SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 20486

MARY FAY, THOMAS GILMER,
JUSTIN ANDERSON AND JAMES GRIFFIN
Plaintiffs - Appellants

v.

DENISE MERRILL
SECRETARY OF THE STATE
Defendant - Appellee

BRIEF OF THE PLAINTIFFS-APPELLANTS MARY FAY, THOMAS GILMER, JUSTIN ANDERSON AND JAMES GRIFFIN

ATTORNEYS FOR THE
PLAINTIFFS-APPELLANTS,
MARY FAY, THOMAS GILMER,
JUSTIN ANDERSON AND JAMES GRIFFIN

Proloy K. Das, Esq.
Rachel Snow Kindseth, Esq.
Matthew A. Ciarleglio, Esq.
MURTHA CULLINA LLP
280 Trumbull Street, 12th Floor
Hartford, CT 06103
Tel. (860) 240-6000
Fax (860) 240-6150
Juris No. 040248

To Be Argued By:
Proloy K. Das, Esq.
pdas@murthalaw.com

TABLE OF CONTENTS

STATEMENT OF THE ISSUES

I. **WHETHER THE PLAINTIFFS ARE AGGRIEVED BY THE UNCONSTITUTIONAL CHANGING OF THE ELECTION BY THE CREATION OF NO-EXCUSE MAIL-IN VOTING FOR ALL VOTERS**

II. **WHETHER ALLOWING EVERY CONNECTICUT ELECTOR TO VOTE BY ABSENTEE BALLOT VIOLATES ARTICLE SIXTH, SECTION 7 OF THE CONNECTICUT CONSTITUTION**

TABLE OF AUTHORITIES

PAGE

Cases

Statutes

Constitutional Provisions

Other Authorities

INTRODUCTION

> In theory, absentee voting is intended to promote the goal of high voter participation, a central value in a democracy. A goal of equal weight is to ensure the integrity of each vote. The current detailed statutory scheme in Connecticut is an attempt to strike a balance between the two.
>
> Connecticut, like many other states, first allowed absentee voting for soldiers serving in the Civil war. The privilege was granted for the duration of the war by an 1864 amendment to the 1818 Connecticut Constitution. A similar provision was enacted by legislation for soldiers in World War I. In 1932, the Connecticut Constitution was amended to allow certain civilians to vote by absentee ballot for the first time. Specifically, the amendment provided the General Assembly the power to authorize qualified voters who were absent from their towns on election days or who were ill or disabled and, therefore, not able to appear at the polls the opportunity to vote absentee.

Absentee Voting in Connecticut, Connecticut General Assembly, Legislative Program Review and Investigations Committee (Dec. 1986), p. 1.

The plaintiffs, Mary Fay, Thomas Gilmer, Justin Anderson, and James Griffin are four candidates for the office of Representative in the United States Congress in the First and Second Congressional Districts. They brought this lawsuit after Secretary of the State Denise Merrill (the "Secretary" or "Secretary Merrill") and Governor Ned Lamont (the "Governor" or "Governor Lamont") exceeded their constitutional authority by using COVID-19 to convert Connecticut into a state that uses no-excuse mail-in voting. Instead of abiding by our Constitution, the Governor and the Secretary implemented their personal views of how voting should be conducted, usurping the supreme will of the electorate. In late June 2020, based on the Governor's Executive Order No. 7QQ, the Secretary mailed 1.25 million unsolicited applications for absentee ballots to Connecticut voters with the text presented below, encouraging all voters to vote by absentee ballot, despite the restrictions placed on absentee voting in the state constitution:

Section II. – Statement of Applicant

I, the undersigned applicant, believe that I am eligible to vote at the primary indicated above. Pursuant to Executive Order No. 7QQ, I expect to be unable to appear at the polling place during the hours of voting and hereby apply for an absentee ballot: (check only one)

☐ COVID-19 ► **All voters are able to check this box, pursuant to Executive Order 7QQ** ◄

☐ My active service in the Armed Forces of the United States

☐ My absence from the town during all of the hours of voting

☐ My illness

☐ My religious tenets forbid secular activity on the day of the election, primary or referendum

☐ My duties as a primary, election or referendum official at a polling place other than my own during all of the hours of voting

☐ My physical disability

This case asks this Court to declare the Secretary's Application and Executive Order No. 7QQ to be unconstitutional. Article Sixth, Section 7 of the state constitution provides:

> The **general assembly may provide by law for voting** in the choice of any officer to be elected or upon any question to be voted on at an election **by qualified voters** of the state who are **unable to appear** at the polling place on the day of election because of absence from the city or town of which they are inhabitants or **because of sickness** or physical disability or because the tenets of their religion forbid secular activity.

(Emphasis added). The Connecticut Constitution entrusts two bodies with prescribing the rules for absentee voting – the electorate, through constitutional amendment, and the legislature, through the constitutional charge to provide by law for implementation of those restricted constitutional requirements. It does not allow the Governor or the Secretary to set or expand absentee voting rules. As this Court long ago explained, in a case in which it struck down another unconstitutional expansion on the use of absentee ballots:

> The constitution of the state, framed by a convention elected for that purpose and adopted by the people, embodies their *supreme original will*, in respect to the organization and perpetuation of a state government; the division and distribution of its powers; the officers by whom those powers are to be exercised; and the limitations necessary to restrain the action of each and all for the preservation of the rights, liberties and privileges of all; and is therefore the supreme and paramount law, to which the legislative, as well as every other branch of the government, and every officer in the performance of his duties, must conform. Whatever that supreme original will prescribes, the General Assembly, and every officer or citizen to whom the mandate is addressed, must do; and whatever it prohibits, the General Assembly, and

> every officer and citizen, must refrain from doing; and if either attempt to do that which is prescribed, in any other manner than that prescribed, or to do in any manner that which is prohibited, their action is repugnant to that supreme and paramount law, and invalid.

In re Opinion of Justices, 30 Conn. 591, 593–94 (Conn. 1862). There is no pandemic exception in the Connecticut Constitution.

NATURE OF THE PROCEEDINGS AND STATEMENT OF FACTS

On March 10, 2020, Governor Lamont issued a declaration of public health and civil preparedness emergencies, proclaiming a state of emergency throughout the State of Connecticut in response to the COVID-19 pandemic. On May 20, 2020, Governor Lamont issued Executive Order No. 7QQ which, *inter alia*, sought to modify General Statutes § 9-135 to state that an eligible elector may "vote by absentee ballot for the August 11, 2020 primary election if he or she is unable to appear at his or her polling place during the hours of voting because of the sickness of COVID-19." Executive Order No. 7QQ further stated: "For purposes of this modification, a person shall be permitted to lawfully state he or she is unable to appear at a polling place because of COVID-19 if, at the time he or she applies for or casts an absentee ballot for the August 11, 2020 primary election, there is no federally approved and widely available vaccine for prevention of COVID-19."

In late June 2020, citing Executive Order No. 7QQ, Secretary Merrill issued an "Application for Absentee Ballot" for the August 11, 2020 primaries that expands absentee voting in Connecticut and allows **all** voters to vote by absentee ballot. The Application for Absentee Ballot added a new seventh category for absentee voting – "COVID-19." Secretary Merrill listed this new category first on the list of reasons for obtaining an absentee ballot and further encouraged all voters to select this reason by highlighting and bolding it to make it distinct from the other six reasons listed from General Statutes § 9-135:

☐ COVID-19 ► **All voters are able to check this box, pursuant to Executive Order 7QQ** ◄
☐ My active service in the Armed Forces of the United States
☐ My absence from the town during all of the hours of voting
☐ My illness
☐ My religious tenets forbid secular activity on the day of the election, primary or referendum
☐ My duties as a primary, election or referendum official at a polling place other than my own during all of the hours of voting
☐ My physical disability

On July 1, 2020, the plaintiffs filed an action with this Court under General Statutes § 9-323 challenging a ruling of the Secretary as reflected in her Application for Absentee Ballot. See S.C. 20477. On July 7, 2020, the Secretary filed a motion to dismiss the § 9-323 action, claiming that the action needed to be brought in Superior Court. On July 7, 2020 this Court issued an order scheduling a hearing in the § 9-323 matter for July 22, 2020. The Court set a briefing deadline of noon on July 17, 2020 and scheduled a hearing for Wednesday, July 22, 2020. On July 16, 2020, the Court issued a *sua sponte* notice bifurcating the defendant's jurisdictional claims and the merits of the § 9-323 action. On the afternoon of July 20, 2020, this Court (*Robinson, C.J.*) held a hearing on the defendant's motion to dismiss the § 9-323 action. After that hearing, the Court (*Robinson, C.J.*) dismissed the plaintiffs' § 9-323 suit, stating that the plaintiffs' claim needed to be filed in Superior Court.

On the evening of July 20, 2020, after the Chief Justice's ruling in the § 9-323 action, the plaintiffs' filed: (1) a motion for reconsideration *en banc* of the dismissal of their § 9-323 action with this Court; and (2) the instant action in the Superior Court, stating causes of action under General Statutes §§ 9-329a, 52-29, and 52-471.

The Superior Court (*Moukawsher, J.*) held an expedited hearing on the plaintiffs' General Statutes §§ 9-329a, 52-29, and 52-471 lawsuit on the afternoon of July 21, 2020. The defendant again sought to avoid a merits consideration of the issue, moving to dismiss

the case for lack of subject matter jurisdiction. After concluding that the court had jurisdiction, the court proceeded to hear the merits of the case. At the end of the hearing, the court previewed for the parties its intended rulings. The court's decision was issued forthwith the next morning on July 22, 2020.

In its Memorandum of Decision, the court entered judgment for the defendant. The court rejected the defendant's jurisdictional claims, concluding that it had jurisdiction to hear the case under General Statutes § 52-29. Mem. Dec. (7/22/20) at 6. The court further rejected the defendant's standing argument, noting that the plaintiffs "are rightly trying to sort this out now to remove a cloud over what happens next." Id. at 5-6. The court then ruled on the merits of the plaintiffs' claims, framing the issue to be:

> May the executive branch of government allow absentee ballots permitted under our state constitution "because of sickness" to be used "because of COVID-19 sickness"? Must the sickness referred to in Article Sixth, Section 7 of the Connecticut Constitution be the sickness of the individual seeking to vote by absentee ballot or is the existence of a raging global pandemic enough?

Id. at p. 1. The court concluded that "sickness" as used in the Connecticut Constitution was broad enough to encompass the existence of COVID-19 as a basis for voting by absentee ballot. Id. at p. 2. The court reasoned that "it is not the applicant's sickness that is specifically referred to" with the absence of the word "their" before "sickness" in the Constitution. Id. at pp. 2-3. The court further concluded that the Governor has the power to modify statutes affecting absentee voting, stating that the commitment of absentee voting to the General Assembly found in the Connecticut Constitution is a commitment made to the General Assembly in other areas as well. Id. at 4-5. On these bases, the court concluded that the Governor's Executive Order No. 7QQ and the Secretary of the State's Application for Absentee Ballot complied with the state constitution.

Less than three hours after the trial court released its decision on July 22, 2020, pursuant to General Statutes § 52-265a, the plaintiffs filed an application for certification of an immediate expedited appeal to this Court with the Chief Justice.[1] On July 23, 2020, the Chief Justice granted the plaintiffs' application. This appeal followed.

ARGUMENT

This appeal challenges the trial court's declaration that the Secretary's Application for Absentee Ballot and the Governor's Executive Order No. 7QQ, which expands absentee voting to every voter in Connecticut, comply with Article Sixth, Section 7 of the Connecticut Constitution. Because the trial court only addressed the plaintiffs' request for a declaratory judgment under General Statutes § 52-29, only that ruling is currently before this Court. The trial court's declaration should be overturned for two reasons.[2]

First, the Secretary improperly implemented Executive Order No. 7QQ through the Application rather than adhering to General Statutes § 9-135. Because the Governor is not authorized by the Connecticut Constitution to alter or expand absentee voting, Executive Order No. 7QQ, which purports to expand absentee voting based on the existence of

---

[1] Because the trial court found jurisdiction and only addressed the plaintiffs' claim based on General Statutes § 52-29, and not under General Statutes § 9-329a, any expedited appeal required the granting of a § 52-265a application because § 9-325 did not apply.

[2] The General Assembly is currently meeting in a special session, which began on July 23, 2020. No activity that may ultimately occur during this special session affects the case *sub judice*, which was brought and decided based on the actions of the Secretary and the Governor. Before this Court is an appeal from the trial court's decision. While any act of the legislature might arguably affect the ultimate scope of any subsequent remedies, no act of the legislature can retroactively change the unconstitutionality of the defendant's actions at the time that they were performed and the reviewability of the trial court's declaratory judgment decision on this issue.

Moreover, the issue of whether the trial court correctly concluded that the term "sickness" as used Article Sixth, Section 7 applies to the existence of COVID-19 unconnected to individual voters will provide necessary guidance on whether mail-in voting during the November general elections would be constitutional.

COVID-19, is unconstitutional and void. Accordingly, it was error for the Secretary to implement Executive Order No. 7QQ through the Application. Second, both the Application and the Executive Order improperly expand absentee voting to all voters in Connecticut, in contravention of the Connecticut Constitution's strict limitation on the use of absentee ballots by individuals who are unable to appear in person for one of the enumerated prescribed reasons. The existence of COVID-19 is not one of those reasons.

The trial court's declaratory judgment should be reversed and the Secretary's Application and the Governor's Executive Order No. 7QQ should be declared unconstitutional.

I. THE PLAINTIFFS ARE AGGRIEVED BY THE UNCONSTITUTIONAL CHANGING OF THE ELECTION BY THE CREATION OF NO-EXCUSE MAIL-IN VOTING FOR ALL VOTERS

The Court has directed the parties to address two additional issues in their briefs: (1) the extent to which the plaintiffs are aggrieved by Executive Order No. 7QQ and the defendant's issuance of the application for absentee ballots; and (2) the appropriate remedy, including whether the issue of aggrievement may limit the scope of relief that can be granted to the primary election in which the plaintiffs are candidates.

A. The Plaintiffs are Aggrieved by Executive Order No. 7QQ and the Defendant's Issuance of the Application for Absentee Ballots

The trial court correctly found that the plaintiffs are aggrieved. The Court reasoned:

> Merrill also said the congressional candidates who brought this suit have no standing because they aren't aggrieved by the actions they challenge. But Merrill tries to treat them as only making a claim indistinguishable from that of an ordinary voter when these are not ordinary voters. They are candidates for office with direct interests at stake and with immediate conduct—encouraging or discouraging absentee ballots—hanging in the balance. They are aggrieved enough to have standing to sue. They are rightly trying to sort this out now to remove a cloud over what happens next.

Mem. Dec. at 5-6.

> In reviewing a finding of aggrievement, our standard of review is well settled. Aggrievement presents a question of fact for the trial court. Bakelaar v. West Haven, 193 Conn. 59, 65, 475 A.2d 283 (1984). We do not, therefore, disturb such a finding on appeal unless the subordinate facts do not support it or it is inconsistent with the law. Mystic Marinelife Aquarium, Inc. v. Gill, 175 Conn. 483, 496, 400 A.2d 726 (1978).

Lewis v. Planning & Zoning Comm'n of Ridgefield, 62 Conn. App. 284, 287 (2001).

The Court's reasoning on this issue, which is entitled to deference on appeal, is straightforward and correct. The plaintiffs further develop their aggrievement below.

1. The Secretary and the Governor have changed the essential character of the elections in which the plaintiffs are candidates

That the plaintiffs have been personally aggrieved by the creation of no-excuse mail-in voting for all voters in elections in which they are candidates cannot be seriously disputed. All four of the plaintiffs are candidates in the August 11, 2020 congressional primary election and two of the four plaintiffs are candidates in the November 3, 2020 congressional general election. As candidates, the plaintiffs have an interest in knowing who is eligible to vote and the manner in which those votes may be cast. The Secretary has represented that, based on her new Application, the upcoming primary election will change from being an election where ninety-five percent of voters cast their votes in-person on the same day, to an election where eighty percent of voters will mail-in votes that are cast over a period of three weeks. See Stipulation, S.C. 20477. This change is likely to occur in the general election as well. It is a fundamental and wholesale change to the character of Connecticut elections.

Throughout Connecticut history, an election has been viewed as a "snapshot" of the will of the voters on a single day. This Court has observed that candidates develop campaigns based on this foundational principle of Connecticut elections:

> An election is essentially—and necessarily—a snapshot. It is preceded by particular election campaign, for a particular period of time, **which**

> **culminates on a particular date**, namely, the officially designated election day. In that campaign, the various parties and candidates presumably concentrate their resources—financial, political and personal—on producing a victory **on that date**. When that date comes, the election records the votes of those electors, and only those electors, who were available to and took the opportunity to vote—whether by machine lever, write-in or absentee ballot—**on that particular day**. Those electors, moreover, ordinarily are motivated by a complex combination of personal and political factors that may result in particular combinations of votes for the various candidates who are running for the various offices.
>
> The snapshot captures, therefore, only the results of the election conducted on the officially designated election day. **It reflects the will of the people as recorded on that particular day, after that particular campaign, and as expressed by the electors who voted on that day.** Those results, however, although in fact reflecting the will of the people as expressed on that day and no other, under our democratic electoral system operate nonetheless to vest power in the elected candidates for the duration of their terms…

Bortner v. Town of Woodbridge, 250 Conn. 241, 255–56 (1999).

The Secretary's Application and the Governor's Executive Order change the fundamental character of the elections in which the plaintiffs are candidates and change the eligibility requirements for who may vote by absentee ballots. The plaintiffs, as candidates, have an obvious personal interest in the propriety of those changes. In short, the plaintiffs were sufficiently aggrieved when they brought this declaratory judgment action.

2. The trial court had jurisdiction over this declaratory judgment action

This action, as decided by the trial court, was brought under General Statutes § 52-29. That statute provides:

> The superior court in any action or proceeding may declare rights and other legal relations on request for such a declaration, whether or not further relief is or could be claimed. The declaration shall have the force of a final judgment.

This Court has explained that a General Statutes § 52-29 lawsuit is a statutory action that vests the court with broad jurisdiction:

> We also have recognized that our declaratory judgment statute is unusually liberal. An action for declaratory judgment ... is a statutory action as broad as it well could be made.... Indeed, our declaratory judgment statute is broader in scope than ... the statutes in most, if not all, other jurisdictions ... and [w]e have consistently construed our statute and the rules under it in a liberal spirit, in the belief that they serve a sound social purpose.... Although the declaratory judgment procedure may not be utilized merely to secure advice on the law ... it may be employed in a justiciable controversy where the interests are adverse, where there is an actual bona fide and substantial question or issue in dispute or substantial uncertainty of legal relations which requires settlement, and where all persons having an interest in the subject matter of the complaint are parties to the action or have reasonable notice thereof....

Travelers Cas. & Sur. Co. of Am. v. Netherlands Ins. Co., 312 Conn. 714, 727 (2014).

This declaratory judgment lawsuit presents a controversy between the parties regarding an actual bona fide and substantial question as to the constitutionality of the Secretary's Application and the Governor's Executive Order. The interests of the plaintiffs and the defendant are adverse because the plaintiffs believe that the creation of no-excuse mail-in voting violates Article Sixth, Section 7 of the Connecticut Constitution; a claim that the defendant disputes. Thus, the requirements for a statutory declaratory judgment action have been met and the trial court properly exercised its jurisdiction to address the constitutionality of the Secretary's Application and the Governor's Executive Order.

B. The Remedy In This Appeal Would Be A Reversal Of The Trial Court's Declaratory Judgment

The only issue before this Court is the constitutionality of expanding no-excuse absentee voting in Connecticut. That is the issue that the trial court addressed under General Statutes § 52-29 and that is the issue on which the plaintiffs seek a reversal. The trial court did not address the plaintiff's claims in Count One (§ 9-329a) or Count Three (§ 52-471) of their Complaint. The issue of what additional remedies, beyond the declaratory judgment, may be available may be addressed on remand in the event that the trial court's declaratory judgment ruling is reversed.

For purposes of the plaintiffs' declaratory judgment action, no additional remedy beyond the Court's declaration of unconstitutionality is required at this time. Justice Palmer observed in his dissenting opinion in Lighthouse Landings, Inc. v. Connecticut Light & Power Co., 300 Conn. 325, 354 (2011) that, a plaintiff who wins a declaratory judgment may go on to seek further relief, even in an action on the same claim which prompted the action for a declaratory judgment. Id., at 361 (*Palmer, J.*, dissenting) (quoting Restatement (Second) Judgments § 33, cmt. c). The majority opinion in Lighthouse Landings agreed with this uncontroverted position. See id. at 354 ("We agree with the dissent that a declaratory judgment, in and of itself, has no res judicata effect on any other claims brought, or to be brought, in a separate action.") This ability to pursue a subsequent claim for relief after bringing a successful declaratory judgment action is referred to as the "declaratory judgment exception to the doctrine of res judicata, which provides that 'a declaratory judgment action does not have a claim preclusive effect beyond what actually was decided in that action.'" Wheeler v. Beachcroft, LLC, 320 Conn. 146, 159 n.14 (2016).

Connecticut's declaratory judgment statute "is broader in scope than ... the statutes in most, if not all, other jurisdictions." New London County Mut. Ins. Co. v. Nantes, 303 Conn. 737, 748 (2012).[3] As this Court made clear in Lighthouse Landings, just as is the case under federal law, a declaratory judgment action under Connecticut law can be brought independent of requests for additional relief. Thus, this Court need not decide the

[3] Connecticut's approach to declaratory judgments, and particularly its permitting of such actions to be brought prior to a separate suit for relief, is consistent with federal law. See, e.g., Richmond v. J. A. Croson Co., 488 U.S. 469, 478 n.1 (1989) (claim concerning expired ordinance not moot); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 8-9 (1978) (claim concerning ceased, unlawful conduct by utility provider not moot); Powell v. McCormack, 395 U.S. 486, 496 (1969) (claim for declaratory judgment concerning ceased, unlawful denial of elective office not moot); Crown Media, LLC v. Gwinnett County, 380 F.3d 1317, 1325 (11th Cir. 2004) (claim concerning repealed law not moot).

scope of any relief that may be obtained after a declaratory judgment is issued in the plaintiffs' favor. The issue before this Court is whether the trial court was correct in resolving the plaintiffs' declaratory judgment action by concluding that the Secretary's Application and the Governor's Executive Order complied with Article Sixth, Section 7 of the Connecticut Constitution. For the reasons set forth *infra*, that declaratory judgment should be reversed. [4]

II. WHETHER ALLOWING EVERY CONNECTICUT ELECTOR TO VOTE BY ABSENTEE BALLOT VIOLATES ARTICLE SIXTH, SECTION 7 OF THE CONNECTICUT CONSTITUTION

A. Neither the Secretary nor the Governor has the Power to Alter or Expand Absentee Voting Under the Connecticut Constitution

The plaintiffs assert that the Secretary's Application and the Governor's Executive Order are unconstitutional because they usurp a power reserved for the electorate and the General Assembly. With respect to the separation of powers claim, the trial court concluded that because the Governor acted pursuant to General Statutes § 28-9(b)(1), the expansion of absentee voting by the executive branch was proper:

> It matters also that this action was taken during a state of emergency. That emergency gave Governor Lamont extraordinary power by virtue of General Statutes §28-9(b)(1), which authorized him to "modify…any statute…in conflict with…the public health." He has modified the statute that would otherwise apply here —General Statutes §9-135— to include, "because of the sickness of COVID-19". The plaintiffs say Governor Lamont had no authority to modify this statute because the constitution gives the authority to legislate about absentee ballots to the General Assembly. This is not, say the plaintiffs, a general assault on the emergency power statute, but a special case because of the specific reference here to the General Assembly. But there are specific references to the General Assembly's power to legislate throughout the Connecticut Constitution, including with regard to the authority over local governments, education, elections in general, corporations and a host of other things. This claim therefore can only be something that the

[4] As noted in footnote 2 *supra*, this Court's declaration about the constitutionality of no-excuse mail-in voting as a result of the existence of COVID-19 in this case may lead to the availability of further relief with respect to the November 3rd general election.

> plaintiffs have neither pleaded nor argued: a claim that the governor has not the power to modify the statute under his emergency powers. With the plaintiffs eschewing making this claim and no reason for the court to independently hold the General Assembly powerless to delegate power in an emergency, the court need not consider this claim further—especially since the General Assembly also retained in the emergency law the power to block the governor's acts under it whenever it chooses.

Mem. Dec. at 4-5. The plaintiffs submit that the trial court erred in failing to recognize that the electorate has limited any changes to absentee voting to acts of the legislature, within the strict limits set forth in Article Sixth, Section 7, and that General Statutes §28-9(b)(1) cannot supersede the Constitution's commitment.[5]

1. Standard of review and relevant legal principles

Preliminary, the plaintiffs note that the issue of whether it would be constitutional to read General Statutes §28-9(b)(1) to permit the Governor to change Connecticut's absentee ballot laws was preserved by way of the briefing in S.C. 20477, which the trial court expressly incorporated into this case. Nonetheless, even if this issue were not preserved, review is appropriate under State v. Golding, 213 Conn. 233, 239-240 (1989).[6]

Because the Secretary's Application is based on the Governor's Executive Order No. 7QQ, the first question is whether the Governor had the constitutional authority to prescribe absentee voting rules. This requires an analysis under State v. Geisler, 222 Conn. 672 (1992). See Feehan v. Marcone, 331 Conn. 436, 449–50 (2019) (issue of

[5] As noted in footnote 2, *supra*, any subsequent action by the legislature during its special session would not have any effect on the issue of whether the Governor's and Secretary's actions were unconstitutional when those actions were taken and when they were challenged in this case.

[6] Golding review is available for claims of error made under the state constitution in both criminal and civil cases. See Perricone v. Perricone, 292 Conn. 187, 212 n.24 (2009). The Golding factors are: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." Id.

whether state constitution commits subject matter to one branch of government requires Geisler analysis), cert. denied, 140 S. Ct. 144, ___ U.S. ___ (Oct. 7, 2019). In State v. Geisler, 222 Conn. 672, 684-85 (1992), this Court set forth six nonexclusive factors that may be considered in analyzing a claim of error under the Connecticut state constitution: "(1) the text of the relevant constitutional provisions; (2) related Connecticut precedents; (3) persuasive federal precedents; (4) persuasive precedents of other state courts; (5) historical insights into the intent of our constitutional forebears; and (6) contemporary understandings of applicable economic and sociological norms." Not every Geisler factor will be relevant in all cases. Honulik v. Town of Greenwich, 293 Conn. 641, 649 (2009).

2. The Connecticut Constitution commits absentee voting to the legislature and the electorate – not to the Secretary or Governor

The Connecticut Constitution entrusts two bodies with prescribing the rules for absentee voting – the electorate, through constitutional amendment, and the legislature, through the constitutional charge to provide by law for implementation of those constitutional requirements. The Connecticut Constitution provides no role for either the Governor or for the Secretary of the State in setting absentee voting rules.

a. the text of the relevant constitutional provisions

Article Sixth, Section 7 of the state constitution states:

> The **general assembly may provide by law** for voting in the choice of any officer to be elected or upon any question to be voted on at an election by qualified voters of the state who are unable to appear at the polling place on the day of election because of absence from the city or town of which they are inhabitants or because of sickness or physical disability or because the tenets of their religion forbid secular activity.

(Emphasis added).

When the text of the state constitution commits a particular subject matter to the General Assembly, no other branch of government may exercise control over that subject

matter. See Feehan v. Marcone, 331 Conn. at 468 (House of Representatives has exclusive jurisdiction over assembly district election disputes); State v. Barriga, 165 Conn. App. 686, 690 (2016) ("[a]lthough our courts have the power and duty to interpret and apply laws enacted by the General Assembly, they do not have the power to repeal or amend them."); Nielsen v. State, 236 Conn. 1, 6 (1996) (article third, § 18 "evinced a clear textual commitment of exclusive authority to the General Assembly to define the spending cap terms"); Kinsella v. Jaekle, 192 Conn. 704, 713 (1984) ("The constitution leaves no doubt but that impeachment proceedings may be brought and tried only in the General Assembly.").

Nowhere in the text of Article Sixth, Section 7 are the Secretary of the State or the Governor empowered to act in the area of absentee voting.

b. related Connecticut precedents

When a governor acts beyond his constitutional authority, that act becomes a nullity. This Court has twice addressed this issue. In Caldwell v. Meskill, 164 Conn. 299, 315 (1973), the Court held that where the Governor had attempted to veto a portion of a bill in a manner that was beyond his constitutional authority, his actions were void (not just voidable) and the Secretary of the State had the duty to disregard them and certify the entire bill as law. Similarly, in Patterson v. Dempsey, 152 Conn. 431, 447 (1965), the Court explained that the reason that the constitution limited the Governor's veto power was to protect, as a matter of separation of power, the legislature's role:

> [T]he fundamental reason why a partial disapproval or veto is not generally authorized, at least in the case of general legislation, is because of the separation of powers among the executive, legislative and judicial branches of the government. All affirmative legislative powers are given exclusively to the General Assembly. See cases such as Booth v. Town of Woodbury, 32 Conn. 118, 126; Beach v. Bradstreet, 85 Conn. 344, 348, 82 A. 1030. If the governor were allowed to disapprove or veto parts of a bill involving general legislation, he could, in the case of many if not most such bills, by the

> exercise of that power, eliminate selected portions of a bill in such a manner as to change its meaning and thereby, in effect, enact an entirely different bill. **This would usurp the legislative function, which is committed to the General Assembly alone.** But such legislative action through the use of the veto power would be impossible if the veto power were restricted to distinct items of appropriation in a bill, whether that bill did, or did not, include other items of general legislation.

(Emphasis added). Patterson v. Dempsey, 152 Conn. at 442. The Court in Patterson further explained that "the [governor] had no constitutional power to veto or disapprove any of the three sections in question and that his action in purporting so to do was unconstitutional and void." Id. at 443.

Moreover, it is the proper role of the judicial branch to declare executive branch conduct that exceeds constitutional bounds to be unconstitutional. See Office of Governor v. Select Comm. of Inquiry, 271 Conn. 540, 574–75 (2004) ("It is emphatically the province and duty of the judicial department to say what the law is.") (quoting Marbury v. Madison, 5 U.S. [1 Cranch] 137, 177, 2 L.Ed. 60 (1803). When the executive branch has acted beyond its constitutional authority or failed to respect the authority of another branch of government to control matters within a particular area, it is the obligation of the judiciary to order remedial action. Thus, in Office of Governor v. Select Comm. of Inquiry, 271 Conn. 540, the Supreme Court recognized that, once the Constitution entrusts one branch of the government with the authority to act in a particular subject matter, in that case the legislature's authority over impeachment, the judiciary appropriately acts in requiring that the other coordinate branch of government acknowledge that authority, in that case recognizing the validity of a legislative subpoena served on the Governor. Similarly, in Republican Party v. Merrill, 307 Conn. 470 (2012), when the Secretary of the State improperly awarded the top line of the 2012 election ballots to the Democratic Party, the Supreme Court ordered her to place the Republican Party's candidates on the top line of

the ballots. It is inherently the obligation of the judicial branch to ensure that the executive and legislative branches are acting within their constitutional parameters.

In this case, both the Governor, in expanding absentee voting in Connecticut to all voters through Executive Order No. 7QQ, and the Secretary, in expanding such absentee voting through the Application for Absentee Ballot, have exceeded their constitutional authority and encroached upon a constitutional function committed to the General Assembly. It is this Court's role to declare those actions to be unconstitutional.

c. persuasive federal precedents

In contexts other than voting, the federal courts have also declared executive branch action unconstitutional when the executive branch exceeds its constitutional authority. See, e.g., National Labor Relations Board v. Canning, 573 U.S. 513, 550-57 (2014) (Supreme Court held that the President's recess appointments were invalid and represented an overreach into the realm of the Senate); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585-89 (1952) (Supreme Court held that executive order directing the seizure of steel plants located throughout the country was outside of the President's constitutional power). It is clear that under both the Connecticut Constitution and the U. S. Constitution, when the executive branch acts in an area committed to the legislative branch, the executive branch's actions are invalid.

d. persuasive precedents of other state courts

There are a number of state court decisions declaring acts of overreach by an executive official to be invalid. See, e.g., Ritchie v. Polis, ____ P.3d ____. 2020 WL 3969873, at *5 (Colo. 2020) (per curiam) ("Article V, section 1(6) of the Colorado Constitution requires that ballot initiative petitions be signed in the presence of the petition circulator. That requirement cannot be suspended by executive order, even during a

pandemic."); Griswold v. Ferrigno Warren, 462 P.3d 1081, 1082 (Colo. 2020) (only legislature, not Secretary of State, could alter statutory minimum signature requirement for candidate's name to appear on primary election ballot). It may be most useful to review one such decision that was issued in the context of COVID-19, demonstrating that, in most states (including Connecticut), there is no pandemic exception to the constitution.

In Wisconsin Legislature v. Palm, 942 N.W. 2d 900, 906 (Wisc. 2020), the legislature brought a declaratory judgment action challenging a COVID-19 emergency order issued by the Department of Health Services that required all Wisconsin residents to stay in their homes, to not travel, and mandated the closure of all non-essential businesses. The Wisconsin Supreme Court held that the emergency order exceeded the agency's authority and amounted to a "vast seizure of power." Id. at 915-918. A concurring opinion from Justice Bradley, joined by Justice Kelly, highlighted the key constitutional separation of powers concerns posed by the emergency order. "In issuing her order, [the secretary-designee of DHS] arrogated unto herself the power to make the law and the power to execute it, excluding the people from the lawmaking process altogether." Id. at 920. "The separation of powers embodied in our constitution does not permit this." Id. "Fear never overrides the Constitution. Not even in times of public emergencies, not even in a pandemic." Id. at 930.

e. historical insights into the intent of our constitutional forebears

The 1818 Connecticut Constitution provided for the time, place and manner for holding elections because the framers and electors did not want future legislatures to potentially have oversight over their elections. See In re Opinion of Justices, 30 Conn. 591, 595 (Conn. 1862) ("It was the intention of the men who framed the constitution of this state, and of the people who adopted it, to place every thing pertaining to the election of state

officers and members of the General Assembly beyond the reach of subsequent legislatures."). In 1862, the General Assembly passed a statute that sought to provide soldiers fighting in the Civil War with the right to vote by absentee ballot. See T. Adams, "History of Absentee Voting in the State Constitution," 2012-R-0379, Office of Legislative Research (Sept. 7, 2012). The Supreme Court held that unless the Constitution delegated to the legislature the ability to change the manner in which elections were conducted, including the use of absentee ballots, any attempt to do so would be unlawful:

> The constitution establishes an elective government, and under it there must of necessity be a fixed time, place and manner of holding elections. If these are clearly and sufficiently fixed and prescribed by the constitution, and nothing is expressly delegated or by implication left to the legislature, that body can not interfere to alter, extend or suspend them, or either of them, in the slightest particular.

In re Opinion of Justices, 30 Conn. at 594. Because the constitution did not delegate to the legislature any authority to alter the manner in which voting was to be conducted, the Court declared the absentee ballot statute to be unconstitutional. The Court went on to explain that if absentee voting was going to be allowed for certain individuals, no matter how exigent the circumstances may be (in that case, the Civil War), that could only be accomplished by a constitutional amendment expressing the will of the electorate:

> But no one, we presume, has heretofore supposed, that a man who was detained by sickness at his home, or the many who are every year detained by business in other states, or in congress, or the departments at Washington, or in coasting vessels, or in the navy yards or navy, or otherwise absent from home, could, by a mere provision of law, be favored with a special opportunity to vote. It is said, and truly, that this is an extraordinary exigency; but the men who made the constitution had just passed through a war which drew many men from the state, and the exigency of a future war may well have been contemplated as possible; and the mere magnitude of the exigency and of its consequent equities do not alter its character. But however that may be, the people saw fit, in their determined intention that all elections should be regulated by constitutional provisions, unalterable by the General Assembly, to prescribe in the clearest manner, when, where, and how the elective franchise should be exercised, and these provisions must

> control the General Assembly *in all exigencies*, until changed by the supreme will of the people, expressed in a new or amended constitution.

(Emphasis in original). In re Opinion of Justices, 30 Conn. at 600–01. The electorate subsequently amended the Constitution in 1864, allowing Civil War soldiers to vote by absentee ballot.[7] See T. Adams, "History of Absentee Voting in the State Constitution," 2012-R-0379, Office of Legislative Research (Sept. 7, 2012).

The use of absentee ballots expanded beyond soldiers for the first time in 1932 when the electorate amended the 1818 Constitution. Id. This constitutional amendment provided that a person could vote by absentee ballot if "because of sickness" he or she was "unable to appear at the polling places on the day of the election":

> The general assembly shall have power to provide by law for voting by qualified voters of the state who are absent from the city or town of which they are inhabitants at the time of an election or because of sickness or physical disability are unable to appear at the polling places on the day of election, in the choice of any officer to be elected or upon any question to be voted on at such election.

Article XXIX, 1818 Connecticut Constitution. The General Assembly subsequently passed

---

[7] Article 13 amending the 1818 Constitution was adopted in August 1864 and provided the following:

> Every elector of this State who shall be in the military service of the United States, either as drafted person or volunteer, during the present rebellion, shall, when absent from this State, because of such service, have the same right to vote in any election of State officers, Representatives in Congress, and electors of President and Vice-President of the United States, as he would have if present at the time appointed for such election, in the town in which he resided at the time of his enlistment into such service. This provision shall in no case extend to persons in the regular army of the United States, and shall cease, and become inoperative and void, upon the termination of the present war. The General Assembly shall prescribe by law, in what manner and in what time, the votes of electors absent from this State, in the military service of the United States, shall be received, counted, returned and canvassed.

Notably, the amendment granted to the General Assembly the authority to prescribe the manner in which absentee voting by Civil War soldiers was to be conducted.

legislation implementing absentee voting for these groups of individuals.

The most recent amendment to the Connecticut Constitution's absentee voting provision came in 1964, when the electorate expanded such privileges to those whose religion forbid secular activity on the day of the election:

> The general assembly may provide by law for voting in the choice of any officer to be elected or upon any question to be voted on at an election by qualified voters of the state who are unable to appear at the polling place on the day of election because of absence from the city or town of which they are inhabitants or because of sickness or physical disability or because the tenets of their religion forbid secular activity.

Article 12, 1955 Connecticut Constitution (Adopted November 24, 1964). Once again, the amendment empowered the General Assembly to implement to right to vote by absentee ballot for the class of individuals designated. This language is verbatim with the current language of the Connecticut Constitution's absentee ballot provision. See Article Sixth, Section 7.

At no time in the historical development of absentee voting did electors grant the Governor, Secretary of the State, or any executive official the ability to address the time, place, or manner in which absentee voting may be conducted in this state.

f. contemporary understandings of applicable economic and sociological norms

The trial court agreed with the defendant's argument that, through General Statutes § 28-9(b)(1), the legislature has empowered the Governor under the current contemporary circumstances to expand absentee voting in Connecticut. That statute provides:

> the Governor may modify or suspend in whole or in part, by order as hereinafter provided, any statute, regulation or requirement or part thereof whenever the Governor finds such statute, regulation or requirement, or part thereof, is in conflict with the efficient and expeditious execution of civil preparedness functions or the protection of the public health.

The trial court concluded that General Statutes § 28-9(b)(1) authorizes the Governor to

modify General Statutes § 9-135(a), which provides the six statutory reasons that a person may use to obtain an absentee ballot.

However, General Statutes § 28-9(b)(1) does not purport to modify (nor could it) the Constitution's command that the manner in which absentee voting is to be conducted must be prescribed by the General Assembly – not the Governor. It is well-settled that a statute should be read in a way that would avoid potential constitutional infirmities. See Honulik v. Greenwich, 293 Conn. 641, 647 (2009) ("This court has a duty to construe statutes, whenever possible, to avoid constitutional infirmities.")

> A statute will be declared unconstitutional if it (1) **confers on one branch of government the duties which belong exclusively to another branch**; … (2) if it confers the duties of one branch of government on another branch which duties significantly interfere with the orderly performance of the latter's essential functions. …

(Emphasis added.) Univ. of Connecticut Chapter AAUP v. Governor, 200 Conn. 386, 394–95 (1986). Here, the Connecticut Constitution commits the prescription of absentee voting to the General Assembly and, thus, any attempt to confer that authority onto the executive branch would be unconstitutional. See State v. Stoddard, 126 Conn. 623, 627 (1940) (statute delegating regulation of sale of milk products to executive branch official declared unconstitutional). Thus, General Statutes § 28-9(b)(1) cannot be read to empower the Governor to alter absentee voting in Connecticut. With respect to the contemporary policy question of whether absentee voting should be expanded in Connecticut – that is a question that should be put to consideration by the legislature and, ultimately, by the electorate. Only the General Assembly, which can assess and evaluate the competing policy considerations associated with absentee voting by holding public hearings, hearing testimony, and studying the impacts on Connecticut elections, is equipped to implement or alter absentee voting procedures. See Absentee Voting in Connecticut, Connecticut

General Assembly, Legislative Program Review and Investigations Committee (Dec. 1986). Unlike the legislature, the Executive Branch is simply not equipped to hold public hearings and engage in the type of study and evaluation that is vital to the legislative process. See Gentile v. Altermatt, 169 Conn. 267, 270 (1975) ("[j]ustification for passage of the [legislation was] based upon legislative hearings, and the findings of the special Connecticut study commission, the United States Department of Transportation Automobile Insurance and Compensation Study, and the testimony of numerous witnesses at public hearings."). Simply put, public hearings, at which witnesses can testify both for and against proposed revisions or amendments to legislation, are traditionally legislative functions and are within the exclusive realm of the legislature. The General Assembly, not the Governor, is therefore the appropriate body to evaluate the impact of a change to absentee voting procedures and to adopt any change to the procedures.

The requirement that any expansion of absentee voting occur only after approval by the electorate through constitutional amendment is equally important to consider here. The integrity of our elections is threatened when the rules governing absentee voting are changed in the middle of an election, as happened here. The considerable time and effort associated with constitutional amendment, which can only occur after the conclusion of at least one legislative session, serves as an important safeguard against elected officials changing the election's ground rules while it is already underway. See Article 12, Connecticut Constitution. This is precisely why absentee voting can only be expanded through a constitutional amendment.

A review of the Geisler factors conclusively demonstrates that, under the Connecticut Constitution, the Governor has no authority to broaden the use of absentee ballots or to implement absentee ballot procedures. Executive Order No. 7QQ is

unconstitutional and void. The Secretary's decision to implement Executive Order No. 7QQ through the Application for Absentee Ballot was equally improper and unconstitutional. The trial court's declaration to the contrary was error.

B. Absentee Voting In Connecticut Is Limited To Those Reasons Set Forth In The Connecticut Constitution

As set forth in the previous section, neither the Secretary of the State nor the Governor had the authority under the Connecticut Constitution to expand absentee voting based on COVID-19 (or any other reason). However, even if Executive Order No. 7QQ had been properly decreed (*i.e.* by the General Assembly rather than by the Governor), it still would be unconstitutional. The reason for its infirmity is that the only reasons for voting by absentee ballot are set forth in the Connecticut Constitution and the existence of COVID-19 is not one of those reasons.

The trial court recognized this to be the primary issue in this case:

> Must the sickness referred to in Article Sixth, Section 7 of the Connecticut Constitution be the sickness of the individual seeking to vote by absentee ballot or is the existence of a raging global pandemic enough?

Mem. Dec. at 1. The trial court reasoned that COVID-19 was unique enough to qualify under the constitutional provision:

> Has the executive branch crossed the line into absurdity by allowing absentee ballots "because of sickness" to include "because of the sickness, COVID-19"? It hardly seems so. What has been done is far from saying the law means any sickness, anywhere, anytime. After all, COVID-19 is today in a class by itself. The court can take judicial notice about that. COVID-19 is the scourge of the earth. It is a sickness of a lethality and ubiquity unknown for a hundred years. According to the state's official website it has killed to date over 4,406 Connecticut residents. The National Archives show that this number is almost exactly the same number of Connecticut residents—4,496— killed in World War I, World War II, Korea, and Vietnam combined.2 It took collectively around 15 years of war to kill those residents. It has taken COVID-19 around six months to kill almost the same number of us.
>
> So it can be said with some confidence that the executive branch has not so broadly interpreted the constitutional language as to make it meaningless.

> Instead, the governor and the secretary of state have confined the interpretation to include a sickness of a nearly unique character. One so rare. One so grievous as to mean—we can hope—that we will not see its like again for another hundred years.
>
> It matters that this is what the executive branch has done. We are not dealing with an absurd exercise of power, and we do not have to contemplate every potential interpretation that might offend the constitution. Suffice it to say that cold and flu season wouldn't be enough. Those circumstances would leave the exception of absentee balloting swallowing the rule of in-person voting. This is a far case from that.

Mem. Dec. at 3-4.

However, the trial court's agreement with the defendant that the limitation on "absentee voting" based on "sickness," could be expanded based on the unique nature of COVID-19 was error. To be sure, COVID-19 does factor into each person's individual health circumstances and his or her decision as to whether he or she is able to appear at the polls to vote. But, COVID-19 cannot be used as a justification for creating a blanket rule stating that everyone, no matter their circumstances, may vote by absentee ballot, including those who are able to appear in-person to vote. Our constitution does not permit this.

1. Standard of review and relevant legal principles

Because the Secretary's Application and the Governor's Executive Order expand the reasons for absentee voting, the question of whether these government actions violate the Connecticut Constitution is once again subject to a Geisler analysis

2. The existence of COVID-19 does not justify the use of absentee ballots by any and all voters under the Connecticut Constitution

a. the text of the relevant constitutional provisions

Article Sixth, Section 7 of the state constitution states:

> The general assembly may provide by law for voting in the choice of any officer to be elected or upon any question to be voted on at an election by qualified **voters** of the state who are **unable to appear at the polling place** on the day of election because of absence from the city or town of which they

> are inhabitants or **because of sickness** or physical disability or because the tenets of their religion forbid secular activity.

(Emphasis added). The state constitution expressly provides that a voter who is "unable to appear at the polling place… because of sickness" may vote by absentee ballot. The Governor's Executive Order No. 7QQ applies this reason to any and all voters, but it does not square with the plain text of the constitutional provision.

To determine the meaning of "because of sickness or physical disability," it is proper to first consider dictionary definitions. See Rutter v. Janis, 334 Conn. 722, 730–31 (2020). When the "because of sickness or physical disability" provision was added to the state constitution in 1932, dictionaries at the time contained a definition of "sickness" that is inconsistent with the trial court's interpretation of the word. Bouvier's Law Dictionary (1934) defined sickness as: "By sickness is understood any affection of the body which deprives it temporarily of the power to fulfill its usual functions." More contemporary dictionaries also define "sickness" in relation to one's individual health. See The New Oxford American Dictionary (Oxford University Press 2001) ("sickness" is "the state of being ill"); Merriam-Webster Dictionary (1983) ("sickness" means "ill health" or "a disordered, weakened, or unsound condition"); Black's Law Dictionary (11th ed. 2019) ("sickness" defined as "[t]he quality, state, or condition of suffering from a disease, esp. a disease that interferes with one's vocation and avocations"). The plain meaning of "sickness" refers to one's personal health condition, not the general existence of a disease.

Moreover, the Constitution requires that the person's "sickness" be the cause in fact for why they are unable to appear at the polls on election day. To be sure, the existence of COVID-19 may provide a valid reason for why a person may not be able to appear at the polls based on individual circumstances. For example, a person may have a sickness or illness that, while it did not prevent him from appearing at the polls in years past, would

prevent him from voting in-person this year because of the effect that COVID-19 may have on that person's illness. But that person would be able to vote by absentee ballot without Executive Order No. 7QQ because he would qualify for an absentee ballot as a result of his "sickness." Executive Order No. 7QQ does not change the availability of an absentee ballot for a person who is unable to appear at the polls due to his or her sickness. The problem is that the Secretary's Application unconstitutionally says that any and all voters may vote by absentee ballot.

The grouping of the words "sickness" with "physical disability" further clarifies that "sickness" does not refer to the existence of a virus, but rather must be an individualized sickness that prevents the person from physically appearing at the polls. "When a statute sets forth a list or group of related terms [the court will] usually construe them together." Dattco, Inc. v. Comm'r of Transportation, 324 Conn. 39, 48 (2016). "Noscitur a sociis ... acknowledges that general and specific words are associated with and take color from each other, restricting general words to a sense ... less general." Id. "As a result, broader terms, when used together with more narrow terms, may have a more restricted meaning than if they stand alone." Id.; see also McCoy v. Commissioner of Public Safety, 300 Conn. 144, 159 (2011); State v. LaFleur, 307 Conn. 115, 133–34 (2012); State v. Agron, 323 Conn. 629, 635 (2016).

Here, "sickness" must be interpreted in accord with the surrounding terms. For example, "physical disability" is necessarily personal to the voter. Indeed, all of the reasons for allowing absentee voting are limited to reasons an individual "cannot appear at their assigned polling place." The six reasons found in General Statutes § 9-135(a), which implements absentee voting, are reasons personal to the voter for not being able to appear to vote in person. An individual who is unable to appear in person due to his personal

health in light of COVID-19 is able to vote by absentee ballot. But what the Secretary's Application and Executive Order No. 7QQ do is improperly expand absentee voting to all voters in Connecticut, regardless of whether they are able to vote in person. This is incompatible with the plain text of the Article Sixth, Section 7.

b. related Connecticut precedents

This Court has regularly stated that absentee voting is the biggest area of concern for election irregularities from mistakes to fraud. See Wrinn v. Dunleavy, 186 Conn. 125, 142–44 (1982) ("We have previously recognized that there is considerable room for fraud in absentee voting and that a failure to comply with the regulatory provisions governing absentee voting increases the opportunity for fraud."); Dombkowski v. Messier, 164 Conn. 204 (1972) (same). As recently as the last election cycle in 2019, the Supreme Court observed that the state has regularly had issues with absentee ballot improprieties. See Lazar v. Ganim, 334 Conn. 73 (2019) (observing history of improper handling of absentee ballots). For this reason, the Court has recognized that absentee voting in Connecticut is an exception to the rule and for a variety of policy reasons must be strictly construed:

> [T]his case concerns various statutes applicable to absentee balloting, which is "a special type of voting procedure established by the legislature for those otherwise qualified voters who for one or more of the [statutorily] authorized reasons are unable to cast their ballots at the regular polling place." Wrinn *v.* Dunleavy, 186 Conn. 125, 142, 440 A.2d 261 (1982); see also -General Statutes § 9–135. [ ] "The right to vote by absentee ballot is a special privilege granted by the legislature, exercisable only under special and specified conditions to [e]nsure the secrecy of the ballot and the fairness of voting by persons in this class." (Internal quotation marks omitted.) Hardin *v.* Montgomery, 495 S.W.3d 686, 696 (Ky. 2016); see also 26 Am. Jur. 2d 129, Elections § 333 (2014) ("[t]he procedures required by the absentee voting laws serve the purposes of enfranchising qualified voters, preserving ballot secrecy, preventing fraud, and achieving a reasonably prompt determination of election results"). This court previously has recognized "that there is considerable room for fraud in absentee [ballot] voting and that a failure to comply with the regulatory provisions governing absentee [ballot] voting increases the opportunity for fraud." (Internal quotation marks omitted.) Wrinn *v.* Dunleavy, supra, at 142–44, 440

A.2d 261.

Keeley v. Ayala, 328 Conn. 393, 406–07 (2018).

Keeley's reference to some of the reasons for limiting absentee voting, including the need to preserve ballot secrecy, is particularly apt under the Connecticut Constitution which expressly requires this right be protected:

> In all elections of officers of the state, or members of the general assembly, the votes of the electors shall be by ballot, either written or printed, except that voting machines or other mechanical devices for voting may be used in all elections in the state, under such regulations as may be prescribed by law. **The right of secret voting shall be preserved.** At every election where candidates are listed by party designation and where voting machines or other mechanical devices are used, each elector shall be able at his option to vote for candidates for office under a single party designation by operating a straight ticket device, or to vote for candidates individually after first operating a straight ticket device, or to vote for candidates individually without first operating a straight ticket device.

Article Sixth, Section 5, Connecticut Constitution. While there are no cases addressing this constitutional right, the fact that it is enshrined in our constitution complements the extremely limited use of absentee ballots. Indeed, with absentee ballots, in addition to the fraud concerns discussed by the Supreme Court in Lazar, Keeley, Wrinn, and Dombkowski, the use of absentee ballots results in a loss of the privacy and security of the voting booth. Spouses, friends, acquaintances, candidates, and campaign workers can view and pressure how a particular elector is filling out his or her ballot. This is another reason that absentee ballots are used sparingly under Connecticut law. The electorate has determined that there are some circumstances where the potential fraud or the loss of the constitutional right to secrecy should cede to the difficulties with a person's ability to vote in person. But those value judgments are left to the electorate, not the Secretary or the Governor.

c. persuasive federal precedents

The issue of whether individuals have an absolute constitutional right to vote by absentee ballot was addressed by the U. S. Supreme Court in McDonald v. Board of Election Commissioners of Chicago, 394 U.S. 802 (1969). There, a group of inmates brought a lawsuit alleging that they were denied equal protection of the laws by not being permitted to vote by absentee ballot. The U. S. Supreme Court rejected the plaintiffs' claim and held that as long as the State provided all eligible voters with the right to vote, limiting the use of absentee ballots to certain individuals was constitutionally permissible. Id. at 807. The Court noted that there were a number of valid reasons that a person might, as a matter of policy, have for wanting to vote by absentee ballot but that the ability to do so is left to the discretion of the state's legislature:

> A number of identifiable groups are not yet entitled to vote absentee under Illinois legislation: those serving on juries within the county of their residence, mothers with children who cannot afford a baby sitter, persons attending ill relations within their own county, servicemen stationed in their own counties, doctors who are often called on to do emergency work, and businessmen called away from their precincts on business. On the other hand, any person in the above groups, including an unsentenced prisoner, presumably can get an absentee ballot if he is outside his resident county, ill, or observing a religious holiday.

Id. at 810 n.8. As the Supreme Court recognized in McDonald, there are many worthwhile reasons for allowing people to vote by absentee ballot; but that determination must come from the electorate and not from the courts (and, implicitly, not from executive officials).

d. persuasive precedents of other state courts

The Massachusetts Supreme Judicial Court has construed the meaning of "sickness" in the context of a sickness indemnity policy. See Rocci v. Massachusetts Acc. Co., 116 N.E. 477 (Mass. 1917). In addressing whether the loss was caused "by reason of sickness," the Court explained the meaning of sickness in three degrees:

> There may be said to be three degrees of sickness. The first degree is when the patient is confined to his bed. The second degree is when he is not confined to his bed, but is confined to the house. And the third degree is when he is too sick to work, but is not confined to the house. By the true construction of it the clause of the policy here in question ('that the insured by reason of sickness is necessarily and continuously confined within the house') is a requirement that the second of these three degrees of sickness should in fact exist.

Rocci v. Massachusetts Acc. Co., 116 N.E. 477, 479 (Mass. 1917). This decision was incorporated into the definition of "sickness" contained in Black's Law Dictionary (3rd ed. 1933) and would have been known to the drafters of the 1932 constitutional amendment.

A much more recent decision from the Texas Supreme Court confirms this understanding of sickness. In In re State, __ S.W.3d ___, 2020 WL 2759629, at *9-10 (Tex. 2020), the Texas Supreme Court held that a lack of immunity to COVID-19 and a fear of contracting COVID-19 do not constitute a "disability" (which was defined as "sickness" or "physical condition") and therefore are not valid grounds for obtaining an absentee ballot. Like in Connecticut, absentee voting in Texas is limited. In concluding that a lack of COVID-19 immunity and a fear of contracting COVID-19 do not constitute a "disability" for purposes of absentee voting, the Texas Supreme Court reasoned that:

> [t]he ordinary meaning of "physical" is "of or relating to the body". The parties agree that this excludes mental or emotional states, including a generalized fear of a disease. "Condition" can mean "a state of being". But if "physical condition" as used in § 82.002(a) meant "physical state of being", it would swallow the other categories of voters eligible for mail-in voting. A voter's location during an election period is certainly a physical state of being. So are age, incarceration, sickness, and childbirth, even participation in a program. To give "physical condition" so broad a meaning would render the other mail-in voting categories surplusage. Further, such an interpretation would encompass the various physical states of the entire electorate. Being too tired to drive to a polling place would be a physical condition. The phrase cannot be interpreted so broadly consistent with the Legislature's historical and textual intent to limit mail-in voting.
>
> Another dictionary definition of "condition" is "the physical status of the body as a whole or of one of its parts usually used to indicate abnormality", as for example a heart condition. The idea of condition as an abnormal or

> at least distinguishing state of being is consistent with the other statutory categories. A lack of immunity to COVID-19, though certainly physical, is not an abnormal or distinguishing condition.
>
> Section 82.002 describes the physical condition that entitles a voter to vote by mail as a "disability". It is the same word the Legislature has used consistently since 1935. "Disabled" normally means "incapacitated by or as if by illness, injury, or wounds". The phrase, "physical condition", must be read in this light. In no sense can a lack of immunity be said to be such an incapacity.

Id. at *9.

The Texas Court held that the decision of whether to vote by absentee ballot is in actuality the voter's personal decision, and not for election officials to determine. "The decision to apply to vote by mail based on a disability is the voter's, subject to a correct understanding of the statutory definition of 'disability.'" Id. at *1. The court continued:

> We agree, of course, that a voter can take into consideration aspects of his health and his health history that are physical conditions in deciding whether, under the circumstances, to apply to vote by mail because of disability. We disagree that lack of immunity, by itself, is one of them. As we have said, the decision to apply to vote by mail based on a disability is the voter's, subject to a correct understanding of the statutory definition of "disability".

Id. at *10. This Court should follow the holding of the Texas Supreme Court and conclude that, whether a person is unable to appear at his polling location to vote in person will depend on the individual health and circumstances of each person.

e. historical insights into the intent of our constitutional forebears

As discussed in Section II.A.2.e, *supra*, the "because of sickness or physical disability" language now found in Article Sixth, Section 7 of the Connecticut Constitution came from a 1932 amendment to the 1818 Constitution. The legislative hearing on House Resolution No. 26 was held on February 21, 1929. Joint Standing Committee Hearings – Constitutional Amendments (General Assembly 1929 Sess.). The examples given of

people who would be able to vote by absentee ballot during that hearing included individuals whose health would not allow for them to vote in person and individuals who traveled out of state for work or school. There was no mention of expanding absentee voting for everyone, even during a pandemic, which is particularly telling given that the hearing was held just ten years removed from the Spanish Influenza Pandemic.

Although 1964 was the last time the Constitution was amended to expand absentee voting, there have been numerous failed efforts to do so over the years. See S. Norman-Eady, "History and Constitutionality of Early Voting in Connecticut," Office of Legislative Research Report, 2004-R-0906 (Dec. 3, 2004). In 1987, a proposed bill that would have allowed absentee voting for those who are working during hours of voting was returned as unconstitutional by the Legislative Commissioners' Office. Id. (quoting commissioners as stating "Section Seven of Article Sixth… provides that absentee voting may be provided for by law…only in the cases where an elector is absent from the city or town…by reason of sickness, physical disability or religious tenets…. The Constitution makes no provision for the general assembly to provide for absentee voting where the elector is employed during all of the hours of voting."). In 1993, the House of Representatives passed Resolution HJR 67, but the Senate did not, which would have allowed the General Assembly to submit a constitutional amendment to the voters that would extend the use of absentee ballots. Id. In 1997, Resolution HJR 96, another proposed constitutional amendment, which would have allowed the General Assembly to pass a law permitting voters to vote by mail, failed in Committee after a public hearing. Id. In 2003, Resolution SJR 10, which would have sought a constitutional amendment that allowed the General Assembly to extend the use of absentee ballots to all people age seventy and older, did not make it out of Committee. Id.

In 2013, the General Assembly passed Resolution HJ 36 which permitted the

electorate to vote on an amendment to the Constitution that would allow all voters the right to vote by absentee ballot. The ballot question submitted to the electorate on the 2014 election ballot was:

> Shall the Constitution of the State be amended to remove restrictions concerning absentee ballots and to permit a person to vote without appearing at a polling place on the day of an election?

See K. Sullivan, "Ballot Question and Explanatory Text for Proposed Constitutional Amendment, Office of Legislative Research (Aug. 19, 2014). The electorate rejected the amendment by approximately 40,000 votes. See Statement of the Vote, State Election Constitutional Question On The Ballot (Nov. 4, 2014).

Thus, the Connecticut Constitution remains unchanged since 1964 in terms of the reasons that can justify the use of absentee ballots.

f. contemporary understandings of applicable economic and sociological norms

In 1986, the General Assembly mandated a study on absentee voting by the Legislative Program Review and Investigations Committee. See Absentee Voting in Connecticut, Connecticut General Assembly, Legislative Program Review and Investigations Committee (Dec. 1986). Indeed, this process is precisely how an issue of the magnitude of changing the essential character of elections though absentee voting is supposed to be vetted. After an in-depth study on absentee voting, balancing the desire to increase voter participation with the need to protect the integrity of each vote, the Committee made several recommendations which were premised on continuing to limit the number of people who should be able to vote by absentee ballot. Notably, the very first recommendation put forth by the Committee was:

> Applications shall only be picked up in person by an elector, mailed to an elector pursuant to a telephone call or written request from the elector, or picked up in person by an individual designed by the elector. Identifying

> information about the elector shall be required, if a request is made by telephone.

Absentee Voting in Connecticut, Connecticut General Assembly, Legislative Program Review and Investigations Committee (Dec. 1986), p. i. Thus, the Secretary's decision to mail out absentee ballots to every voter in Connecticut contravenes the first recommendation offered by the legislative committee that actually studied the issue.

Finally, in terms of contemporary understandings, it is worth noting that, in 2019, the legislature once again considered amending the constitution to provide for no-excuse absentee voting. See House Joint Resolution No. 161. The resolution was adopted by a majority of each house, but not by the three-fourths vote required to place the question on the 2020 general election ballot. Thus, if the next legislature approves of the resolution by a majority vote, then the electors again will have the opportunity to vote on an amendment to the constitution that would permit no-excuse absentee voting. The contemporary understanding of the constitution is that it must be amended before no-excuse absentee voting can be permitted.

The above history shows that there is a legitimate constitutional path to provide for no-excuse absentee voting and that path is by submitting the question to the electorate. No-excuse absentee voting cannot be provided by executive decree, yet that is precisely the path that the Secretary and Governor have taken. Their actions are unconstitutional and should be so declared.

CONCLUSION

For the above stated reasons, the plaintiffs urge this Court reverse the trial court's declaratory judgment and to declare that Executive Order No. 7QQ and the Application for Absentee Ballot are unconstitutional.

Respectfully submitted,

THE PLAINTIFFS-APPELLANTS,

MARY FAY, THOMAS GILMER,
JUSTIN ANDERSON, AND JAMES GRIFFIN

By /s/ Proloy K. Das, Esq.

Proloy K. Das
pdas@murthalaw.com
Rachel Snow Kindseth, Esq
rkindseth@murthalaw.com
Matthew A. Ciarleglio
mciarleglio@murthalaw.com

MURTHA CULLINA LLP
280 Trumbull Street
Hartford, Connecticut 06103
Telephone: 860.240.6000
Facsimile: 860.240.6150

Their Attorneys

CERTIFICATION

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2, that on July 28, 2020:

(1) the electronically submitted brief and appendix have 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 filed paper brief 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 have been sent electronically to each counsel of record 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.

/s/ Proloy K. Das, Esq.
Proloy K. Das, Esq.

CERTIFICATION OF FORMAT AND SERVICE

I hereby certify that a copy of the Plaintiffs-Appellants Brief was sent via electronic mail and mailed, first-class postage-prepaid, this 28th day of July, 2020 to:

Alayna M. Stone, Esq. (Juris No. 436022)
Maura B. Murphy-Osborne, Esq. (Juris No. 423915)
Michael K. Skold, Esq. (Juris No. 431228)
AG-Special Litigation
165 Capital Avenue, 5th Floor
Hartford, CT 06106
Alayna.stone@ct.gov
Maura.murphyosborne@ct.gov
Michael.skold@ct.gov

/s/ Proloy K. Das, Esq.
Proloy K. Das, Esq.