No. 18-1470

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 Supreme Court of Connecticut

BRIEF IN OPPOSITION

WILLIAM BLOSS
Counsel of Record
EMILY ROCK
KOSKOFF KOSKOFF & BIEDER P.C.
350 Fairfield Avenue
Bridgeport, CT 06604
(203) 336-4421
bbloss@koskoff.com
erock@koskoff.com

Counsel for Respondent Philip L. Young III

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STATEMENT OF THE CASE

Jim Feehan, a candidate for state representative of the 120th House District, initiated this election contest in Connecticut Superior Court on November 15, 2018, naming as defendants Connecticut state officials Secretary of State Denise Merrill; Treasurer Denise Nappier; and Comptroller Kevin Lembo ("the State defendants"); as well as several local elections officials. Philip L. Young III, Feehan's opponent, intervened on November 20, 2018. Feehan initially invoked only state law claims and sought declaratory relief, a new election, and an injunction barring the State defendants from certifying the election results.

The Connecticut Constitution provides that exclusive jurisdiction over a contested state legislative race rests in the legislature itself. Conn. Const., art. third, § 7. Young moved to dismiss for lack of subject matter jurisdiction, and the State defendants agreed that the court lacked jurisdiction. In response, Feehan amended his complaint to allege federal constitutional violations. Young renewed the motion to dismiss, and the State defendants again agreed that the plaintiff's only proper remedy was to challenge the election through the House's procedures, as required by the state constitution.

The Amended Complaint asserted that a "mistake" was made by poll workers in the Bunnell High School precinct, a polling place for the 120th House District as well as the 122nd House District. Am. Compl. ¶¶ 15-21. Poll workers allegedly gave 76 voters in the 120th district ballots for the 122nd district before the mistake was discovered. As a result, Feehan alleged, 76 ballots were cast in the 122nd House District when they should have been cast in the 120th. *Id.* ¶ 25. Young's margin of victory was less than the number of

ballots the complaint alleged were miscast. *Id.* ¶ 30. Based on these allegations, Feehan asserted claims on his own behalf and claims under 42 U.S.C. § 1983 that both his and voters' federal constitutional rights were violated. *Id.* ¶¶ 46-66.

The Amended Complaint failed on its face to establish a federal constitutional violation. It alleged only "neglect" by certain election officials and "errors," Am. Compl. ¶¶ 33, 36, 38, not the deliberate and intentional discrimination necessary for a constitutional deprivation. "[H]uman error in the conduct of elections does not rise to the level of a Fourteenth Amendment constitutional violation actionable under § 1983;" it is "*willful* action by state officials *intended* to deprive individuals of their constitutional right to vote" that violates voters' constitutional rights. *Gold v. Feinberg*, 101 F.3d 796, 798-803 (2d Cir. 1996) (emphasis added).

The trial court, after hearing arguments, dismissed the complaint in part because "article third, § 7, of the Connecticut constitution provides the legislature with sole authority to resolve election disputes involving State Representatives and State Senators." *Feehan v. Marcone*, 2018 WL 7501250, at *2 (Conn. Super. Dec. 13, 2018). Thus, "insofar as the plaintiff's claims seek a judicial determination that errors were committed in the election or that a new election must be held, the court lacks subject matter jurisdiction over those claims." *Id.* The Connecticut constitutional provision at issue provides that "[e]ach house shall be the final judge of the election returns and qualifications of its own members." Conn. Const. art. third, § 7. The trial court further held that the addition of federal constitutional claims under 42 U.S.C. § 1983 did not give the court jurisdiction over those claims. *Feehan*, 2018 WL 7501250, at *3. At the same time, the court granted

Feehan's request for a temporary restraining order prohibiting the State defendants from certifying the election results and declaring Young the winner. *Id.*[1]

All three parties (Feehan, Young, and the State defendants) filed appeals of the trial court's decision with permission of the chief justice of the state Supreme Court. Immediately after oral argument on December 21, 2018, the Connecticut Supreme Court issued an order affirming that the trial court lacked jurisdiction over the case and vacating the trial court's temporary injunction. *Feehan v. Marcone*, 331 Conn. 436, 445 (2019). The court followed that order with an extensive written decision on January 30, 2019, holding that under the Connecticut Constitution, "exclusive jurisdiction over the plaintiff's claims in the present case lies with our state House of Representatives." *Id.* at 468.

Addressing the plaintiff's equal protection and due process claims under 42 U.S.C. § 1983, the court held that Feehan "has not sufficiently pleaded federal constitutional claims." *Feehan*, 331 Conn. at 476. Because the plaintiff had not pleaded any "intentional conduct sufficient to state a constitutional claim under Second Circuit case law," *id.* at 482, the court upheld the trial court's dismissal of the plaintiff's claims of constitutional violations.

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[1] The petitioner erroneously claims that the trial court "recognized that the constitutional rights of the Petitioner and of the electors were violated in the election." Pet'r's Br. at 15. In actuality, the court held—having never conducted an evidentiary hearing in the case—that as to the temporary injunction, the plaintiff had demonstrated that he was *likely* to prevail on the merits of his underlying claim, not that he had proven the constitutional violations that he claimed. In any event, the Connecticut Supreme Court vacated that injunction.

Feehan filed a motion for reargument and/or reconsideration on February 11, 2019. The Connecticut Supreme Court denied the motion on February 27, 2019.

REASONS FOR DENYING CERTIORARI

I. AN UNINTENTIONAL MISTAKE IN ELECTION ADMINISTRATION IS INSUFFICIENT TO SUPPORT AN EQUAL PROTECTION OR DUE PROCESS CLAIM.

"The Supreme Court has recognized that the [s]tates have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised." *Shannon v. Jacobowitz*, 394 F.3d 90, 94 (2d Cir. 2005). "Only in extraordinary circumstances will a challenge to a state [or local] election rise to the level of a constitutional deprivation." *Warf v. Bd. of Elections of Green Cty., Ky.*, 619 F.3d 553, 559 (6th Cir. 2010) (quoting *Shannon*, 394 F.3d at 94). "Were we to embrace plaintiffs' theory, this court would henceforth be thrust into the details of virtually every election, tinkering with the state's election machinery, reviewing petitions, registration cards, vote tallies, and certificates of election for all manner of error and insufficiency under state and federal law." *Powell v. Power*, 436 F.2d 84, 86 (2d Cir. 1970).

Petitioner's argument is, in short, that *Bush v. Gore*, 531 U.S. 98 (2000), reversed decades of jurisprudence and must mean that any mistake in election administration—federal, state or local—implicates a federally protected right. Initially, the precedential value of *Bush v. Gore* is limited by the Court's statement that "[o]ur consideration is limited to the present circumstances, for the problem of equal protection in

election processes generally presents many complexities." *Bush v. Gore*, 531 U.S. 98, 109 (2000).

Furthermore, *Bush v. Gore* involved a claim that state standards for counting certain ballots were inconsistent—in effect, a claim of a systemic inadequacy that led to certain votes being counted and others not. But *Bush v. Gore* does not stand for the proposition that an election clerk's pure mistake—negligence—in handing a voter the wrong ballot can establish a federal constitutional violation. To the contrary, this Court has held that "liability for *negligently* inflicted harm is categorically beneath the threshold of constitutional due process." *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2472 (2015) (emphasis in original) (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998)). *See also Daniels v. Williams*, 474 U.S. 327, 330 (1986) (holding that "merely negligent conduct may not be enough to state a claim" for a constitutional violation). "Far from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law." *Id.* at 332. *See also Shannon,* 394 F.3d at 94 (noting that "[b]y ruling in *Daniels* that a negligent act could not amount to a constitutional deprivation, the [Supreme] Court . . . clearly articulated that a finding of intentional conduct was a prerequisite for a due process claim," and applying the *Daniels* holding to the election context).

To establish federally protected equal protection and due process violations in connection with election administration, a plaintiff must show an intentional act on the part of government officials, or a government

policy to suppress voting rights. The petitioner here, however, alleged nothing more than "mistake" and "neglect of official duties," Am. Compl. ¶¶ 19-20, 36, not the intentional or purposeful discrimination required to establish a constitutional violation. As a result, no due process or equal protection violation was pled. Unbroken circuit court authority makes clear that intentional action or a systemic policy is required, notwithstanding petitioner's attempt to manufacture a circuit split that simply does not exist. The Connecticut Supreme Court correctly decided this issue: "It is well settled in the Second Circuit that establishing an equal protection violation requires . . . proof of intentional discrimination," and that the same is required for allegations of due process violations. *Feehan*, 331 Conn. at 480-81. The court also noted that "[t]he Second Circuit has observed that it is not alone in requiring proof of intent," citing cases from the First, Fourth, Ninth, and Eleventh Circuits. *Id.* at 480 n.37.

In *Powell v. Power*, 436 F.2d 84, 88 (2d Cir. 1970), the Second Circuit construed 42 U.S.C. § 1983 as it applies to claims of voting rights violations to require "intentional or purposeful discrimination":

> The plaintiffs invoke the first section of the Civil Rights Act of 1871, 42 U.S.C. § 1983, as a second Congressional authorization for the federal courts to remedy errors in the election process. This concededly broadly-drafted statute provides a remedy against 'every person who, under color of any statute * * * subjects * * * any citizen of the United States * * * to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.' Three constitutional guarantees are claimed

> to have been abridged here: the equal protection and due process clauses of the fourteenth amendment, and the requirement of article I, section 2, that Representatives be 'chosen * * * by the People.'
>
> These claims do not require extended consideration. *Uneven or erroneous application of an otherwise valid statute constitutes a denial of equal protection only if it represents 'intentional or purposeful discrimination.'* Snowden v. Hughes, 321 U.S. 1, 8, 64 S.Ct. 397, 88 L.Ed. 497 (1944). See Swain v. Alabama, 380 U.S. 202, 204-205, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965); Oyler v. Boles, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962). Similarly, the due process clause and article I, section 2 offer no guarantee against errors in the administration of an election. New York Election Law §§145, 330(2) provide a method for correcting such errors as are made, and the plaintiffs do not contest the fairness and adequacy of that remedy. And while article 1, section 2 may outlaw purposeful tampering by state officials with the conduct of a primary election for a Congressional seat, United States v. Classic, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941), we cannot believe that the framers of our Constitution were so hypersensitive to ordinary human frailties as to lay down an unrealistic requirement that elections be free of any error.

Powell, 436 F.2d at 88 (emphasis added).

In *Gold v. Feinberg*, 101 F.3d 796, 798-803 (2d Cir. 1996), the court applied *Powell*, affirming its validity. The Second Circuit reversed a grant of injunctive relief

because although the plaintiffs alleged mistakes and incompetence that impeded the right to vote in a primary (including the inclusion of an ineligible candidate on 2,000 of 77,000 ballots), the plaintiffs did not allege intentional misconduct. The plaintiffs, who included voters and disappointed candidates, moved for a preliminary injunction enjoining the certification of the election results. After an evidentiary hearing, the District Court found that election errors were "willful" and granted the injunction "on the basis of § 1983." *Id.* at 800. The Second Circuit pointed out that under *Powell*, "a § 1983 action to remedy errors in the election process allegedly violating the equal protection clause does not exist unless the state action constituted 'intentional or purposeful discrimination.'" *Id.* (quoting *Snowden v. Hughes*, 321 U.S. 1, 8 (1944)). The District Court's finding of a violation for errors that were not intentional or purposeful was "a radical departure from settled principles underlying § 1983 liability in voters' rights cases." *Id.* at 801. The Second Circuit concluded: "where, as here, there exists a state law remedy to the election irregularities that is fair and adequate, human error in the conduct of elections does not rise to the level of a Fourteenth Amendment constitutional violation actionable under § 1983 in the absence of willful action by state officials intended to deprive individuals of their constitutional right to vote. Short of that, human error is something we all have to live with." *Id.* at 802.[2]

[2] *See also Lecky v. Va. Bd. of Elections,* 285 F. Supp. 3d 908, 918-20 (E.D. Va. 2018) (refusing to enter temporary injunction in § 1983 case where some voters were given wrong ballots because plaintiffs "do not allege that the incorrect assignment of voters was the result of a state policy, regulation or statute," or that they were victims of "intentional or purposeful discrimination" and

The petitioner is incorrect when he claims that there is a circuit split. The circuits agree that more than mere mistake or "garden variety irregularities" is required to prove a constitutional violation in the election context (and indeed, the petitioner has not even claimed that any circuit other than the Sixth has held otherwise). "Circuit courts have uniformly declined to endorse action under § 1983 with respect to garden variety election irregularities." *Griffin v. Burns*, 570 F.2d 1065, 1076 (1st Cir. 1978). *See also, e.g.*, *Minnesota Voters Alliance v. Ritchie*, 720 F.3d 1029, 1032 (8th Cir. 2013) ("[S]ection 1983 is implicated only when there is willful conduct which undermines the organic processes by which candidates are elected.") (internal citation and quotation marks omitted); *Parra v. Neal*, 614 F.3d 635, 637 (7th Cir. 2010) ("[W]e have held that election irregularities implicate § 1983 only when defendants have engaged in only when there is *willful* conduct which undermines the organic processes by which candidates are elected. . . . By 'willful'

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thus they were not likely to succeed on the merits); *Shannon v. Jacobowitz*, 394 F.3d 90, 95-96 (2d Cir. 2005) ("[C]ourts have found due process violations in voting cases before, but each case involved an intentional act on the part of the government or its officials."); 14 C.J.S. Civil Rights, *Election as area of conduct depriving civil rights* § 48 (2019) ("Section 1983 of the Post-Civil War Federal Civil Rights Acts, protecting against deprivations of rights secured by the federal constitution and laws under color of state law, does not afford a remedy for errors in the electoral process in the absence of a showing of intentional or purposeful discrimination, or willful conduct which undermines the processes by which candidates are elected. The availability of a state law remedy for alleged irregularities in an election process precludes a section 1983 action in the absence of willful action by state officials intended to deprive individuals of their constitutional right to vote. Mere negligence is an insufficient basis for a section 1983 action in an electoral context.").

we meant, at a minimum, that the alleged perpetrators had acted with the intent of undermining the electoral process or impairing a citizen's right to vote.") (internal citation and quotation marks omitted) (emphasis in original); *League of Women Voters v. Brunner*, 548 F.3d 463, 476 (6th Cir. 2008) ("[A]llegations of mere negligence will not sustain an action under § 1983."); *D'Agostino v. Delgadillo*, 111 F. App'x 885, 887 (9th Cir. 2004) ("D'Agostino cannot establish a violation of a constitutional right because, at most, she asserts negligence against the city officials for certifying Delgadillo's qualifications and the election. Mere negligence by city officials does not deprive an individual of liberty or property for purposes of procedural due process."); *Bonas v. Town of N. Smithfield*, 265 F.3d 69, 74 (1st Cir. 2001) ("[W]ith only a few narrow and well-defined exceptions, federal courts are not authorized to meddle in local elections. Consequently, they normally may not superintend the step-by-step conduct of local electoral contests or undertake the resolution of 'garden variety election irregularities.'"); *Welker v. Clarke*, 239 F.3d 596, 597 n.3 (3d Cir. 2001) ("If Welker's claims were only that officials negligently maladministered the election by not properly enforcing the Pennsylvania residency requirements as interpreted by Welker, we would hesitate to intervene. Under similar circumstances, other circuits have determined that such disputes do not state a constitutional violation and therefore do not rise to the level appropriate to support federal court interference in a local election."); *Siegel v. LePore*, 234 F.3d 1163, 1187 (11th Cir. 2000) ("[D]isputes over human or mechanical errors in ballot counting, absent a showing of intentional manipulation, do not rise to the level of a federal constitutional violation."); *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998) ("We have drawn a distinction

between 'garden variety' election irregularities and a pervasive error that undermines the integrity of the vote. . . . In general, garden variety election irregularities do not violate the Due Process Clause, *even if they control the outcome of the vote or election*.") (emphasis added); *Hendon v. N. Carolina State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983) ("[N]ot every election irregularity gives rise to a constitutional claim. Whether the irregularity amounts to a constitutional claim depends on its severity, whether it was intentional or more of a negligent failure to carry out properly the state election procedures, and whether it erodes the democratic process."); *Gamza v. Aguirre*, 619 F.2d 449, 453 (5th Cir. 1980) ("[T]he determination that particular conduct constitutes a constitutional deprivation rather than a lesser legal wrong depends on the nature of the injury, whether it was inflicted intentionally or accidentally, whether it is part of pattern that erodes the democratic process or whether it is more akin to a negligent failure properly to carry out the state ordained electoral process . . . ."); *Hennings v. Grafton*, 523 F.2d 861, 864 (7th Cir. 1975) ("[T]he record here shows at most irregularities caused by mechanical or human error and lacking in invidious or fraudulent intent; it does not show conduct which is discriminatory. . . [which] fall far short of constitutional infractions.").

The Sixth Circuit, contrary to the petitioner's argument, has held explicitly that "allegations of mere negligence will not sustain an action under § 1983" in a voting rights action. *League of Women Voters v. Brunner*, 548 F.3d 463, 476 (6th Cir. 2008). Likewise, in *Crim v. Thompson*, the plaintiff alleged First and Fourteenth Amendment violations under § 1983 for election officials' actions in allegedly thwarting his efforts to be placed on the ballot for a primary election,

and the Sixth Circuit held that "Crim's complaint failed to state a claim because he could not show that the defendants intentionally or purposefully discriminated against him." *Crim v. Thompson*, 69 F. App'x 276, 278 (6th Cir. 2003). "The acts and omissions of which Crim complained amounted to, at most, negligence or incompetence, and are not enough to support a claim." *Id.* "However unpleasant the prospect, human error remains a part of the democratic process, and no constitutional rule is going to change that fact." *Stewart v. Blackwell*, 444 F.3d 843, 895–96 (6th Cir. 2006) (Gilman, J., dissenting), *vacated and superseded*, 473 F.3d 692 (6th Cir. 2007) (quoting *Powell* for the proposition that neither the Equal Protection nor the Due Process clause "guarantee against errors in the administration of an election"). Even "[g]ross negligence is not actionable under § 1983, because it is not 'arbitrary in the constitutional sense.'" *Lewellen v. Metro. Gov't of Nashville & Davidson Cty., Tenn.*, 34 F.3d 345, 351 (6th Cir. 1994) (quoting *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 129 (1992)).

As recently as this year, albeit not in the election context, the Sixth Circuit held that: "[o]f course, to establish an equal protection violation, a plaintiff must establish more than differential treatment alone—a discriminatory intent or purpose is required." *Maye v. Klee*, 915 F.3d 1076, 1085 (6th Cir. 2019). While "arbitrary and disparate treatment" may violate the Fourteenth Amendment, negligence cannot. *Brunner*, 548 F.3d at 476 (citing *Bush v. Gore*, 531 U.S. 98, 104-05 (2000)). *Hunter v. Hamilton County Board of Elections*, on which petitioner relies, did not change this standard: "garden variety election irregularities may not present facts sufficient to offend the Constitution's guarantee of due process." *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 232 (6th Cir. 2011)

(internal citation and quotation marks omitted). The court in *Hunter* disagreed with the contention that there must be a showing of "clear and intentional discrimination," but did *not* hold that negligence or mere mistake was sufficient: rather, "the Equal Protection Clause protects the right to vote from *invidious and arbitrary discrimination*." *Id.* at 234, n.13 (emphasis added). And the *Hunter* court did not overturn the *Brunner* holding that allegations of negligence will not sustain an § 1983 action—indeed, the *Hunter* opinion cites to *Brunner*. *See Hunter*, 635 F.3d at 231-32.

What is at issue here is an isolated mistake, the type of "garden variety election irregularit[y]" that simply does not implicate the Constitution. *Hunter*, 635 F.3d at 232. Moreover, "federalism concerns limit the power of federal courts to intervene in state elections." *Id.* (internal citation and quotation marks omitted).

The Court in *Hunter* noted that "the cause for constitutional concern is much greater when the Board [of Elections] is exercising its discretion in areas relevant to the casting and counting of ballots, like evaluating evidence of poll-worker error." 635 F.3d at 235 (internal citation and quotation marks omitted). Here, by contrast, the alleged constitutional violation was a poll worker's entirely inadvertent error in handing out ballots to voters. There was no exercise of discretion, no intentional decision or action. *Compare Hunter*, 635 F.3d at 235 ("Plaintiffs allege that *the Board*

treated some miscast provisional ballots more favorably than others.") (emphasis added).[3]

In this case, the amended complaint alleged nothing more than a simple mistake by an elections clerk. There was no allegation that the mistake was willful, and there was no allegation of any systemic impropriety or policy. The Connecticut Supreme Court correctly distinguished *Hunter*, holding that "*Hunter* is factually distinguishable because it concerned an election board's lack of coherent or consistent standards for the treatment of provisional ballots, rather than an isolated error like the one at issue in the present case." *Feehan*

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[3] Courts in the Sixth Circuit have not interpreted *Hunter* as the petitioner does here. They have consistently held that a mistake or negligent act is not sufficient to raise a constitutional claim under § 1983. *See, e.g.*, *Przybysz v. City of Toledo*, 746 F. App'x 480, 488–89 (6th Cir. 2018) (holding "evidence of negligence is insufficient to sustain a § 1983 claim" in substantive due process claim); *Jones v. Lawry*, 2019 WL 2482361, at *3 (W.D. Mich. June 14, 2019) ("[A]llegations of negligence fall short of the state of mind required to state an actionable § 1983 claim."); *In re Ohio Execution Protocol Litig.*, 2018 WL 2118817, at *7 (S.D. Ohio May 8, 2018) ("An Equal Protection violation requires an intentional act by a state actor; . . . mistakes will happen and they are not constitutional violations."); *Anderson v. Ballard*, 2018 WL 1384099, at *4 (E.D. Ky. Mar. 16, 2018) ("An allegation of negligence is not sufficient to state a claim under § 1983" in deliberate indifference claim); *Sanders v. City of Hodgenville, Kentucky*, 323 F. Supp. 3d 904, 913 (W.D. Ky. 2018) ("[N]egligence rarely rises to the level of a constitutional violation."); *Green v. Woodall*, 2017 WL 4838705, at *3 (M.D. Tenn. Oct. 26, 2017) ("[N]egligence cannot sustain a § 1983 claim."); *Davis v. Hill*, 2017 WL 1064151, at *2 (M.D. Tenn. Mar. 21, 2017) (same, in Eighth Amendment failure to protect claim); *Williams v. Hacker*, 2011 WL 4537966, at *3 (M.D. Tenn. Sept. 29, 2011) ("[A]llegations of mere negligence will not sustain an action under § 1983.") (quoting *Brunner*).

v. Marcone, 331 Conn. 436, 484 (2019). For similar reasons, the court in *Feehan* concluded that:

> *Bush* [*v. Gore*] is readily distinguishable because that case involved a state's widespread application of arbitrarily varying standards in determining the intent of the voters. That decision does not stand for the proposition that *any* unintentional mistake by an election official that casts doubt on the result of an election violates the United States constitution.

Id. at 484 (emphasis in original).

II. THE CONNECTICUT HOUSE OF REPRESENTATIVES' ACTIONS AFTER THE STATE SUPREME COURT'S DECISION ARE NOT PART OF THE PLEADINGS OR RECORD AND CANNOT BE CONSIDERED IN THE FIRST INSTANCE HERE.

Feehan claims that his due process rights were violated by the actions of the Contested Election Committee appointed by the Connecticut House of Representatives. However, those actions took place after the Connecticut Supreme Court's decision and were not subject to review by that Court; therefore, they cannot be considered for the first time in the instant petition for certiorari.

The Connecticut Supreme Court issued its oral decision on December 21, 2018 and published its written opinion on January 30, 2019. The Connecticut House of Representatives appointed a contested elections committee that underwent a fact-finding process and prepared a report, which was issued on February 4, 2019. *See* Pet'r's Br. at 11. The committee report was issued after the briefing and argument before the Connecticut Supreme Court (and its summary order)

and the court's published opinion.[4] The petitioner cannot now shoehorn those post-decision events into the case by means of his unsupported and incorrect claim that "the Connecticut Supreme Court itself treated the House proceedings as a continuum of this action." Pet'r's Br. at 17 n.9.[5]

A party must present arguments to the lower court in order to raise the issue before this Court on a petition for certiorari; petitioner seeks to argue here for the first time events in the House that took place *after* the Connecticut Supreme Court's decision. "Where issues are neither raised before nor considered by the [lower court], this Court will not ordinarily

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[4] Nor does the fact that the *petitioner* discussed the House's actions in his motion for reargument/reconsideration bring it into the record, since that motion improperly raised issues outside the pleadings. "[A] motion for reconsideration is intended to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension of facts. . . . It may also be used to address . . . claims of law that the [movant] claimed were not addressed by the court. . . ." *In re Elianah T.-T.*, 327 Conn. 912, 913-14 (2017) (internal citation and quotation marks omitted). Events that occurred after a court issued its decision are not a proper basis for a motion for reconsideration, and the state Supreme Court did not suggest that it agreed with the petitioner's argument here or considered the question on the merits.

[5] Petitioner points to the Connecticut Supreme Court's citation to House Rule 19 in support of this baseless claim. That rule has been adopted by each successive house in unchanged form since 1987. Thus, the parties briefed Rule 19 before the new House had re-adopted the rule. Then, the 2019 House adopted Rule 19 in identical form to the rule adopted by the House for many years in a row. By citing to this rule, the Connecticut Supreme Court did not somehow cause everything that followed in the House to be retroactively a part of the record in this case.

consider them." *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212–13 (1998) (internal citation and quotation marks omitted). *See also, e.g.*, *United States v. Williams*, 504 U.S. 36, 41 (1992) ("Our traditional rule . . . precludes a grant of certiorari only when the question presented was not pressed or passed upon below.") (internal citation and quotation marks omitted); *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) ("It is well settled that this Court will not review a final judgment of a state court unless the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.") (internal citations and quotation marks omitted); *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259 (1987) ("We ordinarily will not decide questions not raised or litigated in the lower courts.").

A petitioner has the "burden of showing that the issue was properly presented" to the lower court. *Adams v. Robertson*, 520 U.S. 83, 86 (1997).

> When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented . . . and the aggrieved party bears the burden of defeating this assumption . . . by demonstrating that the state court had 'a fair opportunity to address the federal question that is sought to be presented here."

Id. (internal citation and quotation marks omitted). *See also Webb v. Webb*, 451 U.S. 493, 501 (1981) (in order for the Court to have jurisdiction, "there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal

claim at the time and in the manner required by the state law") (emphasis in original). The Connecticut Supreme Court did not address the Due Process claim based on the state house's action, as it was raised by the petitioner for the first time in this certiorari petition, or, to be generous, in his motion for reconsideration in the state Supreme Court. The petitioner has cited no authority for his proposition that the Connecticut House of Representatives' actions can be retroactively considered part of the Connecticut Supreme Court's decision which was released *before* the House Committee issued its report. The petitioner has not even attempted to meet his burden of showing that the issue of post-decision conduct of the House was properly presented in the court below, because it could not have been.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM BLOSS
Counsel of Record
EMILY ROCK
KOSKOFF KOSKOFF &
BIEDER P.C.
350 Fairfield Avenue
Bridgeport, CT 06604
(203) 336-4421
bbloss@koskoff.com
erock@koskoff.com

Counsel for Respondent
Philip L. Young III

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