two out of every three cycles, a U.S. Senate election as well. The district court touted 49 non-endorsed candidates obtaining primary ballot access in 2018. JA55. But for state and federal offices, Connecticut's primary ballot access in 2018 represented the third-worst primary rate in the nation that year. JA70.

C. Connecticut's party nominating conventions do not allow the state to impose severe burdens on primary ballot access

The barriers to both methods of ballot access – and the lack of primaries that have resulted – show that Connecticut's ballot access laws, in their totality, impose a severe burden on voters and candidates. The district court erred when it concluded that it need not consider this evidence at all because, it concluded, the *Lopez Torres* case compels that a candidate selection process must be constitutional if it involves conventions. JA57.

But use of a party nominating convention cannot, on its own, insulate a State from all challenges to its method of primary ballot access. *Lopez Torres* was not even a primary ballot access case. The State of New York had abolished primaries for selecting judges in 1921, despite electing judges on partisan slates. The plaintiffs in *Lopez Torres* sought to abolish the convention method and replace it with party primaries. That alone separates *Lopez Torres* from this case.

Lopez Torres is distinguishable in two additional ways. First, in *Lopez Torres*, there was a reasonable, nonburdensome method to trigger a primary for convention delegates, a procedural protection that is unavailable for party nominating conventions for legislative and executive offices in Connecticut. *See supra* p. 13.

Second, where a State chooses to use primaries to select candidates – like Connecticut here, and unlike New York in *Lopez Torres* – "the State is bound not to design its ballot or election process in ways that impose severe burdens on First Amendment rights of expression and political participation." *Lopez Torres*, 552 U.S. at 210 (Kennedy, J., concurring). Indeed, "[t]here are certain injuries . . . that are so severe they are unconstitutional no matter how minor the burdens at the other stage." *Id.* This is because "there is an individual right to associate with the political

party of one's choice and to have a voice in the selection of that party's candidate for public office." *Id.*

This second distinction—between constitutionally abolishing primaries and having primaries with unconstitutionally restrictive access—has deep roots in the law. States may, for instance, create a facility "designed for and dedicated to expressive activities," *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975), where it cannot "escape the obligation to afford appropriate procedural safeguards," *id.* at 562, of First Amendment rights—a so-called "designated public forum." Although "the government is not required to indefinitely retain the open character of the facility," *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 802 (1985) (internal quotation marks omitted) (citing and quoting *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983)), as long as it maintains a public forum, it must abide by standards of openness and afford appropriate safeguards.

So too with party primaries. Although a State may be free, like New York, to eschew party primaries entirely and select candidates by party nominating conventions alone, once a State elects to use party primaries, it may not "impose severe burdens on First Amendment rights," *Lopez Torres*, 552 U.S. at 210 (Kennedy, J., concurring). But that is exactly what

Connecticut has done—Connecticut allows party primaries for the offices of state representative, state senator, U.S. representative, U.S. senator, and statewide offices, but it erects barriers to primary ballot access so burdensome that they exclude virtually all candidates who attempt to run.

At the very least, Plaintiffs-Appellants raised a genuine dispute of material fact as to the severe burden of Connecticut's ballot access laws. In dismissing the case, the district court made assumptions about how many signatures candidates and volunteers could collect each day of a petition signature-gathering window that failed to view the evidence in the light most favorable to the party against which summary judgment was granted.

The district court then bootstrapped those assumptions to another assumption about the availability, ease, and ability of volunteers to canvass party members for signatures for weeks on end at a constant rate of effectiveness—during a pandemic. This, too, failed to view the evidence in the light most favorable to the party against which summary judgment was granted.

Finally, the district court concluded that the party nominating convention avenue to ballot access imposed no severe burdens on candidates or voters despite the uncontested evidence of Mr. Gottlieb and his co-plaintiffs of the burdens that it imposes, burdens which led Mr.

Gottlieb and his co-plaintiffs to believe that nomination by convention was impossible.

Thus, at the very least, this Court should reverse the district court's grant of summary judgment on the basis that Plaintiffs-Appellants raised a genuine dispute of material fact as to whether Connecticut's ballot access laws are severe and remand for further proceedings.

II. Connecticut's ballot access laws cannot withstand strict scrutiny

"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." *Burdick*, 504 U.S. at 441. Ballot access restrictions infringe on both "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." *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (citing and quoting *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)).

"Access restrictions also implicate the right to vote because, absent recourse to referendums, 'voters can assert their preferences only through candidates or parties or both.'" *Socialist Workers Party*, 440 U.S. at 184 (citing and quoting *Lubin v. Panish*, 415 U.S. 709, 716 (1974)). "By limiting

the choices available to voters, the State impairs the voters' ability to express their political preferences." *Id.*

Access to primary elections is part of the freedom protected by the First and Fourteenth Amendments. The Supreme Court of the United States first held that regulations on party primaries were state action in the "White Primary Cases," *Smith v. Allwright*, 321 U.S. 649, 663-64 (1944) & *Terry v. Adams*, 345 U.S. 461, 469-70 (1963), striking down racial restrictions on access to the primary ballot. *See also Gray v. Sanders*, 372 U.S. 368, 375 (1963) (striking down "county unit system" as basis for counting votes in primary elections for statewide offices because it weighed rural votes more heavily than urban votes).

In many cases since, the Supreme Court has held that unjustified restrictions on access to the primary ballot are unconstitutional, even if avenues remain for access to the general election ballot. *See, e.g.*, *Bullock v. Carter*, 405 U.S. 134, 143 (1972) (striking down excessive filing fees for primary ballot access even though candidates could gain access to ballot in general election without fees); *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973) (striking down law prohibiting person from voting at primary if they had voted at primary of another party within preceding 23 calendar months); *Lubin*, 415 U.S. at 716 (requiring states to offer alternative to filing fees for

candidates in primary elections who cannot afford them); *see also Lopez Torres*, 552 U.S. at 211 (Kennedy, J., concurring) ("[T]here is an individual right to associate with the political party of one's choice and to have a voice in the selection of that party's candidate for public office.").

Thus, if this Court concludes, as it should, that Connecticut's restrictions are "severe," this Court should apply strict scrutiny to the restrictions. "Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

In the district court, the State put forward its interest in "conducting orderly, fair, and transparent elections." JA58-JA59. As the district court noted, the State has an important interest in "requiring some preliminary showing of a significant modicum of support before printing . . . the ballot," (citing *Jenness*, 403 U.S. at 442). JA58. But even "when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty," *Socialist Workers Party*, 440 U.S. at 185 (citing *Kusper*, 414 U.S. at 58-59), because "an election campaign is a means of disseminating ideas, as well as attaining political office." *Id.* at 186. "Overbroad restrictions on ballot access jeopardize this form of political expression." *Id.*

That is exactly what has happened. The requirements imposed by Connecticut are plainly not the least restrictive means of protecting the State's objectives of screening out candidates who do not enjoy a significant modicum of support. Because they are not narrowly tailored, they cannot withstand strict scrutiny.

The district court also concluded that Connecticut's requirements serve the State's interest in the orderly and efficient administration of elections because they encourage "candidates to seek the support of the convention delegates first rather than bypass the conventions altogether." JA58-JA59. According to the state and the district court, Connecticut's regulations "discourage candidates from bypassing the core engaged party members, unless they are confident that they have a broad degree of support from the broader enrolled party members in the district." *Id.*

Although the district court held that these interests are sufficiently important to justify reasonable and non-discriminatory restrictions on access to primary ballots, the district court never reached the question of whether these interests are sufficiently compelling to justify severe restrictions. Should this Court reach the question, they are not.

For one, the prospect of ballot access by party nominating convention is incentive enough for candidates to seek the support of the convention

delegates—if seeking their support is even possible for them. Although the State said there was an interest in requiring candidates to go to convention delegates first, the State already allows candidates for certain offices, such as U.S. representative and U.S. senator, to begin collecting petition signatures before the conventions take place, allowing candidates to "bypass" the convention process altogether already.

Finally, like with the State's interest in screening out non-serious candidates, Connecticut's restrictions are far more than the least restrictive means of accomplishing its objectives. Connecticut's restrictions on access to the primary ballot are so severe that they do not channel candidates to seek the support of convention delegates, but instead discourage primary challenges to incumbent office holders at all.

Indeed, the supposedly important interests put forward by the State in this litigation appear to be post-hoc rationalizations for the restrictions. The short time period for gathering petition signatures does not appear to have originated in Party Rules. *See* ECF No. 28-1 at 22-49 of 116 (State Democratic Party Rules).

As Plaintiff Gottlieb observed in his expert report, JA72-JA73, the severity of the requirements appears to be an accident of history. The legislative history provides no guidance for why the amount of time

provided to collect the signatures is so short (14 or 42 days). Then-Secretary of the State Bysiewicz, who drafted the legislation, said upon questioning about the 5%-in-14-days requirement that "personally I've got no problem if you wanted to lower the percentage . . . ." JA73. Regarding the time period, Bysiewicz replied that "there has been a lot of interest in seeing petitions be available for General Assembly office also in January. . . . [T]he Committee may want to consider that . . . ." *Id*. But the 14-day period, which appears to have originated in the 1955 law, ended up in the 2003 law as well.

Indeed, Connecticut's severe restrictions on ballot access appear to be nothing more than an historical accident. But "[h]istorical accident, without more, cannot constitute a compelling state interest." *Socialist Workers Party*, 404 U.S. 187.

All 49 states have less strict primary ballot access requirements than Connecticut. Some states have hardly any restrictions on primary ballot access at all.

Yet, as Mr. Gottlieb found in his report, no state faces a deluge of candidates on the ballot on a consistent basis. JA71; *Cf. Williams*, 393 U.S. at 33 n.9 (observing that no significant problem has arisen in states with generally lenient requirements for ballot access). No state even has an

average of even two candidates on the ballot for primaries for each elected office. JA71. The highest average number of candidates in a primary in 2020 was 1.8 in Michigan. *Id*. Connecticut's requirements go further than providing a threshold for legitimate candidates and instead screen out even candidates with significant support, denying voters and candidates their associational rights.

III. Connecticut's requirements for the office of state senator, which are more burdensome than its requirements for higher offices, fail even lower levels of scrutiny

Connecticut's requirements for petition signatures for the office of state representative and state senator—5% of party members in 14 days—are far more restrictive than its requirements for U.S. representative, U.S. senator, or governor—2% of party members in 42 days. This results in requiring more signatures to be collected per day for the office of state senator than for U.S. representative.

The district court gave short shrift to this disparity, observing that "'[t]he Constitution does not prohibit legislatures from enacting stupid laws,'" *Lopez Torres*, 552 U.S. 196, 209 (Stevens, J., concurring), JA59 n.13, which is true. But where restrictions on access to the ballot are involved, whatever level of scrutiny is applied, the State must provide "reasons that justify" the restrictions. *Socialist Workers Party*, 440 U.S. at 187. Because no

reasons justify why the offices of state representative and state senator should have restrictions so much more severe than higher offices, the restrictions fail even lower levels of scrutiny.

CONCLUSION

There is error. The district court's order granting summary judgment should be vacated and the case remanded with instructions to deny the Defendants-Appellees' motion for summary judgment and for further proceedings.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

I hereby certify that this brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, as modified by Second Circuit Local Rule 32.1(a)(4), in that this brief contains 5,308 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Palatino font.

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