SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 20477

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

v.

SECRETARY OF THE STATE DENISE MERRILL
DEFENDANT-APPELLEE

BRIEF OF THE DEFENDANT–APPELLEE DENISE MERRILL WITH SEPARATELY BOUND APPENDIX

FOR THE DEFENDANT-APPELLEE DENISE MERRILL :

WILLIAM TONG
ATTORNEY GENERAL OF CONNECTICUT

CLARE KINDALL
SOLICITOR GENERAL

MICHAEL K. SKOLD
MAURA MURPHY OSBORNE
ALMA R. NUNLEY
ASSISTANT ATTORNEYS GENERAL
165 CAPITOL AVE., P.O. BOX 120
HARTFORD, CT 06141-0120
TEL. (860) 808-5020
FAX (860) 808-5347
william.tong@ct.gov
clare.kindall@ct.gov
michael.skold@ct.gov
maura.murphyosborne@ct.gov
alma.nunley@ct.gov

TO BE ARGUED BY:

WILLIAM TONG
ATTORNEY GENERAL

TABLE OF CONTENTS

STATEMENT OF ISSUES

1. Whether this Court lacks jurisdiction under General Statutes § 9-323 because that statute only applies to elections, not primaries.

2. Whether this Court lacks jurisdiction to consider Plaintiffs' constitutional claims under General Statutes § 9-323.

3. Whether this Court lacks jurisdiction because Plaintiffs are not aggrieved by a ruling of an election official when the challenged absentee ballot Application is in conformity with state law as modified by Executive Order 7QQ.

4. Whether this Court lacks jurisdiction because Plaintiffs are not classically aggrieved and therefore lack standing.

5. Whether this Court lacks jurisdiction because Plaintiffs' challenge to the absentee ballot Application is nonjusticiable because Plaintiffs cannot obtain practical relief by invalidating the absentee ballot Application without also invalidating Executive Order 7QQ.

6. Whether the equitable defense of laches bars Plaintiffs' claims.

7. Whether the challenged absentee ballot Application complies with state law as modified by Executive Order 7QQ.

8. Whether Executive Order 7QQ and the absentee ballot Application that executes and implements it violate Article VI, § 7 of the Connecticut Constitution.

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

INTRODUCTION

The Governor has ordered that all voters may vote by absentee ballot in the upcoming August primary. That is the law of the State of Connecticut. By his order, Executive Order 7QQ (the "EO"), the Governor has modified General Statutes § 9-135 in order to (a) protect public health and save lives in the middle of a global pandemic that has infected more than 45,000 and killed more than 4,000 Connecticut residents alone, and killed more than 500,000 and counting across the globe, and (b) protect the fundament right of all voters to vote. The Governor's EO carries the same "force and effect of law" as any statute enacted by the legislature. Conn. Gen. Stat. § 28-9(b)(1). And the Secretary of the State has executed and implemented the Governor's EO by creating and mailing an absentee ballot application (the "Application") that unambiguously complies with it. That is, the Secretary did what she is compelled by oath to do: follow the law and discharge her ministerial duties as the state's chief elections officer.

That should be the end of it. But Plaintiffs filed this lawsuit anyway. Plaintiffs do not contest the Governor's emergency authority under § 28-9(b)(1). Plaintiffs do not deny that Executive Order 7QQ is the law of the land. Plaintiffs do not claim that the Secretary of the State has any discretion to disobey or countermand the Governor or the EO that he lawfully issued. Plaintiffs instead attempt to use this Court to disrupt a state and national election already in process, to cause mass voter confusion, to disenfranchise hundreds of thousands of Connecticut voters, and to force voters into a mass gathering on the same day in August and subject them to the high risk of infection and death from a fast-spreading respiratory virus that is now even more aggressive and resurgent across the country and the world.

The Court must not allow Plaintiffs to endanger hundreds of thousands of Connecticut residents in order to gain attention for their political campaigns, suppress voter turnout and participation, and grandstand in defiance of the law and state government. Plaintiffs' recklessness in bringing this action is exceeded only by their audacity in making legal arguments to this Court that are baseless and without any grounding in the law. The Court should dismiss this case and reject the Plaintiffs' demand for relief for the following reasons:

First, for the reasons set forth in the Secretary's Motion to Dismiss and Memorandum in support, which are incorporated herein by reference, Plaintiffs cannot bring this action under § 9-323 because it does not apply to primaries. Plaintiffs also do not have standing because they are not aggrieved. Plaintiffs may be primary candidates for Congress in the First and Second Congressional Districts, but nothing the Governor or the Secretary has done has caused them any specific, personal and legal injury that is actionable here. The Court should reject Plaintiffs' cause of action for lack of both standing and subject matter jurisdiction.

Second, even if the Court does not dismiss this case and permits Plaintiffs to move forward under § 9-323, this Court has repeatedly held that § 9-323 is not a proper vehicle to make a constitutional claim – that is not the point of the statute. *Wrotnowski v. Bysiewicz*, 289 Conn. 522, 527 (2008); *Scheyd v. Bezrucik*, 205 Conn. 495, 503, 505-06 (1987). Rather, the legislature created § 9-323 to give candidates or electors a procedural mechanism to make a claim when they allege they are "aggrieved by any ruling of any election official" (but again, it does not apply to primaries). Plaintiffs cannot sue the Governor under § 9-323 because he is not an "election official" and the EO is not a "ruling." Plaintiffs therefore try instead to make end-run around the Governor by suing the Secretary for merely doing her

job and implementing and executing the EO. But that does not work either. Plaintiffs cannot be aggrieved by the Secretary if she makes a ruling in conformity with the law, even if Plaintiffs claim that the law itself is unconstitutional. *Price v. Indep. Party of CT-State Cent.*, 323 Conn. 529, 536 (2016); *see Wrotnowski*, 289 Conn. at 527. Because the EO is the law of this state regarding the use of absentee ballots during the August primaries, and because the Application indisputably complies with it, Plaintiffs are not aggrieved by the ruling of an election official and their claims fail on that basis. The Court should proceed no further.

Third, if the Court decides to address Plaintiffs' constitutional claims, they have no basis and the Court must reject them. The Connecticut Constitution authorizes the Governor and the Secretary to take the actions they have taken to protect public health and the right to vote. There is no doubt that the EO is a valid and necessary exercise of the Governor's emergency police powers under § 28-9(b)(1) to modify § 9-135, and Plaintiffs do not (and cannot) argue otherwise. The Connecticut Constitution also authorizes the Governor to allow all voters to vote by absentee ballot because of the "sickness" of COVID-19. Conn. Const. art. VI, § 7. And the Secretary is of course constitutionally authorized—and is in fact constitutionally required—to implement and execute that lawful modification to state law.

Plaintiffs do not like absentee voting, that much is clear. And they may make vague and unsubstantiated claims of potential voter fraud and vote dilution. But they cannot overcome the clear language of the Constitution, no matter how much noise they make. Nor can they block the Governor and the Secretary from doing their jobs to protect our right to vote while keeping all of us safe.

STATEMENT OF THE FACTS

A. Connecticut's Legal Framework For Absentee Voting

The availability of absentee voting in Connecticut is governed by Article VI, § 7 of the Connecticut Constitution and General Statutes § 9-135.

Article VI, § 7 provides that the General Assembly may enact laws authorizing absentee voting 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." Conn. Const. art. VI, § 7 (emphasis added). To comply with the Constitution, therefore, any law authorizing the use of absentee voting must be limited to the reasons referenced in Article VI, § 7. "[B]ecause of sickness" is the only reason that is relevant here.

The General Assembly exercised its authority under Article VI, § 7 to adopt General Statutes § 9-135, which sets forth the list of permissible reasons for voters to vote absentee in Connecticut. Those reasons are:

> (1) His or her active service with the armed forces of the United States; (2) his or her absence from the town of his or her voting residence during all of the hours of voting; (3) ***his or her illness***; (4) his or her physical disability; (5) the tenets of his or her religion forbid secular activity on the day of the primary, election or referendum; or (6) the required performance of his or her duties as a primary, election or referendum official, including as a town clerk or registrar of voters or as staff of the clerk or registrar, at a polling place other than his or her own during all of the hours of voting at such primary, election or referendum.

Conn. Gen. Stat. § 9-135(a) (emphasis added). To invoke one of these reasons, the voter must be "unable to appear at his or her polling place during the hours of voting" because of it. *Id.* Again, the only excuse in § 9-135 that is relevant here is "his or her illness."

B. The COVID-19 Pandemic And The Government's Response To It

COVID-19 has "prompted a rapid reorientation of workplace practices and social life in support of public health." *Fed. Defs. of New York, Inc. v. Fed. Bureau of Prisons*, 954 F.3d 118, 126 (2d Cir. 2020). The Governor responded to the crisis by declaring Civil Preparedness and Public Health Emergencies under General Statutes §§ 28-9 and 19a-131a on March 10, 2020. Stip., ¶ 4. The Governor, the Secretary and other officials have since taken numerous steps to combat the crisis, including measures to ensure that the 2020 primaries are conducted safely and in a manner that protects the health and safety of voters, election officials and volunteers.[1] Three such measures are relevant here.

1. The Secretary's Opinion Interpreting General Statutes § 9-135 As It Applies During The Pandemic And Resulting States Of Emergency

First, concerned about the public health risk posed by in-person voting, the Secretary exercised her authority under General Statutes § 9-3 to issue a Memorandum of Opinion ("the Opinion," A37-A38) interpreting how § 9-135 applies during the current pandemic and resulting states of emergency.[2] She determined that, in this extraordinary context, the term "illness" should be interpreted broadly to include pre-existing illnesses that, although they ordinarily might not prevent a person from voting in-person, do prevent the individual from doing so now if they put the individual at a heightened risk of serious illness or death if they were to contract COVID-19. The Secretary therefore determined that voters who have a pre-existing illness can vote absentee during the August primaries. Opinion at 2.

---

[1] *See generally* https://portal.ct.gov/Coronavirus/Pages/Emergency-Orders-issued-by-the-Governor-and-State-Agencies (last visited July 2, 2020).

[2] Plaintiffs do not challenge the Secretary's Opinion in this case. The Secretary references it only for background purposes.

2. Executive Order 7QQ

Second, concerned that the language of § 9-135 does not adequately protect public health and safety, the Governor exercised the emergency powers delegated to him under § 28-9 to modify § 9-135 by providing that ***all*** eligible electors may vote absentee during the August primaries because of the sickness of COVID-19, whether they have a pre-existing illness or not. EO at 2-3, § 1, Stip. Exh. B.

Specifically, once the Governor has declared a Civil Preparedness Emergency, § 28-9(b)(1) expressly authorizes him to "modify or suspend in whole or in part, by order as hereinafter provided, any statute . . . whenever the Governor finds such statute . . . is in conflict with the efficient and expeditious execution of civil preparedness functions or the protection of the public health." Conn Gen. Stat. § 28-9(b)(1). The statute further provides that any such order issued by the Governor "***shall have the full force and effect of law*** . . ." *Id.* (emphasis added). Thus, § 28-9(b)(1) represents a delegation of emergency legislative powers by the General Assembly to the Governor, and it unambiguously authorizes the Governor to modify "any statute" the Governor determines is conflict with the public health.[3]

Exercising his powers under § 28-9(b)(1), the Governor issued the EO on May 20, 2020. It provides that § 9-135 "is modified to provide that, in addition to the enumerated eligibility criteria set forth in subsection (a) of that statute, 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." EO

[3] Plaintiffs do not mention or challenge § 28-9 in their Complaint. Nor could they do so through the procedural vehicle they have chosen. Indeed, just like the EO, § 28-9 is a state law, not a ruling of an election official, and constitutional challenges to state laws "are not within the ambit" of contest statutes like § 9-323. *Wrotnowski*, 289 Conn. at 527.

at 2-3, § 1. It further provides that, "[f]or 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." *Id.*

The EO is a statutory modification to § 9-135, and it has the same "force and effect of law" that any statutory amendment by the legislature would have. Conn. Gen. Stat. § 28-9(b)(1). Pursuant to its unambiguous language, every eligible elector is legally authorized to apply for and cast an absentee ballot during the August primaries as long there is no federally approved and widely available vaccine for prevention of COVID-19. No vaccine currently exists, and it is common knowledge that a vaccine will not exist by August 11, 2020. Under the statutory framework as modified by the EO, therefore, state law unambiguously permits ***every*** eligible elector to vote absentee during the August primaries if they choose to.

3. The Secretary's Absentee Ballot Application

Third, to ensure that every eligible voter is able to vote, the Secretary announced as early as May 4, 2020, that she intended to mail absentee ballot applications to every voter who is eligible to vote in a primary on August 11.[4] She began mailing those applications out to more than 1.25 million voters on June 26. Bromley Aff., ¶ 13, A5.

Consistent with state law, the Application requires each voter to state that he or she "expect[s] to be unable to appear at the polling place during the hours of voting" because of any one of seven authorized reasons listed in Section II of the Application, and to declare

[4] *See* https://portal.ct.gov/SOTS/Press-Releases/2020-Press-Releases/Secretary-Merrill-Releases-Connecticuts-Election-Plan-in-the-Face-of-COVID19 (last visited July 4, 2020).

"under penalties of false statement in absentee balloting" that said statement is true and correct. Application at 1, Sections II and III, Stip. Exh. C. Also consistent with state law as modified by the EO, the listed reasons for voting absentee include "My illness" and "COVID-19." *Id.* The Instructions explain that voters should check the "My illness" box if they have a pre-existing illness that prevents them from appearing (referring to § 9-135 as interpreted in the Opinion) and that a voter should check the "COVID-19" box if the voter believes he or she is unable to appear because of COVID-19, as authorized by the EO. *Id.*

The Secretary began mailing the Application to voters on June 26, and that process is complete. Bromley Aff., ¶ 13, A5. Over 100,000 voters already have returned their applications, and many applications have been processed. Bromley Supp. Aff., ¶¶ 2, A29. Files of approved voters will be mailed to the State's absentee ballot vendor on July 17, who will begin mailing ballots to voters on July 21. *Id.*, ¶¶ 3, 5, A29-A30. The printing of absentee ballot sets already has begun. *Id.*, ¶ 4, A30. It is now too late to reverse this process without causing substantial voter confusion and disenfranchisement. *See infra* at 25-32.

C. Plaintiffs' Claims And Allegations

Plaintiffs did not file their Complaint until July 1, 2020. Although cloaked in the garb of a challenge to the Application, in reality Plaintiffs challenge the EO itself, upon which they concede the Application is based. Compl., ¶¶ 24-26; *see id.*, ¶¶ 9, 19, 32. They claim that the EO and the Application implementing it illegally expand the use of absentee voting in violation of Article VI, § 7 and General Statutes § 9-135. *Id.*, ¶¶ 9, 11-19, 24-26, 33, 38-39. They also claim that the Application misapplies the EO by omitting two qualifications for voting absentee in the EO. *Id.*, ¶¶ 34-36. Plaintiffs seek declaratory and injunctive relief invalidating the Application and requiring the Secretary to recall it. *Id.* at 12.

ARGUMENT

The Court should reject Plaintiffs' claims and dismiss the case, for several reasons.

As an initial matter, the Court lacks jurisdiction because Plaintiffs invoked the wrong statute in the wrong court. They also are not aggrieved because the Application complies with state law as modified by the EO and has not harmed Plaintiffs in a personal way. Further, any challenge to the Application is nonjusticiable because Plaintiffs cannot obtain practical relief without invalidating the EO, which they may not do under § 9-323.

To the extent the Court has jurisdiction, moreover, Plaintiffs are not entitled to the extraordinary permanent injunction they seek, for three reasons.

First, Plaintiffs cannot succeed on the merits. The EO is the law of this state, and the only question before the Court under § 9-323 is whether the Application complies with it. It clearly does, and the Court can proceed no further. Even if the Court could reach Plaintiffs' constitutional claims, moreover, they have no basis. There is nothing in the text or history of Article VI, § 7 to suggest that the framers intended to preclude health and safety measures like the EO and thereby force voters to appear at the polls in the middle of a pandemic. Such an interpretation would conflict with basic canons of construction, impede the government's ability to combat the crisis, make Connecticut an outlier among other states, and create potential problems under the First Amendment. And worse, it would cause more illness and death. No reasonable constitutional interpretation permits such a result.

Second, Plaintiffs lack standing and therefore will not suffer irreparable harm—or ***any*** actionable harm—for the reasons discussed in the Secretary's motion to dismiss.

Third, the equities do not permit the extraordinary relief Plaintiffs seek. To the contrary, the equitable defense of laches bars this case in its entirety.

I. STANDARD OF REVIEW

Plaintiffs seek declaratory relief and a permanent injunction invalidating the Application. That is an "extraordinary" and "disfavored" remedy that may be granted "only with caution and in compelling circumstances." *Cheryl Terry Enterprises, Ltd. v. City of Hartford*, 270 Conn. 619, 650 (2004). Plaintiffs are not entitled to such relief unless they prove they should succeed on the merits, that they have no adequate remedy at law, and that they will be irreparably harmed absent relief. *Comm'r of Correction v. Coleman*, 303 Conn. 800, 810 (2012). Even if they prove such facts, moreover, the should deny relief if the balancing of the equities do not support it. *Coleman*, 303 Conn. at 810.

II. PLAINTIFFS CANNOT SUCCEED ON THE MERITS

A. As A Matter Of Law, Plaintiffs Are Not Aggrieved By The Ruling Of An Election Official For Purposes Of § 9-323 Because The Application Complies With State Law As Modified By Executive Order 7QQ

The question in this case is whether Plaintiffs have been "aggrieved by any ruling of any election official . . . ." Conn. Gen. Stat. § 9-323. As a matter of law, a litigant cannot be aggrieved by a ruling of an election official "when the ruling is made in conformity with the law," even if the law the ruling is in conformity with is itself claimed to be unconstitutional.[5] *Price*, 323 Conn. at 536 (quotation marks omitted); *see Wrotnowski*, 289 Conn. at 527, citing *Scheyd*, 205 Conn. at 503. Thus, the ***only*** question that properly could be before the Court in this case is whether the Application conforms with current state law regarding the use of absentee ballots. If it does, Plaintiffs are not aggrieved by the Application for purposes of § 9-323 and cannot maintain their challenge under that statute.

---

[5] Notably, Plaintiffs do not even attempt to address this issue in their opposition to the motion to dismiss even though it is one (of many) reasons the Secretary has relied upon to establish this Court's lack of jurisdiction.

As discussed above, current state law regarding the use of absentee ballots is set forth in § 9-135 ***as modified by the EO***. Indeed, the EO is a statutory modification to § 9-135 that carries the same "force and effect of law" that any amendment by the legislature would have. Conn. Gen. Stat. § 28-9(b)(1). Plaintiffs do not challenge the constitutionality of the EO ***or*** § 28-9(b)(1), and they do not seek any relief invalidating either. Nor could they do so in this improper challenge brought under § 9-323, since constitutional challenges "are not within the ambit" of that statute. *Wrotnowski*, 289 Conn. at 527-28 (2008); *Scheyd*, 205 Conn. at 503, 505-06.[6] The EO is therefore the current law of this state, and the only question is whether the Secretary's Application complies with it.[7] The Application clearly does comply with the EO, and that should end the Court's analysis.

Plaintiffs' half-baked argument to the contrary is frivolous, and the Court should reject it. Plaintiffs assert that the Application is inconsistent with the EO because it fails to reference two requirements for a person to vote absentee because of COVID-19; namely, that "[t]he elector must certify that he or she is unable to appear at a polling place because of COVID-19" and that "[t]here is no federally approved and widely available vaccine for prevention of COVID-19." Compl., ¶ 34. Contrary to Plaintiffs' misrepresentations to the Court, however, both of those requirements are right there in the Application, plain as day.

---

[6] Even if Plaintiffs could and did challenge the constitutionality of the EO, it is constitutional for the reasons discussed below. Further, to the extent Plaintiffs may seek to challenge § 28-9 in their merits brief despite the fact that their Complaint does not even mention that statute, the Secretary hereby requests an opportunity for supplemental briefing on any such unpled claim. Such an opportunity is particularly appropriate given that the Court has ordered simultaneous briefing on the merits without any chance for a reply brief.

[7] Thus, Plaintiffs' complaint that the Application does not comply with the pre-EO language of § 9-135 is irrelevant. *See* Compl., ¶¶ 51(a) and 53. The Governor modified § 9-135 through the EO, and the modified language is what controls.

First, Section II of the Application, titled "Statement of Applicant," expressly requires the applicant to state that he or she "expect[s] to be unable to appear at the polling place during the hours of voting" for any one of the specified reasons, and lists COVID-19. Stip. Exh. C at 1. Then in Section III, titled "Applicant's Declaration," the Application expressly requires the applicant to "declare, under penalties of false statement in absentee balloting," that the aforementioned statement in Section II is "true and correct." *Id.* Plaintiffs' suggestion that the Application omits this requirement is therefore confounding, as it is front and center in the Application.

Second, the Application also clearly references and informs voters about the EO's vaccine requirement. Specifically, the Application contains a "Special Instructions" section that explains the new COVID-19 category to voters. The instructions expressly state that "[t]he State of Connecticut, via Executive Order 7QQ, as interpreted by the Secretary of the State pursuant to CGS § 9-3, has determined . . . (2) that ***absent a widely available vaccine***, the existence of the COVID-19 virus allows you to vote by absentee ballot if you so choose for your own safety." *Id.* (emphasis added).

Further, even if the Application did not contain that qualification, it is irrelevant. The indisputable fact is that there is no COVID-19 vaccine, and it is common knowledge throughout the State (indeed, throughout the world) that a "federally approved and widely available vaccine for prevention of COVID-19" will not be developed prior to the primaries on August 11, 2020. Gifford Aff., ¶ 10, A35. Any unqualified statement on the Application that all voters are eligible to vote absentee because of COVID-19 is therefore entirely correct, both as a matter of fact and law. Plaintiffs' suggestion to the contrary is nothing short of pure fantasy.

B. Both Executive Order 7QQ And The Application Implementing It Comply With Article VI, § 7 Of The Connecticut Constitution

To the extent any constitutional claim properly is before the Court—which there is not—it is limited to the question of whether the EO falls within the constitutional authorization for absentee voting for persons who are "unable to appear at the polling place on the day of election . . . ***because of sickness*** . . . ." Conn. Const. art. VI, § 7. The Court must consider six factors in resolving that question: "(1) persuasive relevant federal precedents; (2) the text of the operative constitutional provisions; (3) historical insights into the intent of our constitutional forebears; (4) related Connecticut precedents; (5) persuasive precedents of other state courts; and (6) contemporary understandings of applicable economic and sociological norms, or as otherwise described, relevant public policies." *Feehan v. Marcone*, 331 Conn. 436, 449 (2019), quoting *State* v. *Geisler*, 222 Conn. 672, 684-86 (1992). For the reasons discussed below, each of these factors weighs in favor of interpreting Article VI, § 7 to permit the expanded absentee voting authorized by the EO.

1. The EO Is Consistent With The Text Of Article VI, § 7

Article VI, § 7 provides in relevant part that the "[t]he general assembly may provide by law[8] for voting . . . by qualified voters of the state who are unable to appear at the polling place on the day of election . . . because of sickness . . . ." Conn. Const. art. VI, § 7. Two important points are evident from that constitutional text.

---

[8] The language providing that "[t]he general assembly may provide by law" for absentee voting is nothing more than a specific example of the basic principle that the General Assembly is responsible for passing laws in this state, and it is no different in that regard than the broader grant of legislative power in Article II and Article III, § 1. Here, the legislature has temporarily delegated that power to the Governor to the extent authorized by § 28-9(b)(1). Plaintiffs do not challenge the constitutionality of § 28-9 or the Governor's use of it through the EO. As a result, the language in Article VI, § 7 providing that only "the general assembly may provide by law" for the absentee voting is not at issue in this case. *See supra* at 11 n.6.

First, by authorizing the use of absentee ballots instead of the normal requirement that voters must appear in-person, the clear purpose of Article VI, § 7 is to expand and protect the ability of electors to exercise their fundamental right to vote. *Parker v. Brooks*, No. CV 92 0338661S, 1992 WL 310622, at *3 (Conn. Super. Ct. Oct. 20, 1992). The reasons listed in that provision must be interpreted broadly in a manner that advances and achieves that constitutional purpose, and not in a manner that frustrates or impedes it. *See Wrinn v. Dunleavy,* 186 Conn. 125, 142 (1982); *see also infra* at 15-17.

Second, the particular justification for voting absentee at issue here—"because of sickness"—is broader than the legislature's authorization for absentee voting in the pre-EO version of § 9-135, and certainly is broad enough to encompass the EO.

Specifically, prior to the EO the legislature voluntarily chose to implement Article VI, § 7 by providing that electors could vote absentee only if they are unable to appear because of "***his or her*** illness," suggesting that the individual must actually have an illness to vote absentee. Conn. Gen. Stat. § 9-135 (emphasis added). But the legislature was not required to exercise its authority so narrowly. To the contrary, the constitutional text contains no such limiting language and instead authorizes absentee voting if individuals are unable to appear "because of sickness" more broadly. As far as the constitution is concerned, therefore, only two requirements must be met: (1) there must be a sickness; and (2) the individual must be unable to appear because of it. There is nothing in the text that requires the voter to actually have the sickness. Nor does the text specify what circumstances would be enough to make the person unable to appear because of it.[9]

[9] Thus, there is nothing in the constitutional text that would prevent the legislature, if it so chose, from authorizing absentee voting for individuals who are not themselves sick but who are unable to appear in-person because they are caring for family members who are.

The EO plainly complies with these textual requirements, especially when considered in conjunction with the principles discussed below. *See infra* at 15-17 (election provisions must be interpreted broadly); *id.* at 18 (discussing police powers); *id.* at 20-21 (discussing deference courts must afford political branches of government when responding to a public health crisis); *id.* at 18-19 (constitutional avoidance); *id.* at 22-25 (discussing public policies and responses by other states).

First, the term "sickness" is commonly understood to mean, among other things, "a specific disease."[10] There can be no dispute that COVID-19 is a specific disease.

Second, it is eminently reasonable for the Governor to provide by law that ***all*** voters may state they are unable to appear because of COVID-19 as long as there is no vaccine. Indeed, there is no known or effective treatment for the disease, which already has infected more than 45,000 and killed more than 4,300 people in Connecticut alone.[11] As those numbers illustrate, the disease is highly contagious and spreads easily from person to person, primarily during close contact via small droplets produced by coughing, sneezing, or even just talking.[12] Gifford Aff., ¶¶ 7-8, 10-11, 13, 14, A34-A35. These are ***precisely*** the conditions that voters will find themselves in if forced to vote in-person. There is nothing in the constitutional text that compels voters to make this Hobson's choice between exercising their fundamental right to vote or protecting their health—and potentially their lives—by staying home and avoiding the risk of contracting or spreading the disease. To the contrary, courts have interpreted similar language in the same way. *See infra* at 15-16, 22-23.

---

[10] https://www.merriam-webster.com/dictionary/sickness (last visited July 10, 2020).

[11] *See* https://www.cdc.gov/coronavirus/2019-ncov/hcp/therapeutic-options.html (last visited July 11, 2020).

[12] *See* https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html (last visited July 11, 2020).

2. Historical Insights Into The Framers' Intent

There is a substantial legislative history about how Article VI, § 7 came about and why it was necessary for absentee voting to be permitted under our constitutional framework. However, none of that history sheds any light on the specific issue here; namely, what it means for somebody to be "unable to appear at the polling place . . . because of sickness . . . ." There certainly is nothing to suggest the framers intended for that language to force thousands of voters to risk illness and death by voting in-person during a global pandemic that has killed thousands of people and shut down much of the state.

3. Connecticut Precedents Support The Constitutionality Of The EO

The Secretary has not identified any Connecticut precedents directly interpreting Article VI, § 7. However, there are several cases that inform how the Court should interpret that provision in this context, all of which support the Secretary's position.

a. The EO Is Consistent With The Superior Court's Interpretation Of The "Unable To Appear" Language In § 9-135, Which Parallels The Same Language In Article VI, § 7

As discussed above, Article VI, § 7 imposes two requirements for absentee voting; (1) there must be a sickness; and (2) the voter must be "unable to appear" at the polls because of it. The Superior Court has interpreted the same "unable to appear" language as used in § 9-135, and it did so in a manner that directly supports the Secretary's position.

In *Parker v. Brooks*, a candidate challenged absentee ballots cast by voters who claimed to be unable to appear because of various health problems. 1992 WL 310622, at *2. The voters testified that they "were capable of going out of their apartments" to vote despite these maladies, and the plaintiff therefore argued they did not meet the "unable to appear" requirement because they "were in fact able to go to the polling place." *Id.*

The Court rejected the plaintiff's strict and "literal[]" construction of the phrase "unable to appear" because it is inconsistent with the established principle in Connecticut and other jurisdictions that "absentee voting laws [must be] liberally construed so as to further their evident purpose of protecting and furthering the right of suffrage." *Id.* at *3, citing *Wrinn*, 186 Conn. at 141-42. Although physically capable of going to the polls, the voters' maladies were such that many of them would not do so and therefore would not vote unless permitted to vote absentee. The Court held that "[a] liberal construction of the phrase 'unable to appear' was] necessary to preserve their right to vote." *Id.* at *3. The Court further held that such a construction is buttressed by the fact that the legislature has chosen not to require proof that the illness renders a voter physically incapable of appearing in-person, and has instead left it for the voters themselves to "subjectively determine[] in the first instance whether he or she is 'unable' to go to the polls." *Id.*

Under *Parker*, a voter need not be physically incapable of appearing in-person because of sickness in order to request an absentee ballot. It is enough that the sickness creates a sufficient deterrent that it is reasonable for the voter to believe he or she is unable to appear in person under the circumstances.

Parker is on point and supports the Secretary's position here, at least with regard to the analogous "unable to appear" requirement in Article VI, § 7. Indeed, although most Connecticut voters remain physically capable of appearing in-person to vote, the risk of contracting or spreading the sickness of COVID-19—which already has killed thousands of people, for which there is no vaccine or known treatment, and which spreads easily and primarily during the kind of close contacts that are unavoidable in polling places—is enough for voters reasonably to believe they are unable to vote in-person in this climate.

b. Connecticut Precedents Establish Several Other Principles That Support The Secretary's Position

Wrinn and *Parker* make clear that laws "tending to limit the exercise of the ballot should be liberally construed," and that "absentee voting laws [in particular should be] liberally construed so as to further their evident purpose of protecting and furthering the right of suffrage." *Wrinn*, 186 Conn. at 141-42; *Parker*, 1992 WL 310622, at *3. But those are not the only principles or canons of construction that support the Secretary's position.

First, the EO carries the "force and effect of law" and is the current law of this state. Conn. Gen. Stat. § 28-9(b)(1). It therefore comes to this Court with a strong presumption of constitutionality, and Plaintiffs bear the burden to "establish [the EO's] unconstitutionality beyond a reasonable doubt." *Batte-Holmgren v. Commissioner of Public Health*, 281 Conn. 277, 299 n.12 (2007). The Court must therefore "indulge in every presumption in favor of the [EO's] constitutionality," must "approach [Plaintiffs' claim] with caution, examine it with care, and sustain [the EO] unless it's invalidity is clear." *State v. Long*, 268 Conn. 508, 521 (2004).

Second, beyond this general deference to which the EO is entitled, the Supreme Court has made clear that our state constitution is "an instrument of progress" that "is intended to stand for a great length of time," and that it "should not be interpreted too narrowly or too literally so that it fails to have contemporary effectiveness for all of our citizens." *Kerrigan v. Comm'r of Pub. Health*, 289 Conn. 135, 156-57 (2008). This principle alone arguably is dispositive in this context. Regardless of what the framers intended when they wrote Article VI, § 7, it is doubtful that they had in mind—or that they even could have foreseen—the global pandemic that we currently face. The Court should not interpret that provision narrowly to preclude the expanded absentee voting that the needs of contemporary society clearly demand in this climate.

Third, and relatedly, the breadth and importance of the government's ability to combat the virus under its police powers should weigh heavily on any interpretation of Article VI, § 7 the Court may adopt in this case, and they counsel strongly in favor of the Secretary's position. Indeed, those powers are "broad and inclusive," and they run especially "broad and deep" when addressed to threats to the "health and welfare of the public." *O'Dell v. Kozee*, 307 Conn. 231, 291-92 (2012); *Cohen v. City of Hartford*, 244 Conn. 206, 218 (1998). Courts ordinarily cannot invalidate such laws unless they "either fail to serve the public good or serve it in a despotic way." *Caldor's, Inc. v. Bedding Barn, Inc.*, 177 Conn. 304, 317 (1979). This is true with regard to all laws enacted under the police power, but it is especially apt during a public health emergency like that here. *See infra* at 20-21 (discussing *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905)). This judicial deference that courts owe to the government's exercise of its police powers to protect public health and safety necessarily should inform and guide the Court's interpretation of Article VI, § 7 in this case, and the Court ***must*** take it into account when ruling on Plaintiffs' claims.

Fourth, the Court should adopt the Secretary's interpretation and uphold the EO and Application as a matter of constitutional avoidance. It is well settled in Connecticut that courts "ha[ve] a duty to construe statutes, whenever possible, to avoid constitutional infirmities . . . ." *Mayer-Wittmann v. Zoning Bd. of Appeals of City of Stamford*, 333 Conn. 624, 638 (2019), quoting *Honulik v. Greenwich*, 293 Conn. 641, 647 (2009). There is no reason why that principle does not apply to interpretations of the state constitution as well, and applying it here supports the construction of Article VI, § 7 reflected in the EO.

Specifically, several courts already have called into question or invalidated various limitations on absentee voting during the current pandemic because they burden the right to

vote. *See, e.g., League of Women Voters of Virginia v. Virginia State Bd. of Elections*, No. 6:20-CV-00024, 2020 WL 2158249 (W.D. Va. May 5, 2020); *Thomas v. Andino*, No. 3:20-CV-01552-JMC, 2020 WL 2617329, at *21 (D.S.C. May 25, 2020); *People First of Alabama v. Merrill*, No. 2:20-CV-00619-AKK, 2020 WL 3207824, at *19 (N.D. Ala. June 15, 2020), stay granted *Merrill v. People First of Alabama*, No. 19A1063, 2020 WL 3604049, at *1 (U.S. July 2, 2020). That includes one court that squarely has held that a vote-by-mail option is constitutionally required in this climate. *See Demster v. Hargett*, No. 20-0435-I(III) (Tenn. Chancery Ct. June 4, 2020) (A249-A280). As a result, there is at least a question about whether and to what extent absentee voting is constitutionally required during the COVID-19 crisis. The EO eliminates that question for the August primaries. As a matter of constitutional avoidance, the Court should not interpret Article VI, § 7 in a manner that puts that potential infirmity back on the table or that will prevent the elected branches of government from eliminating it again for the November general election should they seek to do so.

Fifth, and finally, it is a cardinal rule that courts should not interpret statutes or constitutional provisions in a manner that leads to absurd results. *State v. Courchesne*, 296 Conn. 622, 710 (2010). And yet, the interpretation that Plaintiffs ask this Court to adopt will lead to just that. Indeed, while COVID-19 is bad enough, imagine a future disease that has an even higher infection rate and a 50% fatality rate if a person contracts it. It defies logic and common sense to suggest that the framers intended for Article VI, § 7 not to apply in the face of that sickness, thereby forcing any person who has not yet contracted the disease to show up and vote in-person at the polls. COVID-19 is different only degree, not in principle.

4. Persuasive Federal Precedents Support The Validity Of The EO, Both As A Matter Of Constitutional Avoidance And In Deference To The Governor's Police Powers To Protect Public Health And Safety

There is no federal analogue to Article VI, § 7, and the Secretary has not located any federal precedents directly interpreting that provision or others like it. However, there are two important principles from federal law that should again inform the Court's analysis of Article VI, § 7, both of which counsel strongly in favor of upholding the EO and the Application implementing it.

First, the Supreme Court has long interpreted the federal constitution to permit states to substantially ***curtail*** the most fundamental of constitutional rights in order to protect health and safety during a crisis. It would anomalous for this Court to interpret our own Constitution to prevent the state from ***protecting*** those same rights for that same important purpose.

Specifically, in *Jacobson v. Commonwealth of Massachusetts*, the Supreme Court held that "a community has the right to protect itself against an epidemic of disease" and that states may limit the "possession and enjoyment of all rights" when confronted with the "pressure" and "great dangers" posed by infectious disease. 197 U.S. 11, 27, 29 (1905). Those limits can be substantial, and can include measures that clearly would be unconstitutional in normal circumstances, such as forcibly quarantining people or compelling them, by force and against their and religious or political convictions if necessary, "to take [their] place in the ranks of the army of [their] country, and risk the chance of being shot down in its defense." *Id.* at 29. Indeed, the Court held that even personal "liberty itself, the greatest of all rights," can be substantially restrained and restricted when public health and safety demand it. *Id.* at 26-27. Courts regularly have applied these principles from *Jacobson* in the current pandemic. *See generally, e.g., In re Abbott*, 956 F.3d 696, 703 (5th Cir. 2020).

Although *Jacobson* is not directly on point, it too should inform the Court's analysis. If the most fundamental rights protected by the federal constitution must give way during a crisis in order to protect health and safety, there simply is no plausible reason why our state Constitution should be interpreted to preclude the Governor from protecting those same rights also in the name of public health. That is especially true when the whole point of Article VI, § 7 is to facilitate the right to vote, not to impede it. *See supra* at 14, 16-17.

Second, as discussed above, during the pandemic federal courts have invalidated various absentee ballot restrictions under the First Amendment because they unconstitutionally burden the right to vote. The Court should therefore interpret Article VI, § 7 to permit the EO as a matter of constitutional avoidance. *See supra* at 18-19.

5. Persuasive Precedents From Other States

Thirty-four states already offered all-mail or no-excuse absentee voting before the pandemic, and have thus had no occasion to address the issues here.[13] Of the other sixteen states, all but two (Texas and Mississippi) have adopted measures during the pandemic to permit expanded absentee voting during those states' primaries, general elections, or both.[14] *See generally* A47-A157. Defendants are not aware of any state court that has assessed the constitutionality of such measures, much less interpreted their own constitutions to prohibit them. If this Court were to invalidate the EO, therefore, it would be the first in the entire nation to invalidate this kind of near-universal response to the pandemic.

---

13 https://www.ncsl.org/research/elections-and-campaigns/vopp-table-1-states-with-no-excuse-absentee-voting.aspx (last visited July 12, 2020).

14 The states that did not previously permit no-excuse voting but that are permitting it in some form during the pandemic are Alabama, Arkansas, Connecticut, Delaware, Indiana, Kentucky, Louisiana, Massachusetts, Missouri, New Hampshire, New York, South Carolina, Tennessee and West Virginia.

There simply is no cause for the Court to take such a dramatic leap. To the contrary, similar to the Superior Court's decision in *Parker*, the Arkansas Supreme Court has interpreted analogous language in a manner that is fully consistent with the Secretary's construction of Article VI, § 7 here. In *Forrest v. Baker*, the legislature authorized absentee voting for "[a]ny person who, because of illness or physical disability will be unable to attend the polls on election day." 287 Ark. 239, 240 (1985). Like Article VI, § 7, that language does not require the individual to actually have the illness, and instead applies if the individual is unable to appear "because of illness" more broadly. The Court held that two voters who voted absentee because of "sickness in the family" properly cast their vote, as "[a] voter can have sickness in his family which renders him unable to attend the polls." *Id.* at 243-44. That is fully consistent with the Secretary's argument that the phrase "because of sickness" in Article VI, § 7 should be interpreted to include the existence of any sickness that makes a person unable to appear, whether the person actually has it or not. *See supra* at 12-14.

Although *Forrest* supports the Secretary's position, the Secretary located two decisions that interpreted other states' statutes to preclude the expanded absentee voting sought therein. Both cases are readily distinguishable and have no relevance here.

In *Bailey v. S.C. State Election Comm'n*, the plaintiffs sought a declaration that language in South Carolina's pre-pandemic statutory definition of "physically disabled person," which was defined as "a person who, because of injury or illness, cannot be present in person at his voting place on election day," should be construed to include those individuals "practicing social distancing to avoid contracting or spreading the illness COVID-19." No. 2020-000642, 2020 WL 2745565, *2 (S.C. May 27, 2020). The Court rejected the argument, but ***not*** on the basis of any judicial interpretation of the statutory language. Rather, the Court

rejected it because after the plaintiffs brought their case the legislature adopted a new law that permitted absentee voting for all voters. The Court held that the subsequent enactment was a "***legislative*** determination" that the original law did not include the plaintiffs' interpretation, and that any judicial effort to override that determination "based on [the statute's] plain language or the canons of construction" would violate the political question doctrine. *Id.* at *2-3 (emphasis added). The Court therefore refused to conduct such an analysis, and expressed no opinion about how the analysis would have come out if it had. *Id.* at *3; *see id.* at *4 (Hearn, J. dissenting in part).

Bailey has no relevance here. Unlike in *Bailey*, we do not have an amendment to Article VI, § 7 that could shed light on the pre-amendment meaning of that provision. This Court is therefore left to engage in the process of interpretation that *Bailey* refused to conduct.

Similarly, in *In re State*, a Texas statute provided that "[a] qualified voter is eligible for early voting by mail if the voter has a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter's health." No. 20-0394, 2020 WL 2759629, at *7 (Tex. May 27, 2020). Like the pre-EO version of § 9-135, the statute plainly required that the voter must actually ***have*** the sickness or physical condition in order to vote absentee, and the question before the Court was whether lack of immunity to COVID-19 qualifies as a "physical condition" for purposes of that requirement. The Court held that it did not. *Id.* at *7-10.

In re State has no relevance here. As an initial matter, it interpreted the term "physical condition," not the term "sickness" used in Article VI, § 7. Further, it interpreted that term in the context of a statute that required the person to actually have the condition or sickness. While that question may be relevant to an interpretation of the pre-EO version of § 9-135,

which similarly requires that an individual may vote absentee only on the basis of "***his or her*** illness," it has no bearing on the EO or the "because of sickness" language in Article VI, § 7, neither of which impose such a requirement. *See supra* at 12-14.

6. Relevant Contemporary Public Policies

The last *Geisler* factor focuses on how contemporary public policies inform the Court's constitutional interpretation. Those public polices unequivocally support the Secretary's construction of Article VI, § 7 in the unique and extraordinary circumstances of this case.

First, the question before the Court is how to interpret a constitutional provision, the clear purpose of which is to promote the right to vote, in the context of a pandemic that already has taken more than 4,300 lives in Connecticut. There are only two public policies the Court need consider in relation to that question: (1) protecting public health and saving lives; and (2) ensuring that voters are able to safely exercise their fundamental right to vote. Both of those policies categorically require the construction that the Secretary advances.

Second, the Secretary's position is consistent with the public policy that states across the nation have adopted with regard to absentee balloting in particular, both before and during the pandemic. As discussed above, thirty-four states permit all-mail or no-excuse absentee voting during normal times. Of the sixteen states that do not, all but two of them—Texas and Mississippi—have changed their absentee ballot laws during the pandemic to permit some form of expanded absentee voting. If this Court interprets Article VI, § 7 to invalidate the EO, therefore, it will be joining Connecticut with Texas and Mississippi in a class of just three states that have not adapted their voting methods to meet the threats posed by this extraordinary public health crisis. That is contrary to the public policy of Connecticut and virtually every other state in the nation.

III. NOT ONLY DO THE EQUITIES NOT SUPPORT THE GRANTING OF RELIEF, THE EQUITABLE DEFENSE OF LACHES BARS PLAINTIFFS' CLAIMS IN THEIR ENTIRETY

The Court should dismiss Plaintiffs' claims because they fail on the merits and because the Court lacks jurisdiction. To the extent the Court concludes otherwise, however, it nevertheless should dismiss the case for the additional reason that the equitable defense of laches bars Plaintiffs' claims in their entirety.

For laches to apply "there must have been a delay that was inexcusable" and "that delay must have prejudiced the defendant." *Caminis v. Troy*, 112 Conn. App. 546, 552 (2009), *aff'd,* 300 Conn. 297 (2011). This Court recently opined on this defense as-applied to claims under § 9-323 "in the hope that doing so will encourage parties involved in future election disputes to pursue their claims with due urgency." *Price*, 323 Conn. at 544. Despite this Court's admonitions in *Price*, Plaintiffs have utterly disregarded the Court's concerns.

Price involved an inter-Party dispute about who was entitled to the Party's line on the ballot in the 2016 general election. The Secretary notified the parties that no candidate would be placed on the ballot on September 2, 2016, but despite that knowledge the plaintiffs did not take press their claims until September 13, 2016. Although the Court did not have to decide the issue because there were other reasons that made the action even more untimely, it strongly suggested that this "delay of nearly two weeks" was "inexcusable" given its "proximity to the election," which was just over a month and a half away. *See id.* at 546-47, citing *Kay* v. *Austin*, 621 F.2d 809, 810, 813 (6th Cir. 1980). The Court also held that the delay was prejudicial because it would adversely impact an electoral process that already was underway, including by causing a delay in the printing of absentee ballots, requiring a reprogramming of voting machines, and imposing additional costs. *Id.* at 546.

Based on these considerations, the Court held that laches barred the plaintiffs' claims. In doing so the Court made clear that "courts need not shoulder the burden of resolving internecine conflicts on a truncated timeline simply because the parties have inexplicably failed to press their claims at an earlier date." *Id.* at 547. Rather, to invoke the Court's expedited procedures under § 9-323, "parties seeking preelection resolution of such conflicts must act with all due haste" so as to prevent undue interference with the election.

Other courts have reached the same conclusion, including in absentee voting challenges during the pandemic. *See Paher v. Cegavske*, No. 320CV00243MMDWGC, 2020 WL 2748301, at *5–6 (D. Nev. May 27, 2020); *Curtin v. Virginia State Bd. of Elections*, No. 120CV00546RDAIDD, 2020 WL 2817052, at *1 (E.D. Va. May 29, 2020).

In *Paher*, for example, the plaintiffs sought to invalidate Nevada's planned all-mail primary due to COVID-19, but they delayed bringing their motion for fourteen days after they knew it was required. The Court found that the two-week delay was "inexplicable" and prejudicial because the primary was only twenty-six days away when the plaintiffs filed their motion. No. 320CV00243MMDWGC, 2020 WL 2748301, at *5–6 (D. Nev. May 27, 2020). By the time briefing was complete and the Court could rule, absentee ballots already would have been sent to voters and voters already would have begun casting their ballots. *Id.* Further, state officials had made "significant monetary investments and efforts to implement the Plan," all of which would have been for naught if the plan were invalidated. *Id.*

Based on these considerations, the Court held that laches applied because there was no "viable manner of undoing the Plan or stopping its further implementation without increasing the risks to the health and safety of Nevadans and putting the integrity of the election at risk—particularly without sufficient time to prepare an adequate alternative." *Id.*

at *6. The Court also relied on the "*Purcell* principle," which precludes courts from interfering "near an impending election" because in such circumstances the "court orders themselves risk debasement and dilution of the right to vote" through added "voter confusion and consequent incentive to remain away from the polls." *Id.*, citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006). Although the *Purcell* principle primarily has been recognized by the federal courts, there is no reason why it should not apply under state law as well. Indeed, at least one Connecticut court already has recognized it. *Dean v. Jepsen*, No. CV106015774, 2010 WL 4723433, at *7 (Conn. Super. Ct. Nov. 3, 2010); *see, e.g., Liddy v. Lamone*, 398 Md. 233, 254 (Md. 2007); *Chicago Bar Ass'n v. White*, 386 Ill. App. 3d 955, 961 (Ill. 2008); *Duenas v. Guam Election Comm'n.*, 2008 Guam 1, 5 n.7, 8 (Guam 2008).

All of these cases are directly on point, and they require dismissal. Plaintiffs have known since mid-March that expanded absentee balloting for the primaries was a serious possibility, and they learned that they would be candidates in said primaries in early May. Bromley Aff., ¶¶ 6, 8, 15, A3-A4, A6; Stip., ¶ 2. That possibility became a certainty when the Governor issued the EO on May 20. Plaintiffs have known since then that every eligible voter may vote absentee during the primaries. Despite that knowledge, Plaintiffs inexplicably waited until July 1—exactly ***six weeks*** later, and only slightly more than a month before the scheduled primaries—before filing this case. That delay is unreasonable and inexcusable.

The Court should reject Plaintiffs' argument to the contrary based on their frivolous assertion that "their claims were simply not ripe before the Application was issued" on June 26. Pl. Opp. to MTD at 16. Plaintiffs knew by early March that the Secretary believed all voters should be permitted to vote absentee; knew by early May that the Secretary intended to mail the Application to all voters; and most importantly, knew by May 20 that state law as

modified by the EO would permit all voters to vote absentee in the primaries. Plaintiffs had no reasonable expectation whatsoever that the Secretary would somehow disregard the EO and her own prior statements when issuing the Application. If Plaintiffs believed that the EO's authorization of expanded absentee voting was illegal, therefore, they should have challenged it immediately under appropriate judicial procedures instead of waiting six weeks to make up an impermissible claim against the Secretary under § 9-323 based on her ministerial issuance of an Application that Plaintiffs knew full well was ***certain*** to implement the expanded absentee voting that the EO authorizes. The Court should treat Plaintiffs' choice not to do that for exactly what it is; a deliberate attempt to maximize public attention on themselves and sow voter confusion and disenfranchisement. The Court should reject Plaintiffs' litigation tactics in the strongest terms possible.

Indeed, there can be no dispute that Plaintiffs' improper actions will prejudice voters, election officials and poll workers, and the broader electoral process. As an initial matter, the Secretary began mailing the Application to more than 1.25 million voters on June 26. That process is now complete. Over 100,000 those voters already have returned their completed applications, and election officials have begun to process them. The Secretary will soon begin sending files of voters' names whose Applications have been approved to the vendor that has been contracted to mail out the large number of absentee ballots that are expected because of the pandemic, and the vendor will begin mailing absentee ballots to those voters on July 21, after which voters can begin casting their votes at any time. Bromley Aff., ¶¶ 11-13, A5; Bromley Supp. Aff., ¶¶ 2-4, A29-A30. As the courts noted in *Price* and *Paher*, laches is particularly appropriate in such circumstances where the electoral machinery already is "underway" and in "full swing." *Price*, 323 Conn. at 546; *Paher*, 2020 WL 2748301, at *5.

Reversing this process at this juncture is impossible, and even if it were possible it will be extremely burdensome and is certain to lead to voter confusion and disenfranchisement. There simply is no realistic way to "recall" Applications that already have been mailed to more than 1.25 million voters, especially since many have already been returned and processed. Even if Applications somehow could be recalled, moreover, there is no way for the Secretary to identify those voters who are eligible to vote absentee for a reason other than COVID-19, and who should therefore be able to retain the Application and request a ballot with it. That includes voters who may have checked the "COVID-19" box in reliance on the EO but who could also have checked a different box if the "COVID-19" option did not exist. Bromley Aff., ¶¶ 15-17, A6-A7. The obvious level of voter confusion and disenfranchisement that would result from recalling the Application at this late date cannot be overstated.

Further, the prejudice caused by Plaintiffs' purposeful delay is not limited to just voters. To the contrary, much of the election plan the Secretary has implemented centers around the expanded absentee voting authorized by the EO and reflected on the Application, and Plaintiffs' delay will therefore significantly prejudice the Secretary, other election officials and poll workers, and the integrity of the election.

For example, due to the increased number of absentee ballots that are expected, the Secretary has revamped the internal management of absentee ballots and contracted with an outside vendor to print and mail the ballots to voters. That change was necessitated by, and was only possible because of, the EO. *See* EO at 3, § 4. If the EO is invalidated, therefore, the Secretary will have to revert back to the normal process whereby local election officials are responsible for mailing absentee ballots. The logistics of such a change would be extremely difficult, if not impossible. Bromley Aff., ¶¶ 9-12, 27, A4-A5, A9-A10.

Similarly, given the lower anticipated in-person turnout in light of the EO, election officials have reduced the level of staffing to assist on election day. If the EO and Application are invalidated, election officials will be forced at the last minute to enlist numerous additional poll workers, many of whom will be elderly and thus at the highest risk from COVID-19. Gifford Aff., ¶ 16, A35. At this late stage it is unlikely that election officials will have time to find, hire and train enough additional poll workers to meet the increased demand for in-person voting that would arise if the EO is invalidated. Bromley Aff., ¶¶ 9, 18-20, A4, A7-A8.

In addition, officials based their choice of polling locations in part on the assumption that there will be lower in-person turnout because of the EO. Many of the current polling locations are thus too small to accommodate the increased in-person voting that is sure to arise if the EO is invalidated, especially in a way that permits appropriate social distancing. This will either result in longer lines at the polls or will require election officials to move some polling places to other locations. At best this will be logistically difficult, and it will soon violate state law regarding the notice voters must receive about the location of their polling places, resulting in even more voter confusion and disenfranchisement. *Id.*, ¶¶ 19-24, A7-A9.

Finally, all of these changes will cost a significant amount of money beyond what the State already has spent to prepare for and implement the August primaries. For example, the Application alone cost the State $850,000 to print and mail, and the entire expansion of absentee voting contemplated by the EO is anticipated to cost the State approximately $1.6 million. *Id.*, ¶ 14, A6. Reversing course now will waste all of the money, time and effort that went into preparing for a system that Plaintiffs easily could have challenged much sooner, and it will require the expenditure of untold additional dollars, time and effort creating a new system to replace the one that Plaintiffs belatedly seek to invalidate.

Ultimately, it is difficult not to conclude that Plaintiffs timed the filing of this lawsuit to maximize public attention for themselves, disrupt the primary election and sow voter confusion. Plaintiffs' actions are exceedingly improper and prejudicial to both the voters and to the election officials and poll workers who are required to put on an election while keeping people safe during a global pandemic. The Court should not permit it.

CONCLUSION

For all of the reasons discussed above and in the Secretary's pending motion to dismiss, the Court should deny Plaintiffs' requested relief and dismiss their claims for lack of jurisdiction, because they are barred by laches, and because they fail on the merits.

Respectfully submitted,

DEFENDANT DENISE MERRILL

WILLIAM TONG
ATTORNEY GENERAL

CLARE KINDALL
SOLICITOR GENERAL

By: */s/ William Tong*_____

William Tong (Juris No. 440323)
Attorney General
Michael K. Skold (Juris No. 431228)
Maura Murphy Osborne (Juris No. 423915)
Alma R. Nunley (Juris No. 439858)
Assistant Attorneys General
Office of the Attorney General
165 Capitol Ave.
Hartford, CT 06106
Tel.: (860) 808-5020
Fax: (860) 808-5347
William.tong@ct.gov
Clare.kindall@ct.gov
Michael.skold@ct.gov
Maura.murphyosborne@ct.gov
Alma.nunley@ct.gov

CERTIFICATION

Pursuant to Connecticut Practice Book § 67-2, the undersigned attorney hereby certifies that: (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; (2) the electronically submitted brief and appendix, and the paper filed brief and appendix, do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; (3) the brief and appendix being filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically; (4) the brief and appendix comply with all provisions of Connecticut Practice Book § 67-2 and all other applicable rules of appellate procedure; and (5) a copy of the brief and appendix have been mailed, first class postage prepaid, this 17th day of July, 2020, by Brescia's Printing Service to each counsel of record in compliance with Practice Book § 62-7, at the following addresses:

Proloy Das
Matthew Ciarleglio
Murtha Cullina LLP
CityPlace One
185 Asylum Street
Hartford, CT 06103
Tel: (860) 240-6000
Email: pdas@murthalaw.com
Email: mciarleglio@murthalaw.com

William M. Bloss
Koskoff Koskoff & Bieder, P.C.
350 Fairfield Avenue
Bridgeport, CT 06604
Tel: (203) 336-4421
Email: bbloss@koskoff.com

/s/ Michael K. Skold
Michael K. Skold
Assistant Attorney General