

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

LIBERTARIAN PARTY OF CONNECTICUT, :
ET AL., :

Plaintiffs, :

v. :

SUSAN BYSIEWICZ, in her Official Capacity :
as Secretary of State of the State of :
Connecticut, :

Defendant. :

CIVIL ACTION NO.
3:08-CV-1513 (JCH)

DECEMBER 2, 2008

**RULING RE: MOTION FOR PRELIMINARY INJUNCTION (DOC. NO. 15)
(Issued on October 23, 2008)**

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LIBERTARIAN PARTY OF)
CONNECTICUT, ET AL)
Plaintiffs.) NO: 3:08cv1513(JCH)
vs.) October 23, 2008
SECRETARY OF STATE) 2:30 p.m.
Defendant.)

915 Lafayette Boulevard
Bridgeport, Connecticut

RULING ON PRELIMINARY INJUNCTION

B E F O R E:
THE HONORABLE JANET C. HALL, U.S.D.J.

A P P E A R A N C E S:

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Court Reporter : Terri Fidanza, RPR

Proceedings recorded by mechanical stenography,
transcript produced by computer.

1 THE COURT: The Court is prepared to issue its
2 ruling on the plaintiffs' motion for preliminary
3 injunction. Before I do that, I would like to make a few
4 preliminary comments. I apologize to everybody who is
5 here who has to listen to me go on verbally at some
6 length but given the pressing nature of the issue and how
7 long the Court has had to address it, I was not in a
8 position to do a written opinion. I think it was Thomas
9 Jefferson who said if I had more time, I would have
10 written less. Probably if I had more time, I would have
11 to say less.

12 I also would like to note I did indicate to
13 plaintiffs' counsel I was not going to address the Motion
14 to Dismiss but I do want to indicate to the defendants
15 that I had reviewed obviously your Motion to Dismiss as
16 far as to the extent it expressed your view as to those
17 issues relevant to the Motion for Preliminary Injunction
18 and it was helpful to have received that on Monday.

19 First by way of background, this lawsuit was
20 commenced on October 1 and was served upon the defendant
21 on October 3. The plaintiffs in the case are the
22 Libertarian Party of Connecticut, its chairman, its
23 candidate for presidential electors and candidate for
24 president and vice president of the United States.

25 The sole defendant is the Secretary Of State

1 Susan Bysiewicz in her official capacity.

2 The plaintiffs assert claims under 42 U.S.C
3 Section 1983 for violation of their rights under the
4 First and Fourteenth Amendment. They allege denial of
5 access on the ballot, denial of their rights to political
6 association, or put another way, to create a new
7 political party, denial of their Equal Protection Rights
8 and denial of procedural due process.

9 The remedy the plaintiffs seek in their
10 complaint is both a preliminary and a permanent
11 injunction prohibiting the Secretary from refusing to
12 place Mr. Barr and Mr. Root on the November 4th ballot.
13 They seek a declaration that the Secretary of State's
14 refusal to place those two gentlemen on the ballot was
15 unconstitutional and finally the award of attorney's fees
16 and costs.

17 Subsequent to the filing of the complaint,
18 which was I believe entered on the computer system of
19 this Court on October 3, the Court became aware of the
20 existence of the lawsuit and reviewed the complaint and
21 scheduled a status conference on October 8. I was
22 particularly concerned, as I noted at that conference,
23 that there was no Motion for a Preliminary Injunction
24 accompanying the complaint. I was concerned it had
25 either been misplaced or misdocketed by the Clerk's

1 Office and that, in fact, if there was a motion, that I
2 should be attending to.

3 Of course, the Court cannot act without a
4 motion. Federal Rule of Civil Procedure 7B states that a
5 request for a court order which would, of course, be what
6 the preliminary injunction is, must be made by motion.

7 At the status conference, plaintiffs' counsel
8 confirmed that there had been no motion filed and he was
9 not certain when one would be filed.

10 Subsequent to that conference, which as I say
11 was on October 8, a Motion for a Preliminary Injunction
12 was filed on last Friday, October 17, at 4 p.m. in the
13 afternoon.

14 The basis for that motion is that the
15 plaintiffs claim that they are likely to succeed on the
16 merits -- at the higher standard that I discussed with
17 plaintiffs' counsel -- and will suffer irreparable harm.
18 The latter point being unquestioned that the injuries to
19 the plaintiffs' rights are severe and can't be justified
20 by the legitimate state interest and that the preliminary
21 injunction would advance the public's interest.

22 Plaintiffs argued also that they were not foreclosed by
23 laches and they should be excused from the requirement of
24 posting a bond.

25 As I just indicated, the defendant on Monday

1 filed a memorandum in effect in support of a motion to
2 dismiss, as well as stating its opposition to the Motion
3 for a Preliminary Injunction and the basis as set forth
4 in that memorandum are as follows:

5 That the plaintiffs have failed to state a
6 claim under Section 1983 because they didn't allege that
7 any state actors acted intentionally.

8 Second, that the lawsuit is barred by the
9 Eleventh Amendment because the claim is that the state
10 actor or actors failed to comply with state law, not
11 federal law.

12 Third, that the plaintiffs' suit is barred by
13 the Doctrine of Laches and that issuing an injunction at
14 this time would be against the public interest.

15 A Motion for a Preliminary Injunction is
16 obviously the standard for satisfying or having the
17 granting of such a motion, has been addressed many times
18 by the Second Circuit in many precedents.

19 However, what's clear from all of those
20 decisions is that there's one standard for granting a
21 Motion for Preliminary Injunction which is likelihood of
22 success on the merits or serious question going such that
23 on balance, to the merits such that on balance, an award
24 is appropriate.

25 However in this case, as I think it was

1 conceded by plaintiffs' counsel, there was more than one
2 reason why a higher standard is triggered. Here we have
3 a request by the plaintiff in preliminary form, that
4 effectively if granted gives them the entirety of what
5 they seek in their complaint.

6 Second, the nature of the complaint sought is a
7 mandatory injunction, not a status quo injunction. In
8 other words, unlike some election cases where it is to
9 keep a name on a ballot, i.e., the status quo, this is to
10 put a name on the ballot which is not there.

11 And also I think, although I don't really need
12 this, given the first two grounds I just stated, I think
13 a higher standard is likely called for given the nature
14 of what's at issue in the motion. It is a public
15 activity. It is the conduct of elections. There's a
16 high public interest in it. It is a governmental action.

17 I think any of those would trigger the higher
18 standard which is as follows:

19 Obviously first, there must be irreparable
20 harm.

21 And second, and I'm quoting from a case of the
22 Second Circuit case of Doninger v. Niehoff, 527 F.3d 41,
23 (Second Circuit 2008). That case involved a mandatory
24 injunction. "When the movant seeks a mandatory
25 injunction, that is, as in this case, an injunction that

1 will alter rather than maintain the status quo, she must
2 meet the more rigorous standard of demonstrating a
3 "clear" or "substantial" likelihood of success on the
4 merits."

5 The Court, therefore, has in mind that the
6 plaintiffs' burden here is to meet that higher standard
7 of demonstrating a likelihood of success that is clear or
8 substantial.

9 I'm going to focus on, although the plaintiff
10 has raised a number of claims under the First Amendment
11 as well as an Equal Protection claim, the Court is going
12 to focus on the due process claim. I do so, well, for a
13 number of reasons.

14 First, I think the plaintiff conceded as I
15 would have otherwise concluded that the Equal Protection
16 claim really doesn't have any legs to it or basis for it.
17 There's nothing certainly alleged in the complaint and I
18 haven't heard anything here or in the affidavit of
19 Mr. Rule that gives me the basis upon which to claim
20 discrimination was made.

21 With respect to the First Amendment claims,
22 those are obviously very serious First Amendment claims
23 but as the court in Rivera-Powell in the Second Circuit
24 stated, when the First Amendment claim is "virtually
25 indistinguishable from the due process claim," that was

1 the case in the Rivera-Powell opinion and I think it is
2 the case here. And I think that because here, like in
3 Rivera-Powell, there was no challenge to the
4 constitutionality of the state law. There was only a
5 challenge to how state official or officials applied it.

6 And therefore, in effect, the First Amendment
7 claim is not distinguishable from the due process claim.
8 As that court in Rivera-Powell said at page 469, "When as
9 here, a plaintiff challenges a Board of Election decision
10 not as stemming from the constitutionality or statutorily
11 invalid law or regulation, but rather as contravening a
12 law or regulation whose validity the plaintiff does not
13 contest, there is no independent burden on First
14 Amendment rights when the state provides adequate
15 procedures by which to remedy the alleged violation. And
16 as that quote continues, "We note that a contrary holding
17 would permit any plaintiff to obtain federal court review
18 of even the most mundane election dispute merely by
19 adding a First Amendment claim to his or her due process
20 claim. We would thereby undermine our holding that we
21 share with many other circuits, that the federal court
22 intervention in "garden variety" election disputes is
23 inappropriate, ... We therefore hold when a candidate
24 raises a First Amendment challenge to his or her removal
25 from the ballot based on the allegedly unauthorized

1 application of an admittedly valid restriction, the state
2 has satisfied the First Amendment if it has provided due
3 process." That quote covers 469 to 470.

4 While the facts in Rivera-Powell are slightly
5 different -- I won't say slightly, are different than the
6 facts here having to do with the removal of a name of a
7 person from the ballot -- here it is the placement of the
8 name, the refusal to put a name on the ballot.

9 Essentially for the purposes of the analysis of due
10 process, the First Amendment claim, I think the
11 Rivera-Powell case is very instructive one so, therefore,
12 my focus will be on the due process claim of the
13 plaintiffs. If there is a due process claim, I guess
14 what Rivera-Powell is saying is then there's a First
15 Amendment claim. If there's no due process violation,
16 then there's no First Amendment claim.

17 The due process claim is a challenging one to
18 address. Where shall I begin? First, let me identify
19 what I think is the process provided by the state of
20 Connecticut. That is the cause of action provided in
21 Connecticut General Statute Section 9-323 which provides
22 that "any elector or candidate who claims he's aggrieved
23 by any ruling of any election official in connection with
24 any election for presidential electors, ... may bring
25 his complaint to any judge of the Supreme Court, ... If

1 such a complaint is made prior to such election, such
2 judge shall proceed expeditiously to render judgment on
3 the complaint, ... " and to provide a remedy.

4 I will attempt to address the due process
5 claim, which as I say raises a number of interesting
6 issues. The first question I think is whether this is an
7 intentional act or a random act, as I had a bit of a
8 conversation about that with counsel during the oral
9 argument.

10 The Gold decision out of the Second Circuit, at
11 101 F.3d 796 (Second Circuit 1996), talked about the fact
12 that it would not be an intentional act in connection
13 with the due process violation if what we were speaking
14 of were election irregularities. In that case, there
15 were quite a long list of irregularities which I think
16 appalled, certainly Judge Oakes on that two-judge panel,
17 but in the end, they concluded they did not qualify as
18 random acts that would be held up to different standard
19 under due process.

20 Instead they concluded they were "voting
21 irregularities." They were such things as the delay in
22 the delivery of the voting machines, miscounting of
23 votes, the appearance of ineligible candidates on
24 ballots. The Court would note as an aside that all of
25 these things, these irregularities, appear to have

1 occurred in that case as a result of a last minute court
2 order affecting a change in the candidates listed on the
3 original ballot.

4 Defense counsel pointed me to Powell v. Power.
5 In that case, the Second Circuit held, spoke about the
6 Court being thrust into the details of virtually every
7 election, tinkering with the state's election machinery,
8 reviewing petitions, et cetera. "Absent a clear and
9 unambiguous mandate from Congress, we are not inclined to
10 under take such a wholesale expansion of our jurisdiction
11 into an area which, with certain narrow and well defined
12 exceptions, has been in the exclusive cognizance of the
13 state courts." 436 F.2d, 84 at 86. (Second Circuit,
14 1970.)

15 The Court in Gold subsequently described the
16 Powell decision as, in effect, holding that plaintiffs
17 who can establish nothing more than "unintended
18 irregularities" in the conduct of elections are barred
19 from obtaining 1983 relief in federal court, provided
20 there's an adequate and fair state remedy.

21 The Second Circuit, however, takes up this
22 question again of what is whether something is
23 intentional or not in Rivera-Powell and clarifies at
24 footnote 7 that the removal of Rivera-Powell from the
25 ballot was "clearly an intentional act". As best I read

1 that case and I have read it several times but I have to
2 say there's been a bit of press here so I may not have
3 read it clearly, but there seems to have been a complaint
4 about the fact that her petitions were not in order, it
5 sounds like were not numerous enough. However, they had
6 been put on the ballot and this objection was to take her
7 off. So a Board of Elections procedure in New York State
8 provides that the board would decide that question and it
9 did. It determined to remove her from the ballot and the
10 Court distinguished Shannon, that's another Second
11 Circuit election case, and Gold by describing them as
12 dealing with inadvertent election irregularities and
13 contrasted that with the facts before it in Rivera-Powell
14 which clearly an intentional act occurred when the
15 candidate was removed from the ballot.

16 What is the challenge in this case is that the
17 Gold opinion quoting Powell speaks about meshing federal
18 courts in reviewing petitions which is what the plaintiff
19 would have me do here, and yet this concerns a decision,
20 albeit the Secretary of State didn't review the
21 petitions. Nonetheless, it is her decision not to put
22 Mr. Barr on the ballot. So it is -- it is not completely
23 analogous to Rivera-Powell and it does involve an
24 activity which Gold in citing Powell v. Porter
25 specifically said shouldn't be the domain of the federal

1 court.

2 I think that's a very close question for this
3 court. Of course, the plaintiff has to clearly and
4 substantially establish his cause of action. I think in
5 that regard it is a question of law. It is really not a
6 fact so it is really a judgment for me to make as to what
7 the law is in this area. Of course, this is a sort of
8 preliminary question to that analysis which is whether --
9 it is not preliminary. As to assuming it is an
10 intentional act then the Court needs to address whether
11 there's an adequate state remedy or procedure. That if
12 it is intentional, my understanding is that if there were
13 pre and post-deprivation procedures that would be the end
14 of the discussion. That raises the question of what is
15 the deprivation here in terms of deciding is there a
16 predeprivation procedure. If the deprivation is the
17 refusal on the 15th of September to put the Plaintiff
18 Barr on the ballot, then there's no predeprivation
19 procedure that I know of in Connecticut. I don't believe
20 counsel brought any to my attention. If the deprivation,
21 though, is the ability to be on the ballot on November 4,
22 then there is a predeprivation procedure. Again a
23 difficult question. But let's assume that the
24 deprivation occurs sometimes in September because ballots
25 begin to go out according to Mr. Bromley absentee,

1 presidential, overseas, military, late September, early
2 October.

3 So let's assume the deprivation did occur
4 sometime before November 4, then we had in the sense, not
5 necessarily in a predeprivation procedure so then we're
6 left I think at looking I think at, assuming I decide the
7 intentional question in the plaintiffs' favor as a matter
8 of law and I decide the deprivation occurs before
9 November 4, that's left unanswered by the Second Circuit
10 in Rivera-Powell I think. Then we're left with the
11 question under traditional due process case law of
12 whether the post-deprivation remedy does satisfy due
13 process. And as I indicated with counsel for the
14 defendant, there are three factors I believe that I
15 should address: that's the private interest affected by
16 the official action, the risk of an erroneous deprivation
17 through the procedures used and the probable value of any
18 additional or substitute procedural safeguards and
19 finally, the government's interest including the function
20 involved and the burden that additional or substitute
21 procedural requirements would entail.

22 Obviously the private interest here affected by
23 the official action is a large one. The right to
24 associate politically, to be able to vote for the
25 candidate of your choice, all of those rights which I can

1 go on and characterize in various ways under the First
2 Amendment are very substantial rights which we all enjoy
3 and cherish.

4 The risk of erroneous deprivation of the
5 plaintiffs' interests in their rights under the First
6 Amendment through the procedure provided in Title 9, the
7 one that I cited in the Connecticut statutes, strikes me
8 as that's a low likelihood of there being error made when
9 any possible administrative level error or not
10 administrative, clerk, registrar, Secretary of State
11 error is brought to the attention, while it says judge of
12 the Supreme Court, I assume it means Justice of the
13 Supreme Court, but brought to the attention of a member
14 of the Supreme Court who is instructed in mandatory
15 language to expeditiously address it. I think the risk
16 of that justice making an error that would result in the
17 deprivation of the rights of the plaintiffs in this case,
18 I would think would be extremely low.

19 Now, part of that second factor involves a
20 consideration of -- I will put it very colloquially --
21 would we better off if there was some other procedure
22 other than this cause of action before the Supreme Court
23 Justice. How do you answer that? If there was another
24 level of review, I don't know that anyone could ever say
25 it wouldn't be of value. The difficulty I think faced

1 here is the time table and that is, could you have time
2 to do another overview, so I think the answer is that
3 there would be value to say an administrative level of
4 review or some other type of review before the Supreme
5 Court Justice review. But in the context of elections, I
6 think its value, in fact, would be a harm because of the
7 additional time it would take.

8 The last interest or fact that's to be weighed
9 is the government's interest including the function
10 involved in the burdens of additional or substitute
11 procedural requirements. I guess I have answered that by
12 saying that I recognize that the Secretary of State has
13 important responsibilities to carry out including
14 certifying properly people who qualify. But there's an
15 overall governmental interest in the carrying out of
16 elections. Every election is important. Clearly
17 presidential elections are very important, and there are
18 time pressures that are affected upon the Secretary of
19 State in carrying out those responsibilities. So as I
20 noted while additional procedural steps or administrative
21 review might be helpful, not so much the cost I think
22 here but the time, the cost and time is a burden that
23 would argue against a finding that those additional
24 procedures would be valuable.

25 There are a couple of cases I found. They are

1 both out of New York which New York does sometimes seem
2 to have a predeprivation procedure but in these cases, I
3 have read these carefully. I think they say, at least in
4 Douglas v. Niagara County Board of Electrics, 2007 West
5 Law 3036809 Western District of New York, 2007, Judge
6 Arcara found that the plaintiff had an adequate
7 opportunity to be heard in the form of the special
8 proceeding brought in New York State Supreme Court under
9 New York state election laws and, quoting Rivera-Powell,
10 said the due process clause does not protect against all
11 deprivations of constitutionally protected interest,
12 life, liberty or property "only against deprivation
13 without due process." Rivera-Powell 470 F.3d at 465 --
14 64-65 quoting a Supreme Court case.

15 So it would be my conclusion that certainly
16 under the heightened standard that the plaintiff must
17 satisfy, and as a matter of law that he has not shown, a
18 clear or substantial likelihood of success on the merits
19 on the due process claim. Because the Court has
20 indicated, as I articulate my thinking in that regard,
21 there are several questions that have to be answered in
22 that analysis and that I think I expressed my -- what's
23 the right word? Suggestion that one or more of those
24 might be a close question even given the plaintiffs' high
25 standard.

1 The Court is going to assume for the sake of
2 argument that the plaintiff has demonstrated a due
3 process violation and address the defendant's special
4 defense of laches. Both parties have addressed it and,
5 in the Court's view, that issue is very clear.

6 The first thing I would say is that it occurred
7 to me last night that laches is a special defense which I
8 believe must be pled. The defendants haven't pled them
9 because they made a motion to dismiss. However, the
10 Court was able to find that, in the context of
11 preliminary injunctions, the Court, in effect, the burden
12 follows what would be the burden in the case. And so,
13 for example, if the burden of proof of laches is on the
14 defendant generally as to a claim asserted that would be
15 at trial or in a motion for summary judgment, then the
16 burden would be on the defendant in the context of the
17 preliminary injunction motion.

18 There's one election case, which is technically
19 an uncitable Ninth Circuit case but I think the Supreme
20 Court threw those uncitable rulings out, McDonald v.
21 County of San Diego, 124 Fed APPX 588, it appears 2005
22 West Law 736663 Ninth Circuit 2005, in which the Court
23 clearly affirmed the district court who concluded that
24 the plaintiff had failed to demonstrate a likelihood of
25 success of the merits because it was barred by the

1 equitable defense of laches. In other words, recognizing
2 the consideration of special defenses is appropriate.

3 There's also a recent Supreme Court case called
4 Gonzales, as in the Attorney General, versus the O Centro
5 Espirita. It is 126 Supreme Court 1211 and that goes
6 through citing what I suppose could be assumed principles
7 but as I say, it occurred to me last night it wasn't so
8 obviously. This case says the government there had
9 invoked the well-established principle -- those are the
10 words of the Supreme Court, that the party seeking
11 pretrial relief bears the burden of demonstrating the
12 likelihood of success on the merits. The Court then says
13 that it viewed the evidence before the district court in
14 equipoise related to two of the compelling interests
15 asserted by the government which formed part of the
16 government's affirmative defense. And then, citing a
17 prior decision by themselves, the Supreme Court
18 continues, "we reasoned that, quote, as the government
19 bears the burden on the ultimate question of the
20 challenged Acts constitutionality, respondents, bracket,
21 the movants, must be deemed likely to prevail unless the
22 government has shown the respondents' proposed less
23 restrictive alternatives are less effective than
24 enforcing the act."

25 Then lastly Hubbard Feeds, an Eighth Circuit

1 opinion in 1999 at 182 F.3d 598 at page 601. "The
2 equitable defense of laches is applicable to an action to
3 enforce a contestable trademark and therefore, should be
4 considered in evaluating the likelihood of success on the
5 merits of the trademark infringement claim."

6 So having put myself, my mind at ease that it
7 is appropriate to consider a special defense on a motion
8 for preliminary injunction but conclude that the
9 defendant has the burden in connection with the
10 preliminary injunction of establishing that special
11 defense, and I would suggest why the higher standard is
12 required here.

13 Laches is a defense that is based on the maxim,
14 "vigilantibus non dormientibus aequitas subvenit." My
15 clerk is probably grimacing over there. Which means
16 "Equity aids the vigilant, not those who sleep on their
17 rights." Ikelionwu v. the United States, 150 F.3d, 233
18 (Second Circuit, 1998.).

19 As the court continued in that case, "It is an
20 equitable defense that bars a plaintiff's equitable claim
21 where the plaintiff is guilty of unreasonable and
22 inexcusable delay that has resulted in prejudice to the
23 defendant." Thus, the party asserting that defense, in
24 this case, the Secretary, has to show the plaintiff knew
25 of the defendant's misconduct, second, that the plaintiff

1 is excusably delayed in taking action and third, the
2 defendant was prejudiced by the delay.

3 Another Second Circuit case decided a few years
4 before that, that case whose name I can't pronounce, the
5 second earlier case captioned Conopco Inc. v. Campbell
6 Soup Company. 95 F.3d 187 (Second Circuit 1996).

7 The circuit said in expounding on what it
8 means for a defendant to be prejudiced stated, "A
9 defendant has been prejudiced by a delay when the
10 assertion of a claim available some time ago would be
11 "inequitable" in light of the delay in bringing that
12 claim. Specifically, prejudice ensues when a "defendant
13 has changed his position in a way that would not have
14 occurred if the plaintiff had not delayed."

15 There are a number of election cases obviously
16 cited by the parties in which, particularly the
17 defendant, laches has been recognized and generally arise
18 in the context of where the defendant election official
19 claims that the plaintiff has come into court so late in
20 the process to seek relief that basically the process
21 can't be unwound, then the relief granted to them, the
22 plaintiffs, without throwing into chaos the whole
23 election process and jeopardizing the rights of all
24 voters.

25 Obviously there's been a mention made today of

1 the Williams case by the plaintiff. In that case on
2 October 15, the court declined to require the State of
3 Ohio to put a minority party, a socialist labor party on
4 the ballot even though the Supreme Court recognized their
5 claims as material. Indeed there had been another party,
6 the independent party, who had made the same complaint as
7 the socialist party. The two of the parties had
8 proceeded through a whole several steps of process and
9 eventually in a hearing before a single justice, Ohio
10 represented that they could put the independent party's
11 name on the ballot without disruption, but if there was
12 any more delay, it would be a different story. At that
13 proceeding, only the independent party was present. The
14 socialist party not having proceeded past the district
15 court decision. The socialist party after the delay of
16 several -- what the court describes as several days which
17 is not very much, came forward and said well, I would
18 like that order that you gave on behalf of the
19 independent party to apply to socialist party and the
20 State objected on the grounds at this point, it would be
21 disruptive of the process and on October 15, Justice
22 Stevens. I think it was Justice Stevens -- Stewart.
23 Justice Stewart said "Certainly at this late date, it
24 would be extremely difficult, if not impossible, for Ohio
25 to provide still another set of ballots. Moreover, the

1 confusion that would attend such last-minute change would
2 pose a risk of interference with the rights of other Ohio
3 citizens, for example, absentee voters."

4 There's another Supreme Court case which is
5 Norman v. Reed which the plaintiffs cite which would
6 appear on first glance to be favorable to them because
7 there again -- not again, there Justice Stevens granted
8 an injunctive relief on October 25 which, of course, is
9 later than today, let alone the day the plaintiff filed
10 their preliminary injunction motion. However, the relief
11 that Justice Stevens awarded in that case was to allow a
12 name which was on the ballot that had been printed to
13 remain on the ballot. So, in effect, the decision
14 reached by the Justice caused no disruption of the
15 electoral process that was in place and moving throughout
16 as at least as in Connecticut here September and October.

17 Lastly in the case of McCarthy v. Briscoe which
18 I think I mentioned briefly in argument, Justice Powell
19 again sitting as a circuit justice, ordered that the
20 Eugene McCarthy's name placed on the November
21 presidential ballot. That case, of course, that's fairly
22 late but I believe in this case, Mr. Bromley testified
23 that had the plaintiff come forward sometime in September
24 that this process in Connecticut could have been
25 suspended and we would not have been as far down the road

1 and less would have had to be unwound and more time would
2 be available had the plaintiffs moved in say mid to late
3 September, the time frame that Justice Powell was
4 addressing. The Court will note that the case that
5 Justice Powell was acting on was filed on July 30. While
6 I recognize that the plaintiffs could not have filed that
7 early, however, Justice Powell's decision is 17 days
8 before the plaintiffs asked this court to rule. I hope
9 everyone would recognize that it would take any district
10 court judge at least a day, in my case, I was taking two
11 days, to address the issues raised by the motion.

12 There are a number of other cases that have
13 been cited by both sides. I will not bother going
14 through all of them, but one of them I think is
15 particularly informative. That's the Fulani v. Hogsett
16 case out of the Seventh Circuit. That suit was filed on
17 October 13 after the plaintiffs had waited 11 weeks after
18 the irregularities had become a matter of public record
19 but two weeks after the plaintiff had actual notice of
20 them. In that instance, the Court found that there was
21 laches and spoke at some length about the impact of
22 trying to undue what the election officials had done in
23 the time frame in which the plaintiffs had sort of sat on
24 the sidelines and not brought their case. "Laches arises
25 when an unwarranted delay in bringing a suit or otherwise

1 pressing a claim produces prejudice to the defendant. In
2 the context of elections this means any claim against the
3 state electoral procedure must be expressed expeditiously
4 As time passes, the state's interest in proceeding with
5 the election increases in importance as resources are
6 committed and irrevocable decisions are made. The
7 candidate's and party's claims to be respectively a
8 serious candidate and a serious party with a serious
9 injury become less credible by their having slept on
10 their rights."

11 As I say, there's a lot of cases I have
12 reviewed. The other case that permitted the changing of
13 a ballot is the New Jersey Democratic Party case where
14 Candidate Toricelli died on October 1 and October 2 the
15 Supreme Court in New Jersey ordered the reprinting of
16 ballots at the cost of \$800,000 to be borne by the
17 plaintiffs which were in effect the Democratic party who
18 sought to put a live's person name on the Democratic
19 line. Again the court would note that was October 1 that
20 the plaintiff came to the court and the 2 that the court
21 ordered relief.

22 Here, while the plaintiff filed their suit on
23 October 1, despite the inquiry of the court, no motion
24 was filed as required by Rule 7 until October 17. The
25 Court appreciates Mr. Rule's affidavit in which he

1 indicates that it took some time after the 15th for him
2 to be able to determine, in fact, whether he had 7500
3 valid signatures, presumably allowing counsel under Rule
4 11 to be able to make a claim in this federal court
5 that's based in fact and law. The affidavit doesn't tell
6 me exactly how long that took Mr. Rule, though. Even if
7 I assume it took him two weeks, in other words, until
8 October 1, when the complaint was filed, that still
9 doesn't explain why the motion for preliminary injunction
10 wasn't filed on October 1. The Court was available. I
11 think I can say that as a matter of speculation. I held
12 that conference on the 8th, if I had a motion, I would
13 have acted sooner than the 8th and it can be said that
14 certainly by then the plaintiff had a basis for his
15 claim. So there's nothing before the Court that explains
16 to me why the plaintiff waited until October 17 to ask
17 this court to enter a preliminary injunction against the
18 Secretary of State.

19 Therefore, it is the conclusion of this court
20 that the defendants have shown that there's a substantial
21 likelihood of their success on the special defense of
22 laches and the necessary conclusion from that, therefore,
23 is that the plaintiff cannot show a substantial
24 likelihood of success of succeeding on the merits because
25 if it has a meritorious claim, it would be barred by the

1 defense of laches.

2 The court reaches that conclusion with the
3 backdrop of the cases that I have reviewed and many
4 others that I have read, and I'm not going to bother to
5 put on the record, but it is clear that the plaintiffs
6 knew of the defendants' alleged misconduct on September
7 15 when they were told telephonically and by letter that
8 their two candidates -- to inform plaintiffs -- would be
9 excluded from the November 4 ballot.

10 As I said, I recognize it could take sometime
11 to determine if there was a basis to a claim that they
12 had the requisite number of signatures and their rights
13 were violated by refusal to certify them for the
14 election. I'm not going to comment if it did take two
15 weeks until October 1. I'm not sure that's a reasonable
16 period given the time pressures that are faced by the
17 state in preparing for an election on November 4 but, and
18 I don't think the plaintiff has shown that it is
19 reasonable. I'm not sure they have claimed that the 15
20 days was actually necessary, but I don't think they have
21 shown it was reasonable. Even if it was reasonable, as I
22 say, there's no excuse, for having a basis to allege
23 their claims, i.e., filing their complaint, they waited
24 another two and a half weeks to file a motion which
25 motion was filed on Friday afternoon, two and a half

1 weeks prior to the actual election day. Defendants have
2 clearly shown prejudice, could show that prejudice on the
3 day the motion was filed, certainly today. Absentee
4 ballots and other ballots, presidential, military, out of
5 state, I forget what those were called, those had all
6 gone out by the time the motion was filed. So under some
7 of the cases I referred to, one of the Supreme Court
8 justices pointed to the fact the absentee ballot had gone
9 out so it was too late. As I asked plaintiffs' counsel,
10 I'm not aware of any case which permitted the election to
11 proceed, some voters, albeit, a very small number but
12 nonetheless voters, are voting on a different ballot than
13 the rest of the voters.

14 Also I will not go into a lot of detail. I
15 referenced Mr. Bromley's testimony, which I do credit. I
16 found him very credible and clear, and I think laid on
17 the record quite clearly what's involved in the state of
18 Connecticut in conducting a presidential election. The
19 Court finds that two million ballots have already been
20 printed, the computer cards to run the optical scanning
21 machines to accommodate those two million possible voters
22 have already been programmed -- I guess if that's the
23 right word -- and distributed along with the paper
24 ballots out to -- I love this about the State of
25 Connecticut, all of its 169 cities and towns.

1 In addition, and I would note that while this
2 will be the second election in which almost all of the
3 voters in Connecticut will use optical scanning machines,
4 that it will be the first time in a presidential
5 election -- I did not ask about voter turnout in
6 non-presidential elections -- but I believe it is
7 reasonable for me to assume that voter turnout on
8 November 4, will be among the highest in the history of
9 the state and certainly higher than is expected say in
10 municipal elections that occurred in 2007. And so the
11 testing that's needed to be certain that the paper
12 ballots will work on the machine with the computer
13 program cards, has been undertaken and is to be completed
14 by tomorrow.

15 If I were to grant the plaintiffs relief they
16 seek, it would require the reprinting of two million
17 paper ballots, the reprogramming of the computer cards
18 for all of the machines in 169 towns, which reflect 833
19 different ballots, the redistribution of the cards and
20 ballots to 169 towns, and the testing of those paper
21 ballots against the machines and the cards to be certain
22 that they work.

23 The court credits Mr. Bromley's testimony. I
24 think I will conclude this myself, but obviously I credit
25 his testimony that this just can't be done. It can't be

1 done in the time period from today to November 4, and it
2 couldn't have been done from the date of the filing of
3 the motion, the 17th of October. Among the reasons it
4 can't be done is there aren't printers available to print
5 the two million ballots. There isn't time available to
6 reprogram the number of cards we're talking about, let
7 alone the logistical steps of having to retrieve them,
8 get those cards to the programmers, and get them back and
9 into the right machines and tested.

10 Further, and this was something I had not
11 myself considered until Mr. Bromley's testimony, but that
12 there are other laws, certainly state laws, having to do
13 with challenges, recounts and the designation of electors
14 that may be federal law because it is a presidential
15 election, all of which are tied to certain numbers of
16 dates after the election in which, if the election could
17 not occur on the 4th because as I have said, the ballots
18 could not be printed and the cards reprogrammed before
19 then, would throw into chaos really those deadlines and
20 finally create a situation where state law would likely
21 be violated.

22 And lastly a couple of cases I already quoted
23 from talked about the risk of sort of last minute changes
24 posing a risk of interference with the rights of the
25 voters and I think Justice Stewart in the Williams case

1 where he cited the absentee voters whose ballot had
2 already been sent out. Clearly their rights would be
3 implicated were I to order the relief the plaintiffs
4 requested -- those of the personnel from Connecticut
5 serving in the military, those who have relocated and are
6 entitled to vote back here in Connecticut under federal
7 law, their rights would be in jeopardy, would be
8 violated, but I think it would be highly likely there
9 would be enormous confusion and therefore, likely errors
10 in the context of an election by trying to make this
11 change at this time given the large amount of voter
12 turnout, the large number of ballots that have to be
13 printed, and the number of cards given the new equipment
14 that's put into place I think to comply with federal law.
15 All that's involved, in other words, in trying to make a
16 change at this point as I say, well, the motion was filed
17 two and a half weeks before the election. It strikes me
18 that Gold decision which, of course, presented more
19 extreme facts -- I believe there the order was issued to
20 remove the person's name much later in the process than
21 today is in the Connecticut process -- but there in Gold,
22 you were talking about a much smaller pool of voters and
23 voting places and the chaos that appears to have resulted
24 which Judge Oakes recounted at great length, which
25 obviously troubled Judge Trager of the district court.

1 To me that case sort of is an example of the kind of
2 chaos that can result from court intervention at the
3 "last minute" in that case.

4 In this case, we're not on November 3, the
5 hypothetical I posed to the plaintiffs' counsel but
6 effectively we are, as I say, because of the fact that
7 it's a presidential election, that there's two million
8 possible voters, that we have essentially a new system of
9 voting with optical scanning machines that need to be
10 tested against the printed ballots, and that as I say the
11 absentee and other types of ballots that have already
12 gone out, we're really past the time when this court
13 could in the exercise of its powers of equity, grant a
14 motion for preliminary injunction.

15 Therefore, the court's final conclusion is I
16 don't believe the plaintiff has demonstrated a violation
17 of due process cognizable under the due process clause,
18 but at least not to the standard of substantial or clear
19 as required to get a grant of this motion but even if it
20 has, the Court concludes that the defendant has carried
21 that high burden with respect to its special defense of
22 laches, and particularly because it's demonstrated that
23 would be extremely chaotic and impossible and therefore,
24 harmful to the rights of other voters in Connecticut, the
25 people I suppose that the defendant would claim whose

1 interest she represents if the court were to grant the
2 preliminary injunction that the plaintiffs seek.

3 In essence, while the plaintiffs may have a
4 claim, may be correct in their claim, when they argue
5 that they, in fact, presented 7,500 qualified signatures
6 and thus have a right to be on the ballot -- again I
7 emphasize the word assume that they presented that --
8 they waited much too long to seek the Court's relief.

9 Therefore, the motion for preliminary
10 injunction is denied. The plaintiffs haven't reasonably
11 and inexcusably moved for a preliminary injunction. They
12 cannot now establish that they clearly are likely to
13 prove their claim. The motion for preliminary injunction
14 is denied.

15 The opinion of the court is obviously reflected
16 in the transcript. Again I apologize this is a very long
17 verbal ruling. I think if any -- if the plaintiffs wish
18 to appeal, they would need to let the reporter know
19 because she's prepared, as she's always diligent to
20 prepare this transcript very promptly and to convey it to
21 the circuit if you do wish to appeal. And I think I
22 heard at lunch that the Clerk of the Second Circuit has
23 been in touch with our Clerk being certain that the
24 record could be transmitted quickly, if there was an
25 appeal. I ask that you let the reporter know so she

1 knows whether to stay up tonight to do this opinion so
2 that it will be available to the circuit tomorrow. All
3 right, sir. Thank you all very much especially for your
4 patience. Unless there's anything further, the court
5 will stand adjourned.

6 (Whereupon, the above hearing adjourned at
7 03:27 p.m.)

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11
12 COURT REPORTER'S TRANSCRIPT CERTIFICATE

13 I hereby certify that the within and foregoing is a true
14 and correct transcript taken from the proceedings in the
15 above-entitled matter.

16
17 /s/ Terri Fidanza

18 Terri Fidanza, RPR

19 Official Court Reporter

20
21 DATE _____
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