No. _____

IN THE

Supreme Court of the United States

JIM FEEHAN,

Petitioner,

v.

RICK MARCONE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Connecticut Supreme Court

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PETITION FOR A WRIT OF CERTIORARI

Proloy K. Das, Esq.*
Matthew A. Ciarleglio, Esq.
Kevin W. Munn, Esq.
MURTHA CULLINA
CityPlace I
185 Asylum Street
Hartford, CT 06103
Tel. (860) 240-6000
Fax (860) 240-6150
pdas@murthalaw.com
Counsel for Petitioner

*Counsel of Record
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QUESTIONS PRESENTED BY PETITIONER FOR REVIEW

(1) Whether the Connecticut Supreme Court erred in disregarding the equal protection principles applied in *Bush v. Gore*, 531 U.S. 98 (2000) and requiring proof of intentional misconduct to order a new election in a state legislative district, where 75 voters were denied their constitutional right to vote when they were given the wrong ballots in an election decided by 13 votes;

(2) Whether the Connecticut Supreme Court erred in refusing to remedy an unconstitutional election in the 120th Assembly District in contravention of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the court whose judgment is sought to be reviewed are:

Petitioner Jim Feehan was the plaintiff and appellant below.

Respondents Rick Marcone, Lou Decilio, Beth Boda, John Krekosa, and Susan Pauluck ("Town defendants"), were defendants and appellees below.

Respondents Denise Merrill, Denise Nappier, and Kevin Lembo ("State defendants"), were defendants and appellees below.

Respondent Phillip Young, was an intervening defendant and appellee below.

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PETITION FOR WRIT OF CERTIORARI

Jim Feehan, the Republican Party and Independent Party candidate for State Representative for Connecticut's 120th Assembly District, petitions this Court to issue a *writ of certiorari* to review the judgment of the Connecticut Supreme Court.

OPINIONS AND ORDERS BELOW

The Connecticut Supreme Court's decision was published on April 23, 2019, and is reported at 331 Conn. 436, and reproduced in Appendix A (1A-65A). On December 21, 2018, at the conclusion of oral argument, the Court issued an order rejecting the Petitioner's appeal, indicating that a written decision would follow. On January 30, 2019, the Court issued an unpublished slip opinion in which it set that date as the operative one for procedural and substantive purposes. On February 11, 2019, the Petitioner filed a timely motion for re-argument and/or reconsideration, which was denied on February 27, 2019. The Connecticut Supreme Court's decision (Appendix A, 1A-65A), order on the motion for re-argument and/or reconsideration (Appendix C, 80A-81A), and the trial court's written decision are appended to this petition (Appendix B, 66A-79A).

JURISDICTION

The Connecticut Supreme Court issued its decision on January 30, 2019. A timely motion for re-argument and/or reconsideration was thereafter denied on February 27, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution provides, in relevant part:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2.

The First Amendment to the United States Constitution provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S.Const. amend. I.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S.Const. amend. IV, sec. 1.

42 U.S.C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

Article Third, section seven of the Connecticut Constitution provides:

"The treasurer, secretary of the state, and comptroller shall canvass publicly the votes for senators and representatives. The person in each senatorial district having the greatest number of votes for senator shall be declared to be duly elected for such district, and the person in each assembly district having the greatest number of votes for representative shall be declared to be duly elected for such district. The general assembly shall provide by law the manner in which an equal and the greatest number of votes for two or more persons so voted for for senator or representative shall be resolved. The return of votes, and the result of the canvass, shall

be submitted to the house of representatives and to the senate on the first day of the session of the general assembly. Each house shall be the final judge of the election returns and qualifications of its own members." Conn. Const., art. III, § 7.

STATEMENT OF THE CASE

On November 6, 2018, 76 voters[1] were denied the right to vote for their state representative in the 120th Assembly District when they were given the wrong ballots, and the candidates' vote totals were separated by 13 votes. On November 15, 2018, the Petitioner filed a lawsuit in the Connecticut Superior Court seeking a new, fair, and constitutional election.[2] On November 30, 2018, the trial court (*Bellis, J.*) agreed that, if the allegations set forth in the Petitioner's complaint were true, there was a high likelihood of success on the merits of the Petitioner's claim (*i.e.* that a new election was required). T.11/30/18 at 20-21 ("[G]iven the serious allegations with respect to the incorrect ballots distributed during the election, the number of voters who were deprived of their constitutional rights to vote, and the margin by which the plaintiff lost the election, the plaintiff has demonstrated that he is likely to prevail on the merits of his underlying

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[1] The complaint alleged that 76 voters were given the wrong ballots. The Connecticut House of Representatives Committee on Contested Elections found that 75 people were given the wrong ballots.

[2] The Petitioner filed suit against the town officials responsible for administering the election ("Town Defendants"), as well as the state officials responsible for canvassing the votes ("State Defendants"). Thereafter, the Petitioner's opponent in the race, Phil Young, intervened as a defendant.

claim.") However, the trial court concluded that, under the Connecticut Constitution, it was for the Connecticut House of Representatives to hear the Petitioner's claims. T.11/30/18 at 17-18. The trial court granted the Petitioner's request to enjoin the state defendants from certifying the election and from declaring a winner. T.11/30/18 at 21. The court also granted a motion to dismiss filed by the Intervener, Phil Young, the Democratic Party's candidate for State Representative in the 120th Assembly District, concluding that the Petitioner's remedy was before the Connecticut House of Representatives. T.11/30/18 at 17-18.

On December 7, 2018, the Chief Justice of Connecticut Supreme Court granted General Statutes § 52-265a applications filed by all three parties (the Petitioner, Young, and the State Defendants) for expedited public interest appeals. The Connecticut Supreme Court scheduled oral argument for December 21, 2018. During the December 21st oral argument, several justices discussed waiting to see whether the Connecticut House of Representatives would itself grant a new election before addressing the federal constitutional violations. See Oral Argument (https://ct-n.com/ondemand.asp?ID=15856) (Chief Justice Robinson (5:30), Justice Mullins (6:00), Justice Ecker (24:30), and Justice Palmer (28:00)). At the conclusion of argument, the Connecticut Supreme Court issued the following order:

> After a hearing and based on the record and claims before the Court, it is hereby ordered that the judgment of the trial court is affirmed insofar as it lacks jurisdiction at this time. In accordance

> with this determination, it is further ordered that the trial court's injunction is vacated. A written decision will follow.

Supreme Court Order, S.C. 20216, 20217, 20218 (12/21/19) (emphasis added.)

The Connecticut House of Representatives opened its session on January 9, 2019. The House adopted House Resolution 4, which raised a Committee on Contested Elections.[3] The Speaker of the House (Rep. Aresimowicz, D-30), appointed four members to the Committee (Rep. D'Agostino, D-91, Rep. Haddad, D-54, Rep. Candelora, R-86, Rep. Perillo, R-113). Democratic representative D'Agostino was appointed to be the Committee's chair. On January 11, 2019, the Committee convened and, at its request, the Petitioner presented it with an Election Challenge Complaint. The allegations in the Election Challenge Complaint were the same as those made in the November 2018 Complaint. The final paragraph set forth the controlling standard based on established Connecticut case law:

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[3] House Resolution 4 states: "That the committee on contested elections, appointed pursuant to Rule 19 of the House Rules, report to the clerk of the House, on or before the close of business on February 4, 2019; that the Speaker of the House appoint the chairperson of the committee; that the chairperson of the committee have the power to compel the attendance and testimony of witnesses by subpoena, require the production of any necessary records, books, papers or other documents, and to administer oaths to witnesses before the committee; and that the joint committee on legislative management provide to the committee on contested elections such staff and facilities, including administrative personnel, supplies and equipment, that the committee on contested elections may require to discharge its duties.'"

> Where a sufficient number of voters are given the wrong ballots so as to call into question the reliability of the election, Connecticut law requires that a new election be held. *See* Exhibit 10 (*Rutkowski v. Marrocco*, 2013 WL 6916610 (Conn. Super. Ct. 2013) (*Sheridan, J.*) (applying standard set by Supreme Court in *Bortner v. Town of Woodbridge*, 250 Conn. 241, 259 (1999) and ordering a new election where 17 voters received the wrong ballots in an election decided by 3 votes).

Election Challenge Complaint, par. 23.[4] Nothing was filed in response to the Election Challenge Complaint and there did not appear to be any controversy over this settled standard.[5]

On January 11, 2019, the Committee on Contested Elections discussed the procedure it would implement for its investigation and report. The Committee sought "suggestions" from the candidates as to witnesses it should call. But, as made clear in House Resolution 4, it was the Committee and, specifically the Chair of the Committee, who was authorized to call witnesses. The Committee held hearings to investigate the allegations in the Election Challenge Complaint on January 24th and

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[4] All filings and transcripts of proceedings before the Committee are available at:
https://www.cga.ct.gov/gae/taskforce.asp?TF=20190109_Contested Elections Committee

[5] The Chairman (D'Agostino) expressly acknowledged this Connecticut case law and the *Bortner* standard at the start of the Committee's proceedings. *See* 1/11/19 Committee Meeting.

25th. It subpoenaed and heard testimony from witnesses who confirmed the facts alleged in the Complaint as well as the accuracy of the exhibits submitted in support of those allegations. From their questioning and comments, it became clear that the Democratic members were attempting to demonstrate that the distribution of the wrong ballots did not, in fact, occur. However, that effort failed in light of the overwhelming testimony from all witnesses (including both the Republican and Democratic Registrars of Voters) establishing that 75 voters in the 120th Assembly District were not given ballots listing the candidates for their state representative and the margin between the candidates was 13 votes.

The Committee on Contested Elections then asked two candidates, the Petitioner and Young, to submit written briefs by 9 a.m. on January 30, 2019. In his brief to the Committee, the Petitioner noted that a new election was required to remedy the unconstitutional election in which 75 voters were denied their right to vote:

> It is now beyond peradventure, based on the evidence and testimony received by this Committee and in juxtaposition with the allegations in the Election Challenge Complaint, that the rights of the candidates and the voters to a just and constitutional election were violated.... While this Committee does not adjudicate federal constitutional claims in and of themselves, the failure to provide for a new election would not only violate Connecticut state law… it would leave intact the federal

> constitutional violations caused by the improper distribution of the wrong ballots…. In other words, if the House of Representatives orders a new election in response to this election challenge, then the constitutional violations will be remedied and it will not be necessary for the courts to intervene. However, if the House of Representatives does not order a new election, then those constitutional violations will still need to be remedied through the courts. This is consistent with the Supreme Court's "at this time" qualifier set forth in its December 21, 2019 order.

Petitioner's 1/30/19 Brief (cases omitted).

Later that afternoon, the Connecticut Supreme Court emailed to the parties an unpublished decision as a slip opinion. In that decision, the Court erroneously held that the denial of the right to vote to 75 people did not amount to a constitutional violation. The Court first stated that, "[i]t is well settled in the Second Circuit that establishing an equal protection violation requires similar proof of intentional discrimination." *Feehan v. Marcone*, 331 Conn. 436, 481 (2019). From this premise, the Court concluded that, even though 75 people were denied the right to vote, in absence of specific intent to withhold the right to vote, there was no constitutional violation. *Id.* at 483-84. In reaching this conclusion, the Court did not follow the Sixth Circuit's holding in *Hunter v. Hamilton County Board of Elections*, 635 F.3d 219, 234–35 n.13 (6th Cir. 2011) that "in the context of elections, there can be an equal protection violation even in the absence

of evidence of intentional discrimination." *Id*. at n. 39.

Despite being unwilling to remedy the unconstitutional election, the Connecticut Supreme Court expressly acknowledged the injustice that had occurred and expressed its hope that the House of Representatives members would do the right thing and order a new election:

> We are, however, cognizant of the seriousness of the plaintiff's allegations in this case, insofar as the alleged distribution of the wrong ballots could have deprived numerous electors of their right to cast a vote for their state representative, and that the margin was small enough that the alleged error might have affected the outcome of the election. Given the seriousness of those claims, and its exclusive jurisdiction under the elections clause, we "must presume that the members of the General Assembly will carry out their duties with scrupulous attention to the laws under which they serve. [W]e must and should presume that any officer of the state . . . will act lawfully, correctly, in good faith and sincerity of purpose in the execution of his [or her] duties." [ ] (Footnote omitted; internal quotation marks omitted.) *Kinsella* v. *Jaekle*, [192 Conn. 704, 729 (1984)]; *see also* General Statutes § 1-25 (prescribing identical oath to uphold Connecticut and federal constitutions for judges and members of General Assembly). Accordingly, we

> conclude that exclusive jurisdiction over the plaintiff's claims in the present case lies with our state House of Representatives.

Feehan v. Marcone, 331 Conn. at 467-468 (footnote omitted). The Court further noted that, although it was staying its hand, it had the authority to intervene if the House violated the constitution, such as the right to due process. *See id*. at 468, n.27.

On February 1st, the Committee discussed the preparation of its report. Faced with the now established fact that 75 people were given the wrong ballot, but empowered by the Court's trepidation to act, the Democratic members pre-textually changed the standard required for a new election and imposed a new and impossible burden of proof on the Petitioner. On February 4th, the Committee issued its report. The members agreed that the facts alleged in the Election Challenge Complaint were proven. Committee Report p. 1-9. However, the Democrats imposed a new burden, which was not set forth at the beginning of the proceedings, requiring the Petitioner to prove how many of the 75 voters who received the wrong ballot would have voted for the Petitioner. After declaring this new burden of proof, the Democrats proclaimed that the Petitioner had failed to meet this burden and that the Election Challenge Complaint should be dismissed. Committee Report p. 15-19.

The Republican members noted that, based on the established facts, settled Connecticut law mandated a new election and that the Democrats' new burden of proof had been expressly rejected by the Connecticut Supreme Court:

[W]e bind ourselves to the same judicial precedents and principle of *stare decisis* as we would were we the Judicial Branch. Consideration of this matter by the House is merely a change in forum, not a change in law, standard, or applicable precedent. The standard of review laid out by the Connecticut Supreme Court in election disputes such as these is found in *Bortner v. Town of Woodbridge*, 250 Conn. 241 (1999). In order to overturn the results of an election and order a new election the following must be found:

(1) There were substantial errors in the rulings of an election official or officials, or substantial mistakes in the count of the votes; and
(2) As a result of those errors or mistakes, the reliability of the result of the election is seriously in doubt.

We further note that Supreme Court precedent established by *Bortner,* further affirmed and amplified by *Bauer v. Souto¸* 277 Conn. 829 (2006), explicitly rejects the notion that a challenger must establish that, but for the irregularities, he would have prevailed in the election.
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As the *Bortner* standard has been satisfied, we see no other option than for the House of Representatives to order a new election. We do not take this step lightly, and are aware of the

> judicial and legislative history counseling caution before exercising its power to vacate election results. But similar to the Supreme Court in *Bauer*, given the facts properly found in the challenge before us, we have no other reasonable choice but to do so.
>
> Although we are aware that a new election is really a *different* election, we follow the Supreme Court's guidance in *Bauer*. In *Bauer*, the Court ruled that the new election should attempt to "minimize, rather than to maximize, the differences between the first and new election. Put another way, the new election should be the result of an effort to approximate, as closely as is reasonably possible, the first election." We agree, and recommend that the new election should field the same slate of candidates (Rep. Young, Feehan, and Palmer), and operate with the same policies and procedures of a typical election, as is mandated by valid precedent of the Connecticut Supreme Court.

Committee Report p. 20-21, 25.

With the release of the Connecticut Supreme Court's emailed slip opinion on January 30, 2019, and the subsequent partisan[6] decision by the

[6] The Democrats in the House of Representatives did not even attempt to hide their efforts to elevate a partisan power-play over justice. One of the Democratic members provided the following explanation for why he was ignoring judicial precedents:

Democrats in the House of Representatives to refuse to remedy the unconstitutional election, the Petitioner took the Connecticut Supreme Court up on its offer to revisit the case by timely filing a motion for re-argument and/or reconsideration on February 11, 2019. Young responded to the motion by arguing that the Connecticut Supreme Court should not get involved because his Democratic colleagues "may" or "may not" do anything more with the issue. On February 27, 2019, the Connecticut Supreme Court denied the motion for re-argument and/or reconsideration. The instant petition is due with this Court by May 28, 2019, and the Petitioner and the voters of the 120th Assembly District remain standing with their constitutional rights impaired.[7]

> *"[The courts are] legally trained and I would suggest probably far more disciplined as a result. They are not political. They're impartial. And they are distant from the decisions that they're making. None of those things apply to us. We are a body that's valued for being passionate and sometimes parochial. We are a political body elected on two year cycles. We organize ourselves by political party…."*

Representative Gregory Haddad (D), Committee on Contested Elections Meeting (2/1/19) (available at https://ct-n.com/ondemand.asp?ID=15977 at 17:00.)

[7] Republicans in the House of Representatives have attempted to call for a new election through amendments to various voting legislation presented by the Democratic leadership. These amendments have failed on strictly party line votes. See "Candelora's fight over botched election is bigger than the error," Connecticut Post (May 9, 2019). Highlighting the dangers of one-party rule to the rule of law, both Young and a lawyer from the law firm representing Young (Rep. Blumenthal (D-147) actually voted on and against these amendments.

SUMMARY OF ARGUMENT

This appeal is a cautionary tale about the dangers of one-party rule[8] and the obligation that the judiciary has to protect the federal constitutional right to a fair election. Under the federal constitution, candidates and electors have the fundamental right to vote and to have those votes counted equally. Here, electors of the 120th Assembly District were disenfranchised, denied their right to vote for their state representative, and denied equal protection of the law. The Petitioner, Jim Feehan, a candidate for state representative, asked the Connecticut courts, both as a candidate and elector, to protect the constitutional rights of the voters of the 120th Assembly District to choose their state representative. However, the Connecticut courts ruled in favor of Philip Young, the incumbent candidate and member of the majority political party, holding that the decision of who should represent the 120th Assembly District should rest with Young's colleagues in the House of Representatives. At its core, this case is about: (1) the importance of the rule of law; (2) the significance of individual constitutional rights; and (3) the courts' role and obligation to ensure the continued primacy of both of these fundamental precepts in a republican form of government.

The trial court (*Bellis, J.*) recognized that the constitutional rights of the Petitioner and of the electors were violated in the election for state representative in the 120th Assembly District.

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[8] In Connecticut, 91 of the 151 members of the House of Representatives are members of the Democratic Party. All three State Defendants (the Secretary of the State, Treasurer, and Comptroller) are Democrats, as is the Attorney General.

T.11/30/18 at 19-21. The trial court, therefore, granted the plaintiff's request for injunctive relief against certification of the election and the declaration of a winner. Id. Nonetheless, the trial court held that the state constitution barred it from remedying those constitutional violations and that any remedy rested within the discretion of the House of Representatives. T.11/30/18 at 17-18. The trial court concluded that the judiciary could not act to protect the constitutional rights of the electors of the 120th Assembly District in Stratford.

On appeal to the Connecticut Supreme Court, the Petitioner asked the Court to reaffirm the fundamental principle that the judiciary has not only the ability to protect individuals' constitutional rights but, indeed, the obligation to do so. *See*, *e.g.*, *Fisher v. University of Texas*, 579 U.S. ___ (2016); *Obergefell v. Hodges*, 576 U.S. ___ (2015); *United States v. Virginia*, 518 U.S. 515 (1996); *Romer v. Evans*, 517 U.S. 620 (1996); *Roe v. Wade*, 410 U.S. 113 (1973); *Loving v. Virginia*, 364 U.S. 1 (1967); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Brown v. Board of Education*, 347 U.S. 483 (1954). This ability and obligation applies with special force when the judiciary is called upon to protect the right to vote and the right to have those votes counted equally. *See Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Reynolds v. Sims*, 377 U.S. 533, 579 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964); *Baker v. Carr*, 369 U.S. 186 (1962); *Butterworth v. Dempsey*, 237 F.Supp. 302 (D. Conn. 1964); *Butterworth v. Dempsey*, 229 F.Supp. 754 (D. Conn.), *aff'd sub nom*. *Pinney v. Butterworth*, 378 U.S. 564 (1964).

As this Court has explained, "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). The right to vote extends not only to "the initial allocation of the franchise," but also to "the manner of its exercise." *Bush v. Gore*, 531 U.S. 98, 104 (2000). Here, all electors of the 120th Assembly District were not allowed to choose their state representative. The Petitioner, both as a candidate and elector, was deprived of the opportunity to have those electors vote for him and to be treated equally with other candidates for elected office.

The Petitioner asked the Connecticut Supreme Court to remedy these constitutional infringements. However, the Court declined to do so, instead deferring to the House of Representatives to first attempt to resolve the facts and provide for a new election. But when the House failed to do so, the Connecticut Supreme Court still did not remedy the unconstitutionality of the election.[9] Its decision threatens the very core of a republican form of government – the right to vote and the right to a fair election.

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[9] Young and the State Defendants will want this Court to ignore the House of Representatives' unjust proceedings as separate from the judicial proceedings. However, the Connecticut Supreme Court itself treated the House proceedings as a continuum of this action, expressly relying on House Rule 19 in its written decision, which was not adopted until January 9, 2019 (well after the briefing and oral argument in this case). *See Feehan v. Marcone*, 331 Conn. at 448.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CIRCUIT SPLIT AS TO WHETHER, POST-*BUSH V. GORE*, 531 U.S. 98 (2000), PROOF OF INTENTIONAL MISCONDUCT IS REQUIRED TO DECLARE A FLAWED ELECTION TO BE UNCONSTITUTIONAL

A. The Right to Vote and to Have That Vote Counted Equally

A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution. *See Baker v. Carr*, 369 U.S. 186, 207-08 (1962). The failure to provide the correct ballots to voters of the 120th Assembly District severely burdened and infringed upon the fundamental right to vote of the approximately 75 voters in the 120th Assembly District who received incorrect ballots.[10] In addition,

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[10] In elections cases, a candidate has standing to assert his own constitutional rights as well as the constitutional rights of the voters. *See Walgren v. Board of Selectmen of Town of Amherst*, 519 F.2d 1364 n.1 (1st Cir. 1975) ("[A] candidate has standing to raise the constitutional rights of voters."). This is because his rights as a candidate are intertwined with the rights of the associated voters in his district. *See Krieger v. City of Peoria*, No. CV-14-01762-PHX-DGC, 2014 WL 4187500, at *2–3 (D. Ariz. Aug. 22, 2014). Indeed, in *Bush v. Gore*, 531 U.S. 98, 104 (2000), a candidate for President of the United States advanced the equal protection rights of the voters. In that case, this Court recognized the candidates' protection of the rights of the voters when it explained that the right to vote extends not only to "the initial allocation of the franchise," but also to "the manner of its exercise." *Bush v. Gore*, 531 U.S. at 104. Moreover, this Court has explained that "the rights of voters and the rights of

the Petitioner, as a candidate and as an elector, was injured by an election process in which a meaningful number of voters were given ballots that did not include his name. The right to vote is a fundamental federal right. *Reynolds v. Sims*, 377 U.S. 533, 579 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964); *Baker v. Carr*, 369 U.S. 186, 208 (1962).

> 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. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.

Wesberry v. Sanders, 376 U.S. 1, 17-18 (1964).

The voting rights at issue here were recognized by this Court in *Baker v. Carr*, 369 U.S. 186 (1962), which established the constitutional principle of "one-man, one-vote." *See also Avery v. Midland County*, 390 U.S. 474 (1968); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Gray v. Sanders*, 372 U.S. 368 (1963). The supremacy of this constitutional principle over the Connecticut Constitution was previously recognized by the Connecticut federal district court in *Butterworth v. Dempsey*, 237 F.Supp.

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candidates do not lend themselves to neat separation; laws that affect candidates always have some theoretical, correlative effect on voters." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)). Here, the Petitioner is asserting his own constitutional rights as well as the constitutional rights of the voters in 120th Assembly District.

302 (1964); *Butterworth v. Dempsey*, 229 F.Supp. 754 (1964) and by the Connecticut Supreme Court in *Fonfara v. Reapportionment Commission*, 222 Conn. 166, 179-80 (1992). "One-man, one vote," ensures that every elector, no matter where he or she lives, will have an equal say in electing their representative. This Court has held that the principle of "one-man, one-vote" applies to both federal elections for congressional representatives; *Wesberry v. Sanders*, 376 U.S. 1 (1964); as well as to state elections for legislative representatives. *Reynolds v. Sims*, 377 U.S. 533 (1964). At its essence, the principle of "one man, one vote" means that the right of a person to vote cannot be arbitrarily denied based on where he lives and that his vote must be counted equally.

Under the Equal Protection Clause of the Fourteenth Amendment, "all qualified voters have a constitutionally protected right to vote, and to have their votes counted." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). Here, voters who received incorrect ballots were treated differently than other, similarly situated voters, in the 120th Assembly District who received the correct ballots and had their votes counted. The Petitioner, as a candidate, was injured by an election process in which voters in the 120th Assembly District were not given the choice to vote for him in the election for state representative. The Petitioner, as a candidate and as an elector, also has standing to assert that electors have the right to vote on equal terms. *See Bush v. Gore*, 531 U.S. 98, 104–05 (2000).

Equal protection concerns are evaluated by the courts when a legal right is afforded to some individuals while it is denied to others similarly situated. In the context of the right to vote, this right

is lost when an elector is denied "the opportunity to cast a ballot at the same time and with the same degree of choice among candidates available to other voters." *Dudum v. Arntz*, 640 F.3d 1098, 1109 (9th Cir. 2011). "The right to vote includes the right to have one's vote counted on equal terms with others." *Hunter v. Hamilton County Board of Elections*, 635 F.3d 219, 234 (6th Cir. 2011). Here, 75 voters in the 120th Assembly District were denied the right to vote and the right to have their votes counted on equal terms.

B. The Split Between the Second and Sixth Circuits

When a "voting system arbitrarily denies its citizens the right to vote or burdens the exercise of that right based on where they live," the Equal Protection Clause is violated. *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 476 (6th Cir. 2008). The Sixth Circuit has explained that, in elections cases after *Bush v. Gore*, intent is not an issue because "the **only** question … is whether… the defendants arbitrarily den[ied] [voters] the right to vote depending on where they live." *Id.* (emphasis added). The Sixth Circuit has understood *Bush v. Gore* to stand for the proposition that a "showing of intentional discrimination" is not required in elections cases that involve the right to vote. *See Hunter v. Hamilton County*, 635 F.3d at 234 n.13. "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." Id. at 234 (quoting *Bush v. Gore*, 531 U.S. at 104-105). "At a minimum, … equal protection requires 'nonarbitrary treatment of

voters." *League of Women Voters of Ohio v. Brunner*, 548 F.3d at 477 (quoting *Bush v. Gore*, 531 U.S. at 105).

However, the Connecticut Supreme Court rejected the claim that *Bush v. Gore* made clear that it is the fact that a person was denied the right to vote, and not whether a third party intended for that denial to happen, that is determinative of whether an election is unconstitutional. Instead, the Connecticut Supreme Court started with the premise that this Court has not addressed this issue. *See Feehan v. Marcone*, 331 Conn. 436 at 478 ("In considering claims of federal law, it is well settled that, when the United States Supreme Court has not spoken, we find decisions of the Second Circuit particularly persuasive.").

The Court then explained that, under Second Circuit jurisprudence, proof of *intentional* conduct is required for the denial of the right to vote to be unconstitutional. *See Feehan v. Marcone*, 331 Conn. at 479 ("The Second Circuit observed that … in voting cases, 'plaintiffs must prove an intentional act in order to show a due process violation.'") (citing *Shannon v. Jacobowitz*, 394 F.3d 90 (2d Cir. 2005), and *Powell v. Power*, 436 F.2d 84 (2d Cir. 1970)). Following from this interpretation of Second Circuit jurisprudence, the Connecticut Supreme Court refused to acknowledge a constitutional violation of the right to vote without evidence of the deprivation being intentional. *See Feehan v. Marcone*, 331 Conn. at 482-483 ("Nowhere does the plaintiff allege any intentional acts on the part of the election officials, describing the ballot mix-up only as 'irregularities' … We, therefore, conclude that the plaintiff has not made a colorable claim of a constitutional violation because he has alleged only that local elections

officials made an unintentional mistake, rather than adopted an intentional practice or policy.").

This Circuit split requires a resolution. As a practical matter, the Sixth Circuit's approach makes more sense. After all, if people are denied their constitutional right to vote, what difference does it make whether a third party intended for that to happen? Elections are the cornerstone of our constitutional democracy. If there is no remedy for denying people the right to vote in an election, then the legitimacy of the electoral process is in question.

II. THE CONNECTICUT SUPREME COURT'S REFUSAL TO REMEDY AN UNCONSTITUTIONAL ELECTION CONTRAVENES THE FOURTEENTH AMENDMENT

This Court should grant *certiorari* in order to explain that deprivations of the constitutional right to vote are intolerable and that a new election is required in the 120th Assembly District. The Connecticut Supreme Court's decision to avoid deciding the issue and defer to the Connecticut House of Representatives to resolve this case was based on the Court's assumption that the Petitioner's constitutional rights would not be violated through that process. However, once the matter proceeded to the House, and the Petitioner's due process and equal protection rights remained and, in fact, were further violated (and the rights of the disenfranchised voters of the 120th Assembly District remained impaired), the Connecticut Supreme Court should have ordered a new election.

A. The Petitioner's Due Process Rights Were Violated

The Petitioner's constitutional right to a fair election was denied by the Connecticut Supreme Court's decision. His right to due process was further violated when, empowered by the inaction of the Connecticut Supreme Court, the Democrats in the Connecticut House of Representatives changed the rules at the end of the proceedings. Neither the legislature, nor the judiciary, nor the legislature acting as the judiciary, may retroactively change the law to deny a claim.

Due process requires notice that is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," and "of such nature as reasonably to convey the required information." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Due process is violated where the notice is misleading or lacks information regarding the applicable rules or procedures. *See Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978) ("The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.'"); *Rodriguez v. Astrue*, 2013 WL 12329109 (D.N.M. Sept. 12, 2013) (due process violation where notice to Social Security applicant contained legal standard that was not used by hearing officer; "notice must not be so 'misleading that it introduces a high risk of error into the disability decisionmaking process'" (quoting *Rolen v. Barnhart*, 273 F.3d 1189, 1191 (9th Cir. 2001)).

By changing the standard and proceedings from one originally focused on investigating the allegations as set forth in the Election Challenge Complaint, to a hearing with a heightened and previously undeclared burden of proving voter intent, the Democrats violated due process by failing to provide adequate notice and thereby denying a meaningful opportunity to be heard. *See Consol. Edison Co. of New York, Inc. v. F.E.R.C.*, 315 F.3d 316, 323 (D.C. Cir. 2003).

1. The settled Connecticut law at the time of this election

A Connecticut Superior Court case, *Rutkowski v. Marrocco*, 2013 WL 6916610 (Conn. Super. Ct. 2013) (*Sheridan, J.*), summarized Connecticut case law in this area. In *Rutkowski*, incorrect ballots were distributed to voters at the polling location for Voting District Number 14 in Ward 5 of the City of New Britain. The court followed the standard set forth by the Connecticut Supreme Court in *Bortner v. Town of Woodbridge*, 250 Conn. 241 (1999) to order a new election. A new election is required when there is either: (1) an error or errors in the rulings of an election official, or (2) a mistake in the count of the votes and that those errors or mistakes cast serious doubt on the reliability of the election results. *Bortner*, 250 Conn. at 259, 263. After determining that the election officials committed errors and that there was a substantial mistake in the count of the votes in Ward 5 (thus satisfying both of the criteria under *Bortner*) the court held that there was serious doubt about the reliability of the election results. Given the three vote difference between the plaintiff and defendant candidates, if the seventeen voters

had the opportunity to vote in the correct election, the outcome of the election could have been different.

This case is no different than *Rutkowski*. Thus, all that was necessary for a new election was proof that 75 people were given the wrong ballots in an election decided by 13 votes. Under the Connecticut legal standard for a new election, as explained in *Bortner*, a new election in the 120th Assembly District was required as a matter of law.

2. Retroactive changing of the standard violated due process

As discussed above, the retroactive changing of the standard and burden to require proof of how the 75 voters would have cast their votes was a clear due process violation. This is a particularly troubling violation in the context of elections, where "fundamental fairness" is essential to protecting the integrity of the electoral process and the constitutional rights of the electors to vote and have their votes counted equally. *See Roe v. State of Alabama*, 43 F.3d 574, 580–81 (11th Cir. 1995); *see also Griffin v. Burns*, 570 F.2d 1065, 1075 (1st Cir. 1978) (changing rules for absentee ballots after election violated due process). Here, not only did the Democrats add a new burden, the standard they retroactively applied had been expressly disavowed by the Connecticut Supreme Court. *See Bauer v. Souto*, 277 Conn. 829, 840 (2006) (explaining that under *Bortner*, candidate is not required to show that he would have prevailed in the election and rejecting claim to the contrary as "utterly without merit").

3. The retroactive standard created by the Democrats is arbitrary and capricious

The Democrats faulted the Petitioner for not presenting testimony before the House from voters as to how they would have voted. First, pursuant to House Rule 19, it was the chairperson's duty and ability to compel testimony from any witnesses deemed necessary. The Petitioner had no subpoena power. The Petitioner provided a complaint, with the facts needed to meet the Connecticut Supreme Court's standard for a new election. See Election Challenge Complaint, paras. 1-23. The Petitioner suggested witnesses who could confirm the facts alleged in the complaint. If the Democratic chairman genuinely required additional facts or evidence than those set forth in the complaint, it was his obligation and authority, indeed, his sole authority, to obtain it. Having decided not to do so, it was wholly arbitrary to fault the Petitioner for not presenting testimony from voters.

The placing of this burden on the Petitioner is even more absurd when one considers that meeting the standard would have required a violation of state law. The state constitution expressly provides that "[t]he right of secret voting shall be preserved." Connecticut Constitution, Article Sixth, section 5; see also General Statutes § 9-242(a). In fact, it is a felony offense to invade the secrecy of voting. See General Statutes § 9-366 ("Any person who… does any act which invades or interferes with the secrecy of the

voting or causes the same to be invaded or interfered with, shall be guilty of a class D felony.").[11]

Because the burden created by the Democrats was impossible to meet, it was an arbitrary and capricious standard that violated due process that required the Connecticut Supreme Court's intervention. *See Barry v. United States ex rel. Cunningham*, 279 U.S. 597 (1929) (while Congress has power to resolve elections dispute, judicial intervention is proper to remedy arbitrary and improvident use of the power that results in a denial of due process). The Court was wrong in declining to grant the Petitioner's motion.

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[11] The Democrats stated in their report that voters could have testified voluntarily. This argument highlights the due process problem with the Democrats' position. How could the Petitioner's constitutional right to a fair election be dependent on voters waiving their own state constitutional right to secrecy? And how would these people even be identified without the commission of crime, in violation of General Statutes § 9-366? The Democrats also suggested that a statistician could have been called. It is difficult to see how a statistician could divine how the 75 people actually would have voted (after all, this is why we have elections rather than relying on polls in the first place). Nonetheless, if the chairman really needed to hear from a statistician, he could have called one. As a practical matter, that claim seems pre-textual given the obvious prejudice here. See "Bring a New Election in Stratford! Feehan's Chance Was 42 Percent," Connecticut Post (Feb. 13, 2019) (statistician calls this election an obvious toss-up). But, he chose not to. It violated due process for him to use his own decision to deprive the Petitioner of a fair election. Faced with these facts, the Connecticut Supreme Court should have granted the Petitioner's motion, remedied the constitutional violations, and ordered a new election.

B. The Petitioner's Equal Protection Rights Were Violated

In addition to the due process violations set forth above, the Petitioner's equal protection rights were violated. Moreover, the rights of the 75 voters to cast an equal vote remain violated. Here, as discussed above, if the Petitioner had been a candidate for any other office, and these same facts were established, a new election would have been ordered. *See Bortner, Bauer, Rutkowski*. The failure to hold a new and constitutional election violates the Equal Protection Clause.

In addition, the failure of the Connecticut Supreme Court to protect the Petitioner's rights effectively denied him of those rights due to his party affiliation as a Republican (and, therefore, non-majority party) candidate. The Second Circuit has recognized that a system that discriminates on the basis of political party affiliation violates the Equal Protection Clause. *See Green Party of Connecticut v. Garfield*, 616 F.3d 213, 229 (2d Cir. 2010) ("whether the system burdens the political opportunity of a party or candidate in a way that is unfair or unnecessary."); *see also Keating v. Carey*, 706 F.2d 377 (2d Cir. 2006) (holding that political party affiliation can be a protected class); *Gleason v. McBride*, 869 F.2d 688, 695 (2d Cir. 1989) (same).

The procedure that was employed in this matter, which resulted in a political power-play by the ruling party, deprived the Petitioner and the residents of the 120th Assembly District of their constitutional right to a fair election. It was error for the Connecticut Supreme Court to fail to remedy those constitutional violations. Accordingly, this Court's intervention is required.

CONCLUSION

This Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

Proloy K. Das*
Matthew A. Ciarleglio
Kevin W. Munn
MURTHA CULLINA
City Place I
185 Asylum Street
Hartford, CT 06103
Tel. (860) 240-6000
Fax (860) 240-6150
pdas@murthalaw.com
Counsel for the Petitioner

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**Counsel of Record*