UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JANE MILLER,	:	CASE NO. 3:16-cv-174 (AWT)
Plaintiff,	:	
	:	
v.	:	
	:	
THOMAS DUNKERTON, et al.	:	
Defendants.	:	APRIL 14, 2016

MOTION TO DISMISS

Defendants Matthew Grimes and George Walker respectfully move this Court to dismiss the plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) because the Court should abstain from exercising jurisdiction over her claims, and Federal Rules of Civil Procedure 12(b)(6) because the plaintiff has failed to state a plausible claim for relief.

The reasons for this Motion are more fully stated in the accompanying Memorandum of Law.

DEFENDANTS,
MATTHEW GRIMES
GEORGE WALKER

By: */s/ Nathaniel J. Gentile*

Nathaniel J. Gentile (ct28860)
Eliot B. Gersten (ct05213)
Pullman & Comley, LLC
90 State House Square
Hartford, CT 06103
Telephone: (860) 424-4378
Facsimile: (860) 424-4370
Email: ngentile@pullcom.com
Email: egersten@pullcom.com

CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2016, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing.

/s/ Nathaniel J. Gentile
Nathaniel J. Gentile

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JANE MILLER,	:	CASE NO. 3:16-cv-174 (AWT)
Plaintiff,	:	
	:	
v.	:	
	:	
THOMAS DUNKERTON, et al.	:	
Defendants.	:	APRIL 14, 2016

DEFENDANTS GRIMES' AND WALKER'S MEMORANDUM
OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS

TABLE OF AUTHORITIES

Page(s)

CASES

Brown v. City of Syracuse,
673 F.3d 141 (2d Cir. 2012).....18

Clubside, Inc. v. Valentin,
468 F.3d 144 (2d. Cir. 2006).....18, 19

Colorado River Water Conservation Dist. v. United States,
424 U.S. 800 (1976).....9, 10

Cullen v. Fliegner,
18 F.3d 96 (2d Cir. 1994).....8

Diamond "D" Const. Corp. v. McGowan,
282 F.3d 191 (2d Cir. 2002).....8

DLJ Mortg. Capital, Inc. v. Kontogiannis,
2011 WL 611836 (S.D.N.Y. Feb. 17, 2011).....11

Dunne v. Doyle,
2014 WL 3735287 (D. Conn. July 28, 2014) 10

Ericson v. City of Meriden,
113 F.Supp.2d 276 (D. Conn. 2000).....19

Faraday v. Blanchette,
596 F.Supp.2d 508 (D. Conn. 2009).....12

Gladysz v. Planning & Zoning Commission,
256 Conn. 249, 773 A.2d 300 (2001) 14

Goldfarb v. Town of West Hartford,
474 F. Supp.2d 356 (D. Conn. 2007).....18

Gray v. Town of Easton,
115 F.Supp.3d 312, 319 (D. Conn 2015).....18

Griffin v. Breckenridge,
403 U.S. 88, 91 S.Ct. 1790 (1971).....19

Hoblock v. Albany Co. Bd. of Elec.,
422 F.3d 77 (2d Cir. 2005).....12

Lorentzen v. Levolor Corp.,
754 F.Supp. 987 (S.D.N.Y.1990) 11

Migra v. Warren City Sch. Dist. Bd. of Educ.,
465 U.S. 75, 104 S.Ct. 892 (1984).....12

Niagara Mohawk Power Corp. v. Hudson River–Black River Regulating Dist.,
673 F.3d 84 (2d Cir. 2012).....9, 10

Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.,
477 U.S. 619, 106 S.Ct. 2718 (1986).....8

Reynolds v. Barrett,
685 F.3d 193 (2d Cir. 2012).....19

Smulley v. Mut. of Omaha Bank,
2016 WL 736397 (2d Cir. Feb. 25, 2016).....9

Turkmen v. Hasty,
789 F.2d 218 (2d Cir. 2015).....19

Vill. of Westfield v. Welch's,
170 F.3d 116 (2d Cir. 1999).....10

Wiacek Farms, LLC v. City of Shelton,
132 Conn. App. 163, 30 A.3d 27 (2011) 14

Younger v. Harris,
401 U.S. 37, 91 S.Ct. 746 (1971).....8, 9

STATUTES

28 U.S.C. § 1738.....12

42 U.S.C. § 1983.....1

42 U.S.C. § 1985.....19, 20

CONN. GEN. STAT. § 9-60.....3, 16, 17, 19

CONN. GEN. STAT. § 9-61.....2, 3, 5

CONN. GEN. STAT. § 9-62.....3

CONN. GEN. STAT. § 9-63.....3, 4

PRELIMINARY STATEMENT

This case is about the power of a political party to define its membership. Several decades ago, the Connecticut Legislature enacted a law that gives municipal registrars discretion to remove party members who do not support the party's principles or candidates. This 42 U.S.C. § 1983 action arises out of Brookfield's Republican Registrar of Voters' decision to remove the plaintiff from the Republican Party pursuant to that law. The plaintiff claims that the defendants somehow violated her constitutional rights to freedom of association, her right to vote, her right to due process, and her right to equal protection during the removal process. She also claims, in conclusory fashion, that two of the defendants, Mr. Dunkerton and Mr. Grimes, engaged in a conspiracy to violate her rights. But the plaintiff's case is fatally flawed in a number of ways.

As an initial matter, the plaintiff has already litigated her claims (and lost) in the Connecticut Superior Court.[1] Indeed, the Superior Court rejected the plaintiff's arguments in a thorough and well-reasoned decision that essentially absolved the defendants of any wrongdoing. It was only *after* the plaintiff received the unfavorable Superior Court decision that she filed this action, making nearly identical claims that arise out of the same underlying conduct. Having failed to convince the Superior Court that her removal from the Republican Party was improper, or that the underlying statue is unconstitutional, she now asks the federal courts to reach the opposite conclusion and give her the result she desires. But there are a number of well-established doctrines that prevent plaintiffs from abusing the federal judiciary in this fashion. For good reason: our federalist system would be unworkable if plaintiffs could seek review of failed

[1] The plaintiff appealed the Superior Court decision, and her state case is currently pending in the Connecticut Supreme Court. *See* Exhibit 4.

state court claims in the federal court or litigate the same case in state and federal court simultaneously. For this reason alone, the Court should dismiss this case.

But even if the plaintiff had not already litigated these issues, her claims against Mr. Grimes and Mr. Walker, who are being sued in their "official capacity" as former members of the Brookfield Republican Town Committee, would still fail as a matter of law. The Brookfield Republican Town Committee is a private organization, and it has not been endowed with any powers under state law that would otherwise render it susceptible to liability under § 1983. This alone should be sufficient to warrant dismissal. Nevertheless, if for some reason the Brookfield Republican Town Committee could be sued under § 1983, controlling case law makes clear that the plaintiff has not alleged a viable claim for a violation of her constitutional rights.

As for the plaintiff's allegations of a § 1985 conspiracy between Mr. Grimes and Mr. Dunkerton, that entire count is based on conclusory allegations that are not supported by fact.

Lastly, the plaintiff has not alleged any facts to indicate that Mr. Walker had *any role whatsoever* in the underlying conduct. Nor could he: the relevant statute does not provide any role for party committee members in the removal process. Thus, the claims against him must be dismissed.

For all of these reasons, the Court should dismiss the Complaint.

FACTUAL BACKGROUND

I. The Statutory Framework

Under Connecticut law, municipal registrars have authority to remove party members if the registrar det4ermines that a party member is not affiliating in good faith and does not intend to support the party's principles or candidates. CONN. GEN. STAT. § 9-60. Removal is a three-step process. First, the registrar of voters may issue a "citation" to a party member who has engaged

in behavior (within two years) that demonstrates that he or she is not affiliating in good faith. *Id.* General Statutes § 9-61 enumerates certain conduct that the Connecticut legislature has deemed *prima facie* evidence that a member is not affiliating in good faith, including: enrollment in any other political party or organization, active affiliation with any other political party or organization, knowingly being a candidate at any primary or caucus of any other party or political organization, or being a candidate for office under the designation of another party or organization. *See* CONN. GEN. STAT § 9-61. Discretion to issue a citation lies solely with the Registrar of Voters. *See id.* Party committee members have no role in the issuance of a citation. *See id.*

The recipient of a citation must appear at a hearing wherein the Registrar of Voters and the party chairperson hear evidence to determine whether there is reasonable proof that the cited member was not affiliating with the party in good faith. CONN. GEN. STAT. § 9-62. This hearing is the first and only involvement that the party chairperson has in the removal of a party member. *See* CONN. GEN. STAT. § 9-60. If, after the hearing, the Registrar of Voters and the party chairperson agree that there is reasonable proof to that the cited member was not affiliating in good faith as defined in the statute, the cited member is removed from the party for a period of two years from the date of the last detrimental act. CONN. GEN. STAT. §§ 9-60, 9-61.

Individuals who believe they were unjustly or improperly removed from a political party have the right to seek emergency review of in the Connecticut Superior Court. CONN. GEN. STAT. § 9-63. Upon appeal, the Superior Court must conduct a hearing at the earliest date to determine whether removal was proper. *Id.* If the Superior Court determines that the petitioner was improperly removed from his or her political party, it must order the registrar to restore the petitioner to the political party. *Id.*

II. The Parties

The plaintiff is Jane Miller, a resident of the Town of Brookfield. Compl. ¶ 13. The defendants are: Thomas Dunkerton (the Republican Registrar of Voters for the Town of Brookfield), Martin Flynn (a current member of the Brookfield Republican Town Committee), George Walker (a former member of the Brookfield Republican Town Committee), and Matthew Grimes (a former member and former Chairman of the Brookfield Republican Town Committee). Compl ¶ 14-17.[2]

III. The Underlying Conduct

Mr. Dunkerton issued a removal citation to Jane Miller in March 2015. Compl. ¶ 42. Ms. Miller had recently engaged in a series of acts that convinced Mr. Dunkerton that she was not a good faith member of the Brookfield Republican Party. *See* Compl. ¶ 47-48. Shortly after Mr. Dunkerton issued the citation to Ms. Miller, Mr. Dunkerton and Mr. Grimes convened an evidentiary hearing as required by statute. *See* Compl. ¶ 45. After hearing all of the evidence presented, Mr. Dunkerton and Mr. Grimes issued a unanimous decision concluding that there was "reasonable proof" that Ms. Miller had previously been a candidate for office under the designation of another political party, and that Ms. Miller "actively affiliated" with the Democratic Party. Compl. ¶ 47.

Ms. Miller promptly appealed Mr. Dunkerton's and Mr. Grimes' decision to the Superior Court. Exhibit 1.[3] There, she claimed, among other things: (i) that Mr. Dunkerton "conducted a

[2] The Complaint alleges that Mr. Grimes and Mr. Walker are "current" members for the Brookfield Republican Town Committee, but they have subsequently been voted out of that position.

[3] This Court may properly consider the attached exhibits for purposes of this motion to dismiss. "There are exceptions to Rule 12(b)(6)'s general prohibition against considering materials outside the four corners of the complaint." *Halebian v. Berv*, 644 F.3d 122, 131 (2d Cir. 2011).

hearing where the evidence did not support [his] actions;" (ii) that the "conduct of the hearing violated [her] right to due process of law;" (iii) that "[Mr. Dunkerton] failed to establish a standard of conduct to qualify as a member of the Brookfield Republican Party and, as a result, [she] was prejudiced;" (iv) that Mr. Dunkerton's actions held her to "a standard not required by others;" and (v) that "General Statutes § 9-60 is unconstitutional on its face and as applied." Exhibit 2 at 1.

The Superior Court held an evidentiary hearing, and after the hearing allowed Ms. Miller to submit a post-hearing brief. *See* Exhibit 2 and Exhibit 3. In her post hearing brief, Ms. Miller argued, among other things: (i) that her removal from the Republican Party constituted a violation of her right to freedom of association (Exhibit 3 at 16-19); (ii) that her removal from Republican Party constituted a violation of her right to due process (Exhibit 3 at 10-16); (iii) that her removal from Republican Party constituted discrimination because Mr. Dunkerton did not apply General Statutes § 9-60 to men who engaged in conduct similar to Ms. Miller's conduct (Exhibit 3 at 8-11).

The Superior Court then issued a decision rejecting each and every one of the plaintiff's arguments. *See* Exhibit 2. The Superior Court (Truglia, *J.*) found that there was "more than sufficient evidence from which the court can conclude that the plaintiff did commit specific acts under § 9-61 which constitute prima facie evidence supporting defendant's discretionary erasure or exclusion of the plaintiff from the enrollment list." *See id.* The Court also rejected Ms.

For example, it is well established that on a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), the court may also rely upon "documents attached to the complaint as exhibits[ ] and documents incorporated by reference in the complaint." *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010). Courts may also properly consider "matters of which judicial notice may be taken, or documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit." *Halebian*, at 131 (2d Cir. 2011) (citations and quotations omitted).

Miller's constitutional challenges to the underlying statute and its application to her. *Id.* at 9-13. Ms. Miller appealed the Superior Court's decision, and her case is currently pending in the Connecticut Supreme Court. She has filed a brief in the Connecticut Supreme Court in which she argues, among other things, that her removal from Republican Party constituted a violation of her fundamental rights to vote and of association. *See* Exhibit 5.

Approximately five months after appealing her state case to the Connecticut Supreme Court, Ms. Miller filed this action raising the same claims that the Superior Court rejected. She claims that the defendants violated her right of freedom of association, right to vote, right to due process, and right to equal protection. *See* Compl. She seeks $1,000,000 in damages, reinstatement to the Republican Party, and reimbursement of her costs in bringing this action. *See* Compl.

STANDARD

A Rule 12(b)(1) motion seeks dismissal of a complaint for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). The burden of establishing subject matter jurisdiction lies with the plaintiff. *Malik v. Meissner,* 82 F.3d 560, 562 (2d Cir. 1996).

"When deciding a motion to dismiss under Rule 12(b)(6), the court must accept as true all factual allegations in the complaint and must draw inferences in a light most favorable to the plaintiff." *Goins v. Murphy*, 2014 WL 4354456, at *1 (D. Conn. Sept. 2, 2014) (Thompson *J.*). Although a complaint "does not need detailed factual allegations, a plaintiff's obligation to provide the grounds' of his entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 550, 555 (2007), *citing Papasan v. Allain*, 478 U.S. 265, 286 (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual

allegation"). "Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 557 (internal quotation marks omitted)). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555 (citations omitted). However, the plaintiff must plead "only enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. "The function of a motion to dismiss is 'merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof.'" *Mytych v. May Dept. Store Co.*, 34 F. Supp.2d 130, 131 (D. Conn. 1999), *quoting Ryder Energy Distribution v. Merrill Lynch Commodities, Inc.*, 748 F.2d 774, 779 (2d Cir. 1984). "The issue on a motion to dismiss is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support his claims." *United States v. Yale New Haven Hosp.*, 727 F. Supp. 784, 786 (D. Conn. 1990) (citation omitted).

When a party moves to dismiss under Rule 12(b)(1) as well as other bases such as 12(b)(6), "the court should consider the Rule 12(b)(1) challenge first since if it must dismiss the complaint for lack of subject matter jurisdiction, the accompanying defenses and objections become moot and do not need to be determined." *Rhulen Agency, Inc. v. Alabama Ins. Guaranty Ass'n*, 896 F.2d 674, 678 (2d Cir. 1990).

ARGUMENT

I. The Superior Court Decision is Fatal to Ms. Miller's Case

This case has already been decided. Ms. Miller raised each and every one of the claims she brings in this case during her Superior Court hearings. During those proceedings, Ms. Miller had full opportunity to make all of the legal arguments she deemed relevant to her case. She also

had an opportunity to present evidence in support of those arguments. After hearing all of Ms. Miller's evidence (or lack of evidence), the Superior Court rejected each and every one of Ms. Miller's arguments in a thirteen page decision. *See* Exhibit 1. Apparently dissatisfied with the Superior Court's ruling, Ms. Miller appealed to the Connecticut Supreme Court, as is her right. But she cannot simultaneously litigate the same case in the federal courts. Indeed, the only way Ms. Miller can succeed in her federal case would be to convince this Court to contradict the Superior Court's factual findings and legal conclusions, a ruling that would render her state court appeal moot. Thus there are four doctrines—two of them jurisdictional—that require this case's dismissal.

A. 12(b)(1): The *Younger* Abstention Doctrine

First, the Court should abstain under *Younger v. Harris*. The *Younger* abstention doctrine "generally requires federal courts to abstain from taking jurisdiction over federal constitutional claims that involve or call into question ongoing state proceedings." *Diamond "D" Const. Corp. v. McGowan*, 282 F.3d 191, 198 (2d Cir. 2002) (*citing Younger v. Harris*, 401 U.S. 37, 43-44, 91 S.Ct. 746 (1971)). This doctrine applies equally to civil proceedings. *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 627, 106 S.Ct. 2718 (1986). The *Younger* abstention doctrine is founded on the principal that "a state proceeding provides an adequate forum for the vindication of federal constitutional rights." *Cullen v. Fliegner*, 18 F.3d 96, 103 (2d Cir. 1994) (internal citation omitted). The doctrine applies where "(1) there in an ongoing state proceeding; (2) an important state interest is implicated in that proceeding; and (3) the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of the federal constitutional claims." *Diamond "D" Const. Corp.*, 282 F.3d at 191. If *Younger* applies, "abstention is mandatory." *Sica v. Connecticut*, 331 F. Supp. 2d 82, 84 (D. Conn. 2004)

(citing *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 816 n. 22, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976)).

All of the *Younger* abstention elements are met here. First, Ms. Miller cannot dispute that her state case is "ongoing" because her case is currently pending in the Connecticut Supreme Court. *See* Exhibit 4. Second, there is an important state interest involved because the plaintiff is seeking judicial review of a state statute that is designed to give political parties control over their own membership. Third, it is clear from the Superior Court's decision that Ms. Miller's federal claims were raised, heard, and continue to be heard on appeal. *See* Exhibit 2; Exhibit 3; Exhibit 5. Thus, *Younger* abstention should apply to Ms. Miller's claims, and ultimately result in their dismissal.

B. 12(b)(1): *Colorado River* Abstention Doctrine

The Court should also abstain from exercising jurisdiction over Ms. Miller's federal lawsuit pursuant to *Colorado River Water Conservation Dist. v. United States*. "Under the *Colorado River* doctrine, a federal court may decline to hear a case when parallel state court proceedings are pending and 'reasons of wise judicial administration' counsel dismissal.'" *Smulley v. Mut. of Omaha Bank*, 2016 WL 736397, at *1 (2d Cir. Feb. 25, 2016) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 818 (1976)). Actions are "parallel when substantially the same parties are contemporaneously litigating substantially the same issue in another forum." *Niagara Mohawk Power Corp. v. Hudson River–Black River Regulating Dist.*, 673 F.3d 84, 99 (2d Cir. 2012).

Whether "*Colorado River* abstention is justified turns on a balancing of six factors: (1) whether either the state or federal court has assumed jurisdiction over a res; (2) the relative inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the

order in which the actions were filed; (5) whether state or federal law provides the rule of decision; and (6) whether the state action will protect the federal plaintiff's rights. *Id.* (quoting *Colorado River*, 424 U.S. at 818 and *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23–26 (1983)). Courts in this circuit also consider whether the plaintiff has engaged in forum shopping when deciding if abstention is appropriate. *See e.g.*, *Dunne v. Doyle*, 2014 WL 3735287, at *13 (D. Conn. July 28, 2014).

Ms. Miller's state case is "parallel" to this one because it involves the same underlying conduct, the same underlying arguments, and substantially the same parties (Ms. Miller and Mr. Dunkerton are named parties in each case). Moreover, the relevant factors weigh in favor of abstention.[4] With respect to the need to avoid piecemeal litigation, one of the most important factors in the *Colorado River* analysis, allowing Ms. Miller to simultaneously litigate her case in the state and federal courts provides the possibility of inconsistent or even conflicting judgments. Abstention, on the other hand, would avoid the potential embarrassment of such an absurd result. *Dunne v. Doyle*, 2014 WL 3735287, at *11 (D. Conn. July 28, 2014) (recognizing that abstention is appropriate where the court could be asked to re-decide motions, waste judicial resources on duplicative litigation, and risking conflicting outcomes in the state and federal forums).

The order in which the actions were filed also weighs decidedly in favor of abstention. "This factor does not turn exclusively on the sequence in which the cases were filed, 'but rather in terms of how much progress has been made in the two actions.'" *Vill. of Westfield v. Welch's*, 170 F.3d 116, 121 (2d Cir. 1999). Ms. Miller already obtained a final judgment from the Superior Court, and her state case is currently pending in the Connecticut Supreme Court. Conversely, her federal action is in the earliest stages of litigation.

[4] The first two *Colorado River* factors are not relevant to the Court's inquiry in this case.

As for whether state or federal law will provide the rule of decision, the defendants recognize that Ms. Miller's claims arise under federal law. Nonetheless, all of the alleged conduct occurred pursuant to a state statute that implicates Connecticut's public policy. This Court should abstain from this case and permit the Connecticut Supreme Court to rule on the merits of her challenge of the state statute and its application to her.

As for the protection of Ms. Miller's federal rights, the Connecticut judiciary is more than capable of hearing and deciding her federal claims. There is no reason to believe that the Connecticut Supreme Court will not protect her federal rights.

Lastly, Ms. Miller, not the defendants, chose to initiate her claims in the state court first. Now, apparently not optimistic about her chances for success in the Supreme Court, she has filed this successive action. Tellingly, instead of pursuing emergency relief in the Connecticut Supreme Court, Ms. Miller has instead delayed that action by obtaining two extensions of time to file her appellate brief. Exhibit 4. There can be no debate that exercising jurisdiction in this case would encourage the type of forum shopping federal courts generally prohibit. This factor weighs in favor of abstention. *DLJ Mortg. Capital, Inc. v. Kontogiannis*, 2011 WL 611836, at *3 (S.D.N.Y. Feb. 17, 2011) ("The interests of efficiency and judicial economy would clearly be served, and forum-shopping (however indirect) discouraged, by remand of this action to state court for prompt continuation of the previously-pending proceedings."); *Lorentzen v. Levolor Corp.*, 754 F.Supp. 987, 993 (S.D.N.Y.1990) ("Of greatest significance in our review of factor 4—and most influential to our decision to abstain—is the fact that it was plaintiff who chose to trigger the jurisdiction of the state court in this matter . . . . [Filing in federal court] appears to be an attempt by plaintiff to change his original choice of forum in violation of the federal policy against plaintiff removal and forum-shopping.").

C. 12(b)(6): Res Judicata and Collateral Estoppel

Both the Full Faith and Credit Clause of the United States Constitution, U.S. Const. art. IV, § 1, and Full Faith and Credit statute, 28 U.S.C. § 1738, require federal courts to accord state court judgments the same preclusive effect that it would merit under the law of the state from which it originated. *See Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S.Ct. 892 (1984); *Kremer Chem. Constr. Corp.*, 456 U.S. 461, 466, 102 S.Ct. 1883 (1982); and *Hoblock v. Albany Co. Bd. of Elec.*, 422 F.3d 77, 93 (2d Cir. 2005). Thus, Connecticut law governs the preclusive effect of the Superior Court judgment for purposes of *res judicata* and collateral estoppel. *Faraday v. Blanchette*, 596 F.Supp.2d 508, 514 (D. Conn. 2009) (*citing Kulak v. City of New York*, 88 F.3d 63, 71 (2d Cir. 19960).

"[U]nder the doctrine of res judicata, or claim preclusion, a former judgment on a claim, if rendered on the merits, is an absolute bar to a subsequent action on the same claim . . . [or any claim ***based on the same operative facts that] might have been made***." *Linden Condominium Ass'n., Inc. v. McKenna*, 247 Conn. 575, 594, 726 A.2d 502 (1999) (Internal quotations marks omitted emphasis added). In other words, "[a] plaintiff cannot, under the doctrine of res judicata, withhold certain claims from one action and then raise those claims in a later action when an adequate opportunity existed to raise all claims in one action." *Daoust v. McWilliams*, 49 Conn. App. 715, 726, 716 A.2d 922 (1998). Thus, "[t]he appropriate inquiry with respect to [claim] preclusion is whether the party had an adequate opportunity to litigate the matter in the earlier proceeding . . . . " *Sotavento Corp. v. Coastal Pallet Corp.*, 102 Conn. App. 828, 834, 927 A.2d 351 (2007) (Internal quotation marks omitted).

Ordinarily, a party asserting *res judicata* must have been a party in the underlying case, or in privy with a party in that case. *See, e.g.*, *Pollansky v. Pollansky*, 162 Conn. App. 635

(2016). But the Connecticut Appellate Court articulated an exception to this rule in *Bruno v. Geller*, 136 Conn. App. 707 (2012). There, the plaintiff brought claims of civil conspiracy against her former husband and several alleged coconspirators in a number of actions. First, she claimed in her dissolution action that her former husband and his former employer conspired to deprive her of a fair and equitable property division. *Id.* at 710. The dissolution court rejected this claim. *Id.* at 710–11. Second, the plaintiff brought an action in New York against her former husband, his former employer, a company owning a majority interest in his former employer, and a law firm, raising the same allegations of civil conspiracy. The New York Supreme Court held that collateral estoppel barred the plaintiff's claims. *Id.* at 712. Finally, the plaintiff commenced a third action in Superior Court raising the same allegations. *Id.* The trial court rendered summary judgment in favor of the defendants, giving preclusive effect to the New York judgment. *Id.* at 712–13. On appeal, the plaintiff argued that *res judicata* was inapplicable because strict mutuality of parties was lacking. *Id.* at 727.

The Connecticut Appellate Court held that strict mutuality was not required for the purposes of *res judicata* under the circumstances of that case:

> [A]ssuming the identity of the issues, a plaintiff who deliberately selects his forum and there unsuccessfully presents his proofs is bound by such adverse judgment in a second suit involving all the identity issues already decided . . . . [T]o hold otherwise would be to allow repeated litigation of identical questions expressly adjudicated, and to allow a litigant who has lost on a question of fact to reopen and retry all the old issues each time he can obtain a new adversary not in privity with his former one.

The *Bruno* factors are present here: Ms. Miller deliberately chose to litigate her first case in the Superior Court, where she raised identical claims against Mr. Dunkerton. Now, after receiving an unfavorable decision, she is attempting to find a new forum to re-litigate those claims by adding new defendants. Thus, Mr. Walker and Mr. Grimes may assert *res judicata* as a

defense even though they were not parties to Ms. Miller's Superior Court case. And, because Ms. Miller raised or could have raised her claims the Superior Court the doctrine of *res judicata* is fatal to her claims.

Mr. Walker and Mr. Grimes may also assert the doctrine of collateral estoppel even though they were not parties to Ms. Miller's Superior Court case. *Pollansky v. Pollansky*, 162 Conn. App. 635 (2016) (recognizing that "[m]utuality of parties is not a bar to the application of collateral estoppel in Connecticut). Collateral estoppel arises when an issue is actually litigated and determined by a valid and final judgment, and that determination is essential to the judgment . . . . Collateral estoppel express[es] no more than the fundamental principle that once a matter has been fully and fairly litigated, and finally decided, it comes to rest." *Gladysz v. Planning & Zoning Commission*, 256 Conn. 249, 260, 773 A.2d 300 (2001). A party may assert the doctrine where (1) the issue has been fully and fairly litigated; (2) the issue has actually been decided; and (3) the decision must have been necessary to the judgment. *See Wiacek Farms, LLC v. City of Shelton*, 132 Conn. App. 163, 169, 30 A.3d 27 (2011).

All of these factors apply here. First Ms. Miller had a full and fair opportunity to litigate her (identical) claims in the Superior Court. Even though her Superior Court case was on an expedited track pursuant to state statute, her evidentiary hearing did not take place for almost *two months* after the date she filed her petition. *See* Exhibit 1. Two months is more than sufficient time to develop a "comprehensive set of legal grievances," as demonstrated by Ms. Miller's 25 page post-hearing brief. *See* Exhibit 3

Second, Ms. Miller already litigated her claim that she suffered a violation of her rights to (i) freedom of association; (ii) right to vote; (iii) due process; (iv) and equal protection in the Superior Court. During the state court proceeding, Ms. Miller had a full opportunity to make all

of the legal arguments she deemed relevant to her case and to present evidence in support of those arguments. After hearing all of Ms. Miller's evidence (or lack of evidence) in a fair and open hearing, the Superior Court rejected each and every one of Ms. Miller's arguments in a thirteen page decision. *See* Exhibit 2.

Third, the Superior Court's conclusions that Ms. Miller did not suffer a violation of her rights to (i) freedom of association; (ii) right to vote; (iii) due process; (iv) or equal protection were necessary to the Superior Court's Judgment. Indeed, Ms. Miller cannot succeed in this case without receiving a decision that directly conflicts with the Superior Court's judgment.

The doctrine of collateral estoppel dooms Ms. Miller's claims.

II. Ms. Miller's Claims Fail as a Matter of Law

A. The Brookfield Republican Town Committee is not a State Actor

Ms. Miller has sued Mr. Grimes and Mr. Walker in their "official capacity" as members of the Brookfield Republican Town Committee. Such a suit is akin to suing the Brookfield Republican Town Committee itself. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, n. 55 (1978). A private entity, such as the Brookfield Republican Town Committee, becomes a "state actor" for the purposes of 42 U.S.C. § 1983 if it is endowed with powers under state law as it then acts "under color of state law." *Campbell v. Bysiewicz*, 242 F. Supp. 2d 164, 177 (D. Conn. 2003). Where the political party, as authorized by state statute, becomes a state actor, its rules are subject to the same Constitutional limitations as are state statutes, and thus, § 1983 liability. *Id*. (citing *Terry v. Adams*, 345 U.S. 461, 469 (1953)).

The Brookfield Republican Town Committee has no power whatsoever under Connecticut law to issue a removal citation to party member. *See* CONN. GEN. STAT. § 9-60. Under General Statues § 9-60, that authority lies solely with the Registrar of Voters. It is only

after the registrar issues a citation, that the party chairperson (if available) is designated to sit on the hearing panel to determine whether there is sufficient evidence to uphold the registrar's citation. There is no statutorily directed opportunity for input from the Brookfield Republican Town Committee, nor does the statute allow the town committee vote on the matter. Thus, the Brookfield Republican Town Committee has not been "endowed with powers under state law" to remove members from the Republican Party.

The Brookfield Republican Town Committee is not liable to suit under 42 U.S.C. § 1983.

B. Ms. Miller Has Not Stated a Claim for a Violation of Her Rights to Freedom of Association or Due Process

Ms. Miller is not the first plaintiff to claim that the removal from a political party under General Statues § 9-60 constitutes a violation of the rights to freedom of association and due process. In the highly analogous case of *Marchitto v. Knapp*, several residents of Derby, Connecticut brought an action against the Republican Registrar of Voters and Republican Town Chairman. *Marchitto v. Knapp*, 807 F. Supp. 916, 916 (D. Conn. 1993). They claimed that an earlier version of General Statutes § 9–60 violated the plaintiffs' rights to freedom of association and due process. *Id.* at 916. Chief Judge Daly rejected their claims outright. *See id.* at 917-918. In rejecting the plaintiffs' freedom of association claim, just as the Superior Court concluded in Ms. Miller's case, Judge Daly recognized that "individual voters and political parties share a reciprocal right to define themselves politically," and therefore, "a political party may deny membership to an individual voter who acts in a manner clearly inconsistent with a party's interests." *Id.* at 917 (citing *Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981) and *Roberts v. United States Jaycees*, 468 U.S. 609 (1984)). Judge Daly also rejected the plaintiffs' due process claims, holding that the plaintiffs failed to sufficiently

plead a violation of due process and that it would be improper for the Court to substitute its own judgment for that of the political party. *Id.* at 918.

The Court's reasoning in *Marchitto is* persuasive and should be followed here. Ms. Miller has presented no sound reason why the Brookfield Republican Party should not be permitted to define its own membership. Moreover, Ms. Miller had the opportunity to present evidence regarding her "good faith membership" (or lack thereof) ***at two separate hearings***, including one before the registrar and party chairman and another *de novo* hearing before a Superior Court judge. To claim that she was somehow denied due process is nonsensical.

C. Ms. Miller Has Not Stated a Claim for a Violation of Her Right to Vote

Importantly, Ms. Miller's temporary removal from the Brookfield Republican Party does not impact her right to vote in the general election. As the Superior Court decision noted, there appears to be no authority to support the proposition that the right to participate in a primary or caucus is a fundamental right. And to that end, the Brookfield Republican Party has its own competing associational right to define its membership. *Democratic Party of United States v. Wisconsin ex rel. LaFollette,* 450 U.S. 107, 122, 101 S.Ct. 1010, 1019, 67 L.Ed.2d 82 (1981). That is, the Brookfield Republican party has a right not to associate with Ms. Miller, *Roberts v. United States Jaycees,* 468 U.S. 609, 623 (1984), and limit its membership to those who share the party's interests and support its principles. The Brookfield Republican Party may deny membership to Ms. Miller, who has acted in a manner clearly inconsistent with a party's interests. *Marchitto v. Knapp*, 807 F. Supp. 916, 917 (D. Conn. 1993). The Brookfield Republican Party's right to exclude Ms. Miller for failing to support the party's principles or candidates outweighs any infringement of her right to vote in the Brookfield Republican Party's primaries or caucuses.

D. Ms. Miller Has Not Stated a Claim for a Violation of Her Right to Equal Protection

Ms. Miller attempts to distinguish her federal lawsuit from her Superior Court case by making conclusory and unsupported allegations of gender discrimination. But her efforts fall woefully short stating a legally cognizable claim for a violation of her right to equal protection.

"Traditionally, the Equal Protection clause of the Fourteenth Amendment protects against [classification-based] discrimination." *Goldfarb v. Town of West Hartford*, 474 F. Supp.2d 356, 366 (D. Conn. 2007) (internal quotation marks omitted). "Closely related to a class-of-one claim, a claim of selective enforcement or selective prosecution arises when the government seeks to apply the law to a plaintiff differently than it would to other similarly situated individuals for constitutionally impermissible reasons such as on grounds of plaintiff's race or malicious intent." *Gray v. Town of Easton*, 115 F.Supp.3d 312, 319 (D. Conn 2015). Such a claim requires plaintiff to show that "(1) the [plaintiff] compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious bad faith intent to injure a person." *Brown v. City of Syracuse*, 673 F.3d 141, 151-52 (2d Cir. 2012). The Second Circuit has not yet specified "the degree of similarities between comparators that must exist to prove a selective-enforcement claim. But because the two theories themselves are so similar, there is little reason to suppose why a selective-enforcement claim should not require the same high degree of similarity between comparators as the Second Circuit requires for a class-of-one claim." *Gray v. Town of Easton*, 115 F.Supp.3d at 319. Thus, there must be "an extremely high degree of similarity" that provides "an inference that the plaintiff was intentionally singled out for reasons that so lack any reasonable nexus with a legitimate governmental policy that an improper purpose . . . is all but certain." *Clubside, Inc. v. Valentin*, 468 F.3d 144, 159 (2d. Cir.

2006).

Ms. Miller points to the Brookfield Republican Party's treatment of two alleged comparators in her complaint as "proof" of the defendants' discrimination against her. But there is not "an extremely high degree of similarity" between Ms. Miller and her two comparators. *Clubside, Inc.*, 468 F.2d at 159. When Mr. Dunkerton cited Ms. Miller for removal, the constitutionality of General Statutes § 9-60 was not under judicial review. Conversely, when Ms. Miller's alleged comparators sought reinstatement to the Republican Party, Ms. Miller had already appealed her Superior Court case to the Connecticut Supreme Court. Thus, her purported comparators do not have a "high degree of similarity." For this reason, her claim of equal protection fails.

E. Ms. Miller Has Not Stated a § 1985 Conspiracy Claim

Ms. Miller has alleged, in conclusory fashion, a conspiracy between Mr. Dunkerton and Mr. Grimes pursuant to 42 U.S.C. § 1985. A cognizable claim under § 1985 has four elements: "(1) a conspiracy, (2) for the purpose of depriving any person of class of persons of the equal protection of the laws or of equal privileges and immunities under the laws, (3) an act in furtherance of the conspiracy, and (4) whereby a person is injured in his person or property or deprived of a right or privilege of a citizen." *Turkmen v. Hasty*, 789 F.2d 218, 262 (2d Cir. 2015). A successful claim also requires "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin v. Breckenridge*, 403 U.S. 88, 102, 91 S.Ct. 1790 (1971); *accord Reynolds v. Barrett*, 685 F.3d 193, 201-02 (2d Cir. 2012). It is well established that "a complaint containing only conclusory, vague, or general allegations of conspiracy to deprive a person of constitutional rights" is insufficient as a matter of law. *Ericson v. City of Meriden*, 113 F.Supp.2d 276, 291 (D. Conn. 2000) (*citing Sommer v.*

Dixon, 709 F.2d 173, 175 (2d Cir. 1983)).

As with the rest of her complaint, Ms. Miller only makes conclusory allegations regarding the alleged "conspiracy" between Mr. Grimes and Mr. Dunkerton. She vaguely alleges that Mr. Grimes and Mr. Dunkerton entered into an agreement, but offers no specifics aside from broad speculation. Such conclusory allegations are not sufficient to state a cognizable claim under § 1985. Moreover, as demonstrated above, there is no merit to her predicate civil rights claims. Thus, Ms. Miller's § 1985 claim must be dismissed.

F. Ms. Miller's Has Not Alleged Any Facts Against Mr. Walker

Ms. Miller has failed to provide the Court with anything more than conclusory statements regarding Mr. Walker. The plaintiff specifically references Flynn in her "Facts" section only once to claim that Flynn acted with the other defendants to strip plaintiff of her rights. *See* Compl. ¶ 45. This single conclusory allegation fails to state a legally cognizable claim against Mr. Walker. All counts against him must be dismissed.

CONCLUSION

For all of these reasons, the Court should grant Mr. Grimes' and Mr. Walker's motion to dismiss.

DEFENDANTS,
MATTHEW GRIMES
GEORGE WALKER

By: */s/ Nathaniel J. Gentile*

Nathaniel J. Gentile (ct28860)
Eliot B. Gersten (ct05213)
Pullman & Comley, LLC
90 State House Square
Hartford, CT 06103
Telephone: (860) 424-4378
Facsimile: (860) 424-4370
Email: ngentile@pullcom.com
Email: egersten@pullcom.com

CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2016, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing.

/s/ Nathaniel J. Gentile
Nathaniel J. Gentile

Exhibit 1

State of Connecticut Judicial Branch
Civil and Family E-Services

E-Services Home
-
Civil / Family Menu
-
E-File a New Case
-
E-File on an Existing Case
By Docket Number
By Party Name
List My Cases
-
Court Events
By Date
By Juris Number
By Docket Number
-
Short Calendars
Markings Entry
Markings History
My Short Calendars
By Court Location
Calendar Notices
-
My Shopping Cart (0)
My E-Filed Items
-
Pending Foreclosure Sales
-
Search By Property Address
-

Attorney/Firm: PULLMAN & COMLEY LLC (409177) E-Mail: jhawks-ladds@pullcom.com Logout

DBD-CV15-6017272-S MILLER, JANE v. DUNKERTON, THOMAS

Prefix/Suffix: [none] **Case Type:** M20 **File Date:** 04/30/2015 **Return Date:** 04/30/2015

Case Detail | Notices | History | Processing | Scheduled Court Dates | Help Manual

To receive an email when there is activity on this case, click here.

The logged in Juris Number is not appearing on this case. Select "Go" to e-file an appearance.

Select Case Activity: E-File an Appearance Go

Information updated as of: 04/14/2016

Case Information

Case Type: M20 - Misc - Mandamus
Court Location: Danbury JD
List Type: No List Type
Trial List Claim:
Last Action Date: 03/21/2016 (The "last action date" is the date the information was entered in the system)

Disposition Information

Disposition Date: 08/18/2015
Disposition: JUDGMENT WITHOUT TRIAL FOR DEFENDANT
Judge or Magistrate: HON ANTHONY TRUGLIA

Party & Appearance Information

Party	No Fee Party	Category
P-01 JANE MILLER		Plaintiff
Attorney: COHEN & WOLF PC (100137) 158 DEER HILL AVENUE DANBURY, CT 06810 — File Date: 04/30/2015		
D-01 THOMAS DUNKERTON		Defendant
Attorney: CHIPMAN MAZZUCCO LAND & PENNAROLA LLC (410654) 39 OLD RIDGEBURY ROAD SUITE D-2 DANBURY, CT 06810 — File Date: 05/04/2015		

Viewing Documents on Civil Cases: Attorneys who have an appearance on the case can view pleadings, orders and other documents that are ***paperless*** by selecting the document link below. Any attorney without an appearance on the case can look at court orders and judicial notices that are ***electronic*** on this case by choosing the link next to the order or selecting "Notices" from the tab at the top of this page and choosing the link to the notice on this website. Pleadings and other documents that are paperless can be viewed during normal business hours at any Judicial District courthouse and at many geographical area courthouses. Any pleadings or documents that are ***not paperless*** can be viewed during normal business hours at the Clerk's Office in the Judicial District where the case is. Some pleadings, orders and other documents are protected by court order and can be seen at the Clerk's Office in the Judicial District where the case is only by attorneys or parties on the case.

Motions / Pleadings / Documents / Case Status

Entry No	File Date	Filed By	Description	Arguable
	05/04/2015	D	**APPEARANCE** Appearance	
	09/29/2015		**ADMINISTRATIVE DOCUMENT** Letter from Appellate Court	
	01/12/2016		**ADMINISTRATIVE DOCUMENT** tRANSFER FROM APPELLATE COURT TO SUPREME COURT	
	03/21/2016		**ADMINISTRATIVE DOCUMENT** RE: JUDGMENT FILE	
100.30	04/30/2015	P	**SUMMONS**	No

100.31	04/30/2015	P	**COMPLAINT**	No
100.32	04/30/2015	P	**PRE-SERVICE ORDER FOR HEARING AND NOTICE**	No
100.33	05/05/2015	C	**ORDER HEARING AND NOTICE**	No
101.00	05/01/2015	P	**RETURN OF SERVICE**	No
102.00	05/19/2015	P	**RETURN OF SERVICE** re: NOTICE OF HEARING	No
103.00	06/05/2015	D	**ANSWER** Answer to Conn. Gen. Stat. 9-63 Petition of Jane Miller	No
104.00	07/23/2015	P	**TRIAL MANAGEMENT REPORT**	No
105.00	07/24/2015	D	**TRIAL MANAGEMENT REPORT** Respondent's Trial Management Report	No
106.00	07/27/2015	C	**LIST OF EXHIBITS (JD-CL-28/JD-CL-28a)**	No
107.00	08/10/2015	D	**BRIEF** Respondent's Post-Hearing Legal Brief	No
108.00	08/10/2015	P	**BRIEF** Posttrial Brief of the Petitioner	No
109.00	08/18/2015	C	**ORDER** *RESULT:* Order 8/18/2015 HON ANTHONY TRUGLIA	No
109.05	08/18/2015	C	**MEMORANDUM OF DECISION** *RESULT:* Order 8/18/2015 HON ANTHONY TRUGLIA	No
109.10	08/18/2015	C	**JUDGMENT WITHOUT TRIAL FOR DEFENDANT** *RESULT:* HON ANTHONY TRUGLIA	No
110.00	09/08/2015	P	**APPEAL TO APPELLATE COURT**	No
111.00	03/17/2016	C	**JUDGMENT FILE**	No

Scheduled Court Dates as of 04/13/2016

DBD-CV15-6017272-S - MILLER, JANE v. DUNKERTON, THOMAS

#	Date	Time	Event Description	Status
No Events Scheduled				

Judicial ADR events may be heard in a court that is different from the court where the case is filed. To check location information about an ADR event, select the **Notices** tab on the top of the case detail page.

Matters that appear on the Short Calendar and Family Support Magistrate Calendar are shown as scheduled court events on this page. The date displayed on this page is the date of the calendar.

All matters on a family support magistrate calendar are presumed ready to go forward.

The status of a Short Calendar matter is not displayed because it is determined by markings made by the parties as required by the calendar notices and the civil or family standing orders. Markings made electronically can be viewed by those who have electronic access through the Markings History link on the Civil/Family Menu in E-Services. Markings made by telephone can only be obtained through the clerk's office. If more than one motion is on a single short calendar, the calendar will be listed once on this page. You can see more information on matters appearing on Short Calendars and Family Support Magistrate Calendars by going to the Civil/Family Case Look-Up page and Short Calendars By Juris Number or By Court Location.

Periodic changes to terminology that do not affect the status of the case may be made.
This list does not constitute or replace official notice of scheduled court events.

Disclaimer: For civil and family cases statewide, case information can be seen on this website for a period of time, from one year to a maximum period of ten years, after the disposition date. If the Connecticut Practice Book Sections 7-10 and 7-11 give a shorter period of time, the case information will be displayed for the shorter period. Under the Federal Violence Against Women Act of 2005, cases for relief from physical abuse, foreign protective orders, and motions that would be likely to publicly reveal the identity or location of a protected party may not be displayed and may be available only at the courts.

Exhibit 2

DOCKET NO.: DBD-CV-15-6017272-S	)	SUPERIOR COURT
JANE MILLER	)	JUDICIAL DISTRICT OF
	)	DANBURY
v.	)	AT DANBURY
THOMAS DUNKERTON	)	AUGUST 18, 2015

MEMORANDUM OF DECISION
RE: PLAINTIFF'S PETITION PURSUANT TO GENERAL STATUTES § 9-63

Before the court is a petition filed by the plaintiff, Jane Miller, a resident of the town of Brookfield, Connecticut, to have her name restored to the list of Republican electors in Brookfield. The plaintiff alleges that the defendant, Thomas Dunkerton, the Republican Registrar of Voters for the town of Brookfield, on or about April 23, 2015, unlawfully and improperly erased her name from the town's list of Republican electors. The defendant has filed an answer to the plaintiff's petition admitting that he removed her name from the enrollment list of the Brookfield Republican Party, but denying any improper actions on his behalf. The plaintiff petitions this court from the decision of the defendant and seeks a writ of mandamus compelling the defendant to restore her name to the enrollment list.

The plaintiff brings this petition on the following specific grounds. First, that the defendant "conducted a hearing where the evidence presented substantiates a finding which does not support the Defendant's actions." Second, that the "conduct of the hearing violated the Petitioner's right to due process of law." Third, that "the Defendant failed to establish a standard of conduct to qualify as a member of the Brookfield Republican Party and, as a result, the Petitioner has been prejudiced." Fourth, that "the accepted standard for membership in the Brookfield Republican Party allows active membership in other political parties and encourages members to run for political office on other political slates while enrolled in the Brookfield Republican Party." Fifth, that the "action of the Defendant holds Petitioner to a standard not required by others." Finally sixth, that General Statutes § 9-60 is unconstitutional both on its face and as applied by the defendant.

General Statutes § 9-63[1] provides an expedited summary appeal procedure for persons claiming

[1] General Statutes § 9-63 provides in relevant part: "Any elector whose name has been removed from an enrollment list in the manner provided in sections 9-60 and 9-61, and any elector whose application to have his name

CH: Calendar
Chipman, Mazzucco
Rptr 1255 8/18/15

109.05
8-18-15

to be aggrieved by a registrar's erasure or exclusion from a party enrollment list. Pursuant to § 9-63, the court held an evidentiary hearing on the petition on July 27, 2015, in which both parties appeared.

Having heard the testimony of the parties and reviewed the evidence presented in support of their respective positions, the court makes the following de novo findings:

1. The plaintiff in this action is a resident of Brookfield, Connecticut. She moved to Brookfield in 1992 and, in 2002, registered as a member of the Brookfield Republican Party.

2. In 2009 municipal elections, she ran successfully for a seat on the Brookfield Board of Education as a Republican. Prior to that election, the plaintiff was a loyal party member and worked actively on behalf of Republican candidates for election. While serving as an incumbent Republican member on the Board of Education, she remained an active and loyal party member.

3. In June of 2013, the plaintiff spoke with members of the Brookfield Republican Party's vacancy committee regarding the upcoming November 2013 election. The committee interviewed the plaintiff for one of the Republican vacancies on the Board of Education for that year, but chose not to give her a nomination. The plaintiff was informed on July 17, 2013 that she would likely not be nominated at the party caucus to be held later that month to stand for election to the Board of Education in November of 2013. The plaintiff attended the caucus on July 23, 2013, notwithstanding, hoping to receive a floor nomination to the Board of Finance from supporters.

4. Earlier that same day, July 23, 2013, the plaintiff filed a form SEEC 1 registering herself as an unaffiliated candidate for the Board of Finance for the 2013 election (Defendant's Ex. B), and certifying

---

placed upon an enrollment list has been refused, and who is aggrieved thereby, may, within ten days after such removal or refusal, bring a petition before any judge of the superior court, setting forth that the name of the petitioner has been unjustly or improperly removed from such list or excluded therefrom, as the case may be, and praying for an order directing such registrar . . . by whom such name was removed or excluded to restore such name or place the same upon such list. . . . Such petition shall be returnable not more than six days from the date thereof, and to the same shall be attached a citation commanding such registrar . . . in the name of the state to appear and show cause why such name should not be restored to such list or placed thereon. A true copy of such petition shall be served upon such registrar or deputy registrar at least four days before the return day thereof, and the judge before whom such petition is returnable shall assign the same for a hearing at the earliest practicable date; and if, upon due hearing thereof, he finds that the petitioner is entitled to relief, such judge shall issue an order directing such registrar or deputy registrar to forthwith restore the name of such elector to the list from which it was removed or to place the name of such elector upon the list applied for, as the case may be; and any registrar . . . who fails to obey such order shall be deemed guilty of contempt and may be fined not more than one hundred dollars."

under penalties of false statement that her campaign would be sponsored by the Brookfield Democratic Town Committee.

5. The Brookfield Democratic Party also held its nominating caucus on July 23, 2013. The plaintiff did not attend the Democratic caucus, but had been advised previously by members of the Democratic Party that she might receive the party's endorsement to run for the Board of Finance. The plaintiff learned either later that night or the following morning that she had been endorsed to run on the November 2013 ballot on the Democratic line (Defendant's Ex. A). On the following day, July 24, 2013, the plaintiff changed her party affiliation from Republican to unaffiliated (Plaintiff's Ex. 3, p. 2).

6. The plaintiff's name appeared on the November 5, 2013 ballot on the Democratic line (Defendant's Ex. E) for the Town of Brookfield Board of Finance. The plaintiff's name also appeared on campaign literature distributed by the Brookfield Democratic Party for the 2013 election (Defendant's Exhibits C & D). The plaintiff worked to promote her candidacy and the candidacies of the other Democratic nominees in the November 2013 election by, among other things, allowing Democratic Party lawn signs to be placed on her property and by distributing Democratic campaign literature outside polling places on election day (Plaintiff's Ex. 4).

7. The plaintiff did not prevail in her bid for a seat on the Board of Finance, losing instead to the Republican candidates.

8. On December 3, 2013, the plaintiff filed a party enrollment change form declaring her intention to be re-enrolled in the voter list of the Brookfield Republican Party (Plaintiff's Ex. 3, p. 1).

9. In January of 2015, the plaintiff attended a Republican Town Committee meeting.

10. In February of 2015, the plaintiff supported a Democratic candidate for state representative in a special election and also made the maximum financial contribution to his campaign allowed by law (Plaintiff's Ex. 4).

11. By letter dated March 19, 2015, and in accordance with General Statutes § 9-60,[2] the

[2] General Statutes § 9-60 provides in relevant part: "Whenever the registrar of voters of any political party, . . . , is of the opinion that any person on the enrollment list, or any person applying to be placed upon the enrollment list, of the political party which such registrar represents . . . is not affiliated with, or in good faith a member of, that political party and does not intend to support its principles or candidates, such registrar . . . shall cite such person to appear before him and the chairman of the town committee of such political party . . . to show cause why his name

defendant issued a citation to the plaintiff requesting her to appear before the Republican Registrar of Voters and the Brookfield Republican Town Committee Chairman, Matthew Grimes, Jr., to show cause as to why her name should not be erased from the Brookfield Republican Party enrollment list.

12. The plaintiff, through her counsel, objected to the manner of service of the citation. After consultation with defendant's counsel, however, the parties agreed to waive "any potential service of process issues," and re-scheduled the hearing for the evening of April 9, 2015 (Plaintiff's Ex. 4).

13. The plaintiff, represented by counsel, appeared at the hearing and spoke in opposition to the defendant's intention to erase her from the Republican Party enrollment list. Other persons also appeared at the hearing and spoke in support of, and in opposition to, the defendant's citation (Plaintiff's Ex. 1).

14. At the conclusion of the hearing, the defendant and Grimes found "reasonable proof" that the plaintiff had recently been "a candidate for office under the designation of another party." The defendant and Grimes found specifically that the plaintiff's name "was on the ballot exclusively as a Democrat and, had she been elected to office, Connecticut Law would have recognized her as a Democrat in that office." The defendant and Grimes also found that the plaintiff had "actively worked against the Republican Party's efforts," and that she had "been an ally of the Democratic Party." Citing General Statutes §§ 9-61[3] and 9-167a(g),[4] the defendant and Grimes concluded that the plaintiff

---

should not be erased or excluded from such enrollment list. Such citation shall be in writing and shall state the time when and place where such person shall appear, and shall be served upon or left at the usual place of abode of such person at least two days before the time fixed for such hearing upon such citation, which time shall not be less than one week before the next succeeding caucus or primary of such political party. . . . If, at any such hearing, it appears to such registrar and such chairman . . . that it is not the bona fide intention of such person to affiliate with, or that such person is not affiliating with, such political party and does not intend to support the principles or candidates of such party, his name may thereupon be erased or excluded from the enrollment list of such party.

[3] General Statutes § 9-61 provides: "Enrollment in any other political party or organization, active affiliation with any other political party or organization, knowingly being a candidate at any primary or caucus of any other party or political organization, or being a candidate for office under the designation of another party or organization, within a period of two years prior to the date of the notice as provided in section 9-60 shall be prima facie evidence that any elector committing any such act is not affiliated with, or in good faith a member of, and does not intend to support the principles or candidates of the party upon the enrollment list of which his name appears or in which his application for enrollment is pending; and, upon reasonable proof of the commission of any one of such acts, the name of any such elector may be stricken or excluded from such list and such erasure or exclusion shall be effective for a period of two years from the date of any such act."

[4] General Statutes § 9-167a (g) provides in relevant part: "For the purposes of this section, . . . any person whose candidacy for election to an office is solely as the candidate of a party other than the party with which he is enrolled shall be deemed to be a member of the party of which he is such candidate."

committed one or more of the acts within two years of the March 19, 2015 date in which the citation was originally issued, which served as prima facie evidence supporting the defendant's discretionary erasure or exclusion of the plaintiff from the enrollment list (Plaintiff's Ex. 4).

15. By letter dated April 23, 2015, the defendant notified the plaintiff of the decision to erase her name from the Brookfield Republican Party's enrollment list.

16. The plaintiff requested that her name be restored to the list, but her request was refused.

The court rules as follows on each of the grounds asserted in the plaintiff's petition for a writ of mandamus and other relief:

I. The plaintiff is aggrieved by the defendant's decision to remove her list from the enrollment list and by his refusal to honor her request to restore her name to the list. The plaintiff's petition, therefore, is properly before this court.

II. The evidence presented at the hearings held on April 23, 2015, and July 27, 2015 supports the finding that the plaintiff stood for office as a candidate for the Democratic Party in November of 2013. The evidence also supports the finding that the plaintiff actively affiliated herself with the Democratic Party within two years prior to the issuance of the March 19, 2015 citation.

In support of her petition, the plaintiff relies on two Connecticut Supreme Court cases, *In re Gilhuly's Petition*, 124 Conn. 271, 199 A. 436 (1938), and *Kiernan* v. *Borst*, 144 Conn. 1, 126 A.2d 569 (1956). *Gilhuly* and *Kiernan* both make clear that a trial court, when hearing a petition pursuant to § 9-63, hears the matter de novo, rather than acting as an appellate court with limited review. In *Gilhuly*, the Court held that "[§] 703 in effect provides for a special statutory proceeding in the nature of mandamus. In functioning thereunder a judge is exercising a judicial as distinguished from an administrative or executive power. This power is not dependent, however, upon his being engaged in an appellate review of the proceedings had before the registrar, but is exemplified in his original determination of what is the plaintiff's legal right to enrollment and whether this right has been violated." Id., 277.

The court in *Gilhuly* continued: "These statutes give rise to an unequivocal right in a qualified elector to be enrolled on the party list of his expressed choice upon his statement that he is not a member of or connected with any other political party. They further give him such right to have his name continued on that list as long as he chooses, unless and until it is no longer his intention to affiliate with such party and to support its principles and candidates. This right is neither dependent upon nor subject

to the will of the registrar and town committee chairman. Whether an elector shall be enrolled upon the party list rests no more within their discretion than does the determination of whether a hunter's license shall be granted under section 3110 of the General Statutes rests in that of the town clerk to whom application is made. The statute prescribes certain definite prerequisites to the granting of the request in each case, and requires compliance upon the official's part when these exist. The further provision in certain of the statutes quoted, that under specified circumstances the registrar and town committee chairman are to determine whether the prerequisites do exist, is not effective to enlarge their administrative duty into one involving an exercise of discretion and judgment." Id., 279-80.

In other words, the question before this court is whether the plaintiff meets the "prerequisites" for enrollment on a party list. If the court finds the answer to be in the affirmative, then the registrar has no discretion in the matter, and a writ of mandamus is appropriate to compel the registrar to honor the elector's wish and restore his or her name to the enrollment list. If the court finds the opposite, however, then a writ of mandamus is inappropriate in that instance because the registrar has discretion under § 9-60 to erase or exclude that person when, in the registrar's judgment, the person "is not affiliated with, or in good faith a member of, that political party and does not intend to support its principles or candidates."

"A writ of mandamus is an extraordinary remedy, available in limited circumstances for limited purposes. . . . It is fundamental that the issuance of the writ rests in the discretion of the court, not an arbitrary discretion exercised as a result of caprice but a sound discretion exercised in accordance with recognized principles of law." (Internal quotation marks omitted.) *Morris* v. *Congdon*, 277 Conn. 565, 569, 893 A.2d 413 (2006). "[I]n deciding the propriety of a writ of mandamus, the trial court exercises discretion rooted in the principles of equity . . . [M]andamus neither gives nor defines rights which one does not already have. It enforces, it commands, performance of a duty. It acts at the instance of one having a complete and immediate legal right; it cannot and it does not act upon a doubtful or a contested right . . . A party seeking a writ of mandamus must establish: (1) that the plaintiff has a clear legal right to the performance of a duty by the defendant; (2) that the defendant has no discretion with respect to the performance of that duty; and (3) that the plaintiff has no adequate remedy at law." (Citations omitted; internal quotation marks omitted.) *Stewart* v. *Watertown*, 303 Conn. 699, 711-12, 38 A.3d 72 (2012).

In *Kiernan*, the plaintiff successfully challenged the local Republican party registrar's decision to remove his name from the enrollment list. The plaintiff had been removed from the party enrollment list

after he promoted the candidacy of a Democratic nominee in a local election, and participated afterward in the Democratic Party's victory parade. The plaintiff sought to have his name restored, and the local Republican Party Registrar of Voters refused the request. After a hearing on the plaintiff's petition, the trial judge found that "[t]he plaintiff had the bona fide intention of affiliating with the Republican party. He was not affiliated with the Democratic party. He was supporting the principles and candidates of the Republican party and is entitled to have his name restored to the enrollment list of that party." *Kiernan* v. *Borst*, supra, 144 Conn. 3. On appeal the court held that these conclusions were warranted based on the facts found, and upheld the trial court's reversal of the registrar's action. Id., 6.

In contrast to the present case, however, the court in *Kiernan* noted that "the plaintiff had not committed any of the specific acts which under § 562d[5] would have created a presumption that he was not affiliated with the Republican party. He had not enrolled in another party. He had not been actively affiliated with any other party. The most he had done was to advocate the election of a single candidate of another party. He had not been a candidate for nomination by another party or a candidate on another party's ticket. It was therefore open to the trial judge to decide on all the evidence whether the plaintiff in good faith intended to affiliate with the Republican party." *Kiernan* v. *Borst*, supra, 144 Conn. 5-6.

In the present case, there is more than sufficient evidence from which the court can conclude that the plaintiff did commit specific acts under § 9-61 which constitute prima facie evidence supporting the defendant's discretionary erasure or exclusion of the plaintiff from the enrollment list. The plaintiff, by her own admission, did stand as a candidate for office under the designation of the Democratic Party in the November 2013 election, and actively affiliated with the Democratic Party within two years prior to the March 19, 2015 notice and citation. In the case of *Miner* v. *Marsh*, 102 Conn. 600, 129 A. 547 (1925), for example, a case involving a recount, the court held that "those [persons] appearing upon the Independent Republican ticket automatically separated themselves from the original Republican organization, each one of them by knowingly becoming 'a candidate for office . . . of another party or organization,' different from that to which each had formerly belonged." Id., 10. The evidence is clear in the present case that the plaintiff affiliated herself with the Democratic Party and stood for office on the local Democratic ticket two years before the March 19, 2015 letter, and is not in good faith a member of

[5] The predecessor statute to § 9-61.

the Brookfield Republican Party.

III. The court finds that the proceedings initiated against the plaintiff in accordance with § 9-60 et seq. did not violate her procedural rights to due process of law. The plaintiff clearly received advanced notice of the hearing, specific notice of the charges levied, and received an opportunity to be heard on the matter. The plaintiff was also represented by counsel at the hearing. Any possible defects in the citation itself or service of the citation were knowingly and voluntarily waived by the plaintiff and cannot form the basis of a collateral attack after conclusion of the hearing.

IV. At any hearing for a petition for relief under § 9-63, the burden of proof rests on the plaintiff to prove that his "unequivocal right . . to be enrolled on the party list of his expressed choice" has been violated. *In re Gilhuly's Petition*, supra, 124 Conn. 282. With respect to the third and fifth grounds asserted by the plaintiff in support of her petition, the court finds that insufficient evidence was produced from which the court can conclude that the defendant's actions were unlawful and improper. In the first instance, § 9-60 does not impose upon the defendant a burden of proof to establish by a preponderance of the evidence a specific "standard of conduct" before exercising his discretion to remove an elector from a party's enrollment list. Section 9-61 sets forth actions which a registrar can rely on in making the determination of whether a party member is not affiliated with the party or "does not intend to support the principles or candidates of the party," which are precisely the standards which the defendant and Grimes relied upon in rendering the decision.

V. With respect to the fifth ground asserted, i.e., that the defendant's actions hold the plaintiff to a standard not required of others, the plaintiff argues that she is a victim of selective enforcement in that she is being unfairly targeted by the defendant, and perhaps by the Brookfield Republican Town Committee, in retaliation for running on the Democratic ballot line and supporting the Democratic ticket in November of 2013. Part of the evidence presented in support of this contention was the defendant's concession on cross-examination that to the best of his knowledge, the plaintiff is the only person in recent memory to be the subject of a discretionary erasure. In the court's opinion, the defendant's failure to cite other persons in recent years for similar actions, without more, is insufficient evidence of unfair and discriminatory treatment or of malicious intent toward the plaintiff.

The other evidence offered in support of this contention is testimony elicited from the defendant and Grimes that other members of the Brookfield Republican Party have committed similar acts of

disloyalty to the party in recent years, and none of them have been erased from the party's enrollment list. The plaintiff offered evidence that Grimes himself in recent years had founded a separate, competing political party, A Brookfield Party, and was still listed as its agent at the time of the hearing. These actions notwithstanding, Grimes has never been the subject of a discretionary erasure. The plaintiff also offered evidence that two other persons ran against Republican nominees in the 2009 and 2013 municipal elections, either as unaffiliated candidates or as a member of A Brookfield Party, but have not been erased or excluded from the Republican Party.

In the court's opinion, the foregoing examples are insufficient proof of selective enforcement or arbitrary and capricious discrimination against the plaintiff. The mere fact that the defendant chose not to proceed, in accordance with § 9-60, against the two other individuals indicated does not lead ineluctably to the conclusion that the defendant acted with invidious intent toward the plaintiff. The plaintiff presented no specific evidence of discriminatory or retaliatory intent toward her. Furthermore, the court finds insufficient evidence of a pattern of illegal and improper conduct from which the court can draw an inference that the process is constitutionally flawed. The evidence on this point supports the defendant's contention that he simply exercised his statutory discretion to exclude the plaintiff from the enrollment list for acts indicating that she did not intend to support the party or its candidates.

The plaintiff further argues that the defendant applied a double standard to her, in that other Republican party members have received cross-endorsements in recent years and none have been cited pursuant to § 9-60. In response, the defendant argues that standing for election as a member of a different party is not the same as receiving a cross-endorsement, and this court agrees.[6] The plaintiff did not receive a cross-endorsement while standing for office as a Republican; the evidence clearly demonstrates she ran for office exclusively on the Democratic Party ballot line in 2013 against the Republican party nominees.

VI. The court considers next the question of the constitutionality of §§ 9-60 through 9-63. The plaintiff argues that the court should find that the statutory framework for discretionary removal of an

---

[6] The defendant cites a portion of the minority representation statute, § 9-167a (g), in support of this position. Subsection (g), however, by its very terms applies to cross-endorsements for determining minority representation. The court does not reach the question of whether the statute also applies to cross-endorsements in the context of discretionary erasure from voter enrollment lists.

elector from a party's enrollment list is unconstitutional on a number of grounds. Reduced to their essential elements, the plaintiff's arguments are as follows: (1) the statutory scheme for discretionary erasure or exclusion is unconstitutionally vague; (2) the statutes impermissibly burden the plaintiff's first amendment right of association; and (3) the statutes impermissibly burden the plaintiff's fundamental right to vote by preventing her from participating in the Republican primary.

With respect to the first argument, the plaintiff argues that §§ 9-60 and 9-61 are unconstitutional and void for vagueness under the first and fourteenth amendments to the United States constitution,[7] and Article First, §8, of the Connecticut constitution.[8] The plaintiff argues that her "First Amendment right to freedom of association is implicated by her removal from the party of her choice via § 9-61. Accordingly, the statute is subject to more exacting scrutiny." In support of this contention, the plaintiff cites *State* v. *Linares*, 232 Conn. 345, 655 A.2d 737 (1995), which stated that "[p]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply." (Internal quotation marks omitted.) Id., 355. The plaintiff argues that § 9-60 vests a party's local registrar and town chairman with the power to erase or exclude from their party's list any person who, in their opinion, has demonstrated that he or she "is not affiliated with, or in good faith a member of, that political party and does not intend to support its principles or candidates." This, according to the plaintiff, is an impermissibly vague standard that leaves "the ultimate determination of whether an individual intends to support the principles of a party, as well as the definition of those principles, . . . to the unfettered and biased discretion of the registrar - the very person who would have generated the citation in the first place . . . and the party committee chair, who is rarely a neutral party with respect to his views on the principles of

---

[7] The first amendment to the United States constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The fourteenth amendment, §1, provides in relevant part: " No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[8] Article First, § 8 of the Connecticut constitution provides in relevant part: "No person shall be . . . deprived of life, liberty or property without due process of law."

the party at issue." In other words, the hearing process of §§ 9-62 and 9-63 is constitutionally flawed because the statutes allow the registrar and the town chairman to sit in judgment on the very charging document that they themselves brought. In the plaintiff's case, "[r]espondent Dunkerton acted as both prosecutor and judge. His role in the hearing process was to determine the veracity of the very facts alleged in the citation. The other hearing officer, Grimes, was far from a neutral party, and was not obligated to adhere to any guidelines, other than those dictated by his own agenda, as to what constituted the principles of the Brookfield Republican Party." The plaintiff maintains that such an arrangement is inherently unfair and can only lead to examples of arbitrary and discriminatory enforcement. In short, the plaintiff argues that she has a fundamental right to belong to the Brookfield Republican Party and that any restrictions on that right must receive the same strict scrutiny applied to other laws that burden fundamental rights - that is, they must be the least restrictive means to achieve a compelling state interest.

The court respectfully disagrees with this analysis. First, it is important to note that courts have a "narrowly circumscribed role in political disputes" such as the one presently before this court. *Flewellyn* v. *Hempstead*, 47 Conn. App. 348, 350, 703 A.2d 1177 (1997). "Political parties generally are free to conduct their internal affairs free from judicial supervision. . . . This common law principle of judicial restraint, rooted in the constitutionally protected right of free association, serves the public interest by allowing the political process to operate without undue interference. . . . Because the nomination and endorsement of candidates for elective office are among the primary functions of political parties, [j]udicial intervention in [the selection of candidates] traditionally has been approached with great caution and restraint." (Citations omitted; internal quotation marks omitted.) Id. The constitutionally-protected right of association asserted by the plaintiff, in other words, applies equally to the defendant.

Second, strict scrutiny is not the proper standard to apply. See, e.g., *Mazzucco* v. *Verderame*, Superior Court, judicial district of New Haven, Docket No. CV-96-0382136-S (March 22, 1996, *Booth, J.*) ("When a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the first and fourteenth amendment rights of voters, the state's important regulatory interests are generally sufficient to justify the restrictions. . . . The court acknowledges that strict judicial scrutiny is no longer the proper standard."). The plaintiff does not have a fundamental and unlimited right to belong to the political party of her choice. Nor does she have an unlimited right to be a candidate of a certain party. *Campbell* v. *Bysiewicz*, 242 F. Supp. 2d 164, 171 (2003). The court certainly agrees that voting in

general is a fundamental right, but the plaintiff's exclusion from the Brookfield Republican Party's enrollment list does not disenfranchise her from voting in the general election. It precludes her from participating in the Republican Party primaries and caucuses. The court is not aware of, nor does the plaintiff cite to, any authority for the proposition that participation in a party primary or caucus is a fundamental right. In fact, there is authority which supports the opposite. See, e.g., *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 357-58, 358, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997) (Upholding state law prohibiting a candidate from appearing on the ballot as the candidate of more than one party reasoning that "[t]he First Amendment protects the rights of citizens to associate and to form political parties for the advancement of common political goals and ideas," but that states "may, and inevitably must, enact reasonable regulations for parties, elections, and ballots to reduce election- and campaign-related disorder."). "Regulations imposing severe burdens on [candidates' and parties'] rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review." Id., 358.

In this regard, the plaintiff's reliance on *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986), is misplaced. The holding in *Tashjian* affirmed a lower court ruling that Connecticut's closed primary statute impermissibly interfered with a political party's right to define its associational boundaries. In 1955, Connecticut passed a "closed primary" law which prevented anyone from participating in a party primary who was not registered as a member of that party. The state Republican Party sought to allow independent and unaffiliated voters to participate in the party primaries. In 1984, the Connecticut state Republican Party adopted a party rule allowing independent and unaffiliated voters to participate in their primaries. Tashjian, then the Secretary of State of Connecticut, brought suit against the state Republican Party to enforce compliance with the closed primary law and prevent participation in primaries and party caucuses by voters registered as unaffiliated. The Supreme Court ruled in favor of the state Republican Party, concluding that "§ 9-431 impermissibly burdens the rights of the Party and its members protected by the First and Fourteenth Amendments." Id., 225. But the rights at issue in *Tashjian* were the rights *of the party* to expand and define its membership, not the rights of a non-member seeking to vote in a party primary. In fact, the Supreme Court in *Tashjian* directly addressed this issue and expressly recognized the right of a political party to determine its own membership qualifications. The Court held that "[i]t is this element of potential interference with the

rights of the Party's members which distinguishes the present case from others in which we have considered claims by nonmembers of a party seeking to vote in that party's primary despite the party's opposition. In this latter class of cases, the nonmember's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications. . . . Similarly, the Court has upheld the right of national political parties to refuse to seat at their conventions delegates chosen in state selection processes which did not conform to party rules. . . . These situations are analytically distinct from the present case, in which the Party and its members seek to provide enhanced opportunities for participation by willing nonmembers. Under these circumstances, there is no conflict between the associational interests of members and nonmembers." (Citations omitted.) Id., 215 n. 6.

The court finds that the plaintiff has not carried her burden by a preponderance of the evidence that the defendant's actions in erasing her name from the enrollment list of the Brookfield Republican Party were unlawful and improper, and that she has a clear right to be restored to the party's enrollment list. The court finds sufficient evidence that the plaintiff is not in good faith a member of the Brookfield Republican Party. Her petition for a writ of mandamus is, therefore, respectfully denied.

By the Court

Anthony D. Truglia, Jr., J.

Exhibit 3

DOCKET NO. CV-15-6017272-S	:	SUPERIOR COURT
JANE MILLER	:	JUDICIAL DISTRICT OF DANBURY
VS.	:	AT DANBURY
THOMAS DUNKERTON	:	AUGUST 10, 2015

POSTTRIAL BRIEF OF THE PETITIONER, JANE MILLER

Pursuant to Practice Book § 5-1 and the order of the Court, the Petitioner, Jane Miller, submits this Posttrial Brief following trial on July 27, 2015. For the reasons that follow, the Court should issue a writ of mandamus or order directing the Respondent to restore the name of the Petitioner to the enrollment list of the Brookfield Republican Party.

GOVERNING STATUTES

This is a special statutory proceeding governed by General Statutes §§ 9-60 through 9-63, which govern the discretionary erasure or exclusion from a party enrollment list. Because these statutes are the only basis on which the Respondent relies to support his decision to expel the Petitioner from the Republican Party, they are set forth below to provide the proper context for his decision and the Court's analysis thereof.

General Statutes § 9-60,[1] which is entitled "Discretionary erasure or exclusion from enrollment list for lack of good-faith party affiliation; citation and hearing,"

[1] General Statutes § 9-60 provides: "Whenever the registrar of voters of any political party, or any deputy registrar thereof in cases where it is provided by law that the deputy registrar shall act in the place and stead of the registrar, is of the opinion that any person on the enrollment list, or any person applying to be placed upon the enrollment list, of the political party which such registrar or deputy registrar represents is not affiliated with, or in good faith a member of, that political party and does not intend to support its principles or candidates, such registrar or deputy registrar, as the case may be, shall cite such person to appear before him and the chairman of the town committee of such political party, or before him and the chairman of the same party committee of the ward or voting district, if in a town divided into wards or voting districts; or,

provides a statutory basis by which the registrar of voters in a town may erase or exclude an individual from a party enrollment list. According to the statute, the registrar may do so if he is of the opinion that such individual either (1) is not affiliated with, or (2) not a good faith member of the political party which that registrar represents, and does not intend to support its principles or candidates. The statute does not permit immediate erasure or exclusion, but requires the registrar to cite such person to appear before him and the chairman of the town committee of the political party at issue to show cause why the individual should not be erased or excluded from the enrollment list. The statute then provides that if "it appears to such registrar and such chairman . . . that it is not the bona fide intention of such person to affiliate with, or that such person is not affiliating with, such political party and does not intend to support the principles or candidates of such party, his name may thereupon be erased or excluded from the enrollment list of such party."

General Statutes § 9-61,[2] which is entitled "Prima facie evidence supporting discretionary erasure or exclusion," provides a list of the acts which may be used to

---

where there is no such chairman, or in the absence or disability of such chairman, before him and any enrolled member of the same political party chosen by such registrar or deputy registrar, to show cause why his name should not be erased or excluded from such enrollment list. Such citation shall be in writing and shall state the time when and place where such person shall appear, and shall be served upon or left at the usual place of abode of such person at least two days before the time fixed for such hearing upon such citation, which time shall not be less than one week before the next succeeding caucus or primary of such political party. The person leaving or serving such citation shall make a record of the date and time of leaving or serving the same and shall make a return to the registrar or deputy registrar, within thirty-six hours thereafter, of the date and time when such citation was left or served. If, at any such hearing, it appears to such registrar and such chairman or party member or to such deputy registrar and such chairman or party member, as the case may be, that it is not the bona fide intention of such person to affiliate with, or that such person is not affiliating with, such political party and does not intend to support the principles or candidates of such party, his name may thereupon be erased or excluded from the enrollment list of such party. If any elector upon whom a citation to appear, as herein provided, has been served fails to appear at the time and place fixed for such hearing, such registrar or deputy registrar may take such action as to the erasure or exclusion of the name of such elector as the facts warrant."

[2] General Statutes § 9-61 provides: "Enrollment in any other political party or organization, active affiliation with any other political party or organization, knowingly being a candidate at any primary or

support erasure or exclusion from a party list: (1) enrollment in any other political party or organization; (2) active affiliation with any other political party or organization; (3) knowingly being a candidate at any primary or caucus of any other party or political organization; and (4) being a candidate for office under the designation of another party or organization. The statute provides that if any elector commits any of the acts within two years of the issuance of a citation under § 9-60, it constitutes prima facie evidence that such elector is not affiliated with, or in good faith a member of the party in which she is enrolled or is for which she is applying for enrollment, and does not intend to support the principles or candidates of such party. Upon reasonable proof of the commission of any one of the enumerated acts, the statute permits (but not requires) erasure or exclusion from the party list for a period of two years from the date of any such act.

General Statutes § 9-62,[3] entitled "Hearings concerning discretionary erasure or exclusion," governs the procedure of the hearing. It provides the elector at issue the right

---

caucus of any other party or political organization, or being a candidate for office under the designation of another party or organization, within a period of two years prior to the date of the notice as provided in section 9-60 shall be prima facie evidence that any elector committing any such act is not affiliated with, or in good faith a member of, and does not intend to support the principles or candidates of the party upon the enrollment list of which his name appears or in which his application for enrollment is pending; and, upon reasonable proof of the commission of any one of such acts, the name of any such elector may be stricken or excluded from such list and such erasure or exclusion shall be effective for a period of two years from the date of any such act. The same procedure as to notice to appear thereon, return and hearing shall be followed as provided in section 9-60. If, after full hearing, such registrar and chairman or party member or such deputy registrar and chairman or party member, as the case may be, find that the name of any such elector has been wrongfully or improperly stricken or excluded from such list, such name shall be forthwith placed upon the enrollment list."

[3] General Statutes § 9-62 provides: "At any hearing provided for in sections 9-60 and 9-61, any elector upon whom a citation or notice as therein provided has been served and any person offering himself as a witness shall be sworn; and all registrars and deputy registrars are authorized to administer, for that purpose, the oath provided for witnesses. Any person cited to appear before any registrar or deputy registrar under any of the provisions of said sections shall have the right to appear either in person or by attorney; and, when no witnesses are present at any such hearing to testify in favor of the removal of the name of an elector from any list on which the same appears, or against placing the name of an elector upon an enrollment list, or against the restoration of the name of an elector to an enrollment list from which the name of such elector has been removed or excluded, the registrar or deputy registrar before whom the hearing is held shall make a statement of facts in his possession, showing why the name of any such elector should be erased from such enrollment list or why it should not be placed upon the enrollment list as

to appear either in person or by attorney, and that when no witnesses are present at any such hearing to testify in favor or against removal, exclusion, or restoration, the registrar "shall make a statement of facts in his possession, showing why the name of any such elector should be erased from such enrollment list or why it should not be placed upon the enrollment list . . . ."

Finally, General Statutes § 9-63,[4] entitled "Court appeal of discretionary erasure or exclusion," governs the applicable procedure in the present action. It provides that any elector whose name has been removed from an enrollment list pursuant to §§ 9-60 and 9-61 may bring a petition to the Superior Court "setting forth that the name of the petitioner has been unjustly or improperly removed from such list or excluded therefrom . . . and praying for an order directing [the] registrar . . . to restore such name or place the same upon such list." The statute further provides that "if, upon due hearing thereof, [the Court] finds that the petitioner is entitled to relief, [it] shall issue an order directing such registrar . . . to forthwith restore the name of such elector to the list from which it was

---

requested by the applicant or why such name was wrongfully or improperly stricken or excluded from the enrollment list upon which it appeared."

[4] General Statutes § 9-63 provides: "Any elector whose name has been removed from an enrollment list in the manner provided in sections 9-60 and 9-61, and any elector whose application to have his name placed upon an enrollment list has been refused, and who is aggrieved thereby, may, within ten days after such removal or refusal, bring a petition before any judge of the superior court, setting forth that the name of the petitioner has been unjustly or improperly removed from such list or excluded therefrom, as the case may be, and praying for an order directing such registrar or deputy registrar by whom such name was removed or excluded to restore such name or place the same upon such list. A recognizance shall be attached to the petition, with proper surety, in a sum not less than fifty dollars, conditioned that the petitioner will prosecute such action to effect and pay all proper costs of the adverse party in case he fails therein. Such petition shall be returnable not more than six days from the date thereof, and to the same shall be attached a citation commanding such registrar or deputy registrar in the name of the state to appear and show cause why such name should not be restored to such list or placed thereon. A true copy of such petition shall be served upon such registrar or deputy registrar at least four days before the return day thereof, and the judge before whom such petition is returnable shall assign the same for a hearing at the earliest practicable date; and if, upon due hearing thereof, he finds that the petitioner is entitled to relief, such judge shall issue an order directing such registrar or deputy registrar to forthwith restore the name of such elector to the list from which it was removed or to place the name of such elector upon the list applied for, as the case may be; and any registrar or deputy registrar who fails to obey such order shall be deemed guilty of contempt and may be fined not more than one hundred dollars."

removed or to place the name of such elector upon the list applied for, as the case may be . . . ."

PROPOSED FINDINGS OF FACT

The Petitioner is a resident of Brookfield, Connecticut, and dedicated supporter of Republican principles. The Respondent, Thomas Dunkerton, is the Republican Registrar of Voters for the Town of Brookfield. Prior to the events giving rise to this case, she had been a registered Republican for many years. In 2009, she was nominated by the Brookfield Republican Party to run for the Board of Education. She was elected and served a four-year term.

In 2013, she sought the Republican nomination for her seat on the Board of Education in Brookfield. However, she was not endorsed or nominated by the Brookfield Republican Party at the Republican Caucus on July 23, 2013, which she attended as a Republican. The Brookfield Democratic Party subsequently endorsed her as a candidate for the Board of Finance, but she was not nominated at its caucus. Rather, she was appointed to fill a ballot vacancy. See testimony of Howard Lasser. She then changed her party affiliation to "unaffiliated" effective July 24, 2013, in order to run for the position. Petitioner's Exhibit 3. This act did not constitute grounds for exclusion from the Republican Party from which she had resigned.[5] She was not elected for the position, and never changed her party affiliation to Democrat. Shortly after the election, the Petitioner sent a request to change her party affiliation back to Republican. Petitioner's Exhibit 3. The Respondent did not attempt to exclude her from the Brookfield Republican Party, but accepted her request, even initialing the form personally. Id.

[5] See Section II, infra.

Having decided to exact a belated punishment on the Petitioner more than a year after she ran for the Board of Finance position, the Respondent issued a citation dated March 19, 2015. A hearing on the citation was scheduled for March 26, 2015, before the Respondent and the Chairman of the Brookfield Republican Town Committee, Matthew Grimes. The hearing was later rescheduled for and held on April 9, 2015, at the Brookfield Town Hall.[6]

On or about April 20, 2015, Grimes and Dunkerton issued an unsigned and undated written "decision" on whether the Petitioner should be removed from the Republican party list.[7] Grimes and Dunkerton purportedly found "reasonable proof" of two acts for which the Respondent cited the Petitioner: (1) she was "a candidate for office under the designation of another party," i.e., the Democratic Party; and (2) she "actively affiliated" with the Democratic Party. They did not find that she had committed the third act for which she was cited by the Respondent, "knowingly being a candidate at any primary or caucus of another party," and did not address that ground further. In accordance with their decision, the name of the Petitioner was removed from the Republican Enrollment list on April 23, 2015. For the reasons that follow, such removal was improper and in violation of the Petitioner's constitutional rights to freedom of association and due process.

[6] Grimes and Dunkerton originally wanted to make the hearing closed to the public, but later capitulated to opening the hearing to all individuals who had requested to speak at the hearing. See Petitioner's Exhibit 1.
[7] Dunkerton referred to this decision as an "affidavit" during his testimony.

ARGUMENT

I. The Statutory Scheme for Discretionary Erasure or Exclusion from a Party Enrollment List is Unconstitutional As Applied to the Petitioner

While "administration of the electoral process is a matter that the Constitution largely entrusts to the States . . . in exercising their powers of supervision over elections and in setting qualifications for voters, the States may not infringe upon basic constitutional protections." (Footnote omitted.) Kusper v. Pontikes, 414 U.S. 51, 57 (1973). As the United States Supreme Court has made clear, "unduly restrictive state election laws may so impinge upon freedom of association as to run afoul of the First and Fourteenth Amendments." Id.

A. General Statutes § 9-61 is unconstitutionally vague as applied

As applied to the Petitioner, § 9-61 is void for vagueness under the First and Fourteenth Amendments to the United States Constitution and Article First, § 8, of the Connecticut Constitution.[8] The void for vagueness doctrine is a procedural due process concept that originally was derived from the guarantees of due process contained in the fifth and fourteenth amendments to the United States constitution." (Internal quotation marks omitted.) In re Angel R., 157 Conn. App. 826, 2015 WL 3561257, *6 (2015). "[T]o demonstrate that [a statute] is unconstitutionally vague as applied . . . [the challenger must typically] demonstrate that [she] had inadequate notice of what was prohibited or that [she was] the victim of arbitrary and discriminatory enforcement." Id. However, because "[t]he right to associate with the political party of one's choice is an

[8] The First Amendment to the United States Constitution provides in relevant part: Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. The Fourteenth Amendment to the United States Constitution, § 1, provides in relevant part: "No state . . . shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Article First, § 8 of the Connecticut Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty or property without due process of law."

integral part of this basic constitutional freedom"; Kusper v. Pontikes, 414 U.S. at 56-57; the Petitioner's First Amendment right to freedom of association is implicated by her removal from the party of her choice via § 9-61.[9] Accordingly, the statute is subject to more exacting scrutiny. State v. Linares, 232 Conn. 345, 355 (1995) ("[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If . . . the law interferes with the right of free speech or of association, a more stringent vagueness test should apply." [Internal quotation marks omitted.]).

Regardless of any finding as to whether the individual sought to be removed from a political party commits any of the prima facie acts of disloyalty, § 9-60 requires a finding that the individual sought to be removed "does not intend to support its principles or candidates." In other words, the statutes governing the rights of electors and the duties of registrars "give rise to an unequivocal right in a qualified elector to be enrolled on the party list of his expressed choice . . . unless and until it is no longer his intention to affiliate with such party and to support its principles and candidates." In re Gilhuly, 124 Conn. 271, 279 (1938); see also Kiernan v. Borst, 144 Conn. 1, 5 (1956) ("[t]he statutes relating to the preparation of party enrollment lists by the registrars . . . make it plain that any elector has a legal right to be enrolled on the list of the party of his choice so long as he in good faith intends to affiliate with that party").

Therefore, the ultimate determination of whether an individual intends to support the principles of a party, as well as the definition of those principles, is left largely to the unfettered and biased discretion of the registrar – the very person who would have generated the citation in the first place. The other decisionmaker is the party committee

[9] See also Connecticut Constitution, Article First, §§ 2, 4, 5, and 14.

chair, who is rarely a neutral party with respect to his views on the principles of the party at issue. Thus, notwithstanding the enumerated acts of disloyalty in § 9-61, any hearing must necessarily involve a determination of the principles of the party from which a respondent's expulsion is sought. But pursuant to the statutory scheme, the registrar who initiated the citation claiming a certain individual did not adhere to party principles is not merely a witness as to what these principles are, but conclusively sets them based on whatever criteria he wishes – no matter how arbitrary or subjective. The vagueness of the statute and the subjectivity of its enforcement is highlighted by the language only requiring the registrar to be "of the opinion" that the respondent does not adhere to such principles to justify expulsion.

This case is a perfect example of how this statutory scheme can be exploited for the purpose of purging party members against whom the registrar and town committee chair are prejudiced. As was clearly demonstrated by the April 9, 2015 hearing, this scheme almost invariably leads to arbitrary and discriminatory enforcement repugnant to the well-established right to freely associate with the party of one's choice. Respondent Dunkerton, as Republican Town Registrar, acted as both prosecutor and judge. His role in the process was to determine the veracity of the very facts he alleged in his citation. The other hearing officer, Grimes, was far from a neutral party, and was not obligated adhere to any guidelines, other than those dictated by his own agenda, as to what constituted the principles of the Brookfield Republican Party.

There are several examples of arbitrary and/or discriminatory enforcement before the Court. Grimes himself testified that he was a founding member of a completely separate political party (A Brookfield Party) just a few years prior, and was still listed as

an agent of that party at the time of trial. Not surprisingly, no erasure proceedings were pursued against Grimes. There was testimony that that another previous member of A Brookfield Party and member of the Republican Town Committee, Kevin McCaffrey, ran for the Board of Assessment Appeals as a member of A Brookfield Party against a Republican candidate in the *very same 2013 election* in which the Petitioner ran for a Board of Finance Position. No attempt was made to expel him from the party. Grimes also testified that Ernesto Nepomuceno ran for First Selectmen as an unaffiliated candidate in 2009 against William Tinsley, the Republican Candidate for First Selectman. No attempt was made to expel Nepomuceno from the Republican Party either. To the contrary, he was rewarded with a seat on the Republican Town Committee.

The only logical conclusion from this evidence is that the Petitioner was expelled in an arbitrary and discriminatory manner in an attempt to purge certain members from the Republican Party. This conclusion is further supported by the lack of any reference to the Brookfield Republican Party's relationship with A Brookfield Party in the Dunkerton and Grimes decision, despite significant evidence of the same. Accordingly, the statutory scheme used by the Respondent to expel the Petitioner from the Brookfield Republican Party is unconstitutionally vague as applied, and in violation of her rights under the First and Fourteenth Amendments to the United States Constitution and Article First, § 8, of the Connecticut Constitution.

B. The hearing held by Grimes and Dunkerton violated the Petitioner's constitutional right to procedural due process

In addition to vagueness, § 9-61 fails to meet minimum procedural due process standards. A prior version of § 9-61 was held unconstitutional on the grounds that it was unconstitutional on grounds of due process, freedom of association, and/or equal

protection.[10] See General Statutes (Rev. to 1996) § 9-61; Mazzucco v. Verderame, Superior Court, Docket No. CV-96-0382136-S, 1996 WL 166732 (Conn. Super. March 22, 1996) (16 Conn. L. Rptr. 364); Fand v. Legnard, No. 31 60 63, 1994 WL 613423 (Oct. 31, 1994) (12 Conn. L. Rptr. 592); Mandanici v. Fischer, Superior Court, judicial district of Fairfield, Docket No. 21 36 18 (February 22, 1984, *Berdon, J.*) (10 Conn. Law Trib. July 2, 1984, p. 16).[11]

In Mazzucco, 20 enrolled Democrats in the Town of East Haven were removed from the enrollment list of the Democratic Party of the town by the defendant Registrar of Voters on the basis that after losing a primary, they ran in an election on the ballot under the designation of a different party known as the "Better Government Party." Id. at *1. The court ordered their names restored to the list, concluding that a previous version of § 9-61, which provided for the mandatory disaffiliation of a person whose name appears on a ballot label under a party designation other than that of the party in which he is an enrolled member, is unconstitutional. Id. at *4. Although the court found the statute unconstitutional in that it violated the plaintiffs' freedom of association, it did so on the ground that the statute created an irrebuttable presumption of party disloyalty, and did not require a hearing to test whether all the facts and circumstances support a conclusion that the plaintiffs were not good faith members or did not intend to support the principals or candidates of the party. Id. at *2.

---

[10] Between 1967 and 1997, General Statutes § 9-61 included the following sentence: "If the name of any elector appears on the ballot label at an election only under a party designation other than that of the party with which he is enrolled, whether such elector was nominated by a major or minor party or by nominating petition, such name *shall be removed from the enrolment list for a period of two years* from the date of such election after which time he may apply for enrolment in said party." (Emphasis added.) General Statutes (Rev. to 1996) § 9-61; Public Act 67-902, §2; Public Act 97-154, § 10; Mazzucco v. Verderame, Superior Court, Docket No. CV-96-0382136-S, 1996 WL 166732 (Conn. Super. March 22, 1996) (16 Conn. L. Rptr. 364). Thus, prior to such revision, it not only permitted but *required* erasure, without a hearing, in certain circumstances. General Statutes (Rev. to 1996) § 9-61.

[11] A copy of the Mandanici decision as published in the Connecticut Law Tribune is attached hereto.

The court in Mandanici reached a similar result on freedom of association grounds. There, then judge Berdon found that the state had no compelling interest in punishing a party member for running the ticket of another party. The plaintiff there was an enrolled member of the Democratic Party of Bridgeport for twenty years prior to the decision. Id. at 16. The plaintiff was nominated and elected as a Democrat to office in 1975, 1977, and 1979. After being defeated for Democratic nomination in 1981 and 1983, the plaintiff was nominated to fill a vacancy for candidacy by the "Taxpayers Party" after another individual withdrew. Id. On election day, the plaintiff appeared on the official ballot for Bridgeport as a candidate for mayor under the Taxpayers Party label. Id. He continued until that day to be an enrolled member of the Democratic Party of Bridgeport. After losing the election to a Republican, the chairman of the Bridgeport Democratic Town Committee demanded that he be removed from the list, and the Democratic registrar did so. Id.

Judge Berdon first highlighted the importance of the fundamental right to freedom of association under the United States and Connecticut constitutions.[12] Id. at 17. Applying strict scrutiny, the court held that the applicable version of § 9-61 was unconstitutional in violation of the right to freedom of association. The court noted that in contrast to a prohibition on running for office under another party label for a reasonable period of time, the erasure of the plaintiff's name from the enrollment list completely severed his association with the Democratic party, disenfranchising him from voting in all Democratic caucuses, elections for party officers, and national primaries including those for President of the United States and United States Representative. Id. The court opined that the only conceivable reason for the mandatory disaffiliation provision was to

[12] See Connecticut Constitution, Article First, §§ 2, 4, 5, and 14.

punish disloyal members who run for office under a different party label, and that "punishment is not a legitimate state purpose for substantially infringing upon the plaintiff's associational rights." Id. Finally, relying on Kusper v. Pontikes, 414 U.S. at 59-60, the court stated that "[i]t is doubtful whether any purpose discussed in this opinion could justify the interference with a person's associational rights to vote for a two-year period in local, state or federal primaries." Mandanici at 18; see also Nagler v. Stiles, 343 F. Supp. 415, 418 (D.N.J. 1972) (statutes requiring two successive primaries to elapse before voter may change his party affiliation unconstitutional as being patently over-broad in scope).

In Fand, the plaintiff argued that a previous version § 9-61 violated his rights to procedural due process, freedom of association, and equal protection, and sought injunction blocking his erasure from the enrollment list of the Republican Party by the Republican Registrar of Voters of the Town of Bethel. Id. at *1. In analyzing the procedural due process ground, the court held that the irrebuttable presumption of party disloyalty created by § 9-61 rendered it unconstitutional. Id. at **2-4. It also found a violation of the right to freedom of association in that the mandatory erasure statute was not narrowly drawn to advance a compelling state interest, and a violation of equal protection on the ground that it was not the least restrictive method to achieve state interests in preserving the integrity of elections. Id. at *11.

Although the primary provision at issue in these cases provided for mandatory erasure without a hearing, the fact that the statutory scheme provides the petitioner with essentially a symbolic hearing before Dunkerton and Grimes does not satisfy due process, especially when the Petitioner's fundamental right of association was put at issue. In

order to satisfy due process, the Petitioner must have been provided notice and an opportunity to be heard "***at a meaningful time and in a meaningful manner***." (Emphasis added; internal quotation marks omitted.) Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

Consequently, the mere fact that a hearing was held does not establish the constitutionality of § 9-61 as applied to the Petitioner. Rather, the procedural due process analysis is inherently flexible and fact-bound, and calls for "such procedural protections as the particular situation demands." (Internal quotation marks omitted.) Sassone v. Lepore, 226 Conn. 773, 779 (1993). "The constitutional requirement of procedural due process thus invokes a balancing process that cannot take place in a factual vacuum." Id. Under both Connecticut and federal precedent, courts balance three factors: (1) the risk of an erroneous deprivation of the interest at issue; (2) the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Id. at 781.

"[A]t the core of due process protection is the requirement of a fair and impartial decision-maker. Clisham v. Board of Police Commissioners, 223 Conn. 354, 355 (1992)." Yankee Gas Co. v. Meriden, Superior Court, Complex Litigation, Docket No. X07-CV-980072559-S, 2000 WL 1005607, at *3 (June 30, 2000). A token hearing by the very individual who levied the charges against the Petitioner in the first place, along with a party leader leading an attempted purge of any dissent in the party, does ***not*** satisfy this standard. The decision on the hearing establishes that "the adjudicator [Dunkerton] ha[d] prejudged adjudicative facts that are in dispute." Id.; Petitioner's Exhibit 4. This fact

alone justifies restoration of the Petitioner's status, as erasure requires the agreement of both the registrar and party chairman. General Statutes § 9-60 ("if, at any such hearing, it appears to such registrar *and* such chairman or party member . . . ." [emphasis added]). Nevertheless, any reasonable observer would conclude that neither Dunkerton nor Grimes were fit to fill the role of neutral decisionmaker; the trial records clearly reflect that each of them impermissibly "adjudged the facts as well as the law of a particular case in advance of hearing it." Clisham v. Board of Police Commissioners, 223 Conn. at 355.

The fact that the erasure hearing was conducted by two heavily biased decisionmakers makes the risk of an erroneous deprivation of the Petitioner's constitutional rights much greater. More so, adding to this risk is the vague "reasonable proof" standard used by Dunkerton and Grimes, which is only used in a few other statutes primarily related to commercial and consumer matters. See, e.g., General Statutes §§ 42a-9-406 (UCC Article 9); 42-247 (consumer rent-to-own agreements); 42-411 (consumer leases). Although this rarely utilized standard is not well-defined under Connecticut law, it appears to be used in contexts where only one person is submitting evidence, as opposed to situations in which a factfinder is analyzing potentially conflicting evidence from adversaries. In any event, it is insufficient to protect fundamental constitutional rights of political association. See In re Jason R., 306 Conn. 438, 465 (2012) (right to make child-rearing decisions is fundamental right protected by the Fourteenth Amendment to the United States Constitution requiring at least "clear and convincing" burden of proof commensurate with importance of that right).

Moreover, our Supreme Court has held that "to ensure that fundamental rights are protected, the burden of proof is always on the party seeking to interfere with that right."

Id. This bears on the second prong of the due process test, which looks to the procedures used, and the probable value, if any, of additional or substitute procedural safeguards. Here, instituting a higher burden of proof would have benefitted the Petitioner. Additionally, the legislature could have enacted further procedural safeguards to ensure the Petitioner's right to a fair and impartial decisionmaker was not violated.

With respect to the third prong of the test, the state's interest in having the hearing conducted as set forth in § 9-61 is minimal, and could be adequately protected by additional safeguards without eliminating all remedies for the removal of party imposters or saboteurs. See Fand v. Legnard, No. 31 60 63, 1994 WL 613423, at *4 (finding previous version of § 9-61 unconstitutional because of other "reasonable and practicable means of establishing the facts upon which the interest asserted by the defendant is premised"). Dunkerton and Grimes are far from the best, and certainly not the *only* individuals competent to adjudicate the right of the Petitioner to freely associate with the party of her choice, and any interest the state has preserving the integrity of political parties could be effectuated through more meaningful proceedings by neutral factfinders.

C. The Petitioner was deprived of her constitutional right to freedom of association

"The freedom of association protected by the First and Fourteenth Amendments includes partisan political organization. . . . The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." (Citation omitted; internal quotation marks omitted.) Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 214 (1986).

First, in order to determine the proper standard of review, a court must make a realistic assessment of the extent to which the statutory scheme at issue burdens First

Amendment rights by assessing the "character and magnitude" of the asserted injury protected by those rights. Gonzalez v. Surgeon, 284 Conn. 573, 588-89 (2007). If such an assessment yields the conclusion that the scheme lightly or even moderately burdens such rights, a court must apply a "relaxed standard of review, according to which the restrictions generally are valid so long as they further an important state interest." (Internal quotation marks omitted.) Id. "On the other hand, if [the court] conclude[s] that a law imposes severe burdens, [it must] apply strict scrutiny, which requires that the law be necessary to serve a compelling state interest." Id.

In Kusper v. Pontikes, 414 U.S. at 58, an individual challenged the constitutionality of an Illinois statute prohibiting a person from voting at a primary if such person has voted at a primary of another political party within preceding 23 months. The United States Supreme Court held that the statute "substantially restrict[ed] an Illinois voter's freedom to change his political party affiliation." Id. at 57. It noted that a restriction on the freedom of association need not be absolute to violate the First and Fourteenth Amendments, but need only constitute a "substantial restraint" or "significant interference" with constitutionally protected associational rights. Id. at 58. Thus, it held that "[w]hile the Illinois statute did not absolutely preclude Mrs. Pontikes from associating with the Democratic party, it did absolutely preclude her from voting in that party's 1972 primary election." Id.

In commenting on the applicable standard of review, the court held: "As our past decisions have made clear, a significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest. . . . For even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict

constitutionally protected liberty. . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms. . . . If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." (Citations omitted; internal quotation marks omitted.) Id.

Here, the statutory scheme set forth in General Statutes § 9-60 et seq. similarly encroaches upon associational freedom and cannot be justified upon a mere showing of a legitimate state interest. Like in Kusper, it provides a two-year restriction on voting rights. Here, however, the interest is even more significant since the Petitioner was prevented from *all* affiliation with the Republican party – not merely the right to vote in a particular primary. Thus, in order to justify the burden on the Petitioner's rights, the law must be necessary to serve a compelling state interest. See also In re Gilhuly, 124 Conn. at 276 (statute providing for appeal of registrar's decision allows petitioner to seek redress of a "primary legal right").

As recognized in Fand, while "Connecticut does have an interest with respect to protecting political parties against intrusion by individuals with interests adverse to those of the party . . . unduly restrictive state election laws may so impinge upon freedom of association as to run afoul of the first and fourteenth amendments." Fand v. Legnard, Superior Court, 1994 WL 613423, at *6. As established in Mazzucco, Fand, and Mandanici, § 9-61 does not pass this rigorous test. Although those cases involved a prior version of the statute involving per se erasure, the substitution of a symbolic hearing conducted by two interested parties under the current statute does little to cure the constitutional deficiencies.

Even assuming arguendo that the protection of political parties against intrusion by certain individuals is a compelling state interest, the current statutory scheme is far from "necessary" to achieve those ends. As previously established, greater procedural protections against arbitrary deprivation of associational rights, as well as against the potential for abuse of the erasure process, are necessary to meet this standard. Moreover, even if a statutory violation is established by a neutral decisionmaker, the remedy provided by § 9-60 et seq., i.e. total party disaffiliation and disenfranchisement from partisan political process for a substantial period of time, is patently overbroad. Kusper v. Pontikes, 414 U.S. at 58; Nagler v. Stiles, 343 F. Supp. at 418.

II. Even Assuming the Statutory Scheme for Discretionary Erasure or Exclusion from a Party Enrollment List is Not Unconstitutional As Applied to the Petitioner, the Respondent Has Failed to Present Sufficient Evidence to Justify Her Exclusion or Erasure from the Brookfield Republican Party List

A. Standard of review and burden of proof

Before analyzing the Petitioner's entitlement to relief, it is important that the case at bar is not a record appeal, but a trial de novo in the nature of an original action in mandamus.[13] This was first established by our Supreme Court in In re Gilhuly, 124 Conn. 271. There, the petitioners sought and received from the trial court an order restoring their names to the Democratic enrollment list of the Town of West Haven. Id. at 275. At the hearing before the trial court, the defendants claimed that the judge had no power to hear the matter de novo, but could determine only whether the defendants had acted arbitrarily and illegally in striking the plaintiffs' names from the enrollment list. Id. The

[13] The extraordinary remedy of mandamus can only lie where (1) the plaintiff has a clear legal right to performance of a particular duty, (2) the defendant has no discretion in the performance of that duty, and (3) no sufficient remedy at law exists. *Vartuli v. Sotire*, 192 Conn. 353, 365 (1984). The remedy is also preserved by General Statutes § 52-493, which provides: "Any court having cognizance of writs of . . . mandamus . . . in any action pending before it, make any order, interlocutory or final, in the nature of any such writ, to the extent of its jurisdiction, so far as it may appear to be an appropriate form of relief."

defendants were so convinced of this that they offered no evidence to the trial court. Id. at 274.

On appeal, the Supreme Court held that while at first glance the statute providing for an "appeal" to the Superior Court appears to be a statute governing an appeal of administrative action, the statute's context, coupled with the lack of any provision suggestive of a review of the proceedings before the registrar indicates otherwise. Id. at 276. Rather than an appeal, "[t]he remedy thereby provided is . . . **an original judicial proceeding** to afford redress to an elector for the violation of a primary legal right, [and not] one in the nature of an appeal to review the registrar's act. [What is now § 9-63] . . . in effect provides for a special statutory proceeding in the nature of mandamus. . . . This power is not dependent . . . upon [the court] being engaged in an appellate review of the proceedings had before the registrar, but is exemplified in [its] **original determination** of what is the plaintiff's legal right to enrollment and whether this right has been violated." (Emphasis added.) Id. at 276-77. Thus, having presented no evidence to the trial court in In re Gilhuly, the defendants could not rely on the prior hearing to justify erasure from the party list, and the court upheld the trial court's determination that the facts adduced at trial entitled the plaintiffs to relief.

The Connecticut Supreme Court in Kiernan v. Borst, 144 Conn. at 4-5, subsequently reaffirmed and summarized these principles: "Although denominated an appeal in the title of § 9-63, the proceeding authorized is not in reality an appeal from an administrative officer in the ordinary sense. It is rather an action in the nature of a mandamus to compel the performance of a public duty. This is apparent both from the fact that in the body of the statute the proceeding is referred to as a petition and also from

the fact that the judgment to be rendered, if it is in favor of the petitioner, is to be an order directing the registrar to restore the petitioner's name to the list. It follows that the issue to be decided by the trial judge is not whether the registrar has acted arbitrarily and in abuse of a discretion, as it is in the ordinary appeal from an administrative officer. The question presented on the hearing of a petition under § 564d is whether the plaintiff is entitled as a matter of right to have his name restored."

In re Gilhuly also addressed who bears the burden of proof in a proceeding under § 9-63. The court held that an order to show cause did not shift the burden to the respondent, and followed the rule in ordinary civil cases placing the burden on the plaintiff/petitioner. Id. at 281-82. However, the court also held that the statutes governing the rights of electors and the duties of registrars "give rise to an unequivocal right in a qualified elector to be enrolled on the party list of his expressed choice . . . unless and until it is no longer his intention to affiliate with such party and to support its principles and candidates." In re Gilhuly, 124 Conn. at 279; see also Kiernan v. Borst, 144 Conn. at 5 ("[t]he statutes relating to the preparation of party enrollment lists by the registrars . . . make it plain that any elector has a legal right to be enrolled on the list of the party of his choice so long as he in good faith intends to affiliate with that party"). So while the burden may technically rest on the Petitioner, her right to enrollment in the Brookfield Republican Party is automatic so long as she in good faith intends to affiliate with that party and adhere to its principles.

The foregoing law provides that the Court must render a decision after making an original determination as to the Petitioner's entitlement to relief based solely on the evidence adduced at this trial and the Court's factual findings thereon. The question of

whether the Petitioner is a "good faith" member of the Brookfield Republican Party, and whether she intends to support its principles or candidates, is therefore one for the court, as no deference is due to the findings of Dunkerton and Grimes. Therefore, although nominally bearing the burden of proof, she is not charged with proving the absence of the acts enumerated in § 9-61, but must only show her good faith intent to affiliate and adhere to party principles. Kiernan v. Borst, 144 Conn. at 6. ("if the plaintiff in the present action proved by a fair preponderance of the evidence that he intended in good faith to continue his affiliation with the Republican party and to support its principles and candidates, the judgment rendered [by the trial court] in his favor was correct"). Once that showing is made, it is the Respondent who must prove at least one act enumerated in § 9-61. But even if the Respondent can show one or more such acts, he must further prove the Petitioner's absence of good faith intent to affiliate and adhere to party principles. For the Respondent to win, he must prove both of these things with evidence presented to this Court. As set forth below, the Respondent has failed to do so.

B. The evidence adduced at trial clearly establishes the Petitioner's good faith membership in the Brookfield Republican Party and her intent to support its principles and candidates

The Petitioner testified at trial as to her good faith intent to affiliate with the Republican party and her belief in its principles. This was demonstrated further by her longstanding membership in the party, and by her serving a four year term on the Board of Education as a Republican. The mere fact that the Petitioner ran in one election while unaffiliated before promptly re-enrolling in the Republican Party thereafter is insufficient. Nor does putting up lawn signs of non-Republican candidates establish that her affiliation with the Republican Party was in bad faith. As the Connecticut Supreme

Court has made clear, "it is not intended by the statute that an elector who occasionally supports a candidate of another party thereby manifests an intention not to affiliate with the party of which he is a member. The statute requires nothing more than that the elector support the principles of the party in which he claims enrollment and customarily, but not exclusively, support its candidates." Kiernan v. Borst, 144 Conn. at 6 (fact that plaintiff joined Democratic victory parade does not compel inference that he did not intend to affiliate with Republican Party). So long as this is the case, the desire to exact punishment for past acts is not a legitimate purpose party expulsion.

In contrast, Dunkerton offered essentially no testimony of his own in support of his decision, which is fatal to his case. See generally In re Gilhuly, 124 Conn. 271. First, with one possible exception, the Respondent has failed to establish any of the prima facie acts of disloyalty set forth in § 9-61. With respect to the first enumerated act, "[e]nrollment in any other political party or organization," the evidence presented at trial was that the Petitioner never enrolled in the Democratic party, but only temporarily became "unaffiliated." Dunkerton and Grimes did not find that she was ever enrolled, in any other political party in their original decision. Nor did Dunkerton and Grimes find that the Petitioner was "knowingly . . . a candidate at any primary or caucus of any other party or political organization," nor was there any evidence of such presented to this Court.

With respect to the second enumerated act, the Respondent failed to show "active affiliation with any other political party or organization." There was no evidence that the Petitioner sought to actively affiliate with the Democratic Party prior to the Republican caucus at which she was not nominated to run for her Board of Education seat, nor any

time thereafter. In fact, she sought the *Republican* nomination for Board of Education, and was not knowingly a Democratic candidate at a primary or caucus. She merely accepted an appointment to fill a ballot vacancy, and made the conscious decision to change her status to "unaffiliated," rather than Democrat.[14]

Finally, even assuming the Respondent has established that the Petitioner technically ran for office under the designation of another party, there are several reasons why this is insufficient to justify expulsion. First, to the extent that running under the designation of another party constitutes *any* evidence of disloyalty, as previously set forth, the remedy for such an act is unconstitutionally overbroad. Kusper v. Pontikes, 414 U.S. at 58; Nagler v. Stiles, 343 F. Supp. at 418. This is not a situation where the Petitioner is merely prevented from running for a period of time, but is totally disenfranchised from partisan political process for a substantial period of time. Additionally, constitutional issues aside, the Respondent has not met his burden of showing lack of good-faith intent to affiliate with the Brookfield Republican Party, or to adhere to its guidelines. There is little or no evidence of the guidelines of the Brookfield Republican Party or the way in which the Petitioner has failed to adhere to those guidelines to such a degree so as to justify erasure.

Because the evidence adduced at trial unequivocally establishes that the Petitioner customarily supports Republican candidates and principles, and the Respondent has failed to show otherwise, the Petitioner is entitled to enrollment in the Brookfield Republican Party.

---

[14] The decision issued by Dunkerton and Grimes cites the minority representation statute, General Statutes § 9-167 (g) for the proposition that if the Petitioner had been elected to the Board of Finance she would have been considered a Democrat. However, even if that were true, that statute is not relevant to the issues before the Court, as it has no bearing on good faith party affiliation.

CONCLUSION

For the foregoing reasons, the Court should issue a writ of mandamus or order directing the Respondent, Thomas Dunkerton, to restore the name of the Petitioner, Jane Miller, to the enrollment list of the Brookfield Republican Party.

THE PETITIONER

By: _____

Neil R. Marcus
Alexander Copp
Cohen and Wolf, P.C.
158 Deer Hill Ave
Danbury, CT 06810
Tel: (203) 792-2771
Fax: (203) 791-8149
nmarcus@cohenandwolf.com
Juris No. 100137

CERTIFICATION

I certify that a copy of the above was or will immediately be mailed or delivered electronically or non-electronically on August 10, 2015 to all counsel and self-represented parties of record and that written consent for electronic delivery was received from all counsel and self-represented parties of record who were or will immediately be electronically served, as follows:

Ward Mazzucco
Chipman, Mazzucco, Land & Pennarola, LLC
39 Old Ridgebury Road, Suite D-2
Danbury, CT 06810
wjm@danburylaw.com

Neil R. Marcus

Exhibit 4

State of Connecticut
Judicial Branch

Supreme and Appellate Court

Case Detail

Supreme & Appellate Court Look-up Home | Printer Friendly Version | New Search | Judicial Home Page | Back

Case Information

SC 19621 JANE MILLER v. THOMAS DUNKERTON **Status: Briefing**

Appeal Case Information

Date Filed:	09/08/2015	**Disposition Method:**	
Appeal By:	Plaintiff	**Disposition Date:**	
Argued/Submitted Date:		**Cite:**	
Standby Date(s):		**Petition(s) For Certification:**	
Panel:			

Cross Appeal/Amended Appeal

Trial Court Case Information

Docket Number:	DBDCV156017272S		
Judgment For:	Defendant	**Court:**	JD COURTHOUSE AT DANBURY
Trial Judge(s):	HON. Anthony D. Truglia Jr.	**Judgment Date:**	08/18/2015
		Case Type:	CIVIL - MANDAMUS

Party/Attorney or Self-Represented Information

	Trial Court Party Class	Appeal Party Class
JANE MILLER Juris: 433711 PASTORE & DAILEY LLC	Plaintiff	Appellant
THOMAS DUNKERTON Juris: 410654 CHIPMAN MAZZUCCO LAND & PENNAROLA LLC	Defendant	Appellee

Transcripts and Exhibits

Party	Transcripts Ordered	Estimated Delivery Date	Delivered To Party	Exhibits Received By Court: Pages	Exhibits Received By Court: Delivered To Court
JANE MILLER	09/17/2015	11/02/2015	11/02/2015	160	

Preliminary Papers

Party Name	Preliminary Statement of Issues	Designation Contents of Record	Certificate re Transcript Received	Docketing Statement	PAC Statement	Draft Judgment File	Constitutionality Notice	Sealing Notice
JANE MILLER	09/17/2015		09/17/2015	09/17/2015	09/17/2015	09/17/2015	10/09/2015	
Amended				03/16/2016				

Briefs and Prepared Record

	Type	Due Date	Record Filed: Date Filed
JANE MILLER Appellant	Brief	04/01/2016	04/01/2016

THOMAS DUNKERTON Appellee	Brief	05/02/2016

Case Documents

Combined Brief/Appendix
by - Appellant
Uploaded By: 433711: PASTORE & DAILEY LLC
Description:
Upload Date: 4/1/2016 10:46:36 AM

Motion, Order and Transfer Activity

Motions Disclaimer

Activity	Number	Date filed	Initiated By	Description	Action	Action Date	Notice Date
Motion For Ext	SC1510490	03/15/2016	JANE MILLER	Appellant Brief Ext Date:04/01/2016	Granted	03/15/2016	
Motion For Ext	SC1510397	02/01/2016	JANE MILLER	Appellant Brief Ext Date:03/17/2016	Granted	02/01/2016	
Motion For Ext	SC1510389	01/29/2016	JANE MILLER	Motion Ext Date:	Returned	02/01/2016	

Exhibit 5

SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 19621

JANE MILLER,

PLAINTIFF-APPELLANT,

v.

THOMAS DUNKERTON

DEFENDANT-APPELLEE,

BRIEF OF PLAINTIFF-APPELLANT JANE MILLER WITH WITH ATTACHED APPENDIX PART I AND PART II

COUNSEL FOR PLAINTIFF-APPELLANT:

PASTORE & DAILEY LLC
FOUR HIGH RIDGE PARK, THIRD FLOOR
STAMFORD, CT 06905
(203) 658-8454
(203) 348-0852 (FACSIMILE)

TO BE ARGUED ON BEHALF OF
DEFENDANT-APPELLANT BY:

Susan Bysiewicz, Esq.
Juris No. 305389
EMAIL: SBYSIEWICZ@PSDLAW.NET

TABLE OF CONTENTS

STATEMENT OF ISSUES ii

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF FACTS AND PROCEEDINGS COMMON TO ALL CLAIMS 2

STANDARD OF REVIEW COMMON TO ALL CLAIMS 6

ARGUMENT 7

I. THE PROPER STANDARD TO APPLY IN DETERMINING THE CONSTITUTIONALITY OF § 9-61 IS STRICT SCRUTINY 7

II. THE SUPERIOR COURT ERRED IN HOLDING THAT FORCIBLY DISAFFILIATING MS. MILLER FROM THE REPUBLICAN PARTY DID NOT IMPERMISSIBLY BURDEN HER RIGHT TO FREEDOM OF ASSOCIATION UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION 11

III. THE TRIAL COURT CLEARLY ERRED IN HOLDING THAT FORCIBLY DISAFFILIATING PLAINTIFF FROM THE REPUBLICAN PARTY DID NOT IMPERMISSIBLY BURDEN HER FUNDAMENTAL RIGHT TO VOTE 18

CONCLUSION 26

APPENDIX ..... Ai

STATEMENT OF ISSUES

I. Did the Superior Court err when it determined that strict scrutiny was not the correct standard of review to use in determining Plaintiff's claims under the United States Constitution?

Discussion Begins on Page 7

II. Did the Superior Court err when it held that Defendant's act of removing Plaintiff's name from the rolls of the Republican Party did not impermissibly burden Plaintiff's right to freedom of association under the First and Fourteenth Amendments to the United States Constitution?

Discussion Begins on Page 11

III. Did the Superior Court err when it held that Defendant's act of removing Plaintiff's name from the rolls of the Republican Party did not impermissibly burden Plaintiff's fundamental right to vote by preventing her from participating in Republican Party primaries and caucuses?

Discussion Begins on Page 18

TABLE OF AUTHORITIES

Cases

Bendinger v. Ogilvie,
335 F. Supp. 572 (N.D. Ill. 1971) 19
Burdick v. Takushi,
504 U.S. 428 (1992) 7, 8, 9, 22, 25
Campbell v. Bysiewicz,
242 F. Supp. 2d 164 (2003) 12
Cousins v. Wigoda,
419 U.S. 477 (1975) 17
Dawson v. Delaware,
503 U.S. 159 (1991) 11
Democratic Party of United States v. Wis.,
450 U.S. 107 (1981) 17
Elfbrandt v. Russell,
384 U.S. 11, 18 (1966) 11
Fand v. Legnard,
NO. 31 60 63, 1994 Conn. Super. LEXIS 2722, at *25 (Conn. Super. Ct. Oct. 31, 1994) 10
Flewellyn v. Hempstead,
703 A.2d 1177 (Conn. App. Ct. 1997) 12
Gordon v. Exec. Comm. of Democratic Party,
335 F. Supp. 166 (D.S.C. 1971) 24
In re Quarles,
158 U.S. 532 (1895) 18
Jalowiec Realty Assocs., L.P. v. Planning & Zoning Comm'n, 278 Conn. 408 (Conn. 2006) 6
Kiernan v. Borst,
126 A.2d 569 (Conn. 1956) 6
Kusper v. Pontikes,
414 U.S. 51 (1973) 8, 9, 12, 20
Mandanici v. Fischer,
Superior Court, judicial District of Fairfield, Docket No. 21 36 18 (February 22, 1984, *Burdon, J*) (10 Conn. Law Trib. July 2, 1984) 11
Mazzucco v. Verderame,
NO. CV 96-0382136-S, 1996 Conn. Super. LEXIS 752, at *5-6 (Conn. Super. Ct. Mar. 22, 1996) 7, 10, 14, 23
Nader v. Schaffer,
417 F. Supp. 837 (D. Conn. 1976) 16, 18

Nagler v. Stiles,
343 F. Supp. 415 (D.N.J. 1972) 8
Reynolds v. Sims,
377 U.S. 533 (1964) 19
Rosario v. Rockefeller,
410 U.S. 752 (1973) 16
Smith v. Allwright,
321 U.S. 649 (1944) 11, 20
Tashjian v. Republican Party,
479 U.S. 208 (1986) 15, 16, 17, 18, 20
Timmons v. Twin Cities Area New Party,
520 U.S. 351 (1997) 19
United States Term Limits v. Thornton,
514 U.S. 779 (1995) 22
United States v. Classic,
313 U.S. 299 (1941) 18, 20, 22
Wesberry v. Sanders,
376 U.S. 1 (1964) 18
Williams v. Rhodes,
393 U.S. 23 (1968) 25
Yale v. Curvin,
345 F. Supp. 447 (D.R.I. 1972) 8, 19, 23
Zapata v. Burns,
529 A.2d 1276 (Conn. 1987) 19

Statutes

C.G.S. § 9-60 ..... 1, 3, 4, 9, 13, 24, 25, 26
C.G.S. § 9-61 ..... 1, 3, 7, 8, 9, 10, 11, 12, 13, 14, 20, 22, 23, 25
C.G.S. § 9-63 4
C.G.S. § 9-379 22
C.G.S. § 9-431 21
C.G.S. § 65-1 5

Constitutional Provisions

U.S. CONST. art. I, § 2 18

INTRODUCTION

Ms. Miller brought this action to challenge the constitutionality of Connecticut statutes which have been used by the Defendants to deprive her of her ability to participate in the fundamental civil process of our republic—the election of our leaders. This basic right to cast a vote and participate in the election of our representatives and leaders is protected by federal and state statute, and the constitutions of both the State of Connecticut and the United States of America. As a direct result of the actions of the defendant, Ms. Miller has already been denied her right to participate in two municipal caucus' in July 2015 and January 2016. Nevertheless, the statutes in question, C.G.S. § 9-60 *et seq.*, have been cited by the Defendant as giving him authority to arbitrarily, and without due process, determine that the Ms. Miller may not affiliate with the party of her choice, thereby denying her the ability to participate in the upcoming 2016 Republican presidential primary election.

Unfortunately, the trial court, applying a lesser scrutiny standard, found that Ms. Miller's right to vote and to freely associate were not unduly burdened when a "hearing committee" of two declared her disloyal and stripped her of her ability to cast a vote in a Republican Party primary for well over two years and counting. These statutes, and the Defendant's wrongful and arbitrary application of them to deprive the Plaintiff of her ability to participate in this fundamental, and most important American civil process, should be immediately addressed by this Court. For these reasons, Ms. Miller respectfully asks that this Court reverse the trial court's decision and recognize C.G.S. §§ 9-60 and 9-61 for what they are--the archaic, unconstitutional relics of Connecticut's past, applied here in an unconstitutional manner.

STATEMENT OF FACTS AND PROCEEDINGS COMMON TO ALL CLAIMS

Jane Miller ("Plaintiff" or "Ms. Miller") has been a resident of Brookfield, Connecticut ("Brookfield") since 1992, and she first registered to join the Republican Party approximately 14 years ago in 2002. Memorandum of Decision dated August 18, 2015 ("Mem. Dec.") at 2; Hearing Transcript dated July 27, 2015 ("HT") at 62:24. Defendant Thomas Dunkerton ("Defendant") is the Republican Registrar of Voters for Brookfield. HT at 10:1-11.

In 2009, the Brookfield Republican Party nominated Ms. Miller as a candidate for a seat on the Brookfield Board of Education. Mem. Dec. at 2; HT at 63:3-5. Ms. Miller was elected to the Board of Education, and she served a full four-year term. Mem. Dec. at 2; HT at 63:6-8. When Ms. Miller sought reelection to the Board of Education in 2013, however, the Brookfield Republican Party declined to endorse her and made an announcement to that effect at its July 23, 2013 caucus. Mem. Dec. at 2-3; HT at 63:6-8; 64:3-6. This Brookfield Republican Party caucus was held on the same day as the Brookfield Democratic caucus. Mem. Dec. at 3; HT at 64:23-25. Ms. Miller attended the Brookfield Republican Party caucus, and did not attend the Brookfield Democratic Party caucus. Mem. Dec. at 2; HT at 64:7-8 and 64:23-27.

Because Ms. Miller wanted to continue serving her community as a public official even though she did not win the endorsement of the Brookfield Republican Party for reelection to the Board of Education, she sought a seat on the Board of Finance. Mem. Dec. at 3; HT at 66:3-5. She ran for this seat as an unaffiliated candidate on the

Democratic line because, as stated above, the Republican Party would not endorse her. Mem. Dec. at 3; HT at 66:3-5.

On July 24, 2013, Ms. Miller changed her party affiliation to "Unaffiliated," deliberately choosing not to join the Democratic Party or any other political party. Mem. Dec. at 3; HT at 65:22-27. The Brookfield Democratic Party endorsed Ms. Miller in her bid for a seat on the Board of Finance. Mem. Dec. at 3; HT at 66:3-10. Ms. Miller was not elected to the Brookfield Board of Finance. Mem. Dec. at 3; HT at 66:13-14. On December 3, 2013, Ms. Miller submitted a voter registration card to the Defendant in his capacity as the Brookfield Republican Registrar of Voters. HT 20:11-14. The form was accepted by the Defendant on December 4, 2013, who then mailed the statutory notice of a change in registration on December 5, 2013. *Id.* As of this date, December 5, 2015, Ms. Miller was reinstated on the rolls of the Republican Party. *Id.* at 21:1-3. Ms. Miller has always supported the principles and values of the Republican Party, even during the brief six month period when she was registered as "Unaffiliated." *Id.* at 73:19-24.

At the winter 2015 Brookfield Republican Party Town Committee meeting, the party members in attendance discussed forcibly disaffiliating Ms. Miller from the Republican Party pursuant to C.G.S. §§ 9-60 and 9-61. *Id.* at 108:18-109:1. When asked whether the group approved of Ms. Miller's forcible disaffiliation under C.G.S. §§ 9-60 and 9-61, the members of the Brookfield Republican Town Committee informed Defendant "this is entirely [your] decision, it is not ours." *Id.* at 109:5-6. Matthew Grimes, the Chairman of the Brookfield Republican Town Committee, also told Defendant that initiating a hearing to consider Ms. Miller's forcible disaffiliation from the

party was a "decision [Defendant] need[ed] to make . . . absolutely independently of [Mr. Grimes] and the town committee." *Id.* at 109:10-11.

On March 19, 2015, Defendant sent Ms. Miller a citation telling her to appear before him and Mr. Grimes to show cause as to why she should not be disaffiliated from the Republican Party. Mem. Dec. at 3-4; HT at 16:16-18. Defendant and Mr. Grimes presided over this hearing. Mem. Dec. at 4. After the hearing, the Defendant and Mr. Grimes issued an unsigned decision finding that there was "reasonable proof" that Plaintiff was "a candidate for office under the designation of another party" and was "actively affiliated" with the Democratic Party. Mem. Dec. at 5 and Exhibit 4; HT at 26:24-28:6. They did not find "reasonable proof" that Ms. Miller had "knowingly [been] a candidate at any primary or caucus of another party," even though they had initially accused Ms. Miller of this act. HT at 142:9-21. Aside from Ms. Miller, neither the Defendant nor any of his predecessors, has ever invoked the procedure set forth in C.G.S. § 9-60 *et seq.* against anyone, let alone actually disaffiliated anyone from the Republican Party. HT at 138:23-139:2. Defendant notified Ms. Miller by letter dated April 23, 2015 that her name would be erased from the Brookfield Republican Party's enrollment list. Mem. Dec. at 5.

Pursuant to C.G.S. § 9-63, on April 30, 2015, Ms. Miller brought a petition to the Superior Court to establish that her name had unjustly and improperly been removed from the Republican Party enrollment list and to obtain an order directing Defendant to restore her name to this list. Appendix ("Appx.") at A4. On August 18, 2015, Superior Court Judge Anthony D. Truglia, Jr. issued an opinion denying Ms. Miller's petition. Appx. at 10. On September 8, 2015, Ms. Miller appealed this decision to the Appellate

Court. Appx. at A25. On January 12, 2016, pursuant to C.G.S. § 65-1, this Court transferred the appeal from the Appellate Court.

STANDARD OF REVIEW COMMON TO ALL CLAIMS

The proceeding adjudicated by the Superior Court in this matter was "an action in the nature of a mandamus to compel the performance of a public duty." *Kiernan v. Borst*, 126 A.2d 569, 571 (Conn. 1956) (cause of action to compel registrar to re-enroll voter in party is a mandamus action). This Court reviews lower court mandamus decisions for abuse of discretion. *See Jalowiec Realty Assocs., L.P. v. Planning & Zoning Comm'n*, 278 Conn. 408, 412 (Conn. 2006). While this Court "must make every reasonable presumption in favor of [a lower court's] action," it must "overturn a lower court's judgment if it has committed a clear error or if it has misconceived the law." *Id.*

ARGUMENT

I. THE PROPER STANDARD TO APPLY IN DETERMINING THE CONSTITUTIONALITY OF § 9-61 IS STRICT SCRUTINY

"[T]he rigorousness of [a court's] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). To determine the appropriate level of review, "[a] court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the First and Fourteenth Amendment rights that the plaintiff seeks to vindicate against the precise interests put forward by the state as justifications for the burden imposed by the state's rule." *Id.* "[W]hen [a plaintiff's] rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance." *Id.* (internal citations and quotations omitted). Only when a regulation's encroachments on a plaintiff's rights are not "severe" and impose nothing more than "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters is a lower level of review appropriate. *Id.*

In addressing the Plaintiff's claim that § 9-61 is an unconstitutional burden on her right of association and right to vote, the trial court incorrectly determined that strict scrutiny was not the proper standard to apply. In so holding, the trial court found that because the restrictions upon Ms. Miller's constitutional rights were "reasonable" and "nondiscriminatory," citing *Mazzucco v. Verderame*, a lesser level of scrutiny should be applied. For the following reasons, the trial court should have applied the strict scrutiny

standard to determine whether the statutes in question impermissibly infringe on Ms. Miller's constitutional rights.

First, strict scrutiny should apply to C.G.S. § 9-61 because the restrictions it imposes on the rights of those affected are not "reasonable." *Burdick*, 504 U.S. at 434. In *Nagler v. Stiles*, for instance, the District of New Jersey struck down a regulation that "require[d] two successive primaries to elapse before a voter [could] change his party affiliation," describing this regulation "as being patently over-broad in scope." 343 F. Supp. 415, 418 (D.N.J. 1972). The court in *Nagler* , thus, found a restriction on party membership lasting the same amount of time as that imposed by C.G.S. § 9-61 (i.e. two years)[1] to be "both ***unreasonable*** and excessive." *Id.* (emphasis added); *see also Yale v. Curvin*, 345 F. Supp. 447, 452 (D.R.I. 1972) (law preventing voters from changing party affiliation for twenty-six months was "***unreasonable*** and excessive") (emphasis added).

Second, strict scrutiny should also apply to C.G.S. § 9-61 because application of this provision results in "severe" encroachments on the rights of those affected. *Burdick*, 504 U.S. at 434. The Supreme Court has found various other restrictions, less onerous than those at issue here, on the rights of citizens to affiliate with political parties, to be substantial abridgements of associational rights. In *Kusper v. Pontikes*,

[1] C.G.S. § 9-61 provides that the period of disaffiliation from the political party "shall be effective for a period of two years from the date of" the acts giving rise to the disenrollment. During the hearing before the trial court, the Defendant acknowledged the two-year limit on the disaffiliation under § 9-61 and even agreed that regardless of what action or inaction the trial court took, he would have to reinstate Ms. Miller sometime in November 2015—two years from the date of the alleged bad acts for which she was disaffiliated. Appx. at A59; HT at 48:8-12. To this date, Ms. Miller has not been re-enrolled in the Republican Party despite the fact that it has been more than two years since the acts Defendant cited as giving rise to her disaffiliation.

for instance, the Supreme Court held that where "less drastic means" were available, the "legitimate interest of [the state] in preventing 'raiding' [could not] justify" a state law preventing a voter from casting a primary ballot for 23 months after voting in a different party's primary (i.e. one month *less* than the statutory provision at issue in our case). 414 U.S. 51, 61 (1973). The Court observed that the 23 month disqualification from primary voting "substantially abridged" the voter's ability to associate effectively with the party of her choice. *Id.* at 58. This was so, even though the Court acknowledged that – unlike the statutory provision at issue in our case – the law they reviewed in *Kusper* did not "deprive [voters] of all opportunities to associate with the political party of their choice," but rather placed restrictions solely on the voter's right to vote in primaries. *Id.* at 58. Given that C.G.S. § 9-61 encroaches upon Ms. Miller's rights in ways far more severe than those found to "substantially abridge[]" the plaintiff's rights in *Kusper*, strict scrutiny should apply to C.G.S. § 9-61, with the burden then falling on Defendant to establish that C.G.S. § 9-61's restrictions were "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434.

Strict scrutiny should also have been applied as C.G.S. §§ 9-60 and 9-61 are designed to be used punitively against "disloyal" party members. Indeed, the Defendant freely admitted that he believes the forcible disaffiliation provisions in C.G.S. §§ 9-60 and 9-61 have, as their purpose, the "punishment" of party members for prior acts of perceived party disloyalty:

> Q: . . . You're not keeping her out of the Republican Party to be punitive of Ms. Miller, are you?

A: Well, if -- if the statute requires punishment, is that punitive, I would say it is.

Q . . . "[A]re you punishing her for what you deem to be her prior acts? . . .

A: . . .Yes.

Appx. A59; HT at 48:13-21. Indeed, in invalidating as unconstitutional an earlier version of C.G.S. § 9-61 (which has since been amended to, among other things, make disaffiliation discretionary rather than mandatory), the Superior Court observed that "[t]he only conceivable purpose of the mandatory disaffiliation act is to punish the disloyal party member who runs for office under a different party label." *Mazzucco,* NO. CV 96-0382136-S, 1996 Conn. Super. LEXIS 752, at *9 (internal quotations omitted). The court in *Mazzucco* further observed that "[t]he legislative history of the act indicate[d] its intended effect was to punish the person" thought to be disloyal. *Id.* (internal quotations omitted). In light of this, the court rejected the defendants' claim that C.G.S. § 9-61 served the compelling purposes of "provid[ing] political stability and prevent[ing] voter raiding" and instead found that C.G.S. § 9-61's sole purpose to punish disloyal voters was insufficient to save the law even without applying strict scrutiny. *Id.* at *8-9. The court also found that the defendants had failed to show that the purpose behind C.G.S. § 9-61 "could not be achieved by less restrictive means," and it would have struck down the law for that reason even if the purpose for the law had been legitimate. *Id.* at *9.

Likewise, in *Fand v. Legnard*, the court also found an even earlier version of C.G.S. § 9-61 unconstitutional. NO. 31 60 63, 1994 Conn. Super. LEXIS 2722, at *25 (Conn. Super. Ct. Oct. 31, 1994). In *Fand*, the court held that strict scrutiny did apply to C.G.S. § 9-61, since "[t]he erasure of [the plaintiff's] name from the Republican Party

enrollment list is persuasive of a substantial impingement upon his freedom of association with that party since it clearly prohibits him from participating in the political process of that party." *Id.* at *22. Additionally, in *Mandanici v. Fischer,* Superior Court, judicial District of Fairfield, Docket No. 21 36 18 (February 22, 1984, *Burdon, J*) (10 Conn. Law Trib. July 2, 1984), the Superior Court also overturned an earlier version of C.G.S. § 9-61. In *Mandanici*, the court observed that "punishment is not a legitimate state purpose for substantially infringing upon the plaintiff's associational rights." *Id.* at *18. The court went further, opining "[i]t is doubtful whether any purpose discussed in this opinion could justify the interference with the person's associational rights to vote for a two-year period in local, state, or federal primaries" *Id.* The weight of this authority militates strongly in favor of the conclusion that strict scrutiny ought to apply to C.G.S. § 9-61.

II. THE SUPERIOR COURT ERRED IN HOLDING THAT FORCIBLY DISAFFILIATING MS. MILLER FROM THE REPUBLICAN PARTY DID NOT IMPERMISSIBLY BURDEN HER RIGHT TO FREEDOM OF ASSOCIATION UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The United States Supreme Court has held that "the First Amendment [to the United States Constitution] protects an individual's right to join groups and associate with others holding similar beliefs." *Dawson v. Delaware*, 503 U.S. 159, 163 (1991).[2] Indeed, "[t]here can no longer be any doubt that freedom to associate with others for the

[2] The "freedom of association protected by the First Amendment [is] made applicable to the States through the Fourteenth Amendment." *Elfbrandt v. Russell*, 384 U.S. 11, 18 (1966). Moreover, "state delegation to a [political] party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the State," for the purposes of the application of the United States Constitution's proscriptions against a state's efforts to deprive its citizens of voting rights. *Smith v. Allwright*, 321 U.S. 649, 660 (1944).

common advancement of political beliefs and ideas is . . . activity protected by" this Amendment. *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973) (internal citations and quotations omitted). The Court has even gone so far as to describe "[t]he right to associate with the political party of one's choice" as "an integral part of [our] basic constitutional freedom." *Id.* at 57.[3]

The trial court supported its decision to reject Ms. Miller's claim that Defendant's actions impermissibly violated her right to freedom of association by reasoning that re-enrolling Ms. Miller as a Republican would impermissibly violate the associational rights of the Republican Party.[4] *See* Appx. at A20; Mem. Dec. at 11 ("The constitutionally

---

[3] The Superior Court framed its discussion of whether Defendant violated Ms. Miller's constitutional rights to freedom of association by quoting *Flewellyn v. Hempstead*, 703 A.2d 1177, 1179 (Conn. App. Ct. 1997). This case, the court noted, stands for the idea that "political parties ***generally*** are free to conduct their internal affairs free from judicial supervision. . . .," a principle that the court said "serves the public interest by allowing the political process to operate without undue interference." *Id.* (internal quotations omitted) (emphasis added). In light of this principle, the court noted that "judicial intervention in [the selection of candidates] traditionally has been approached with great caution and restraint." 703 A.2d 1177, 1179 *Flewellyn* expressed this principle in a case in which the court was called upon to decide which of two competing candidates was properly nominated for a particular office, not a case, such as ours, in which the right of a voter to join a political party is in question. *Id.* at 1178. Arguably, the principle upheld in *Flewellyn* was to allow the much larger electorate to decide the correct candidate, rather than the small judiciary. Defendant's actions in this case shrink the electorate in an arbitrary manner, going against this principle. Furthermore, *Flewellyn* did not involve a conflict between a voter's associational rights and the associational rights of a political party, as does the instant case. Thus, the principles expressed in *Flewellyn*, while perhaps generally true, have no bearing here. *See Kusper v. Pontikes*, 414 U.S. 51, 57 (1973) (Although "administration of the electoral process is a matter that the Constitution largely entrusts to the States[,] in . . . setting qualifications for voters, the States may not infringe upon basic constitutional protections.").

[4] The Superior Court supported its decision upholding C.G.S. § 9-61 by citing to *Campbell v. Bysiewicz* for the proposition that Ms. Miller did not have an unlimited right to be a ***candidate*** of a specific party. 242 F. Supp. 2d 164, 171 (2003). Ms. Miller does not ask this Court to vindicate her rights to run as a candidate, however, but merely to protect her "right to associate with the political party of [her] choice" as a ***member*** with rights to vote in party primaries. *Kusper*, 414 U.S. at 57.

protected right of association asserted by the plaintiff, in other words, applies equally to the defendant."). This reasoning was in error, as the record clearly shows that Ms. Miller's forcible disaffiliation from the Republican Party was not motivated by, or the result of, the desire of party members to define the scope of their association. Notably, when asked whether the group encouraged Ms. Miller's forcible disaffiliation, the members of the Brookfield Republican Town Committee informed Defendant "this is entirely [your] decision, it is not ours." HT at 109:4-6. Mr. Dunkerton also testified that no one else asked him to "take [t?]his on" and that he invoked C.G.S. §§ 9-60 and 9-61 independently. *Id.* at 26:6-14.

Even Matthew Grimes, the Chairman of the Brookfield Republican Town Committee who, with Defendant, presided over the hearing leading to Ms. Miller's forcible disaffiliation, told Defendant that initiating the hearing was a "decision [Defendant] need[ed] to make . . . absolutely independently of [Grimes] and the town committee." HT 109:9-11. Indeed, the record shows that Ms. Miller's forcible disaffiliation was motivated by the desire of Defendant alone, or at most a small cadre of the party, to exact punishment against Ms. Miller for temporarily suspending her registration as a Republican.

Q: . . . You're not keeping her out of the Republican Party to be punitive of Ms. Miller, are you?

A: Well, if -- if the statute requires punishment, is that punitive, I would say it is.

Q . . . "[A]re you punishing her for what you deem to be her prior acts? . . .

A: . . .Yes.

Appx. at A59; HT at 48:13-21. When given the opportunity to present evidence and witnesses concerning how other members of the Brookfield Republican Party wanted Ms. Miller thrown out of the Party, they were either unable or unwilling to do so. In fact, Mr. Dunkerton readily admitted under oath at the hearing that at least two other current members of the Brookfield Republican Party who ran on other party lines against Republican candidates, won their elected seats, and then were readmitted back into the Republican party, including Mr. Grimes who presided at the hearing to dis-affiliate Ms. Miller. HT 56:24-60:19. Clearly, the associational rights of the Republican Party are not at issue here, but rather the whims and prejudices of Defendant against Ms. Miller.

Connecticut courts have astutely observed that the expressed opinion of a single member of a political party concerning a decision to forcibly disaffiliate a voter is not itself an expression of the preference of the party as a whole to expel that person, even if the party member expressing the opinion is a party official. *Mazzucco v. Verderame,* NO. CV 96-0382136-S, 1996 Conn. Super. LEXIS 752, at *5-6 (Conn. Super. Ct. Mar. 22, 1996) (court unconvinced that preference of party to disaffiliate voter can be discerned solely from opinion of party Town Chairman, since such preference must be "ascertained from a Town Committee meeting at a minimum and a caucus at a maximum"). Also, neither the Connecticut state nor the Brookfield local Republican Party rules call for the forcible disaffiliation of voters. *See* Appx. A63. This further underscores the notion that Ms. Miller's disaffiliation should not be viewed as reflecting the associational preference of the Republican Party. *Mazzucco,* NO. CV 96-0382136-S, 1996 Conn. Super. LEXIS 752, at *9-10 (party Town Chairman's decision to disaffiliate voter using § 9-61 did not represent preference of party since "rules of the

[party] contain[ed] no such disaffiliation" provision). In light of the above, the associational rights of the Republican Party would simply not be implicated by a decision of this Court ordering Defendant to reenroll Ms. Miller in the party, as the party as a whole has no objection to associating with Ms. Miller, or others who change their party affiliations in order to better serve their community.

The trial court relied exclusively on *Tashjian v. Republican Party*, 479 U.S. 208 (1986) in support of the notion that Ms. Miller's associational rights should give way to the purported rights of the Republican Party to "determine its own membership qualifications." *See* Appx. A21; Mem. Dec. at 12. Specifically, the trial court quotes extensively from footnote 6 of the *Tashjian* decision, which therein relies on four distinct cases, none of which, however, stand for the proposition that individual party officials may arbitrarily disaffiliate members of the party. *See* Appx. at A21-22; Mem. Dec. at. 12-13. In *Tashjian*, the Untied States Supreme Court was called upon to decide whether an older Connecticut state Republican Party rule permitting the participation of unaffiliated voters in state primaries would govern the party's primary process in spite of a conflicting state law that required primary voters to be affiliated with the party for which they sought to cast a primary vote. 479 U.S. at 210. In siding with the Republican Party, the court in *Tashjian* upheld the right of a political party to "**broaden** the base of public participation in and support for its activities," rather than – as here – to restrict such participation. *Id.* at 214 (emphasis added). This obvious distinction is just one of the many that arise upon a further examination of *Tashjian* and the cases cited in that decision.

The first case cited, *Rosario v. Rockefeller*, 410 U.S. 752 (1973), involved a New York statute requiring voters to register at least 30 days before the general election to vote in the next party primary. The plaintiffs alleged they were disenfranchised by this requirement, but the statue was upheld with the court stating, "if their plight can be characterized as disenfranchisement at all, it was not caused by § 186, but by their own failure to take timely steps to effect their enrollment." *Id.* at 758. In fact, the Court went on to say that "[s]ince they could have enrolled in a party in time to participate in the June 1972 primary, § 186 did not constitute a ban on their freedom of association, but merely a time limitation on when they had to act in order to participate in their chosen party's next primary." *Id.* Thus, the statute analyzed is very different than the statute, and its enforcement, in this case. Defendants' actions clearly "constitute a ban" on Mrs. Miller's right to freedom of association, as she is prevented from voting in the primary of her chosen political party, despite no evidence she has ever espoused any ideals that differ from that party.

Nader v. Schaffer, 417 F. Supp. 837 (D. Conn. 1976) was also cited by the Court in *Tashjian*. In this case, seemingly more congruent to the facts of the instant case, plaintiffs refused to affiliate with any political party, and challenged a Connecticut statute which, at the time, allowed only those who were registered with a political party to vote in the primary, regardless of the party's desire. They alleged that by forcing them to affiliate in order to vote in primaries, the statutes infringed on their freedom of association. A key distinction between this case and the instant case is that Mrs. Miller *does* wish to register with the Republican Party, and has been so registered for nearly 20 years, yet her right to vote in the primaries has been taken through the questionable

application of statutes that the court in *Nader* acknowledged were never actually used. *Id.* at 844 ("The voter's name, however, may be erased from the party's enrollment list on a proper showing that he does not support the party's principles or candidates; but in actual practice these statutes are not used.") While the court does recognize the ability of the state and party to regulate the ability to vote in primaries to prevent 'raiding' by those with adverse political principles, Mrs. Miller has never been accused of such "raiding activities."

Two other cases cited in *Tashjian*, *Democratic Party of United States v. Wis.*, 450 U.S. 107 (1981) and *Cousins v. Wigoda*, 419 U.S. 477 (1975), dealt with the ability of the national political party organizations to design their own rules with regard to who may vote in national conventions (as the convention vote is generally controlled by the primary vote of the state, these cases therefore involve the same elections Mrs. Miller is being prevented from participating in). In both cases, the right of the national party apparatus to determine rules for its internal governing structure were upheld, but neither case stands for the proposition that registered members of a party can be prevented from voting at the discriminatory whim of a local official.

For these reasons *Tashjian* is inapplicable to the present set of facts, despite the trial court relying on it to hold that a party's rights of association are more valuable than an individuals. Here, Defendant's forcible disaffiliation of Ms. Miller from the Republican Party encroaches upon Ms. Miller's rights to associate with the party of her choosing and her right to vote, despite the fact that she has been a registered Republican for nearly 20 years, with only a brief hiatus (similar to that taken by Defendant Grimes when he established a competing political party, "A Brookfield Party"). Appx. at A60-61; HT at

62:18-20 and 103:21-104:22. No case cited by the court supports the notion that an individual's right to associate with a political party, and thereby to vote in that party's primary, can be taken away arbitrarily. States are able to regulate elections, certainly, but stripping an individual of their rights is very different from requiring registration 30 days before an election in order to vote. Finally, even the federal court in *Nader* never expected the statutes at issue here to be used to remove individuals from a political party. Respectfully, we submit that the trial court fundamentally misunderstood the holding in *Tashjian*, and its decision should be reversed.

III. THE TRIAL COURT CLEARLY ERRED IN HOLDING THAT FORCIBLY DISAFFILIATING PLAINTIFF FROM THE REPUBLICAN PARTY DID NOT IMPERMISSIBLY BURDEN HER FUNDAMENTAL RIGHT TO VOTE

The United States Supreme Court has explained that "[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." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Indeed, "[o]ther rights, even the most basic, are illusory if the right to vote is undermined." *Id.* The United States Constitution secures for the people the right to vote for candidates seeking public office. *See, e.g.*, *United States v. Classic*, 313 U.S. 299, 315 (1941) (identifying "right of qualified voters within a state to cast their ballots and have them counted at Congressional elections" as "secured by the Constitution"); *In re Quarles*, 158 U.S. 532, 535 (1895) ("Among the rights and privileges, which have been recognized by this court to be secured to citizens of the United States by the Constitution, are . . . the right to vote for presidential electors or members of Congress"); *see also* U.S. CONST. art. I, § 2 ("The House of Representatives shall be composed of Members chosen every second Year ***by the People*** . . .") (emphasis added); U.S.

CONST. amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, ***elected by the people*** thereof . . .") (emphasis added). This right "undeniably" applies both to state and federal elections. *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) . Given that the "right to vote" is understood to be "the guardian of all other rights," it is considered a fundamental right. *Zapata v.* Burns, 529 A.2d 1276, 1279 (Conn. 1987).

The trial court agreed that a fundamental right to vote was secured by the United States Constitution, but found that this right is applicable only to general elections and that it does not extend to primaries. Appx. at A21; Mem. Dec. at 12. ("The court is not aware of, nor does the plaintiff cite to, any authority for the proposition that participation in a party primary or caucus is a fundamental right.").[5] However, a review of the relevant precedent leaves no doubt that American courts recognize a fundamental, Constitutionally protected right to vote in primaries. The Supreme Court has held that the "right of participation [in a primary] is protected just as is the right to vote at the

---

[5] *Timmons v. Twin Cities Area New Party* was the only authority that the Superior Court relied upon in support of its holding that the fundamental right to vote does not extend to primaries. 520 U.S. 351 (1997). In *Timmons,* the Supreme Court upheld a state law prohibiting ***candidates*** from appearing on the ballot as the candidate of more than one party. *Id.* at 353-54. The case did not address restrictions on the rights of ***voters***, however, and therefore is inapplicable to the issues to be decided in this case. "The state's interest in preserving a vigorous and competitive two-party system is fostered by the requirement that ***candidates*** demonstrate a certain loyalty and attachment to the party in whose primary they are running; the same cannot be said of ***voters***, however, who should be freer to demonstrate their changes in political attitude by voting for popular candidates or against unpopular candidates in any party's primary election." *Bendinger v. Ogilvie*, 335 F. Supp. 572, 576 (N.D. Ill. 1971); *see also Yale v. Curvin*, 345 F. Supp. 447, 452 (D.R.I. 1972) (where "state's interest is weighed against the constitutional claims of political party ***members***, the outcome has been different" from instances where party candidates are burdened) (emphasis in original). Ms. Miller asks this Court to vindicate her rights as a party ***member*** and ***voter***, not as a party ***candidate***, so *Timmon*s is, thus, inapposite to this Court's analysis of her case.

[general] election" under circumstances where "a state . . . changes the mode of choice [of candidates] from a single step, a general election, to two, of which the first is the choice at a primary of those candidates from whom, as a second step, the [winner] is to be chosen at the election." *United States v. Classic*, 313 U.S. 299, 316-17 (1941); *see also Smith v. Allwright*, 321 U.S. 649, 661-62 (1944) ("It may now be taken as a postulate that the right to vote in . . . a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution."); *Tashjian*, 479 U.S. at 227 (goal of Seventeenth Amendment to United States Constitution to secure to the people the right to elect United States Senators "applicable to every stage in the selection process," including primaries).

Indeed, "the right to associate with the political party of one's choice," described more fully in Section II *supra*, implies that there must also be a corresponding right to vote in the party's primary. *See Kusper v. Pontikes*, 414 U.S. 51, 57 (1973). The Supreme Court has held that the right to associate with a chosen political party would have little meaning without the corresponding right to participate in the "basic function of [the] political party[, which] is to select the candidates for public office to be offered to the voters at general elections." *Id. at* 58. The Court recognized that "[a] prime objective of most voters in associating themselves with a particular party must surely be to gain a voice in that selection process." *Id.* In light of this, the Court has struck down laws barring citizens from voting in primaries for periods even shorter than the two year disqualification period prescribed by C.G.S. § 9-61, holding that "[b]y preventing the [voter] from participating at all in . . . primary elections during the statutory period, the [law] deprived her of any voice in choosing the party's candidates, and thus *substantially*

abridged her ability to associate effectively with the party of her choice." *Id.* (emphasis added) (law barring voters from casting a ballot in a primary for 23 months held unconstitutional).

Under state law, Connecticut political parties conduct "closed" primaries, in which only persons enrolled as members of a party are allowed to vote for that party's nominees for general election.[6] As a consequence of this closed system, when Defendant removed Ms. Miller's name from the Republican Party rolls, he disqualified Ms. Miller from voting in any Connecticut Republican primary to select the party's nominees for all offices. Included in this ban are both primaries for selecting nominees running to become local or state officials, such as Board of Education members and state representatives, as well as primaries for selecting nominees running to become federal officials, such as members of the United States House of Representatives or Electors to the Electoral College, which in turn selects the President of the United States.

As a result of her forcible disaffiliation from the Republican Party, Ms. Miller has already been unjustly precluded from casting her vote in several Republican primaries and caucuses, including two municipal caucuses held in July 2015 and January 2016 as well as the March 2016 Brookfield Republican Town primary. Moreover, absent an order reversing Ms. Miller's forcible disaffiliation, Ms. Miller will remain ineligible to

[6] See C.G.S. § 9-431("(a) No person shall be permitted to vote at a primary of a party unless (1) he is on the last-completed enrollment list of such party . . . , or (2) if authorized by the state rules of such party filed pursuant to section 9-374, he is an unaffiliated elector. . ."). The state rules of the Connecticut Republican party do not permit unaffiliated electors to vote in the Republican primary elections. Appx. at A63.

participate in future Republican primaries, including the important , and potentially historic April 26, 2016 Republican presidential primary.

Nominees selected in the primaries of Connecticut political parties are entitled to have their names placed on the official ballots used in the general election, a privilege giving them a significant advantage over other candidates seeking election, who must undergo the more onerous process of obtaining signatures from state voters for use in petitioning the Secretary of the State to add their names to the ballot. *See* C.G.S. § 9-379.[7] As a practical matter then, it is quite likely that any candidate who fails to be nominated by their party in a primary election will stand almost no chance of winning election to the office that they seek. *United States Term Limits v. Thornton*, 514 U.S. 779, 830-31 (1995) ("write-in candidates have only a slight chance of victory"). Republican primaries and caucuses are, thus, "an integral part of the election machinery," and Ms. Miller's right to participate in them is "protected just as is the right to vote at the [general] election." *United States v. Classic*, 313 U.S. at 318.

In light of the above, the restrictions that C.G.S. § 9-61 places on Ms. Miller's right to vote are particularly severe, since Defendant's application of the law precludes Ms. Miller in many instances from having any chance to effectively support her chosen candidates for public office at the ballot box. This is yet another reason that this Court should subject C.G.S. § 9-61 to strict scrutiny. *Burdick*, 504 U.S. at 433. As noted in Section I, *supra*, the state does not even have a legitimate, let alone compelling, interest

[7] C.G.S. § 9-379 provides: "No name of any candidate shall be printed on any official ballot at any election except the name of a candidate nominated by a major or minor party unless a nominating petition for such candidate is approved by the Secretary of the State as provided in sections 9-453a to 9-453p, inclusive."

in punishing persons thought to be disloyal to their party by forcible disaffiliation, the purpose that both Defendant and the court in *Mazzucco* believe is behind C.G.S. § 9-61. *See* Appx. A59; HT at 48:13-21;*Mazzucco,* NO. CV 96-0382136-S, 1996 Conn. Super. LEXIS 752, at *9. Indeed, restrictions on voting rights of the type imposed here actually work against the political stability interests that the state proffered, but that the *Mazzucco* court rejected, as compelling interests furthered by an earlier version of C.G.S. § 9-61. *Id.* at *9.

The United States District Court, District of Rhode Island in *Yale v. Curvin* explained why this is so. 345 F. Supp. at 452?. In this case, the court assessed the constitutionality of a law that "prohibit[ted] any person from voting in the primary of any political party . . . if, within the preceding 26 months, [that] person ha[d] voted in a primary . . . for a candidate of another political party . . ." *Id.* at 448. The court rejected the notion that this restriction preserved "multi-party system integrity," and described the myriad reasons that such an encroachment on the fundamental right to vote actually worked against the integrity of our political system. *Id.* at 52. First, the court explained that "[i]n these times of dominant national issues, evolving and changing with each shading of the international picture, it belies reality to ignore voters' shifting allegiances from one candidate to another rather than adherence to party lines." *Id.* at 451.

Then the court noted that the restriction "inhibit[ed] growth of third parties[,] penalize[d] independents who wish[ed] to join parties and vote in their primaries[,] place[d] a premium on old guard party regularity, and hinder[d] growth of diverse constituencies within a party." *Id.* at 452. Noting that the law ignored the fact that voters may desire to vote for one party in local elections and another party in federal elections,

the court concluded that "[a] voter ought not be required to hold himself bound to a single party on every level of government." *Id.* at 453 (internal quotations omitted). For all of these reasons, the court held that the law in question was unconstitutional. *See also Gordon v. Exec. Comm. of Democratic Party*, 335 F. Supp. 166, 169 (D.S.C. 1971) ("Our system of government is based on the consent of the governed, and such consent is only illusory when voters are prevented by artificial restrictions for significant periods of time from changing political parties even though events or the actions of elected representatives may have convinced the voter that a change in party allegiance is warranted.").

The two-year disqualification from primary voting imposed under C.G.S. § 9-60 *et seq.* undercuts the stability of our political system in all of the same ways that *Yale* and *Gordon* warned about. It artificially distorts the popular will reflected in the outcome of primary elections by prohibiting voters, such as Ms. Miller, who would otherwise cast a ballot, from participating. It ignores the fact that some voters may support the principles of a party on the federal level while choosing to support other parties, or – as is the case here – choosing to run for office independently of their preferred party, at the local level. It leaves to the arbitrary whim of old guard party officials, such as Defendant, the decision as to who is and who is not sufficiently loyal to the party and entitled to vote in its primary elections. Finally, even if prohibiting voters suspected of party disloyalty from participating in primary elections did promote state interests in political stability, despite all of the above-mentioned reasons showing that it would not, a restriction of the duration at issue here – 2 years – is far from a narrowly tailored means to achieve that end. A prohibition of this length on primary voting ignores the fact that "the principal

policies of the major parties change to some extent from year to year." *Williams v. Rhodes*, 393 U.S. 23, 33 (1968).

As a consequence, a party member may, in one election, exhibit signs of disloyalty sufficient to give grounds for forcible disaffiliation under C.G.S. § 9-61, but resume strong loyalty to the party if the party's principles evolve during the course of her disqualification from voting in the party's primaries. Thus, a two-year period of disqualification from participation in party primaries imposes excessive burdens on the affected person's fundamental right to vote without a commensurate benefit in the form of increased levels of political stability. It certainly makes such a disqualification much more severe. It certainly makes such a disqualification much more subject to self-serving and improper gamesmanship. For these reasons, this Court should apply strict scrutiny to C.G.S. § 9-60 *et seq.* and rule the law unconstitutional on the grounds that it imposes an impermissible infringement on the fundamental voting rights of affected party members, without "be[ing] narrowly drawn to advance a state interest of compelling importance." *Burdick,* 504 U.S. at 434.

CONCLUSION

For the reasons set forth herein, the decision of the Superior Court should be reversed, as the trial court abused its discretion in denying Ms. Miller's request for a writ of mandamus directing Defendant to restore her name to the enrollment list of the Brookfield Republican Party. The Superior Court clearly erred in holding that C.G.S. § 9-60 *et seq.* does not impermissibly infringe upon the rights of those against whom it is applied to freely associate with the political party of their choice and to vote in that party's primary. This Court should accordingly rule C.G.S. § 9-60 *et seq.* unconstitutional.

JANE MILLER
PLAINTIFF-APPELLANT

By _____

Joseph M. Pastore III ct11431
Nathan Zezula ct27936
Pastore & Dailey LLC
4 High Ridge Park, Third Floor
Stamford, CT 06905
Phone: (203) 658-8454
Fax: (203) 348-0852
jpastore@psdlaw.net
nzezula@psdlaw.net
****
Susan Bysiewicz ct02242
Pastore & Dailey LLC
115 Glastonbury Blvd., Suite 100
Glastonbury, CT 06033
Phone: 203.658.8467
sbysiewicz@psdlaw.net

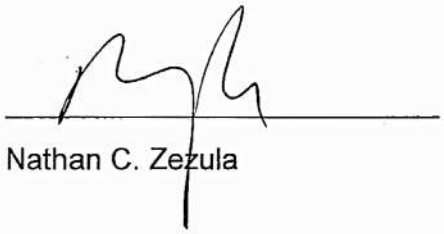
Attorneys for Appellant

CERTIFICATION OF SERVICE

This is to certify, in accordance with Practice Book §§ 66-3 and 62-7, that on April 1, 2016, copies of the foregoing were mailed, via US mail, postage prepaid, to the following addresses to all counsel and pro se parties of record and to the trial judge who rendered the decision below:

Ward Mazzucco
Chipman, Mazzucco, Land & Pennarola, LLC
39 Old Ridgebury Road, Suite D-2
Danbury, CT 06810
Phone: (203) 744-1929
Fax: (203) 790-5954
wjm@danburylaw.com

The Honorable Anthony D. Truglia, Jr.
J.D. & G.A. 3 Courthouse
146 White Street
Danbury , CT 06810
Phone: (203) 207-8690
Fax: (203) 207-8689



Nathan C. Zezula

CERTIFICATION OF COMPLIANCE

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2, that on April 1, 2016:

1. The electronically submitted brief and appendix has been delivered electronically to the last known e-mail address of each counsel of record for whom an e-mail address has been provided; and

2. The electronically submitted brief and appendix and the filed paper brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and

3. A copy of the brief and appendix has been sent to each counsel of record and to any trial judge who rendered a decision that is the subject matter of the appeal, in compliance with Section 62-7; and

4. The brief and appendix being filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically; and

5. The brief complies with all provisions of this rule.

Nathan C. Zezula