

## Absentee Voting: Summary of *Fay v. Merrill* (2021)

By: Terry Adams, Principal Analyst  
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### Issue

Summarize the Connecticut Supreme Court's opinion in [Fay v. Merrill](#) (338 Conn. 1 (2021)), particularly its discussion of whether "sickness," as used in the state constitution's absentee voting section ([Conn. Const.](#) art. VI, § 7), applies only to an individual voter's personal sickness or more broadly to the COVID-19 pandemic.

### Summary

In a unanimous opinion (issued on February 11, 2021, after a ruling from the bench on August 6, 2020), the Connecticut Supreme Court upheld the state's expansion of absentee voting eligibility for the 2020 primary. It agreed with the state that "sickness," as used in the state constitution's absentee voting section, includes a specific disease such as the COVID-19 pandemic and is not limited to an individual voter's illness. Applying a six-factor test (i.e., the *Geisler* factors), it concluded that the plaintiffs did not establish beyond a reasonable doubt that changes made to absentee voting eligibility for the 2020 primary through executive order ([EO 7QO](#), §§ 1-5) and ratified by the legislature ([PA 20-3](#), July Special Session (JSS), § 16) violate the constitution.

Most significantly, the court concluded that "unable to appear" and "sickness," as used in the constitution, are sufficiently capacious to include the particular disease of COVID-19:

Although the plaintiffs have identified concerns of election security and disenfranchisement that might arise from hypothetical lapses on the part of election officials or the voter during the absentee ballot process, [EO] 7QO nevertheless represents a considered judgment by

our political branches that the limited expansion of absentee voting is an appropriate measure to protect public health and suffrage rights during the exceptional circumstance of a pandemic, the likes of which have not been seen in more than one century. Put differently, our political branches acted to protect the critical constitutional right to vote while accommodating public health directives not to congregate, an act that was consistent with the text of article sixth, § 7, the plain language of which permits absentee balloting for far less serious reasons, such as voluntary absences from town for leisure activities. We conclude, therefore, that [EO] 7QQ does not violate article sixth, § 7, of the Connecticut constitution (*Fay, supra*, at 53).

In addition to its analysis of the state constitution, the court also concluded that (1) the plaintiffs (four congressional candidates appearing on the 2020 primary ballot) were aggrieved by EO 7QQ and thus had standing, (2) the plaintiffs' separation of powers challenge was mooted by the legislature's subsequent ratification of EO 7QQ, and (3) it could not consider the state's special defense of laches (i.e., an inexcusable delay that unduly prejudices the defendant) for the first time upon appeal. This report focuses on the court's analysis of the state constitution.

## **Facts and Procedural History**

### ***Permitted Reasons for Voting by Absentee Ballot***

The state constitution authorizes the General Assembly to pass a law allowing eligible voters to cast their votes by absentee ballot if they are unable to appear at a polling place on election day because of (1) absence from their city or town, (2) sickness or physical disability, or (3) the tenets of their religion prohibit secular activity ([Conn. Const.](#) art. VI, § 7).

The General Assembly exercised this authority and passed laws codified at [CGS § 9-135](#) (as amended by [PA 21-2](#), June Special Session, § 127), which permits eligible voters to vote by absentee ballot for the following reasons:

1. they are absent from the municipality in which they reside during all hours of voting;
2. they are ill or have a physical disability;
3. the tenets of their religion forbid secular activity on the day of the primary, election, or referendum;
4. they are in active service in the U.S. Armed Forces; or
5. their duties as a primary, election, or referendum official outside of their voting district will keep them away during all hours of voting.

## ***2020 Executive Order and Legislation***

As part of the state's COVID-19 response, Governor Lamont issued EO 7QQ on May 20, 2020, which among other things, modified [CGS § 9-135](#) to allow electors to (1) vote by absentee ballot in the August 11, 2020, primary if they are unable to appear at their polling place due to the COVID-19 sickness and (2) lawfully state that they are unable to appear because of COVID-19 if, when applying for or casting an absentee ballot, a federally approved vaccine is not widely available ([EO 7QQ](#), §§ 1-5).

During its July 2020 Special Session, the legislature enacted legislation allowing eligible electors to vote by absentee ballot in the November 2020 state election because of the COVID-19 sickness ([PA 20-3](#), JSS). With respect to the August 11, 2020, primary, the legislature also ratified §§ 1-5 of EO 7QQ ([PA 20-3](#), JSS, § 16). (In 2021, the legislature extended this ability to any election, primary, or referendum held from June 23, 2021, through November 2, 2021 ([PA 21-2](#), June Special Session, § 127).)

## ***Court Challenge***

On July 1, 2020, the plaintiffs (four congressional candidates appearing on the 2020 primary ballot) filed a petition directly with the Connecticut Supreme Court, which the court [dismissed](#) for lack of subject matter jurisdiction (*Fay v. Merrill*, 336 Conn. 432 (2020)). (The petition was filed under [CGS § 9-323](#), which allows for certain complaints concerning elections for federal office to be filed directly with the Supreme Court, but the court held that the statute does not cover primaries.)

Separately, and also on July 1, the plaintiffs brought an action in Superior Court (HHD CV 20-6130532 S). They argued that "sickness," as used in the state constitution, does not broadly encompass a pandemic; it instead depends on a particular voter's "individual health circumstances" and whether that voter is physically "unable to appear" at the polls in person. (The plaintiffs also argued that the governor and secretary of the state lacked the authority to expand absentee voting, but as noted above, this claim was mooted by the legislature's ratification of EO 7QQ.)

After the trial court ruled for the state on [July 22](#), the plaintiffs appealed to the state Supreme Court. After expedited oral argument, the court announced its ruling from the bench on August 6, 2020, and issued a [written opinion](#) on February 11, 2021 (338 Conn. 1 (2021)).

## **Holding and Analysis**

### ***Geisler Factors***

In *State v. Geisler*, the Connecticut Supreme Court enumerated the following six factors to be considered when interpreting the state constitution:

1. the text of the operative constitutional provisions;
2. historical insights into the intent of our constitutional forebears;
3. related Connecticut precedents;
4. persuasive relevant federal precedents;
5. persuasive precedents of other state courts; and
6. contemporary understandings of applicable economic and sociological norms, or as otherwise described, relevant public policies (*State v. Geisler*, 222 Conn. 672, 684-86 (1992)).

Below we summarize the court's analysis of each of these factors with respect to the state constitution's absentee voting section. Although no factor was individually decisive, generally the court found that most were supportive of the state's position and that, taken together, they supported the conclusion that EO 7QQ, as ratified by the legislature, did not violate the constitution.

### ***Constitutional Text***

The plaintiffs argued that "unable to appear," as used in Art. VI, § 7 of the state constitution, means that a voter is completely unable to get to the polls (i.e., helpless or incompetent). They also argued that "because of sickness" narrowly refers to the voter's personal condition rather than an infectious disease affecting the community at large.

With respect to "sickness," the state countered that it is not limited to an individual person's condition; it contrasted the constitution's "sickness" clause to its "religious tenets" clause and noted that the latter is confined to a specific voter, whereas the former has no such limiting language.

According to the court, the constitution's text, when read in context,

"suggests that *physical* inability to get to the polling place on election day is not the sine qua non for rendering a voter 'unable to appear' there. Instead, that determination of ability is squarely within the individual voter's control or judgement....The plaintiffs' purely physical focus in reading the term 'unable' is

inconsistent with the fact that it is entirely subject to the individual actions and motivations of the voter" (*Fay* (2021), *supra* at 33-34) (emphasis in original).

The court drew a similar conclusion with respect to "sickness." It noted that the presence of language tying "religious tenets" to an individual voter, in the absence of similar language with respect to "sickness," "strongly suggests that the term 'sickness' is capacious enough to include an identified illness such as COVID-19 that has created a public health emergency (*Id.* at 35-36).

However, the court concluded that the textual factor was not dispositive of the issue: although the text was supportive of the state's reading, the plaintiffs' reading was also reasonable. Thus, the court continued with its analysis of the *Geisler* factors.

### ***Constitutional History***

The constitutional amendment allowing for absentee voting was adopted in 1932 (Article XXXIX of the Amendments to the 1818 Constitution). (Approximately 70 years earlier, the constitution was temporarily amended to allow soldiers serving in the Civil War to vote by absentee ballot.) The court noted the amendment's legislative history did not shed light on whether its proponents intended for it to cover illnesses not personally suffered by the voter (e.g., a pandemic). It also noted that the legislative history included only a brief discussion of "sickness," and that this discussion was generally confined to supporters' anecdotes about ill or infirm relatives who had been unable to vote.

The court agreed with the plaintiffs that the absence of discussion about the 1918 influenza pandemic was "curious," but the court did not draw any inference from this given the limited nature of the discussion and the lack of opposition on the record.

(For more information about the history of absentee voting in Connecticut, please see OLR reports [2012-R-0379](#) and [2020-R-0236](#).)

### ***Connecticut Case Law***

The court cited two Connecticut cases as being relevant to its analysis. The first, from the Civil War era, declared unconstitutional a statute that allowed soldiers to vote by absentee ballot. The opinion noted that the constitution at that time required voters to cast their votes in their towns on election day (*Opinion of the Judges of the Supreme Court*, 30 Conn. 591 (1862)). (Following this opinion, the constitution was temporarily amended to allow soldiers to vote absentee.)

The second case was an unpublished 1992 Superior Court opinion that analyzed the phrase "unable to appear" as it is used in the absentee voting eligibility statute ([CGS § 9-135](#)) (*Parker v. Brooks*, 1992 WL 310622). In *Parker*, the court rejected a claim that certain voters who were elderly or had disabilities failed to meet the statutory requirement of being "unable to appear" at the polls.

The court, citing a 1982 Connecticut Supreme Court case holding that the right to suffrage was to be construed liberally (*Wynn v. Dunleavy*, 186 Conn. 125 (1982)), found that although the challenged voters were not bedridden or confined to their apartments, they could move only with difficulty. Further, if unable to vote absentee, they would abstain from voting rather than go to the polls. Thus, the absentee voting eligibility statute had to be construed liberally in order to preserve their right to vote.

The Supreme Court concluded that *Parker* supported the state's argument that a voter's ability to appear is uniquely subjective and should be liberally construed in favor of the right to vote. However, it did not shed light on the meaning of "sickness."

### ***Federal Case Law***

The court noted that *Fay v. Merrill* differs from other *Geisler* analyses because there are no federal cases directly on point, given that the U.S. Constitution does not have a provision analogous to the state constitution's absentee ballot section.

However, the court noted that under U.S. Supreme Court precedent, states have broad police powers related to public health, including restricting personal liberties through measures such as quarantines (*Jacobsen v. Massachusetts*, 197 U.S. 25 (1905)). Additionally, the court cited several federal cases holding that states have broad powers to determine the conditions under which the right of suffrage may be exercised.

The court further noted that COVID-19 concerns "have not diminished federal deference to state officials' control over the election process, including expanded access to absentee voting, as long as those innovations do not impose irrational, undue, or discriminatory burdens on the right to vote" (*Fay*, supra at 43).

The court concluded that EO 7QQ "is consistent with the state's exercise of its police power to protect the fundamental right to vote, along with its responsibility under the United States constitution to superintend elections within Connecticut" (*Id.* at 45). However, it also noted that

federal case law does not shed light on whether EO 7QQ is consistent with the state constitution's absentee voting restrictions.

### ***Cases in Other States***

The court did not identify any cases from other states that were directly on point. It noted that the most instructive case was from the Arkansas Supreme Court, which ruled in a 1985 case that "sickness in the family" was a legally sufficient reason to vote by absentee ballot under a statute that allows absentee voting by a voter who "because of illness or physical disability will be unable to attend the polls on election day" (Id. at 46 (emphasis in original), quoting *Forrest v. Baker*, 287 Ark. 239). However, the Connecticut Supreme Court noted that this ruling was not especially persuasive as it was conclusory and lacked a thorough textual or historical analysis.

The court also discussed two 2020 opinions, one from the Texas Supreme Court (*In re State*, 602 S.W.3d 549, 560 (Tex. 2020)) and the other from the Tennessee Supreme Court (*Fisher v. Hargett*, 604 S.W.3d 381 (Tenn. 2020)). In each case, the respective court rejected a challenge that sought to broaden absentee voting eligibility due to COVID-19. However, the Connecticut Supreme Court found neither case to be instructive with respect to the Connecticut Constitution.

### ***Economic and Sociological Considerations***

The court noted that this factor is essentially a public policy analysis. The plaintiffs relied on absentee balloting's perceived shortcomings (e.g., that it is potentially more susceptible to election irregularities). They also argued that voters' rejection of a proposed constitutional amendment on this subject at the 2014 state election shows a common understanding that the state constitution does not presently permit no-excuse absentee balloting. The state countered by arguing that it relied on public policies of protecting health and saving lives while ensuring that voters can safely exercise the right to vote.

The court concluded that "[g]iven the reasonable policy concerns that support the parties' respective state constitutional arguments, in interpreting our state's constitution, we must defer to the legislature's primary responsibility in pronouncing the public policy of our state" (Id. at 51-52).

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