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 Connecticut Supreme Court

RESPONDENTS DENISE MERRILL'S, DENISE NAPPIER'S AND KEVIN LEMBO'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the Connecticut Supreme Court properly held, consistent with the established rule in the Circuit Courts, that garden variety election irregularities involving mere negligence are insufficient to establish constitutional liability under 42 U.S.C. § 1983;

(2) Whether Petitioner waived his claims based on the Contested Elections Committee's recommendations by failing to plead them below;

(3) Whether Petitioner lacks standing to challenge the Contested Elections Committee's recommendations;

(4) Whether this Court should abstain from deciding the novel and unclear questions of state law that are the basis for Petitioner's claims based on the Contested Elections Committee's recommendations;

(5) If Petitioner's claims based on the Contested Elections Committee's recommendations are justiciable and reviewable by this Court, what legal and evidentiary standards govern this contested election dispute under state law, whether the Committee's non-binding recommendations conflict with those state law standards, and whether the evidence presented to the Committee was sufficient to satisfy whatever legal and evidentiary standards apply under state law.

PROCEEDINGS RELATED TO THIS CASE

Connecticut Superior Court, *Feehan v. Marcone, et al.*, No. FBT-CV18-6080798-S, Judgment entered on November 30, 2018.

Connecticut Supreme Court, *Feehan v. Marcone, et al.*, S.C. 20216, Opinion affirming in part and reversing in part issued on January 30, 2019.

Connecticut Supreme Court, *Feehan v. Marcone, et al.*, S.C. 20216, motions for reargument and/or reconsideration and for supplemental briefing denied on February 27, 2019.

Connecticut House of Representatives, *In re: 120th General Assembly District*, Complaint filed on January 11, 2019.

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INTRODUCTION

Petitioner improperly asks this Court to interfere with an ongoing state election dispute that has not yet been resolved through the procedures provided under state law. That request is primarily based on new and unpled legal claims involving conduct by non-parties that occurred after the judicial proceedings below ended. Further, those new claims turn on novel and difficult questions of state law that the Connecticut Supreme Court specifically declined to address because Petitioner did not properly raise them. These issues comprise the bulk of the petition, and this Court should not even consider them.

To the extent that Petitioner asks this Court to resolve a purported Circuit split about whether *Bush v. Gore* eliminated the intent requirement for equal protection claims involving the right to vote, the Court should deny that request. Contrary to Petitioner's assertions, the Sixth Circuit adheres to the rule applied below that garden variety election irregularities involving mere negligence by local election officials are not enough to establish liability under 42 U.S.C. § 1983. Further, to the extent that the Sixth Circuit has deviated from that rule—which it has not—any deviation is limited to the specific circumstance in which a state uses arbitrary and disparate standards for counting ballots across and within districts. That has nothing to do with the isolated and unintentional act of negligence at issue here, and fails as a basis for seeking this Court's review.

STATEMENT OF THE CASE

A. THE IRREGULARITY DURING THE 2018 ELECTION

Petitioner is the Republican candidate for State Representative in Connecticut's 120th General Assembly District. One of the polling places for the 120th Assembly District also served as a polling place for the 122nd Assembly District during the 2018 election. On the day of the election, an irregularity occurred when election officials mistakenly gave ballots for the 122nd Assembly District to approximately 76 voters who should have voted in the 120th Assembly District. Petitioner did not allege that the error was the result of any intentional misconduct or deliberate discrimination, and instead alleged that it was a simple mistake. At the conclusion of the election and a statutorily required recount, the election returns showed that Petitioner lost to his Democratic opponent, Phillip Young ("Young"), by a margin of 13 votes. Pet. App. at 4A-5A, 52A-55A.

B. THE PROCEEDINGS BELOW

Petitioner filed an action in the Connecticut Superior Court alleging that the irregularity discussed above compromised the election and violated state law, and subsequently amended his complaint to add claims under 42 U.S.C. § 1983 based on alleged denials of the voters' rights to vote and to equal protection. Among other things, Petitioner sought declaratory and

injunctive relief requiring that a new election be held in the 120th Assembly District. *Id.* at 5A-6A.

Young intervened and moved to dismiss because the court lacked jurisdiction under article third, § 7 of the Connecticut Constitution, which provides that "[e]ach house shall be the final judge of the election returns . . . of its own members." Conn. Const. art. third, § 7; *see* Pet. App. at 7A. The trial court agreed, and held in relevant part that Petitioner's proper remedy is to challenge the election through the procedures provided by the Connecticut House of Representatives ("Connecticut House"). *Id.* at 69A-73A. Petitioner appealed to the Connecticut Supreme Court, which affirmed in an oral ruling from the bench, and later issued a unanimous written opinion explaining its decision.

With regard to Petitioner's state law claims, the Connecticut Supreme Court analyzed the text and history of article third, § 7, as well as analogous provisions in other jurisdictions. Based on that analysis, the Court held that article third, § 7 "gives our state House of Representatives exclusive jurisdiction over this election contest," and that it "divested the courts of authority over . . . this case." *Id.* at 2A-3A, 12A. The Court further held that the Connecticut House's judgment about whether a new election is required "is beyond the authority of any

other tribunal to review," and cannot be "interfere[d] with or revise[d]" by the courts. *Id.* at 16A, 33A.[1]

The Court declined to decide whether article third, § 7 also deprived the trial court of jurisdiction over Petitioner's § 1983 claims. Relying on established caselaw from the Second Circuit, the Court instead held that those claims fail on their merits because "garden variety election irregularities" involving unintentional "human error" are not unconstitutional, "even if they control the outcome of the vote or election." *Id.* at 49A, quoting *Shannon v. Jacobowitz*, 394 F.3d 90, 96 (2d Cir. 2005). Rather, the Court held that Petitioner "must prove an intentional act" to establish a constitutional violation. *Id.*, quoting *Jacobowitz*, 394 F.3d at 95-96; *see id.* at 59A-60A. Because Petitioner alleged only unintentional mistakes by local election officials, and not any deliberate misconduct or intentional discrimination, the Court concluded that Petitioner "pleaded only a garden variety election dispute" that does not give rise to a colorable constitutional violation under federal law. *Id.* at 52A-55A (quotation marks omitted).

In reaching that conclusion, the Connecticut Supreme Court considered and rejected Petitioner's argument that a different conclusion was required by this Court's decision in *Bush v. Gore*, 531 U.S. 98

[1] The Court noted that courts may play a "limited role" in reviewing the Connecticut House's actions, but such review "must rest on violation of some individual interest beyond the failure to seat an individual or to recognize that person as the winner of an election." Pet. App. at 35A-36A.

(2000), and by the Sixth Circuit's decision in *Hunter v. Hamilton County Board of Elections*, 635 F.3d 219 (6th Cir. 2011). The Court held that those cases are distinguishable because they involved systemic and "widespread application of arbitrarily varying standards" for counting ballots across and within districts. Pet. App. at 53A-55A. By contrast, this case involves only an isolated and unintentional act of negligence that is insufficient to support a constitutional violation.

C. PETITIONER'S COMPLAINT FILED WITH THE CONNECTICUT HOUSE

Following the Connecticut Supreme Court's oral ruling, Petitioner pursued his state remedies by filing a complaint with the Connecticut House. Petitioner did not raise any federal claims in that complaint. As a result, the House proceedings turn exclusively on whether a new election is required under state law, not federal law.

Pursuant to its rules, the Connecticut House formed a Contested Elections Committee ("the Committee") to determine the facts and make recommendations. The Committee requested and received proposed witnesses and evidence from the parties; jointly agreed on which witnesses should

testify; held six public hearings; and sought and received briefing and argument from the parties.[2]

The Committee issued a Report at the conclusion of that extensive process. All four committee members agreed in the Report that they "conducted their negotiations, deliberations and, occasionally, argument, in good faith, with sincerity of purpose and 'with scrupulous attention to the laws under which they serve.'" *Id.* at 14-15. They also agreed on the procedural history and factual findings in the case. *Id.* at 1-14. However, they were unable to agree on whether a new election is required based on the evidence.

Specifically, the Democratic committee members determined that, although the standards that the Connecticut Supreme Court has adopted in other election contexts may be persuasive, they are not binding on the Connecticut House when exercising its constitutional authority under article third, § 7. Nevertheless, drawing on the test set forth in *Bortner v. Town of Woodbridge*, 250 Conn. 241, 263 (1999), along with the standards that the United States House of Representatives has used in similar proceedings, the Democratic committee members determined that a new election should be ordered if the election irregularities put the result "seriously in doubt." They further determined, as an evidentiary matter, that the

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[2] The legislative record is available on the Committee's website, https://www.cga.ct.gov/gae/taskforce.asp?TF=20190109_Contested%20Elections%20Committee (last visited June 7, 2019).

"seriously in doubt" standard is met only if there is evidence that a different electoral result would have occurred but for the irregularity. Because Petitioner presented no such evidence, the Democratic committee members recommended that a new election is not warranted. *See* Resp. App. at 15-27.

By contrast, the Republican committee members determined that the Connecticut House is bound by Connecticut Supreme Court precedents, and that the "seriously in doubt" standard from *Bortner* therefore controls. Because the Connecticut Supreme Court has held that evidence that a different electoral result would have occurred is not necessary to satisfy the *Bortner* standard, *see Bauer v. Souto*, 277 Conn. 829, 840 (2006), the Republican committee members determined that a new election was required based solely on the margin of error and the number of voters who improperly voted with the wrong ballot. *See* Resp. App. at 27-35.

With that disagreement, the Committee submitted its divided Report for consideration by the full Connecticut House. The Committee specifically noted in its Report that "the final decision on this matter never rested with the Committee," and that "the competing arguments and conclusions" in the Report will simply "inform the full House" as it considers Petitioner's complaint. *Id.* at 15. The Connecticut House has not yet acted on the Report or determined which of the two competing recommendations contained therein should control, if either. Nor has it yet decided whether or to what extent

a new election should be ordered in the 120th Assembly District.

D. POST-JUDGMENT LITIGATION

Despite the fact that his complaint remains pending before the Connecticut House, Petitioner improperly sought to challenge the two Democratic committee members' preliminary and non-binding recommendations by filing a motion for reconsideration with the Connecticut Supreme Court. But Petitioner did not ask that Court to "reconsider" anything in his motion. He instead sought to raise new and unpled legal claims that the Democratic committee members' recommendations somehow violate Petitioner's right to due process, and that the Connecticut Supreme Court should order a new election on that independent basis. The Court denied Petitioner's motion because "the actions of the Contested Elections Committee were not the subject of the complaint, as amended, or any prior court decision in this matter," and therefore were not "a proper subject of a motion for reargument, reconsideration, or supplemental briefing." Pet. App. at 80A-81A. In so holding, the Court specifically informed Petitioner that his proper recourse is to file a new complaint in which he properly pleads his claims based on the Committee's recommendations. *Id.*, citing *In re Elianah T.-T.*, 327 Conn. 912, 913-14 (2017).

Despite that clear instruction, Petitioner has elected to skip the entire judicial process and has

instead asked this Court to review his unpled and heretofore undecided legal claims against the Committee in the first instance. For the reasons set forth below, this Court must reject that improper request.

REASONS FOR DENYING THE WRIT

Petitioner devotes the bulk of his petition to challenging the preliminary and non-binding recommendations of the two Democratic committee members. The Court should reject that aspect of the petition for a host of reasons, including that: (1) the claims were not pled below and have not previously been addressed by any court; (2) the claims are based on post-judgment conduct by non-parties; (3) the claims are based on novel and complicated questions of state law that the Connecticut Supreme Court specifically declined to address because Petitioner did not properly raise them; and (4) Petitioner lacks standing to challenge the Democratic committee members' recommendations in any event, as he simply has not been harmed by them.

Further, to the extent that Petitioner asks this Court to resolve a purported Circuit split over whether *Bush v. Gore* eliminated the intent requirement for equal protection claims involving the right to vote, the Court should deny that aspect of the petition too. There is no Circuit split, as the Sixth Circuit adheres to the rule applied below that "garden variety election irregularities" involving "mere negligence" by local

election officials are not enough to establish a constitutional violation under 42 U.S.C. § 1983. *Warf v. Bd. of Elections of Green Cty., Ky.*, 619 F.3d 553, 559 (6th Cir. 2010); *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 476 (6th Cir. 2008). Further, to the extent that the Sixth Circuit has deviated from that rule—which it has not—any deviation is limited to cases in which a state uses disparate standards for counting ballots across and within districts. That simply has nothing to do with the isolated, unintentional and garden variety election mistake at issue here.

I. THE COURT SHOULD NOT CONSIDER PETITIONER'S CHALLENGE TO THE COMMITTEE'S PRELIMINARY AND NON-BINDING RECOMMENDATIONS.

Although Petitioner superficially grounds this petition on a purported Circuit split over the impact of this Court's decision in *Bush v. Gore*, *see* Pet. at 21-23, that is not his primary basis for seeking review. Rather, Petitioner devotes the bulk of his petition asking this Court to review the legality of the two Democratic committee members' preliminary and non-binding recommendations in the Report. Pet. at 23-29. The Court should reject that request for several reasons.

First, it is well established that this Court will not review claims that were not properly raised in or addressed by the lower courts. *E.g.*, *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 533 (1992). Here, the

only federal claims that Petitioner pled below focused exclusively on whether local election officials violated § 1983 by mistakenly giving out the wrong ballots during the election. By contrast, Petitioner never pled any claims based on conduct by the Committee, its members, or the Connecticut House. Nor could he have done so, as those individuals and entities are not parties to this litigation, and any conduct by them occurred ***after*** the judicial proceedings in this case ended.

In fact, Petitioner previously sought to raise these unpled claims through a motion for reconsideration after the Connecticut Supreme Court issued its opinion. The Connecticut Supreme Court denied that request precisely because "the actions of the Contested Elections Committee were not the subject of the complaint, as amended, or any prior court decision in this matter," and therefore were not "a proper subject" of the litigation. Pet. App. at 80A-81A. In doing so, the Court instructed Petitioner that his proper recourse is to file a new complaint in which he properly pleads his claims based on the Committee's recommendations, which claims can then be reviewed through the ordinary judicial process just like every other claim. *Id.*, citing *In re Elianah T.-T.*, 327 Conn. at 913-14. For reasons known only to him, Petitioner deliberately has chosen to ignore that instruction and has instead asked this Court to directly review these new and unpled claims in the first instance. That is improper.

Second, even if these unpled claims properly were before the Court, the Court should not review them

because they depend on a number of novel and complicated questions of state law that the state courts should address in the first instance. Specifically, Petitioner claims that the Democratic committee members violated due process by retroactively imposing a new legal standard that conflicts with existing Connecticut Supreme Court precedents. To decide that claim, this Court would first have to determine: (1) whether the Connecticut House is even bound by Connecticut Supreme Court precedents when exercising its authority under article third, § 7; (2) if the Connecticut House is so bound, whether *Bortner* and *Bauer* control despite the fact that they are based on the language of a specific statute that does not apply to election disputes involving the office of State Representative;[3] (3) if *Bortner* and *Bauer* do not control, what legal and evidentiary standards do apply under state law; (4) whether the Democratic committee members' recommendations conflict with those standards; and (5) whether the evidence presented to the Committee was sufficient to meet whatever legal and evidentiary standards apply. It simply is not this Court's role to decide all of these

[3] The "seriously in doubt" was the result of a process of "statutory interpretation" based on the specific language and history of Connecticut General Statutes § 9-328. *See Bortner*, 250 Conn. at 257-64. The Connecticut Supreme Court expressly held below that § 9-328 has no application to election disputes involving the office of State Representative, and there is no statute that does. Pet. App. at 36A-43A. Even if the Connecticut House is bound by Connecticut Supreme Court precedents when acting under article third, § 7, therefore, it is unclear whether *Bortner* and *Bauer* properly should control in this context.

difficult and important questions of state law in the first instance, especially when Petitioner could and should have presented them to the state courts in the ordinary course but deliberately chose not to. *See R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941).

Third, even if these undecided questions of state law were not enough to require denial of the petition, Petitioner has not identified any recognized basis for this Court to review the federal aspects of his claims based on conduct by the Committee. Specifically, Petitioner has not identified a split of authority with regard to any issue of federal law related to those claims, and has not argued that the state courts decided the claims in a manner that conflicts with this Court's precedents. *See* Sup. Ct. Rule 10. Even if the Court takes up these claims, therefore, it would not be doing so to resolve any unclear or disputed question of federal law. Rather, the only questions the Court would have to resolve are the issues of ***state*** law discussed above.

Fourth, even if Petitioner's claims raised a legitimate federal issue that might justify this Court's review, the Court cannot consider the claims for the additional reason that Petitioner simply lacks standing to assert them. The Democratic committee members' recommendations are precisely that; non-binding ***recommendations*** that have not harmed Petitioner in any way. Indeed, the Report expressly notes that "the final decision on this matter never rested with the Committee," and that "the competing arguments and conclusions" in the Report will simply

"inform the full House as it considers" Petitioner's complaint. Resp. App. at 15. The Connecticut House has not yet voted on the Report or decided which of the two competing recommendations contained therein should control, if either. Petitioner cannot plausibly argue that he has suffered a cognizable injury that is attributable to the Democratic committee members' recommendations in the Report unless and until the Connecticut House votes on the Report and chooses to adopt them. That has not happened yet, and it is pure speculation that it ever will. *See*, *e.g.*, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 413 (2013) (rejecting "standing theories that require guesswork as to how independent decisionmakers will exercise their judgment").

II. THERE IS NO CIRCUIT SPLIT, AND EVEN IF THERE WERE A SPLIT, THIS CASE IS NOT AN APPROPRIATE VEHICLE THROUGH WHICH TO RESOLVE IT.

In addition to challenging post-judgment conduct by the Committee, Petitioner also asks this Court to review whether the Connecticut Supreme Court properly rejected his § 1983 claims based on mistakes by local election officials during the election. In an attempt to dress that issue up as something more than it is, most of Petitioner's discussion on that point consists of abstract pronouncements about the importance of the right to vote and the rule of law. Pet. at 15-21. Of course, nobody disputes either of those

things, and they have nothing to do with the issues in this case.

Rather, the only question of federal law that Petitioner actually presents is whether *Bush v. Gore* eliminated the intentional act requirement for all equal protection claims involving the right to vote. Petitioner's sole basis for seeking review on that issue is a purported split between the Second and Sixth Circuits. Pet. at 21-23. But that split is simply made up, and is not implicated by the facts of this case in any event. To the extent that a split exists and is relevant, moreover, it is insubstantial and does not require this Court's review.

A. The Second And Sixth Circuits Agree That Garden Variety Election Irregularities Involving Mere Negligence By Local Election Officials Do Not Violate The Constitution.

Contrary to Petitioner's assertions, there is no split between the Second and Sixth Circuits about whether *Bush v. Gore* eliminated the intentional act requirement for equal protection claims involving the right to vote, and thereby created a new rule that subjects local election officials to constitutional liability for isolated and unintentional election irregularities that involve mere negligence.

As an initial matter, the Sixth Circuit simply has not adopted the rule that Petitioner identifies. To the contrary, in the very case that Petitioner cites as his

basis for the purported split, the Sixth Circuit expressly reaffirmed that "mere negligence ***will not*** sustain an [equal protection] action under § 1983," and it cited the same decision by this Court that the Second Circuit relied upon in *Jacobowitz*. *League of Women Voters*, 548 F.3d at 476, citing *Daniels v. Williams*, 474 U.S. 327 (1986) (emphasis added). Similarly, the Sixth Circuit has held in more recent cases that it continues to adhere to the established rule—which the Sixth Circuit specifically noted has been applied "uniformly" throughout the federal courts—that courts will not "endorse action[s] under [§] 1983 with respect to garden variety election irregularities" like those here. *Warf*, 619 F.3d at 559; *see Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012). That is the same rule that exists in the Second Circuit, and it is the same rule that the Connecticut Supreme Court applied below.

In fact, not only did *League of Women Voters* reject the rule that Petitioner claims the Sixth Circuit has adopted, both parties in that case argued that the Equal Protection Clause ***does*** include an intent requirement in the voting context after *Bush v. Gore*. The Sixth Circuit declined to address what that requirement is in that case, and has since reiterated that it still has not decided that question. *League of Women Voters*, 548 F.3d at 476; *see Ne. Ohio Coal.*, 696 F.3d at 597, citing *League of Women Voters*, 548 F.3d at 476 (noting that the Sixth Circuit has thus far "declin[ed] to decide the scienter requirement for a voting restriction to violate equal protection" or due

process). Thus, not only does the Sixth Circuit currently apply the same rule as the Second Circuit, it expressly has declined to address the very question that Petitioner presents.

Petitioner's reliance on *Hunter v. Hamilton County Board of Elections*, 635 F.3d 219 (6th Cir. 2011), does not compel a different conclusion. In that case, the Sixth Circuit suggested in a footnote that *Bush v. Gore* eliminated the discriminatory purpose requirement in equal protection cases where a state's election procedures "result in 'arbitrary and disparate treatment' of votes." *Hunter*, 635 F.3d at 234 and n.13, quoting *Bush*, 531 U.S. at 104-05. That statement does not create a Circuit split, for two reasons.

First, the statement in *Hunter* is not the law in the Sixth Circuit. To the contrary, it is non-binding dicta in a footnote that contained virtually no substantive analysis. No other Sixth Circuit decision has cited *Hunter* for that proposition, and in fact, the Sixth Circuit implicitly has rejected the statement in *Hunter* by making clear in later cases that it still has not decided what scienter requirement applies to equal protection and due process claims involving the right to vote. *Ne. Ohio Coal.*, 696 F.3d at 597, citing *League of Women Voters*, 548 F.3d at 476.

Second, even if the statement in *Hunter* were controlling law in the Sixth Circuit, it does not conflict with the Second Circuit rule that the Connecticut Supreme Court applied below. Unlike the local election officials in this case, in *Hunter* the elections board

intended to treat voters differently by deliberately "carv[ing] out" some situations in which it would consider evidence of poll worker error in determining whether to count a ballot, and other situations in which it would not. *Hunter*, 635 F.3d at 236. Although the Sixth Circuit stated that such differential treatment need not be motivated by an invidious discriminatory ***purpose*** to violate equal protection, it did not in any way suggest that local election officials can be held constitutionally liable when they did not intend the differential treatment at all. Nor did it purport to address, distinguish or overrule the established rule in the Sixth Circuit that "garden variety election irregularities" and unintentional acts involving "mere negligence" by local election officials are not enough to establish a constitutional violation under § 1983. *Warf*, 619 F.3d at 559; *League of Women Voters*, 548 F.3d at 476. Because that is the same rule applied below and in the Second Circuit, there simply is no Circuit split with regard to any issue in this case.

In any event, even if the Sixth Circuit had adopted the rule that Petitioner proposes, that still would not create a Circuit split because the Second Circuit has not assessed what impact, if any, *Bush v. Gore* had on the intent requirement for equal protection claims involving the right to vote. To the contrary, the Second Circuit has cited *Bush v. Gore* only six times over the last nineteen years, and in none of those cases did it even arguably address that issue. Nor did the Second Circuit address the issue—or even cite *Bush v. Gore*—in the two cases upon which the Connecticut Supreme

Court relied. *See Shannon v. Jacobowitz*, 394 F.3d 90 (2d Cir. 2005); *Powell v. Power*, 436 F.2d 84 (2d Cir. 1970). By definition, a Circuit split cannot be based on decisions by only one Circuit Court.

B. Any Purported Circuit Split Is Not Implicated By The Facts Of This Case, And This Case Is Therefore A Poor Vehicle Through Which To Resolve It.

To the extent that a Circuit split exists—which it does not—it is limited to the specific context of cases like *Hunter* and *Bush v. Gore*, in which a state uses disparate standards for counting ballots across and within districts. That simply has nothing to do with the isolated and unintentional act of negligence at issue here.

Specifically, *Hunter* involved a so-called "lack-of-uniform-standards claim" in which the "central question" is whether the state "lacks adequate statewide standards for determining what is a legal vote." *See Ne. Ohio Coal.*, 837 F.3d at 635 (quotation marks omitted). The legal theory for such claims is based on the analysis in *Bush v. Gore*, which this Court specifically stated is "limited to the . . . circumstances" present in that case. 531 U.S. at 109. Consistent with that limitation, the Sixth Circuit has not applied the statement from *Hunter* in any other case, and certainly has not applied it outside of the limited context of a "lack-of-uniform-standards claim."

Whatever import *Hunter* has, therefore, it is irrelevant here. Petitioner does not argue that Connecticut lacks uniform standards for counting ballots across or within districts. Nor does he argue that local election officials knowingly deviated from the uniform standards that exist.

C. *Bush v. Gore* Did Not *Sub Silentio* Eliminate The Longstanding Intent Requirement For Equal Protection Claims Involving The Right To Vote.

Finally, assuming arguendo that a Circuit split exists and is relevant to the circumstances of this case, it is insubstantial and does not require this Court's review.

Contrary to Petitioner's assertions, this Court has never suggested that "intent is not an issue" in equal protection cases involving the right to vote. Pet. at 21. To the contrary, in the redistricting context upon which Petitioner heavily relies, Pet. at 18-20, this Court repeatedly has held that equal protection claims involving the right to vote still ***do*** require proof of intent. *See*, *e.g.*, *Abbott v. Perez*, 138 S. Ct. 2305, 2314, 2324-25 (2018); *Harris v. Arizona Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1306-07 (2016). Petitioner does not cite any case to the contrary.

Bush v. Gore did nothing to overturn that longstanding requirement. Indeed, *Bush v. Gore* did not even mention the intent requirement at all, and did not have to because the requirement was satisfied in

that case. Specifically, the Florida Supreme Court intentionally imposed a recount process that lacked uniform standards and resulted in differential treatment of voters. Having intentionally imposed that disparate process, moreover, the Florida Supreme Court intentionally "ratified th[e] uneven treatment" of voters that flowed from it. 531 U.S. at 107.

In any event, even if *Bush v. Gore* eliminated the intent requirement in that case, this Court specifically noted that its analysis was "limited to the present circumstances" of that case. 531 U.S. at 109. Whatever impact *Bush v. Gore* has is therefore limited to circumstances in which a state's election procedures result in the widespread application of arbitrary and disparate standards for counting ballots across and within districts. That simply is not this case.

CONCLUSION

For all of the reasons set forth herein, the Court should deny the petition in its entirety.

Respectfully submitted,

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