No. 09-2516

United States Court of Appeals for the First Circuit

HIPOLITO FONTES
Plaintiff - Appellee

v.

THE CITY OF CENTRAL FALLS; THE CITY OF CENTRAL FALLS BOARD OF CANVASSERS AND REGISTRATION; GERTRUDE CHARTIER, in her official capacity as Registrar of the City of Central Falls Board of Canvassers; ALFRED GREGOIRE, in his official capacity as a Chairman of the City of Central Falls Board of Canvassers; MELVIN GOLDENBERG, in his official capacity as Clerk of the City of Central Falls Board of Canvassers; ROSEMARIE CANAVAN, in her official capacity as a Member of the City of Central Falls Board of Canvassers; CHARLES D. MOREAU;
Defendants - Appellants

PATRICK LYNCH, in his official capacity as Attorney General of the State of Rhode Island
Defendant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

BRIEF OF THE PLAINTIFF-APPELLEE HIPOLITO FONTES

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I. JURISDICTIONAL STATEMENT

The District Court has jurisdiction over this matter, which presents a federal question regarding Appellants' restrictions on ballot-access that are violative of the United States Constitution, pursuant to 28 U.S.C. § 1331.

The Court of Appeals has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1) because the subject matter of this appeal is the District Court's Order and Opinion that entered a permanent injunction based on the First and Fourteenth Amendments.

Appellants filed their Notice of Appeal on November 5, 2009, which was within thirty days of the District Court's Order and Opinion dated October 8, 2009, that is the subject of this Appeal, so that this Appeal is timely pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A).

II. STATEMENT OF THE ISSUES PRESENTED

Did the District Court abuse its discretion, after an evidentiary hearing, in holding that the City of Central Falls candidate nomination process – the "first filed" rule, which provides the first candidate to file his or her nomination papers with the benefit of any signatures of voters who may have signed multiple nomination papers, while invalidating those signatures as to all other candidates -- failed to track any state legitimate interest, and consequently in granting Plaintiff-

Appellee Hipolito Fontes' Motion for Permanent Injunction enjoining Central Falls from enforcing this irrational impediment to ballot access?

III. STATEMENT OF THE CASE

This appeal focuses on the City of Central Falls, Rhode Island's "first filed" candidate qualification process. The United States District Court for the District of Rhode Island's entered an Order that permanently enjoined Central Falls from invalidating signatures on Plaintiff-Appellee Hipolito Fontes' nomination papers for mayor of Central Falls on the basis that those signatures of those voters appeared on previously filed nomination papers of another candidate. (App. 232).

On September 8, 2009, the Central Falls Board of Canvassers disqualified Fontes from the mayoral ballot. (App. 219). Fontes submitted 333 signatures, well above the required 200 signature minimum required for a place on the ballot. (App. 219). The Board of Canvassers disqualified 136 of Fontes' signatures, including 65 signatures that were disqualified because the incumbent mayor filed the same signatures first. (App. 214). After the disqualifications, Fontes was three votes shy of having his name placed on the mayoral ballot. (App. 214).

With the general election scheduled for November 3, 2009, Fontes filed a Verified Complaint on September 18, 2009. Fontes sought to permanently enjoin Article VI, § 6-110 of the Central Falls Charter that invalidates second-filed signatures, in order to increase the number of valid signatures on his nomination

papers from 197 to 262, thereby securing his place on the mayoral ballot. (App. 215).

The Verified Complaint also alleged numerous due process violations against Appellants.[1] In general terms, Fontes pled that Appellants engaged in a deliberate, unlawful, and unconstitutional scheme to deny him placement on the mayoral ballot. Fontes alleged, *inter alia*, that Appellants refused to file his nomination signatures before the incumbent mayor's signatures, followed him and attempted to collect the same signatures that he collected, and denied him access to his opponent's signatures. (*See* App. 11-15). Fontes alleged that Appellants filed his nomination papers a few minutes after the incumbent's papers, thereby validating the incumbent's signatures and invalidating any duplicates on Fontes' nomination papers. (*See* App. 12-15).

On September 24, 2009, Fontes filed a Motion For Permanent Injunction to enjoin the enforcement of the first filed rule. (App. 5). The District Court held an evidentiary hearing on the Motion for Permanent Injunction on October 1, 2009. The parties previously agreed to bifurcate the litigation, so that the October 1

[1] Appellants' claim that the district court engaged in a "facial challenge"—and therefore this Court cannot apply facts to the constitutionality of first filed rule, (*see* App. Br., p. 20)—misconstrues the District Court's analysis. The District Court bifurcated Fontes' due process claims from the constitutionality of the first filed rule. (App. 215). The District Court adjudicated the constitutionality of § 6-110. If the District Court found § 6-110 constitutional, the parties would have proceeded to litigate Fontes' due process claims.

evidentiary hearing focused solely on Fontes' First Amendment ballot-access claims. On October 8, 2009, the District Court entered an Opinion and Order that granted Fontes' Motion.[2] (App. 214). Appellants timely appealed on November 5, 2009.

IV. STATEMENT OF FACTS

The law in Rhode Island is that voters may sign multiple nomination papers for multiple candidates, irrespective of whether those candidates are seeking the same office:

> A voter may sign any number of nomination papers for any office the voter may lawfully vote for at the general election.

R.I. Gen. Laws § 17-14-9. This law governs elections for all state offices in Rhode Island. In the vast majority of Rhode Island municipalities, candidates need only collect 200 valid signatures to run for mayor, without reference to whether those signatures are duplicative of signatures on other nomination papers:

> The nomination papers of a candidate for party nomination or an independent candidate for any local office to be filled by the voters of any city at large shall be signed, in the aggregate, by at least two hundred (200)

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[2] On October 8, 2009, Fontes also submitted the meeting minutes from the Rhode Island Board of Elections as requested by the district court clerk. Contrary to Appellants' contention that they did not have notice of this request (App. Brief, p. 6), Fontes' memorandum in the District Court stated: "The Board of Elections Minutes from this hearing are not available yet, and Fontes will file a certified copy when they become available." (Fontes Pre-Hearing Mem. Law at 7 n.2).

> voters of the city; provided, that in the city of Providence, at least five hundred (500) signatures shall be required.

R.I. Gen. Laws § 17-14-7(f).[3]

Ballot access for Central Falls municipal offices is far more difficult to obtain than for state offices or in most Rhode Island municipalities. Specifically, Art. VI, § 6-110 of the Central Falls Charter requires:

> Nominating petitions for city officers to be elected at large shall require the signatures of not less than two hundred qualified electors of the city . . . Should an elector sign more nominating petitions for any office than the number of candidates for said office for which he would be eligible to vote in the municipal election, his signature shall be void except as to the said number of petitions for said office signed by him first filed.

These requirements include onerous provisions not present in the general state statute, namely the "first filed" rule, which provides the first candidate to file his or her nomination papers with the benefit of any signatures of voters who may have signed multiple nomination papers, while duplicative signatures are invalidated on nomination papers other than the first filed. *Id.* R.I. P.L. 1953,

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[3] East Providence (P.L. 1957 ch. 33, § 14), Pawtucket (P.L. 1953 ch. 3238, § 11), and Woonsocket (P.L. 1953 ch. 3235, § 9) have first filed rules for all elected municipal offices that have been approved by state law; Newport has a first filed rule for city council and school committee that is approved by state law. (P.L. 1953 ch. 3234, § 18). Westerly, by town ordinance, has a first filed rule for its Charter Commission, Charlestown, through town ordinance, has a first filed rule for Planning Commission, and North Smithfield, through the Town Charter, has a first filed rule for elected municipal offices, but undersigned counsel was unable to find any state statutory approval for those rules.

ch. 3239, § 11 approved this section of the Central Falls City Charter. Significantly, the Central Falls Charter and the public session law fail to provide any rationale for this departure from general state law.

The facts of this case, as adduced at the evidentiary hearing that the District Court held, illustrate that the irrational nature of the first filed rule. Fontes collected 333 nomination signatures, a number 66.5% greater than what the required 200 signature minimum. (App. 40). Yet, the Board of Canvassers disqualified him because only 197 of his signatures were "valid." (App. 40-41). Of the 136 disqualified signatures, 65 were found to be invalid because those signatures were duplicates of signatures that the incumbent mayor, Charles Moreau, had filed earlier. (App. 40-41). In one instance, on September 4, 2009, Moreau's nomination papers have a time stamp of precisely 8:30 a.m., the time at which the Board of Canvassers' office opens, while Fontes' papers bear the time stamp of 8:32 a.m. (*See* App. 13 ¶ 29; App. 26 ¶ 29).

But for the exclusion of these duplicate signatures, Fontes would have qualified for the ballot with 262 valid signatures. The Board's determination that Fontes did not have sufficient signatures to qualify as a candidate for mayor occurred after the September 4, 2009 deadline for submission of nomination papers had passed. (App. 41).

For his part, Moreau submitted 2,056 nomination signatures, of which the Board of Canvassers determined 1,706 to be valid. (App. 41). Moreau collected at least 1,000 signatures before Fontes entered the race. (App. 198-99). Central Falls had a total of approximately 6534 registered voters eligible to execute nomination papers for this municipal election. (App. 38-39, ¶ 5).

Appellants presented one witness at the evidentiary hearing, Gertrude Chartier, in support of its contention that the first filed rule is valid. (App. 139). Chartier has been the since the Registrar of the Central Falls Board of Canvassers since 1981, and is the sole city employee assigned to that office. (App. 42, 166-67).

Her testimony failed to identify any legitimate state interest in the first filed rule. Rather, she candidly admitted that the first filed rule causes confusion, in that candidates have difficulty in navigating the disparate state and municipal candidates qualification standards. (App. 185). The District Court accepted Chartier's testimony, noting that the "incongruent rules historically have caused confusion amongst candidates who may run for city office in one election and state office the next." (App. 218). Chartier consequently testified that she favors the adoption of the general state rule by Central Falls. (App. 185).

Chartier's testimony also demonstrates that Central Falls does not have problems with "ballot clutter" or any other issues with the orderly administration

of elections. Chartier testified that historically there have been only a handful of candidates for mayor. (App. 166, 178-79). Chartier testified that the mayoral race has been uncontested on at least two occasions. (App. 180). In fact, Cartier testified that the maximum number of candidates for mayor during her tenure was four, and that only happened once. (App. 178-79). Tellingly, in her 28 years as Registrar, Chartier never had a problem as a result of the number of candidates on the ballot. (App. 181).

Further evidencing the pretextual nature of Central Falls' ballot clutter argument, Chartier testified that a runoff election occurs if there are more than two candidates on the ballot, further diminishing any alleged issues that hypothetical ballot clutter might cause. (App. 181). In fact, Central Falls has never disqualified a municipal candidate other than Fontes. (App. 180).

Exacerbating an already flawed process, Central Falls has no formal policy regarding access to nomination papers to enable candidates to learn whether the signatures that they had collected were duplicates of previously submitted signatures. (App. 192-193). At the injunction hearing, Fontes testified that Chartier told him he would have to wait ten days to receive the incumbent's nomination papers. (App. 153-54). Another witness, Philip St. Pierre, also testified that Appellants told him would have to wait ten days to review copies of nomination signatures. (App. 161).

For her part, Chartier claimed that nomination papers were available for review. (App. 170). However, on cross-examination, she admitted that her office had no written policy relative to access to the nomination papers, that she did not provide notification to candidates of the availability of other candidates' papers for review, and that she did not inform Fontes that he had the option to review Mayor Moreau's nomination papers. (App. 191-94).

Of course, even if candidates could review their opponents nomination papers, that process is a time-consuming and an unnecessary distraction from collection of signatures and other campaign activities (especially where, as here, there were 2,056 signatures to review). (App. 190). Chartier testified at the injunction hearing an individual working for Fontes spent a "whole day and a half" verifying Fontes' nomination papers against the registered voter list. (App. 172). Chartier herself testified that it took her "all month" to verify nomination papers for mayor and city council. (App. 189).

The District Court consequently found, based upon Chartier's testimony, that the alleged access to the nomination papers did not alleviate the constitutional flaws of the first filed rule: "The fact that a candidate might be allowed to hunt down names from other candidates' papers before going out to hunt for signatures, is no remedy to the constitutional flaws presented by the first to file rule." (App. 228-29).

The District Court also made several significant findings of fact. The District Court found that the first filed rule has historically caused confusion among candidates for office in Central Falls. (App. 218). Further, Fontes would have appeared on the ballot but-for the first filed rule. (App. 219, 229). Finally, the District Court found that Central Falls "failed to offer any evidence" demonstrating that the first filed rule eliminated chaos and clutter in elections. (App. 231). The Court determined that the rule "serve[d] to generate confusion, not eliminate it." (App. 231).

Based upon these facts, the District Court found that the first filed rule imposed a threefold burden: (1) the first filed rule limits voters ability to nominate more than one candidate for an office, and the voter has no control over which of his or her signatures will count, as that issue is determined by the "candidate's race to the Canvasser's office"; (2) a candidate who wishes to exclude rivals may do so by collecting vastly more signatures than is needed to get on the ballot (as evidenced by Mayor Moreau's collection of over 2000 signatures); and (3) candidates are forced to race to the Canvasser's office to file first or "predict (or, more realistically, guess)" at the number of duplicative signatures on their papers. (App. 227-28).

The District Court consequently found that the Central Falls candidate qualification process was an "absurdity." (App. 229). The District Court also

specifically found that the burden on candidates to file two hundred signatures that were either first filed or non-duplicative of first filed signatures on other candidates nomination papers was “substantial.” (App. 230).

The District Court also rejected Appellants’ argument that Fontes’ filing of candidacy papers in two races automatically disqualified him from all state and local ballots. (App. 224-25). Appellants posited that Fontes was allegedly ineligible because he declared as a candidate for mayor and city council.

Fontes testified that he filed his mayoral declaration papers first, a fact that Chartier corroborated. (App. 152, 175-176). It is further undisputed that Fontes did not collect signatures or submit nomination papers relative to the city council position. (App. 40). The Central Falls Board of Canvassers, when reviewing whether Fontes had qualified as a candidate for mayor, never considered whether Fontes was ineligible as a result of his declaration for two offices, and rather only disqualified him as a result of allegedly having too few nomination signatures. (App. 124-25).

Another candidate, Edna Poulin, also declared for mayor and city council. Poulin ultimately submitted sufficient signatures for her city council candidacy, but only submitted approximately 40 signatures in support of her mayoral candidacy. The Board of Canvassers disqualified her as a candidate for city council on the basis that she had declared for two offices. (App. 125). Poulin appealed that

decision to the Rhode Island Board of Elections based upon her allegation that the Board of Canvassers had misapplied the law (and not because the law is facially unconstitutional). The Board of Elections reversed, finding that Poulin declared for the city council candidacy first, and ordered Poulin to be placed on the ballot. (App. 204, 221); *see also* R.I. Bd. of Elec. Minutes (Sept. 23, 2009) (*available at* http://sos.ri.gov/documents/publicinfo/omdocs/minutes/132/2009/16471.pdf).

The District Court determined as a factual matter that Fontes filed declaration of candidacy forms for Mayor prior to filing the same form for city council. (App. 218). Like Poulin, Fontes was eligible to run for the first office for which he declared. Appellants failed to adduce any evidence that the Rhode Island Board of Elections would have handled Fontes' case any differently, had the Board addressed this issue. The District Court consequently determined that Fontes was eligible to run for mayor, and thereby rejected Appellants' futility argument. (App. 224).

V. SUMMARY OF THE ARGUMENT

In this case, Appellants failed to forward any legitimate reason for Central Falls' first filed rule; rather, that rule presents an unreasonable impediment to ballot access without any rational basis. The only reason for this regimen, as Appellants concede in their papers, is to limit "ballot clutter." However, the only constitutionally permissible means to ensure against ballot clutter is to adopt a

candidate qualification process that distinguishes between serious and frivolous candidates. *Lubin v. Panish*, 414 U.S. 709, 716-17 (1973). A nomination process that limits ballot access for the sole purpose of reducing the number of candidates, without consideration of the seriousness of the candidates, is unconstitutional. *Id.*

Central Falls' first filed rule fails to make any meaningful distinction between serious and frivolous candidates, and rather results in the disqualification of a candidate, Fontes, who diligently attempted to comply with the nomination requirements and collected 333 signatures – 166.5% of what was required. (App. 219). This limitation on access is wholly contradictory to the constitutional goal of providing voters with real choice. *See Illinois State Bd. of Elections v. Socialist Worker Party*, 440 U.S. 173, 184 (1979).

Appellants' reliance on *Werme v. Merrill*, 84 F.3d 479, 483-84 (1st Cir. 1996) for the application of rational basis scrutiny is inapposite. (Appellant Br. at 23). Rather, this Court utilizes a sliding scale to gauge the applicable level of scrutiny to apply to relative to the determination of lawfulness of election laws: "the lighter the burden, the more forgiving the scrutiny; the heavier the burden, the more exacting the review …. if restrictions are severe, the burden is great, and the law must be drawn to advance a 'state interest of compelling importance.'" *Block v. Mollis*, 618 F. Supp.2d 142, 149 (D.R.I. 2009) (quoting *Norman v. Reed*, 502

U.S. 279, 289 (1992)). And, in this case, the District Court correctly concluded that the first filed rule created a “substantial” burden on ballot access. (App. 230).

Moreover, Appellants’ alleged concerns regarding ballot clutter lack any basis in fact. Appellants failed to provide the District Court with any evidence of why it needs to address ballot clutter. Rather, Central Falls does not have any history of problems with ballot clutter. (App. 42, 179-81, 230-31). The most probative fact regarding the lack of efficacy of Central Falls nomination process is that its own Registrar admits that the process does not assist her and she would prefer that the general state statute govern. (App. 184-86, 196).

Appellants’ futility argument is also badly flawed, as it is counterfactual and based upon a misread of state law. Poulin, a candidate in the exact position as Fontes relative to filing multiple declarations, undisputedly appeared on the ballot. (App. 204, 219-20). Appellants ignore this fact completely, and cannot proffer any set of facts to demonstrate that that the result would have been different with respect to Fontes. Also, Appellants’ interpretation of R.I. Gen. Laws § 17-14-2(b) is at direct odds with the statutory language – a plain read of this statute makes evident that it does not affect Fontes’ candidacy for mayor.

VI. STANDARD OF REVIEW

The standard of review on an appeal from a grant of permanent injunctive relief is abuse of discretion. *Asociacion de Educacion Privada de P.R., Inc. v. Garcia-Padilla*, 490 F.3d 1, 8 (1st Cir. 2007). The district court's findings of fact are reviewed for clear error. *Id.* Questions of law are reviewed *de novo*. *Id.*

Appellants incorrectly assert that this Court "considers anew, without any measure of deference to the District Court's decision, whether the District Court was correct," and that constitutional challenges to statutes are reviewed *de novo*. (Appellant Br. at 19). Rather, the abuse of discretion standard of review for permanent injunctions applies to constitutional claims. *See Aponte v. Calderon*, 284 F.3d 184, 191 (1st Cir. 2002). This Court may affirm based on any valid reason supported by the record, and is not bound by the district court's rationale. *CoxCom, Inc. v. Chaffee*, 536 F.3d 101, 112 (1st Cir. 2008).

In order to grant a permanent injunction, the court must find four elements: (1) plaintiff would prevail on the merits; (2) plaintiff would suffer irreparable harm without an injunction; (3) the harm to plaintiff would exceed the harm to defendant from the imposition of an injunction; and (4) the public interest would not be adversely affected by an injunction. *Aponte*, 284 F.3d at 191.

VII. ARGUMENT

A. The District Court Correctly Found That The First Filed Rule Is An Unconstitutional Impediment To Ballot Access.

i. Appellants' Claims Fail as a Matter of Law.

Democracy works only when voters have real choices. This self-evident principle undergirds all jurisprudence regarding ballot access. Restrictions on access to the ballot therefore implicate two interrelated fundamental rights – "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams v. Rhodes*, 393 U.S. 30 (1968).

Courts are therefore understandably chary of regulation that restricts the ability of candidates to appear on the ballot. Only those regulations that track genuine, compelling state interests and do not unreasonably restrict ballot access are permissible. *See Illinois State Bd. of Elections*, 440 U.S. at 184. The United States Supreme Court has specifically emphasized the fundamental importance of ballot access, finding that candidate eligibility requirements should be narrowly tailored so as not to impede ballot access for legitimate candidates:

> [O]ur previous opinions have also emphasized that 'even when pursuing a legitimate state interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty,' and we have required that States adopt the least drastic means to achieve their ends. This requirement is particularly important where restrictions on access to the ballot are involved. The States' interest

> in screening out frivolous candidates must be considered in light of the significant role that third parties have played in the political development of the Nation. Abolitionists, Progressives, and Populists have undeniably had influence, if not always electoral success. As the records of such parties demonstrate, an election campaign is a means of disseminating ideas, as well as attaining political office.

Id. at 185-86 (invalidating a Chicago signature requirement that was not "the least restrictive means of protecting the State's objectives") (quoting in part *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973) (citations omitted).

This Court utilizes a sliding scale to gauge the applicable level of scrutiny to apply to relative to the determination of lawfulness of election laws: "the lighter the burden, the more forgiving the scrutiny; the heavier the burden, the more exacting the review …. if restrictions are severe, the burden is great, and the law must be drawn to advance a 'state interest of compelling importance.'" *Block*, 618 F. Supp. at 149 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

Because Courts disfavor restrictions on ballot access, the burden is on the government to articulate and defend its alleged compelling state interest and manner with which the state pursues that interest. *See id.; see also American Party of Texas v. White*, 415 U.S. 767, 780-81 (1974). In this case, Appellants failed to forward any legitimate reason for its first filed rule; rather, that rule presents an unreasonable impediment to ballot access without any rational basis.

Appellants reliance on *Werme*, 84 F.3d at 483-84, for the application of rational basis scrutiny is inapposite. (Appellant Br. at 23). In *Werme*, this Court considered whether the Libertarian Party had a constitutional right for one of its members to serve as a ballot clerk. This Court noted that ballot clerks perform ministerial duties and exercise no discretion. *Id.* at 482. Unsurprisingly, the First Circuit found the burden on the First and Fourteenth Amendment rights of Libertarians to be slight. *Id.* at 484. *Werme* reasoned that the statutory framework did not impact ballot access, and that the record did not support any evidence that "minority parties are at special or undue risk because they have no right to appoint" ballot clerks. *Id.* at 485. Given the slight nature of the burden, and the lack of magnitude to First and Fourteenth Amendment rights, the First Circuit employed rational basis scrutiny. *Id.*

In this case, contrary to the facts in *Werme*, the District Court concluded that the first filed rule placed a substantial burden on First and Fourteenth Amendment rights in three ways. (App. 229-30). Unlike *Werme*, the first filed rule directly impacts ballot access, and the District Court found that the rule imposes a substantial burden. First, the rule limits the ability of individual to nominate more than one candidate for an office. (App. 227). Second, the first filed rule allows a candidate who wishes to exclude potential rivals by collecting vastly more signatures than required. (App. 228). Third, hopeful candidates are required to

guess at the possible number of duplicate signatures. (App. 228). As the District Court explained, "regardless of who actually obtains the signature first, candidates are forced into a race to the Board of Canvassers' time-stamp, in order to capture the signature on his or her papers." (App. 228).

The only reason for this regimen, as Appellants concedes in its papers, is to limit ballot access. Appellants' recitation of avoidance of "ballot clutter" as a legitimate state interest misapprehends the law on this point. The only constitutionally permissible means to ensure against ballot clutter is to adopt a candidate qualification process that distinguishes between serious and frivolous candidates. *Lubin*, 414 U.S. at 716-17. A nomination process which limits ballot access for the sole purpose of reducing the number of candidates, without consideration of the seriousness of the candidates, is unconstitutional. *Id.* And, the first filed rule fails to make any meaningful distinction between serious and frivolous candidates, and rather results in the disqualification of a candidate, Fontes, who diligently attempted to comply with the nomination requirements and collected 333 signatures – 166.5% of what was required. (App. 219).

Appellants' presentation to the District Court and on appeal misses this point entirely. The constitutionally infirm portion of the Central Falls candidate qualification process is its irrational scheme whereby a candidate receives credit for nomination signatures by dint of the fact that the candidate may have filed his

or her nomination papers a couple of minutes prior to other candidates. A qualification process does not meaningfully distinguish between serious and frivolous cases as a result of a two minute difference in filing nomination papers, as the Central Falls process does. (*See* App. 13 ¶ 29; App. 26 ¶ 29).

Taken to the extreme, the first filed rule could potentially eliminate all candidates as a result of duplicative signatures overlapping to such an extent that no candidate is able to meet the qualification threshold -- and incents candidates to capture as many signatures as they can so as to deny their opponents of those signatures and perhaps a place on the ballot. The facts of this case are not far off. Moreau filed 1706 valid signatures, a figure that comprises 26% of all voters who were eligible to execute nomination papers, (App. 38 ¶ 5, App. 41 ¶ 22), which increases the burden on Fontes to find non-duplicative signatures from a shrinking pool of registered voters. This limitation on access is wholly contradictory to the constitutional goal of providing voters with real choice. *See Illinois State Bd. of Elections*, 440 U.S. at 185-86.

The two cases to which Appellants analogizes are entirely distinguishable from the Central Falls ballot access requirements. (App. Brief, pp. 34-35). *Jenness v. Fortson*, 403 U.S. 431 (1971), upheld Georgia's requirement that candidates collect signatures from at least 5% of registered voters in order to qualify as a candidate. However, the scheme under consideration in *Jenness* did

not invalidate duplicative signatures, so that the United State Supreme Court did not find consider whether a first filed regimen was unduly burdensome or not.

Reliance on *Storer v. Brown*, 415 U.S. 724 (1974), is even more attenuated. That case addressed California's requirement that an independent candidate be unaffiliated for a year before the election in which the candidate sought to run. The United States Supreme Court concluded that this requirement did not unnecessarily impede ballot access because the prospective candidate retained other avenues to appear on the ballot, including running in a party primary. *Id.* at 725. *Storer* does not address signature requirements, and unlike the scheme in *Storer*, Central Falls' candidate qualification process constitutes an absolute bar to the ballot.

ii. Appellants' Claims Fail For Lack of Proof.

Appellants' alleged concerns regarding ballot clutter also lack any basis in fact. Appellants failed to provide the District Court with any evidence of why it needs to address ballot clutter. Rather, Central Falls does not have any history of problems with ballot clutter. (App. 42, 179-81, 230-31). The District Court was understandably skeptical of ballot clutter claim, particularly where the facts show that this interest is pretext that Appellants used to retrospectively justify its impingement on ballot access. *See The Cool Moose Party v. State of Rhode Island*, 183 F.3d 80, 88 (1st Cir. 1999) (the Court will not credit "justifications out of

whole cloth on the State's behalf"). The most probative fact regarding the lack of efficacy of Central Falls nomination process is that its own Registrar admits that the process does not assist her and she would prefer that the general state statute govern. (App. 184-86, 196).

Tellingly, Appellants' Brief steers clear of arguing that Appellants presented sufficient evidence at the evidentiary hearing on which the District Court should have concluded that Central Falls had a legitimate state interest in the first filed rule. Rather, Appellants inappropriately rely on materials that were not before the District Court and should not be part of the Appendix.[4]

Appellants also cannot advance any reason, much less a compelling one, for why Central Falls requires a more stringent signature requirement than the state as a whole. If voters may execute multiple nomination papers for governor of Rhode Island, there is no rational reason why this same rule should not apply for the nomination papers for mayor of Central Falls. Moreover, the fact that the state statute does not contain "first filed" rule demonstrates that lack of any compelling government interest in this rule. Appellants have failed to articulate any historic or factual reason why it should uniquely have a more arduous qualification process than the State or other Rhode Island communities. Significant discrepancies

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[4] Fontes incorporates by reference his Motion to Strike Portion of the Appendix, and reasserts the arguments contained therein consistent with this Court's denial of that motion without prejudice.

between local and state nomination requirements, like the ones that this case presents, violate the Equal Protection Clause. *See Illinois State Bd. of Elections*, 440 U.S. 173, 183-87 (1979).

iii. Appellants' Claim That The District Court Abused Its Discretion In Considering Evidence Regarding Fontes' First Amendment Claims Is Erroneous.

Appellants also argue erroneously that the District Court abused its discretion by deciding this matter based upon facts related to the application of the Central Falls ballot qualification process to Fontes. (App. Brief, pp. 37-40). As an initial matter, Appellants failed to raise this issue before the District Court, and in fact, fully participated in the submission of evidence to the District Court by way of a Joint Statement of Stipulated Facts, (App. 38), through presentation of Chartier as a witness, (App. 139), and significantly, did not object to Fontes' presentation of evidence at that hearing. Appellants also rely on Chartier's testimony in support of their arguments on appeal. (*See, e.g.* App. Brief, p. 24). Appellants have therefore waived this issue on appeal by failing to raise it below. *United States v. Nee,* 261 F.3d 79, 86 (1st Cir. 2001) ("It is a cardinal principle that issues not squarely raised in the district court will not be entertained on appeal.").

Additionally, Appellants argument elevates form over substance. While the District Court nominally referred to the evidentiary hearing as relating to the "facial" constitutionality of the Central Falls candidate qualification process,

(App. 215, n. 2), the conduct of the evidentiary hearing and the District Court's Opinion and Order make clear that the focus of the hearing was on Fontes' First Amendment challenge to the first files ruled, leaving to another day Fontes' due process claims.

B. Appellants' Futility Argument Fails As A Matter of Fact and Law.

Appellants' argument that Fontes would not be eligible to run for Mayor even if he presented sufficient valid signatures is counterfactual and based upon a misread of state law. Poulin, a candidate in the exact position as Fontes relative to filing multiple declarations, undisputedly appeared on the ballot. (App. 204, 219-20). Appellants ignore this fact completely, and cannot proffer any set of facts to demonstrate that that the result would be different with respect to Fontes.

Appellants' interpretation of R.I. Gen. Laws § 17-14-2(b) is at also odds with the statutory language, which states:

> No person shall be eligible to file a declaration of candidacy, or be eligible to be a candidate or eligible to be voted for or to be nominated or elected in any party primary or general election if that person has declared to be a candidate for another elected public office, either state, local or both.

The import of this statute is evident – if a person files a declaration for one office, that same person may not declare and is not eligible to run for another office. The District Court came to the same conclusion. (App. 10-11).

Appellants also claim that the District Court's decision on this point improperly relied upon minutes for the Rhode Island Board of Elections that undersigned counsel submitted after the evidentiary hearing (with a copy to counsel for Appellants). (App. Brief, pp. 43-47). This is not so – what the District Court said in dicta was that if this statutory language were ambiguous, which it is not, then the District Court would defer to the Board of Elections reasonable reading of the statute. (App. 224). The Board of Election minutes were consequently not part of the District Court's "four corners" interpretation of this statute.

Even if (*arguendo*) the District Court relied upon the Board of Elections' decision in the Poulin case as a basis for its interpretation of § 17-14-2(b), those minutes are public records of which the District Court could take judicial notice. *See, e.g., Conecuh-Monroe Community Action Agency v. Bowen,* 852 F. 2d 581, 583 (D.C. Cir. 1983) (taking judicial notice of administrative decision not included in the record).

VIII. CONCLUSION

Limiting ballot access for the purpose reducing the number of candidates on the ballot, as Central Falls claims it is doing, is antithetical to the fundamental bedrock of democracy, providing voters with a real choice. This Court should therefore deny and dismiss this Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on April 14, 2010:

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