IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 09-1083

JOSEPH M. BENNETT, et al;
Plaintiffs – Appellants

v.

RALPH MOLLIS, in his official capacity as
Secretary of State for Rhode Island, et al;

Defendants – Appellees

BRIEF OF THE RHODE ISLAND AFFILIATE, AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE

This Brief supports Appellants in seeking reversal
of the order of the District Court

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March 25, 2009

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STATEMENT OF IDENTITY, INTEREST, AND SOURCE OF AUTHORITY TO FILE

The Rhode Island Affiliate, American Civil Liberties Union ("RI ACLU") is the state affiliate of the American Civil Liberties Union, a nationwide, non-profit, nonpartisan organization with over 500,000 members. RI ACLU, like its national organization, is dedicated to vindicating the principles of liberty embodied in the Bill of Rights to the U.S. Constitution. RI ACLU, through volunteer attorneys, has appeared in numerous cases in this Court and the District Court for the District of Rhode Island, as counsel for parties or, as here, amicus curiae on issues involving constitutional rights and election law. *See, e.g., Ayers-Schaffner v. DiStefano,* 37 F.3d 726 (1st Cir. 1994); *Bonas v. Town of North Smithfield,* 265 F.3d 69 (1st Cir. 2001); *Vote Choice v. DiStefano,* 4 F.3d 26 (1st Cir. 1993); and *Laffey v. Begin,* 137 Fed.Appx. 362 (1st Cir. 2005).

Because amicus believes that this case and the decision below raise issues of significance to the constitutional rights of voters, the RI ACLU has an interest in the outcome of this case and believes that its participation will assist the Court in resolving the very important issues at stake.

Counsel for amicus has received the consent of the Appellant and of counsel representing Appellees R.I. State Board of Elections and intervenor Cavanaugh to

file this brief, but has received no response from counsel for the remaining Appellees. Therefore, the source of authority to file an amicus brief is by leave of the court, pursuant to F.R.A.P. Rule 29(a).

F.R.A.P. Rule 26.1 CORPORATE DISCLOSURE STATEMENT

Rhode Island Affiliate, American Civil Liberties Union (RI ACLU) is a corporation with no parent corporation; no publicly held company owns 10% or more of the stock of RI ACLU. RI ACLU is affiliated with the national ACLU by shared goals.

ARGUMENT

The District Court erred in holding that Plaintiffs failed to demonstrate a substantial likelihood of success on the merits of their case. *Bennett v. Mollis* at 3. The Court rested its holding on a clearly erroneous finding of fact that was material to the decision to deny Plaintiff's request for a preliminary injunction. *See e.g.*, *Henry v. Connelly*, 910 F.2d 1000, 1002 (1st Cir. 1990) ("We review the trial courts' factfinding only for clear error."); *Zepeda v. INS*, 753 F.2d 719, 724 (9th Cir. 1983).

> The facts of this case show that federal courts' abstention doctrine was successfully overcome and that federally cognizable rights are implicated, and that Plaintiffs have a substantial likelihood of success on the merits.

A crucial underlying fact here is just how close the vote at issue was. Approximately 9,500 voters submitted ballots for election to the Smithfield Town Council. The top five vote-getters among the thirteen candidates would win the five Council seats. The difference between the fifth-place candidate and the sixth-place candidate was just 39 votes. *Bennett v. Mollis at 4.* Of the 9,500 voters, approximately 2,900—nearly one out of three voters—received defective ballots. This dilution, in light of the extraordinarily close vote on the one hand and the very

large number of defective ballots on the other, constitutes a broad-gauged election irregularity sufficient to support a substantial constitutional claim.

A. Not a garden variety election irregularity: Plaintiffs successfully overcame federal abstention doctrine so that federal intervention is warranted

The RI ACLU recognizes the validity and importance of the federal courts' reluctance to engage in federal invalidation of a state election and the mandating of a new election to cure prior irregularities.

> Few remedial measures employed by federal courts cut quite as deeply to the core concepts of both federalism and representative government as the device of invalidation. . . . The new-election remedy has been described by the courts as "drastic, if not staggering."[1]

Griffin v. Burns set out the position of the First Circuit: Federal courts "normally may not . . . undertake" the resolution of "garden variety election irregularities," and circuit courts in particular have "uniformly declined to endorse actions under sec. 1983 with respect to garden variety election irregularities." 570 F.2d 1065, 1076 (1st Cir. 1978). The First Circuit standard for overcoming this abstention doctrine is set forth in *Bonas v. Town of N. Smithfield,* 265 F.3d 69 (1st Cir. 2001):

[1] Kenneth W. Starr, *Federal Judicial Invalidation as a Remedy for Irregularities in State Elections,* 49 N.Y.U.L. Rev. 1092, 1095-96 (1974), quoting from *Bell v. Southwell,* 376 F.2d 359, 662 (5th Cir. 1967).

federal courts have jurisdiction over sec. 1983 claims "arising out of a state or local election dispute, if, and to the extent that, the complaint limns a set of facts that bespeak the violation of a constitutionally guaranteed right." *Bonas,* 265 F.3d at 76. Given this jurisdiction, the courts have a clear duty to hear election dispute cases: "federal courts *must* be open to review the constitutionality of state electoral processes . . . when confronted with substantial constitutional claims in an election contest."[2]

Further, regarding questions of federal jurisdiction, "each case must be evaluated on its own facts." *Bonas,* 265 F.3d at 77. The facts of the instant case show that the standard for overcoming federal abstention doctrine is met: federally cognizable constitutional rights are clearly implicated. This case does not involve mere "garden variety" election irregularities that did not "harbinger patent and fundamental unfairness." *Bonas,* 265 F.3d at 75. Rather it involves error, albeit unintentional, resulting in broad-gauge unfairness and so warranting federal intervention. *Griffin*, 570 F.2d at 1077 (plaintiff must show either intentional election fraud or unintentional error resulting in broad-gauge unfairness; there is

[2] Louise Weinberg, *When Courts Decide Elections: The Constitutionality of* Bush v. Gore, 82 B.U. L. Rev 609, 654 (2002)(emphasis added).

"precedent for federal relief where broad-gauged unfairness permeates an election, even if derived from apparently neutral action.").

The District Court in this case set out factors for the court to consider, based on the First Circuit's leading cases, in assessing whether election errors rise to the level of fundamental unfairness warranting judicial intervention. One is the breadth of the unfairness, which the Court acknowledges in light of the high number of incorrect ballots, 2,900, out of the total cast of 9,500. *Bennett v. Mollis* at 11. Another is availability of adequate state administrative and judicial corrective process, which the Court declined to reach. *Bennett v. Mollis* at 15. A third is whether the error (the presence of Mr. DiIorio's name on the morning ballots) induced the voters' detrimental reliance, on which the Court held that Plaintiffs produced neither evidence of voters' reliance on the error to the exclusion of other candidates nor evidence regarding whether election officials attempted to inform morning voters they were receiving incorrect ballots. *Bennett v. Mollis* at 11. However, the Court held, even if the Court were to assume voters' detrimental reliance on the ballots, Plaintiffs "have totally failed" to meet the demands of a fourth factor: showing that the

reliance on incorrect ballots "somehow could have made a difference in the outcome." *Bennett v. Mollis* at 11.

Herein lies the Court's error. The facts here clearly show, at the least, a debasement or dilution of the votes of the citizens of Smithfield. "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Griffin v. Burns*, 570 F.2d at 1075. Dilution is clear here: during the morning hours when the faulty ballot was being used, 2,900 citizens—30% of all those voting—cast their votes on the faulty ballots, with 570 of them "voting" for someone who was not a candidate. That the afternoon voters received corrected (that is, different) ballots highlights what were basic structural flaws in the election, notwithstanding the good intentions of the election authorities.

Beyond those indisputable data, however, calculations and analyses veer to greater or lesser extent into the uncertain realm of theorizing for which there are always reasonable counter theories. For example, the Court notes that 480 people who voted for Mr. DiIorio also voted for Mr. Hawkins, the sixth-place finisher. The Court theorizes that those 480 voters would have voted for Mr.

Hawkins even if Mr. DiIorio's name were not on the ballot, so that their votes need not be taken into account. Perhaps so.

And perhaps not. Some of these voters may well have responded differently if Mr. DiIorio's name were absent, judging, say, that Hawkins was needed on the town council to counter some ideology or stand which Mr. DiIorio campaigned on and which Hawkins opposed, and that absent Mr. DiIorio name, these voters would have selected another candidate. This is theorizing, of course, perhaps positing a scenario somewhat more or less likely than the Court's. Both, however, are plausible theories nonetheless, only two of many conceivable on this point alone. At the least, the District Court's doubtful theorizing is not ground for holding that the undisputed election irregularity did not rise to a constitutional deprivation warranting judicial intervention.

B. The District Court set the bar too high in its application of the outcome-determination factor for deciding if intervention is warranted

The District Court erred in setting an unreasonably strict standard in holding that the Plaintiffs "totally failed" to show that the incorrect ballot "somehow could have made a difference in the outcome." *Bennett v. Mollis* at

11. The Court upbraids Plaintiffs for presenting "no expert witness to assist the Court in analyzing this evidence for outcome determinativeness" and for relying "on their bald assertions that because the because the number of ballots containing a vote for Mr. DiIorio but not a vote for Mr. Hawkins is greater than the margins separating the fifth or sixth place finisher, the outcome could have been affected." The Court holds that this argument, "like most easy solutions, is 'neat, plausible, and wrong.'" *Bennett v. Mollis* at 12 (quote from H.L. Mencken). The Court then brings in a "nationally known scholar and a leading authority in the field [of] quantitative analysis of election data" and notes that it brought the expert in "because she possesses the specialized skill of applying statistical analysis to election data." *Bennett v. Mollis* at13. The expert's "computations of the election data," the Court concludes, "suggest a 'compelling statistical improbability' that Mr. DiIorio's name being on the ballot cost Mr. Hawkins the election." *Id*. The Court does allow that the expert's report "does leave room for the remote possibility that a more in-depth analysis might reveal a different conclusion," but the Court concludes "that it is not probable." *Bennett v. Mollis* at 14.

On the expert's statistical analysis the Court largely bases its decision: "The Court need not go further. Plaintiffs have not met their burden of showing likelihood of success on the merits of their due process claim and to probe the remaining factors would be pointless." *Id.*

But this reliance on pure statistical analysis, arriving at a precise probability statement readily applied to answer an outcome-determination question, is like most easy solutions, neat, plausible, and wrong. There is no foundation in law that permits a federal court to require such a high degree of certainty, much less to require parties to bring forth experts to provide the statistical analysis to arrive at the certainty. The District Court here appears to be creating a new de facto test for outcome determination, in effect for federal intervention, by requiring mathematical precision for an outcome determination provided by an expert who may be selected by the court without opportunity for vetting or challenge by the parties (as was the case here).

This goes far beyond the *Griffin* standard. "While the 'outcome' test," said the *Griffin* court, "provides a sensible guideline for determining when federal judicial invalidation of an election might be warranted, . . . *it is not a principle requiring mathematical certainty*." *Griffin v. Burns*, 570 F.2d at 1080 (emphasis added). While it is reasonable to require a plaintiff to show a substantial

possibility that an election irregularity affected outcome, in order to warrant federal intervention, there is no justification for requiring more to make out a prima facie due process federal case.[3] Further, courts simply have not reached—and should not reach—the point of demanding mathematical precision or certainty. *Griffin* cites with approval an Illinois federal case stating the view that an election irregularity may have due process consequences warranting federal intervention if the irregularity's effect was *either* changing the election results or *rendering the results doubtful*. *Griffin v. Burns*, 570 F.2d at 1078, citing *Ury v. Santee*, 303 F.Supp. 119 (N.D. Ill. 1969) (emphasis added).[4]

Neither the law regarding injunctive relief nor the law of election disputes is so amenable to mathematical certainty that statistical formulae may be demanded of plaintiffs seeking redress for due process grievances in elections, or may be used by the court as a dispositive adjudicatory tool. The Seventh Circuit, hearing an appeal of a denial of a preliminary injunction, observed that

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[3] *Cf. Saxon v. Fielding*, 614 F.2d 78, 79 (5th Cir. 1980) ("We need not . . . decide the appropriateness in all instances of an inflexible mathematical rule [since] . . . the plaintiffs did not prove even 'that a substantial possibility of changed results existed.'").

[4] *See also Gunaji v. Macias*, 31 P.3d 1008, 1010 (N.M. 2001) (holding that where a voting machine in one precinct listed wrong candidates' names in two races with margins of 11 and 99 votes respectively, and 66 voters used the faulty machine, the outcome of the two races "*conceivably could have been different*" if the machine was not faulty). (Emphasis added.)

> a formula is not a substitute for, but an aid to, judgment. A mathematical formula can create a false impression that the elements of the formula, the magnitude and probabilities, can be accurately quantified and that through a specified type of mental calculus the singularly "correct" result can be arrived at with some exactitude. *Lawson Products v. Avnet*, 782 F.2d 1429 (7th Cir. 1986), quoted in Geoffrey Hazard, et al, Pleading and Procedure, 8th ed., 114 (1999).

The standard for federal judicial intervention here should be the outcome test set forth in *Griffin:* intervention is warranted when election irregularities are sufficient to render the results doubtful, as well as when they are sufficient to change the election results. *Griffin v. Burns*, 570 F.2d at 1078. That standard is appropriate because a reasonable doubt about the outcome of an election—especially, as here, a very close election—undermines the public trust and confidence in the integrity of elections. Due process, the *Griffin* court observed, involves the appearance of fairness as well as actual fairness. *Id.* at 1079. Violation of the *Griffin* standard amounts to a constitutional violation entitled to remedy in federal court.

That standard has been met in this case. There is indeed considerable likelihood of Plaintiffs' success on the merits of their due process claim.

CONCLUSION

For the reasons set forth herein, the RI ACLU respectfully urges this Court to reverse the District Court's denial of Plaintiff's motion for injunctive relief.

Respectfully submitted,

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Attorney's Rule 32(a)(7)(B) Statement of Compliance

The within Memorandum of Law complies with the type-volume limitations set forth in Federal Rules of Appellate Procedure 29 (Brief of Amicus Curiae) and 32 (form and length of briefs). Specifically, this Memorandum is less than the 7,000 words in length (half the length permitted of a party's principal brief) authorized by the Rules for an amicus curiae brief.

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of March, 2009, I caused to be sent by Federal Express ten (10) copies of the foregoing Brief to:

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