

**SUPREME COURT
OF THE
STATE OF CONNECTICUT**

S.C. 20486

MARY FAY, ET AL

V.

SECRETARY OF THE STATE DENISE MERRILL

**BRIEF OF THE AMICI CURIAE
CONNECTICUT DEMOCRATIC PARTY, SHERRY HELLER and KATE
FARRAR**

*AMICI CURIAE,
CONNECTICUT DEMOCRATIC PARTY,
SHERRY HELLER and KATE FARRAR*

**WILLIAM M. BLOSS
KOSKOFF, KOSKOFF & BIEDER, P.C.
350 FAIRFIELD AVENUE
BRIDGEPORT, CT 06604
TEL: (203) 336-4421
FAX: (203) 368-3244
bbloss@koskoff.com**

TABLE OF CONTENTS

IDENTITY AND INTEREST OF AMICI CURIAE ii

TABLE OF AUTHORITIES iii

ARGUMENT.....1

I. THE REPUBLICAN PLAINTIFFS CANNOT BE ALLOWED TO SEEK CHANGES
AFFECTING THE DEMOCRATIC PRIMARY.....1

II. THE COURT SHOULD NOT PRECLUDE USE OF ABSENTEE BALLOTS IN
PRIMARIES AS ALLOWED BY EXECUTIVE ORDER 7QQ.....3

IDENTITY AND INTEREST OF AMICUS CURIAE

The Connecticut Democratic Party has 797,868 active voters registered as Democrats as of October 2019. It is one of two major parties in Connecticut, as that term is defined in Conn. Gen. Stat. § 9-372(5). The Connecticut Democratic Party has a substantial interest in advocating for the rights of its supporters to encourage election of candidates for public office who support the principles of the Democratic Party.

Sherry Heller and Kate Farrar are candidates running in the Democratic primary for the 20th House District on August 11, 2020.

The Connecticut Democratic Party is committed to protecting the fundamental right to vote. "It has long been held that the right to vote is a 'fundamental political right, because preservative of all rights.'" *Nielsen v. Kezer*, 232 Conn. 65, 84 (1995) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)). "[N]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

Connecticut Democrats, Farrar and Heller want eligible voters to vote in the August 11, 2020, Democratic primary, fairly and without unnecessary health risk in light of the pandemic. Preventing the widest possible use of absentee ballots carries a wholly unnecessary health risk to voters and to poll workers and likely will dampen turnout. Accordingly, the Connecticut Democratic Party, Heller and Farrar request that the Court affirm the judgment of the Superior Court.¹

¹ This brief was written solely on behalf of the amicus by the undersigned counsel without contribution from any party or other person.

TABLE OF AUTHORITIES

CASES

<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983).....	7, 8
<i>Andross v. Town of West Hartford</i> , 285 Conn. 309 (2008).....	2
<i>In re Baker</i> , 404 S.W.3d 575, 581 (Tex. Civ. App. 2010).....	3
<i>Burdick v. Takushi</i> , 504 U.S. 428 (1992).....	3, 7, 8
<i>Connecticut State Conference of NAACP Branches v. Merrill</i> , No. 3:20CV909 (JBA) (D. Conn.).....	10
<i>Crawford v. Marion Cnty. Election Bd.</i> , 553 U.S. 181 (2008).....	6, 7
<i>Demster v. Hargett</i> , 2020 Tenn. Cir. LEXIS 314 (Tenn. Chancery Ct. June 4, 2020).....	4, 5, 7, 8
<i>Dombkowski v. Messier</i> , 164 Conn. 204 (1972).....	8
<i>Eu v. San Francisco County Democratic Cent. Comm.</i> , 489 U.S. 214 (1989).....	6
<i>Feehan v. Marcone</i> , 331 Conn. 436 (2019).....	3
<i>Goodyear v. Discala</i> , 269 Conn. 507 (2004).....	2
<i>Jacobson v. Massachusetts</i> , 197 U. S. 11 (1905).....	10
<i>Kelly v. Harris</i> , 331 F.3d 817 (11 th Cir. 2003).....	3
<i>League of Women Voters of N.C. v. North Carolina</i> , 769 F.3d 224, 238 (4th Cir. 2014).....	9
<i>Marshall v. United States</i> , 414 U. S. 417 (1974).....	10
<i>Nielsen v. Kezer</i> , 232 Conn. 65 (1995).....	ii, 1
<i>Republican Nat'l Comm. v. Democratic Nat'l Comm.</i> , 140 S. Ct. 1205 (2020).....	6
<i>S. Bay United Pentecostal Church v. Newsom</i> , 140 S. Ct. 1613 (2020).....	4, 10
<i>Shannon v. Jacobowitz</i> , 394 F.3d 90 (2d Cir. 2005).....	4
<i>Timmons v. Twin Cities Area New Party</i> , 520 U.S. 351 (1997).....	7
<i>Wesberry v. Sanders</i> , 376 U.S. 1 (1964).....	ii

STATUTES

Conn. Gen. Stat. § 9-135(a)	4
Conn. Gen. Stat. § 9-372(5)	ii
Conn. Gen. Stat. § 9-431(a)	2
Conn. Gen. Stat. § 9-463.....	1

OTHER AUTHORITIES

Conn. Const., Art. Sixth, § 4	4, 6, 10
Conn. Const., Art. Sixth, § 7.....	9
Executive Order 7QQ.....	3, 5, 6

ARGUMENT

I. THE REPUBLICAN PLAINTIFFS CANNOT BE ALLOWED TO SEEK CHANGES AFFECTING THE DEMOCRATIC PRIMARY.

Members of the Democratic Party have an associational interest protected by the first amendment to the United States Constitution. "Freedom of association means not only that an individual voter has the right to associate with the political party of her choice . . . but also that a political party has a right to identify the people who constitute the association . . . and to select a standard bearer who best represents the party's ideologies and preferences." *Nielsen v. Kezer*, 232 Conn. 65, 86-87 (1995).

There will be two separate sets of primaries on August 11, 2020, one for Democratic candidates and one for Republican candidates. As for Democrats, there will be a statewide presidential preference primary under Conn. Gen. Stat. §§ 9-463 to 9-485. The outcome will determine the proportion of delegates assigned to Vice President Joseph R. Biden, Jr. and Senator Bernie Sanders for the Democratic National Convention beginning August 17, 2020. Without the primary, the Connecticut Democratic Party will not be able to seat delegates and would not be able to vote at the convention for the nominee, rules, the platform, or anything else.

Additionally, there are two primaries for Democratic state senate candidates, eight for state house candidates, and one for a town's registrar of voters. Heller and Farrar are

candidates in the Democratic primary for the 20th House District. No Democratic primary candidates have objected to the Secretary of the State's actions.²

The Democratic Party wants everyone eligible to vote in its primaries to vote safely. It has a strong interest in allowing absentee voting in as wide a manner as the law permits so that people may vote without fear, and so that the primary does not lead to a resurgence of the pandemic. While the plaintiffs appear unconcerned about that for their primaries, they cannot be allowed to affect the primary of a party to which they do not belong.

Plaintiffs sought orders that would impact the Democratic primary, including that involving Heller and Farrar. But they do not allege that they are eligible to vote in the Democratic primary. See Conn. Gen. Stat. § 9-431(a). In fact, they are candidates in Republican primaries.

"It is well settled that '[t]he burden rests with the party who seeks the exercise of jurisdiction in his favor . . . clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.'" *Andross v. Town of West Hartford*, 285 Conn. 309, 340 (2008) (quoting *Goodyear v. Discala*, 269 Conn. 507, 511 (2004)). If plaintiffs wish to try to interfere with the *Republican* primaries, that choice might be available to them (or perhaps more appropriately to the Connecticut Republican Party, whose views have not been offered in this case). But they have alleged no facts indicating that they should have a role in how the *Democratic* primaries are conducted.

Courts sensibly have rejected attempts by members of one party to interfere in the

² There will also be eight primaries for Republican candidates on August 11, 2020, two for Congress involving the four plaintiffs in this case, two for registrars of voters, one for state senate, and three for state house.

political affairs of other parties. In *Kelly v. Harris*, 331 F.3d 817 (11th Cir. 2003), the court refused an attempt by a Republican elector seeking to challenge a Democratic Party rule. He argued that it might affect who he could vote for in the general election. The court dismissed the case for lack of standing.

Appellant cannot establish any injury under the facts as he has plead them. Two possible injuries can be immediately rejected. First, Appellant does not allege that he has been excluded from a Democratic primary ballot or party office. Such an alleged injury would surely satisfy the requirement of an injury in fact, yet Appellant makes no such allegation. Second, Appellant has not been injured with respect to his ability to vote in the Florida Democratic Party primary. Again, such an alleged injury would supply the necessary injury in fact, but as a registered Republican, Appellant is not eligible to vote in a Democratic primary to choose Democratic nominees for Congressional offices.

Kelly v. Harris, 331 F.3d 817, 820 (11th Cir. 2003); see also *In re Baker*, 404 S.W.3d 575, 581 (Tex. Civ. App. 2010) (rejecting claim that Democrat should be allowed to challenge ballot inclusion of Republican and dismissing claim for lack of standing: “There is no direct relationship between Ramos’s candidacy for a Republican nomination and Baker’s support of a Democratic candidate in a separate contested primary election.”). Even if this Court might at this very late date order changes to the *Republican* primary – changes that the Republican Party has not sought – it cannot do so as to the *Democratic* primary in the absence of a claim by someone able to vote in that primary.

II. THE COURT SHOULD NOT PRECLUDE USE OF ABSENTEE BALLOTS IN PRIMARIES AS ALLOWED BY EXECUTIVE ORDER 7QQ.

The right to vote is protected by the United States Constitution. “It is beyond cavil that ‘voting is of the most fundamental significance under our constitutional structure.’” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)); *Feehan v. Marcone*, 331 Conn. 436, 478 (2019)

“The ‘right to vote is regarded as a fundamental political right . . . preservative of all rights. . . . As the citizen’s link to his laws and government . . . the right to vote is at the heart of our democracy.’”) (quoting *Shannon v. Jacobowitz*, 394 F.3d 90, 93 (2d Cir. 2005)). It is also protected by the Connecticut Constitution. “Laws shall be made to support the privilege of free suffrage, prescribing the manner of regulating and conducting meetings of the electors, and prohibiting, under adequate penalties, all undue influence therein, from power, bribery, tumult and other improper conduct.” Conn. Const., Art. Sixth, § 4.

Plaintiffs claim that the Connecticut Constitution limits use of absentee ballots to circumstances not present here. To be sure, the General Assembly did adopt narrower qualifications for absentee ballots than the constitution allows, in specifying that it would be the elector’s own sickness or physical disability in Conn. Gen. Stat. § 9-135(a). But the governor’s authority in this health emergency, provided by the legislature in Conn. Gen. Stat. § 28-9(b)(1), properly broadened eligibility to an extent allowed by the Connecticut Constitution. The present situation is one where “sickness” – the pandemic – will prevent many voters from appearing in person. Similarly, “physical disability” is broad enough to include a lack of immunity to the coronavirus. The governor’s interpretation of the constitution is consistent with his duty to protect the public’s health,³ and with enfranchisement, not disenfranchisement, to further the guarantee of free suffrage.

Several states have administratively adopted a similar construction of restrictive absentee ballot statutes, or amended their statutes, to allow for sickness or disability to include pandemic-related concerns. See *Demster v. Hargett*, 2020 Tenn. Cir. LEXIS 314,

³ *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring).

at *12-*14 (Tenn. Chancery Ct. June 4, 2020), *stay denied*, No. M2020-00832-SC-RDM-CV (Tenn. June 24, 2020). After noting that two-thirds of states allow no-excuse absentee voting, the court in *Demster* reviewed how the states with more restrictive laws increased voting access. *Id.* at *12-*16. Executive Order 7QQ follows this pattern of sensible interpretations of similar state laws.

If the Court considers the merits of Executive Order 7QQ and Secretary Merrill's actions pursuant to that order, it should uphold them for another reason: to avoid a conflict with the federal constitution. Connecticut is a distinct outlier when it comes to voting by mail. Thirty-four states allow excuse-free absentee balloting. National Center for State Legislatures, *VOPP: Table 1: States with No-Excuse Absentee Voting* (available at <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-1-states-with-no-excuse-absentee-voting.aspx>). Five states conduct all elections by mail. *Id.* Nearly all states without excuse-free absentee voting have made allowances. *Wines, As Trump Rails Against Voting by Mail, States Open the Door for It*, N.Y. Times, May 21, 2020 (available at <https://www.nytimes.com/2020/05/21/us/vote-by-mail-trump.html>).

There are sound reasons for this. The Centers for Disease Control and Prevention advises that “[e]lections with only in-person voting on a single day are higher risk for COVID-19 spread because there will be larger crowds and longer wait times.” *Recommendations for Election Polling Locations*, CDC (available at <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>) (last visited July 15, 2020). That would include Connecticut, absent Executive Order 7QQ. The CDC further recommends that “[l]ower risk election polling settings include those with: a wide variety of voting options; longer voting periods (more days and/or more hours); any

other feasible options for reducing the number of voters who congregate indoors in polling locations at the same time,” and “[w]here available in your jurisdiction, offer alternative voting methods that minimize direct contact and reduce crowd size at polling locations.” *Id.*

States can regulate who can vote in an election. But they must do so within federal constitutional limits. “A State’s broad power to regulate the time, place, and manner of elections ‘does not extinguish the State’s responsibility to observe the limits established by the First Amendment rights of the State’s citizens.’” *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989) (quoting *Tashjian v. Republican Party of Connecticut*, 479 U.S., 208, 217 (1986)); see also *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008) (plurality opinion) (burden on right to vote “must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation’”). If a state does not exercise its authority to allow alternatives to in-person voting on election day, voters have a terrible choice: “Either they will have to brave the polls, endangering their own and others’ safety. Or they will lose their right to vote, through no fault of their own.” *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1211 (2020) (Ginsberg, J., dissenting).

Executive Order 7QQ likely saved the primary from constitutional challenges. If the state constitutional provision limiting absentee balloting to “sickness” is interpreted narrowly to include only the voter’s sickness and “disability” is not construed to include susceptibility to the virus, it is likely inconsistent with federal constitutional principles in the circumstances of this pandemic. Similarly, it also avoids a claim that the right to free suffrage under Conn. Const., Art. Sixth, § 4 has been unreasonably limited.

A recent decision of a state court agreed, applying the federal *Anderson/Burdick* test⁴ to consider whether state restrictions on absentee voting were constitutional under the state constitution in light of the pandemic. The court in *Demster*, 2020 Tenn. Cir. LEXIS 314, ordered the state to allow absentee voting for any voter despite statutory limitations similar to Connecticut's -- even though Tennessee allows for a fourteen-day early voting period. The court began its opinion with this observation:

In this time of the worldwide COVID-19 pandemic and its contagion in gatherings of people, almost all states — both Republican and Democrat — are providing their citizens the health protection of a voting by mail option. This includes southern states such as Alabama, South Carolina and Arkansas, and Tennessee's neighboring state of Kentucky and nearby West Virginia. The governors, state officials and legislators in those states have spearheaded efforts to expand access to voting by mail to protect the health of their citizens during the pandemic.

Id. at *1. The court evaluated the risks of in-person voting, finding that “[t]he health consequences of in-person voting are plainly evident after recent primaries.” *Id.* at *34. The court held that the burden of having to vote in-person depended in part on their health. “The Court therefore concludes that for persons with heightened susceptibility to COVID-19, such as the Plaintiffs in Case No. 20-453, the burden placed on them by the State not providing them the mail-in option is severe. For persons who do not fit into this more susceptible category, including the Plaintiffs in Case No. 20-435, the burden placed on them by the State is in the category of somewhat severe to moderate.” *Id.* at *37.

⁴ The *Anderson/Burdick* test, named after *Burdick v. Takushi*, 504 U.S. 428 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780 (1983), directs courts hearing voting challenges under the federal constitution to consider the extent of the burden of state laws on voting rights and to weigh them against the state interests justifying those burdens. *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 204 (2008); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

The court held that the failure to allow broader absentee voting under these circumstances violated voters' state constitutional rights under the same test applied to assess federal constitutional voting rights claims.

Under *Anderson-Burdick*, the burdens are weighed against the State's justifications for imposing the burden of in-person voting. Those justifications were shown in this case in the above analysis of the evidence not to exist. The evidence demonstrated that providing a vote by mail option is fiscally and logistically feasible, and that voter fraud is not a material threat. Thus, under these circumstances the State's actions of requiring in-person voting during the time of the pandemic and not providing an option to vote by mail are an unreasonable burden on the right to vote in violation of the Tennessee Constitution.

Demster, 2020 Tenn. Cir. LEXIS 314, at *40. The Tennessee Supreme Court refused a stay.

Although this Court has referred to absentee ballots as presenting an elevated risk of fraud, *Dombkowski v. Messier*, 164 Conn. 204, 209 (1972), more current evidence is that "[m]ail ballot fraud is extremely rare, even in all-mail ballot states, regardless of partisan control over the process." *Vote by Mail: Debunking the Myth of Voter Fraud in Mail Ballots*, UCLA Voting Rights Project (Apr. 14, 2020) (available at <https://latino.ucla.edu/wp-content/uploads/2020/04/LPPI-VRP-Voter-Fraud-res.pdf>) (last accessed July 15, 2020). Mailed ballots have certain security measures that can protect against fraud. National Conference of State Legislatures, *Security Features of Voting by Absentee/Mailed Ballots* (listing security features to protect mail balloting) (available at <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx>).

Further, the federal Voting Rights Act likely would be violated if the state failed to take steps to protect minority participation in the primary. Section 2 of the VRA "'prohibits all forms of voting discrimination' that lessen opportunity for minority voters." *League of*

Women Voters of N.C. v. North Carolina, 769 F.3d 224, 238 (4th Cir. 2014) (quoting *Thornburgh v. Gingles*, 478 U.S. at 30, 45 n.10 (1986)). One factor in § 2 cases is “the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process.” *Gingles*, 478 U.S. at 45. The CDC has answered that question in the context of this pandemic.

There is increasing evidence that some racial and ethnic minority groups are being disproportionately affected by COVID-19. Inequities in the social determinants of health, such as poverty and healthcare access, affecting these groups are interrelated and influence a wide range of health and quality-of-life outcomes and risks. To achieve health equity, barriers must be removed so that everyone has a fair opportunity to be as healthy as possible.

CDC, *Health Equity Considerations and Racial and Minority Ethnic Groups* (available at <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html>)

(last accessed July 29, 2020). That is also true in Connecticut.⁵ In-person voting in communities that have already been more deeply affected by the pandemic will be significantly riskier than in other communities. The failure to allow absentee balloting because of the “sickness,” to use the term in Art. Sixth, § 7 of our constitution, that is affecting all of our communities – but some more heavily than others – also is likely a

⁵ “Data on COVID-19 in Connecticut suggests black and Latino residents have been disproportionately affected by the coronavirus pandemic, mirroring a trend observed across the country.” Putterman, *Black and Latino residents hit particularly hard by COVID-19 in Connecticut, as experts fear disparities will widen*, Hartford Courant (Apr. 12, 2020) (available at <https://www.courant.com/coronavirus/hc-news-coronavirus-covid-19-racial-disparities-0407-20200408-jsrg2au2fnab5fbxhpu4ioqmb4-story.html>); DataHaven, *Towards Health Equity in Connecticut: The Role of Social Inequality and the impact of Covid-19* (“Prior to the pandemic, communities of color endured disproportionately worse health outcomes and increased mortality as a consequence of decades of structural inequality. The pandemic has made these disparities only more obvious.”) (available at <https://www.ctdatahaven.org/sites/ctdatahaven/files/DataHaven%20Health%20Equity%20Connecticut%20061820.pdf>).

violation of equal protection principles as well as Conn. Const., Art. Sixth § 4 (right of free suffrage). But it also would violate the Voting Rights Act, 52 U.S.C. § 10301. Indeed, a pending federal lawsuit alleges that the failure to have broader absentee balloting for the *general* election violates the Voting Rights Act. *Connecticut State Conference of NAACP Branches v. Merrill*, No. 3:20CV909 (JBA) (D. Conn.) (complaint filed July 2, 2020). Governor Lamont could take this impact of the pandemic into account.

“Our Constitution principally entrusts ‘[t]he safety and the health of the people’ to the politically accountable officials of the States ‘to guard and protect.’ *Jacobson v. Massachusetts*, 197 U. S. 11, 38, 25 S. Ct. 358, 49 L. Ed. 643 (1905). When those officials ‘undertake[] to act in areas fraught with medical and scientific uncertainties,’ their latitude ‘must be especially broad.’ *Marshall v. United States*, 414 U. S. 417, 427, 94 S. Ct. 700, 38 L. Ed. 2d 618 (1974).” *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring).

AMICI CURIAE,
CONNECTICUT DEMOCRATIC PARTY
SHERRY HELLER, KATE FARRAR

By: /s/William M. Bloss
WILLIAM M. BLOSS
KOSKOFF KOSKOFF & BIEDER, P.C.
350 FAIRFIELD AVENUE
BRIDGEPORT, CT 06604
TELEPHONE: (203) 336-4421
FAX: (203) 368-3244
JURIS #302902

CERTIFICATE OF COMPLIANCE

I hereby certify, on this 31st day of July, 2020, the following:

1. This Brief and Appendix comply with the format requirements of Rule of Appellate Procedure § 67-2;
2. The Brief and Appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure.
3. The printed Brief and Appendix are true copies of the Brief and Appendix that were submitted electronically.

/s/William M. Bloss
William M. Bloss

CERTIFICATION OF SERVICE

Pursuant to Practice Book § 62-7, I hereby certify that on July 31, 2020, the electronic filed brief were delivered electronically to the last known e-mail address of each counsel of record and paper copies of the Brief were mailed, postage prepaid, to:

On Behalf of Mary Fay, Thomas Gilmer, Justin Anderson, James Griffin

Proloy Das, Esq.
Matthew A. Ciarleglio, Esq.
Murtha Cullina LLP
CityPlace One
185 Asylum Street
Hartford, CT 06103
pdas@murthalaw.com

On Behalf of Denise Merrill

Michael Kenneth Skold, Esq.
AG-Special Lit 2nd Fl
55 Elm St PO Box 120
Hartford, CT 06141
michael.skold@ct.gov

/s/William M. Bloss

William M. Bloss