SC 20477

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| MARY FAY ET AL. | : | SUPREME COURT |
| v. | : | STATE OF CONNECTICUT |
| DENISE MERRILL | : | JULY 7, 2020 |

**DEFENDANT'S MOTION TO DISMISS**

We are in the middle of a global emergency. For that reason, the Governor has directed by Executive Order 7QQ (the "EO") that voters be allowed to vote by absentee ballot in the upcoming August primary -- to keep people safe and to save lives in the face of a fast-spreading respiratory virus that to date has infected 46,717 and killed 4,335 Connecticut residents in just a few short months. No one can seriously dispute that the Governor has the authority and the state has a compelling interest to minimize the extreme risk of human transmission through mass gatherings of people. It is hard to imagine a greater risk than forcing all Connecticut voters into thousands of small, close-quarter polling locations all across Connecticut on primary day, August 11, 2020.

Plaintiffs do not challenge the Governor's authority to protect and save lives head-on; that is, as a matter of law, pointless. Instead, Plaintiffs try to make an end run around the Governor by making up a cause of action against the Secretary of the State ("the Secretary") under General Statutes § 9-323, based on her ministerial dissemination of an absentee ballot application (the "Application") for the primary. But § 9-323 does not even apply to primaries. Nonetheless, Plaintiffs try to invoke it so they can get an expedited hearing in the Supreme Court. No amount of artful pleading will get them the fast-track, high-profile Supreme Court case they desire.

That is why Plaintiffs' Petition and Complaint (the "Complaint") is not a complaint in any substantive legal sense; it is more of a political handbill or manifesto of defiance. If it were an actual complaint, Plaintiffs would establish legal standing, state an effective claim and cause of action, and name a proper defendant. Plaintiffs do not bother with any of that. Instead, Plaintiffs

launch a last-minute attempt to disrupt and interfere with the state's carefully managed plan to guarantee the right to vote while fighting the still-ranging wildfire of COVID-19, and thereby disenfranchise hundreds of thousands of Connecticut voters and, worse, expose them to the risk of infection and death.

The Court should dismiss Plaintiffs' Complaint because it does not state a proper cause of action under any statute, much less a claim under our state constitution, that this Court has jurisdiction to decide. Specifically, the Court should dismiss the case because:

(1) *Plaintiffs have no cause of action.* Plaintiffs cannot sue under the statute they have chosen or in this forum. Plaintiffs bring this case pursuant to General Statutes § 9-323, which by its terms only applies to elections, not primaries. Primaries are covered under a different statute, § 9-329a, and are governed by different judicial proceedings before the Superior Court, not the Supreme Court. This error cannot be corrected through re-pleading, and it deprives the Court of jurisdiction.

(2) *Plaintiffs cannot make a constitutional claim or challenge the Governor's Executive Order 7QQ through Section 9-323.* Plaintiffs make a lot of noise in their Complaint about the state constitution. If Plaintiffs are making a constitutional claim, they did not allege one or choose a proper vehicle through which to pursue it. The Supreme Court repeatedly has held that constitutional challenges to election laws like this "are not within the ambit" of election laws known as the "contest statutes," including § 9-323. *Wrotnowski v. Bysiewicz*, 289 Conn. 522, 527 (2008). If Plaintiffs claim that the absentee ballot procedure in force is unconstitutional, then their quarrel is with the Governor and his issuance of the EO that permits absentee ballot voting for the August primary. The Secretary's Application is a ministerial act, the authority for which

derives directly from the Governor's EO. The only way Plaintiffs can obtain practical relief is to attack the EO itself. If Plaintiffs wish to challenge the Governor's EO, § 9-323 is not a proper vehicle through which to do so, as § 9-323 only applies to rulings of an election official. The Governor is not an election official, and his EO is not an election ruling; it is a statutory modification that the Governor ordered pursuant to his emergency powers under § 28-9.

(3) *Plaintiffs do not have standing.* Plaintiffs have no standing to assert their claims. Their claimed injury of being deprived of a fair election and having their votes diluted by the allegedly illegal use of absentee ballots is a "general interest that all members of the community share," and "is not sufficient to establish standing." *Lazar v. Ganim*, 334 Conn. 73, 91-92 (2019).

(4) *Plaintiffs sat on their rights and their claims are barred by laches.* Plaintiffs have known about the absentee voting authorized by the EO for more than ***six weeks***, and yet they waited until July 1—just over a month before the primaries—before challenging it. Plaintiffs sat on their rights and their claims are barred by laches. Plaintiffs do not even attempt to justify their unreasonable delay, which will substantially prejudice the election. Indeed, the Application already has been mailed to more than 1.25 million voters, voters have begun returning it, and absentee ballots are about to be mailed to and cast by voters. Reversing that process on the eve of the primary will at best cause substantial voter confusion, and at worst mass disenfranchisement. The Court cannot permit such a result when it is caused by Plaintiffs' own complacency in pressing their claims.

## I. BRIEF HISTORY OF THE CASE

Plaintiffs filed their Complaint on 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. The Secretary now moves to dismiss the Complaint in its entirety for lack of jurisdiction and because Plaintiffs' claims are barred by laches.

## II. SPECIFIC FACTS RELIED ON

### 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 such 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 is an infectious disease that 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. The Governor, the Secretary of the State ("the Secretary") and other officials have since taken numerous steps to combat the crisis, including measures to ensure that the 2020 primaries and general election 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] *See generally* https://portal.ct.gov/Coronavirus/Pages/Emergency-Orders-issued-by-the-Governor-and-State-Agencies (last visited July 2, 2020).

### 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 people appearing in-person to vote, the Secretary exercised her authority under General Statutes § 9-3 to issue a Memorandum of Opinion ("the Opinion," attached as Exhibit 2 to Bromley Affidavit) interpreting how § 9-135 applies in the unique circumstance of the current pandemic.[2] She determined that, in this extraordinary context, the term "illness" should be interpreted 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 because of COVID-19. Opinion at 2. The Secretary therefore determined that registered voters who have such a pre-existing illness can vote absentee during the August primaries. *Id.*

### 2. Executive Order 7QQ

Second, concerned that the language of § 9-135 and the Secretary's interpretation of it do 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 (attached as Exhibit 1 to Bromley Affidavit).

Specifically, once the Governor has declared a Civil Preparedness or Public Health 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

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

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" that 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 in relevant part 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 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 modification to § 9-135 that 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 elector is legally authorized to apply for and cast an absentee ballot during the primaries as long there is no federally approved and widely available vaccine for prevention of COVID-19. No vaccine exists, and it is common knowledge that a vaccine will not exist by August 11. Under the statutory framework as modified by the EO, therefore, state law unambiguously permits ***every*** elector to vote absentee during the primaries if they choose to.

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[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.

### 3. The Secretary's Absentee Ballot Application

Third, to ensure that every eligible elector is able to vote, the Secretary announced as early as May 4, 2020, that she intended to affirmatively mail absentee ballot applications to every voter who is eligible to vote in a primary on August 11.[4] She subsequently began mailing applications out to more than 1.25 million voters on June 26. Bromley Aff., ¶ 13. The Application specifically 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 "under penalties of false statement in absentee balloting" that said statement is true and correct. Compl., Exh. A, Sections II and III. Consistent with state law as modified by the EO, the reasons for voting absentee listed in the Application include entries for "My illness" and "COVID-19." *Id.*, Section II. The Instructions in the Application explain that voters should check the "My illness" box if they have a pre-existing illness that prevents them from appearing at the polls (referring to the language in § 9-135, as interpreted in the Secretary's Opinion) and that a voter should check the "COVID-19" box if the voter believes he or she is unable to appear because of the sickness of COVID-19, as authorized by the EO. *Id.*

As noted above, the Secretary began mailing the Application to voters on June 26, and that process is complete. Bromley Aff., ¶ 13. Many voters already have returned their applications, and many applications have been processed. *Id.* Files of voters' names whose applications have been approved will soon be mailed to the State's absentee ballot vendor, who will begin mailing absentee ballots to voters on July 21. *Id.*, ¶¶ 11-13. It is now too late to reverse this process without causing substantial voter confusion and disenfranchisement. *See infra* at 22-28.

[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).

## III. LEGAL GROUNDS RELIED UPON

This motion is brought pursuant to Practice Book §§ 66-2, 66-3 and 66-8, and the Court's sua sponte order permitting the Secretary to file a motion to dismiss up to thirty pages in length.

## IV. ARGUMENT

This Court lacks jurisdiction and must dismiss this case in its entirety, for several reasons.

First, Plaintiffs filed their claims in the wrong forum and under the wrong statute. Section 9-323 only applies to elections, and the EO and Application are both limited to the primaries. If anything, therefore, Plaintiffs should have filed in the Superior Court under § 9-329a.

Second, even if § 9-323 applied to primaries, which it clearly does not, Plaintiffs still cannot invoke it. At its core this case is a transparent backdoor challenge to the constitutionality of the EO. This Court lacks jurisdiction to consider such a challenge because the EO is not a ruling of an election official that can be constitutionally challenged under § 9-323 (or any other contest statute), and even if the EO were such a ruling Plaintiffs simply are not aggrieved by it.

Third, Plaintiffs cannot avoid these jurisdictional flaws by framing their case as a standalone challenge to the Application. Any such challenge is nonjusticiable because Plaintiffs cannot obtain practical relief without invalidating the EO. Plaintiffs also are not aggrieved by the Application for the same reasons as the EO, and also because the Application conforms with state law as modified by the EO. And in any event, adjudicating the constitutionality of the Application under § 9-323 is no more permissible than it would be of the EO.

Fourth, laches bars this case in its entirety. Plaintiffs unreasonably delayed for six weeks after the Governor issued the EO before filing this case. Their unreasonable delay will substantially prejudice the electoral process and is certain to cause significant voter confusion and disenfranchisement. The Court cannot permit such an unjust result.

### A. PLAINTIFFS FILED THIS CASE IN THE WRONG FORUM AND UNDER THE WRONG STATUTE

Plaintiffs brought this case to a single Supreme Court justice under § 9-323. By its plain terms that statute only applies to disputes involving "elections" for representatives in Congress, not primaries. By contrast, the primary contest statute is § 9-329a, which provides different procedures and remedies than § 9-323, most notably the requirement that the case must be filed with the Superior Court. Plaintiffs failed to follow those procedures that the General Statutes unambiguously require. That error deprives the Court of jurisdiction.

This issue raises a question of statutory interpretation in which the Court's "fundamental objective is to ascertain and give effect to the apparent intent of the legislature." *Price*, 323 Conn. at 539. The Court must determine whether the statutory text, when read in the context of its "relationship to other statutes," applies to the facts of the case. *Id.*, citing Conn. Gen. Stat. § 1-2z. For the reasons discussed below, § 9-323 does not apply to Plaintiffs' claims in this case.

The General Assembly has enacted several different election contest statutes, all of which are designed "for speedy adjudication of disputes about technical violations of election laws on the theory that identification and rectification of such mistakes is ordinarily not a matter of great complexity." *Scheyd v. Bezrucik*, 205 Conn. 495, 505 (1987). However, the various contest statutes provide different procedures and remedies, and which contest statute applies depends on the office at issue and whether the dispute relates to a primary or an election. *See* Conn. Gen. Stat. § 9-323 (elections of presidential electors and senators and representatives in Congress); *id.*, § 9-324 (elections of state officers and probate judges); *id.*, § 9-328 (election of municipal officers); *id.*, § 9-329a (complaints in connection with any primary).

Plaintiffs brought this case under § 9-323, which only applies to elections, not primaries. Because the challenged EO and Application only apply to the August primaries, Plaintiffs should have filed their claims in the Superior Court under the primary contest statute, § 9-329a.

Section 9-323 provides, in relevant part, that "[a]ny elector or candidate who claims that he is aggrieved by any ruling of any election official in connection with any ***election*** . . . for representative in Congress . . . may bring his complaint to any judge of the Supreme Court . . . ." (Emphasis added). By its plain terms, § 9-323 only applies to "elections," which are statutorily defined as "any electors' meeting at which the electors ***choose public officials*** by use of voting tabulators or by paper ballots . . . ." Conn. Gen. Stat. § 9-1(d) (emphasis added).

By contrast, § 9-329a provides that any "elector or candidate aggrieved by a ruling of an election official in connection with ***any primary*** held pursuant to (A) section 9-423, 9-425 or 9-464 . . . may bring his complaint to any judge of the Superior Court for appropriate action." Conn. Gen. Stat. § 9-329a(a)(1)(A). A primary is defined as "a meeting of the enrolled members of a political party . . . held during consecutive hours at which such members or electors may, without assembling at the same hour, vote by secret ballot for candidates ***for nomination to office*** or for town committee members." Conn. Gen. Stat. § 9-372(11) (emphasis added).

Reading these two statutes together, they unambiguously preclude Plaintiffs from filing this action with a Supreme Court justice under § 9-323. The challenged EO and Application only apply to the August primaries, not the November general election. Further, the specific primaries in which these Plaintiffs are candidates will be "voted upon at a state election," and therefore fall squarely within the scope of § 9-329a because they are a "primary held pursuant to . . . section 9-423 . . . ." Conn. Gen. Stat. §§ 9-329a and 9-423. Section 9-329a therefore controls. *See Wrotnowski*, 289 Conn. at 527 n.6.

To the extent Plaintiffs may argue that both statutes apply because the ***office*** they seek falls under § 9-323, and that they can therefore choose which one to invoke, that is not the case.

First, any such argument ignores the clear statutory distinction the legislature has drawn between elections and primaries. *Compare* Conn. Gen. Stat. §§ 9-329a and 9-372(11) (primaries) *with* Conn. Gen. Stat. §§ 9-1(d), 9-323, 9-324 and 9-328 (elections); *see Price*, 323 Conn. at 541 (noting the same distinction). Indeed, § 9-329a applies to "any" primary, and that necessarily includes primaries for offices that have a different contest statute that governs disputes related to the general election. *See Keeley v. Ayala*, 328 Conn. 393 (2018) (applying § 9-329a to primary dispute involving municipal office despite existence of § 9-328); *Caruso v. City of Bridgeport*, 285 Conn. 618 (2008) (same). Indeed, any other conclusion would improperly render § 9-329a superfluous, as it would mean that primary disputes always could be filed under whichever contest statute governs election disputes for the particular office at issue. *See Allen v. Comm'r of Revenue Servs.*, 324 Conn. 292, 309 (2016).

Second, this construction is confirmed by the fact that the differences between § 9-323 and § 9-329a are not mere semantics that can be corrected by simply repleading or belatedly citing the correct statute. *Contra Caruso*, 285 Conn. at 626-30. To the contrary, § 9-323 and § 9-329a provide different procedures and remedies that are not interchangeable. Most notably, the two statutes require the case to be filed in entirely different forums, § 9-323 in the Supreme Court and § 9-329a in the Superior Court. Further, whereas § 9-329a permits judicial review by the full Supreme Court under § 9-325, § 9-323 does not expressly provide a mechanism for such appellate review and arguably prohibits appellate review altogether. *See infra* at 14 n.5. In addition, if an error is found § 9-329a permits the Superior Court to "determine the result of such primary," but § 9-323 does not include such language for disputes related to the election.

The Supreme Court expressly has held that these differences between the procedures and remedies that each contest statute provides "represent[] a different legislative policy as to the way in which such challenges are to be resolved." *Wrinn v. Dunleavy*, 186 Conn. 125, 151–52 (1982). In light of these different policy choices the legislature has made, which "legislative expressions should be given great weight," Plaintiffs were jurisdictionally required to proceed under the correct statute. The differences "between the primary challenge statute . . . and the statutes regarding challenges of elections . . . can be given no other meaningful construction." *Id.* at 152.

### B. THIS CASE FUNDAMENTALLY IS A CHALLENGE TO THE CONSTITUTIONALITY OF EXECUTIVE ORDER 7QQ, AND THIS COURT LACKS JURISDICTION TO CONSIDER SUCH CLAIMS UNDER § 9-323

Even assuming that § 9-323 applied to primaries—which it clearly does not—Plaintiffs still cannot invoke that statute to raise their constitutional claims in this case.

"For this court to exercise original jurisdiction under § 9–323, a candidate for the United States [Congress] or an elector must claim that he or she is 'aggrieved by any ruling of any election official in connection with any election for . . . a [representative] in Congress . . . ." *Price*, 323 Conn. at 535. There are three distinct elements to this requirement, all of which must be satisfied before the Court can exercise jurisdiction: (1) the challenged action must be by an "election official;" (2) the challenged action must constitute a "ruling of an election official" as that term has been interpreted by the Supreme Court; and (3) the litigant must be "aggrieved" by said ruling. Conn. Gen. Stat. § 9-323.

In a transparent attempt to shoehorn their claims into this statutory framework and obtain expedited review by a single justice without the possibility of further review by the full Supreme Court,[5] Plaintiffs seek to portray their claims as a challenge to the constitutionality of the Application instead of the EO. But that obviously puts form over substance. This case undeniably is—and ***must*** be—a challenge to the EO itself. Indeed, the EO is what authorizes the absentee voting that Plaintiffs wish to suppress, and invalidating it is the only way Plaintiffs can obtain the practical relief they seek. When properly construed in this way, Plaintiffs do not meet any of the requirements for this Court to exercise jurisdiction under § 9-323.[6]

**1. The Governor Is Not An "Election Official," And The EO Is Not A "Ruling Of An Election Official" The Constitutionality Of Which Can Be Challenged Under § 9-323**

As discussed above, to invoke the Court's original jurisdiction under § 9-323 Plaintiffs must demonstrate that the state action they challenge constitutes a "ruling of an election official." Plaintiffs cannot do so here, both because the Governor is not an election official and because the EO is not a ruling of an election official the constitutionality of which can be challenged under § 9-323.

First, the Governor plainly is not an "election official" as that term is used in § 9-323. He is not listed among the state actors whom the legislature has statutorily defined as "election officials" because they are involved in the day to day management and operation of elections. *See*

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[5] Unlike § 9-329a, which permits review of legal questions by the full Supreme Court under § 9-325, § 9-323 does not reference any review procedure under § 9-325 or otherwise. Further, in the case of a § 9-323 challenge that is before a three justice panel because the case was filed after the election (which this case is not), the statute provides that the judgment of the three justice panel "shall be final upon all questions relating to the rulings of such election officials . . . ." Conn. Gen. Stat. § 9-323.

[6] To the extent the Court construes Plaintiffs' claims as a standalone challenge to the Application, the Court still lacks jurisdiction for the reasons discussed below in Part III. *See infra* at 19-22.

*Price*, 323 Conn. at 538, citing Conn. Gen. Stat. § 9-258. He does not perform any functions that are analogous to those performed by such individuals. *See id.* at 539. And he does not meet any of the criteria this Court identified in *Price* to determine whether a person who does perform functionally analogous duties should be considered an election official for purposes of § 9-323. *See id.* at 540-43. Rather, the Governor is the head of the Executive Branch of government. He plays no role in the management or conduct of elections, and in this context was acting in a legislative capacity pursuant to the emergency powers delegated to him under § 28-9(b)(1). To conclude that such actions make him an "election official" just because the EO relates to elections would be nonsensical, as it would mean that the legislature also acts as an "election official" anytime it adopts, amends or repeals an election statute. That clearly is not the law.

Second, even if the Governor somehow were an election official, the EO is not a ruling of an election official the constitutionality of which can be challenged under § 9-323. "[A] ruling of an election official must involve some act or conduct by the official that (1) decides a question presented to the official, or (2) interprets some statute, regulation or other authoritative legal requirement, applicable to the election process." *Price*, 323 Conn. at 536, quoting *Bortner v. Town of Woodbridge*, 250 Conn. 241, 268 (1999). Neither of these grounds exist here, as the EO is not a response to an election question presented to the Governor and it does not purport to interpret any statute, regulation or other legal requirement related to the election process.

Rather, the EO is a ***statutory modification to*** the election process that has the same "force and effect of law" that any statutory amendment enacted by the legislature would have. Conn. Gen. Stat. § 28-9(b)(1). It is well established that state laws governing the election process are not themselves rulings of an election official that can be challenged under § 9-323, or any other contest statute for that matter. *Wrotnowski*, 289 Conn. at 528-29.

This conclusion is confirmed by the fact that the state's election contest statutes are not a permissible vehicle through which to raise constitutional challenges at all, whether to state elections laws ***or*** to election officials' implementation of them. The Supreme Court made this clear in *Scheyd,* in which it held in the context of a claim under § 9-328 that "[a] plaintiff may not use the[ contest statutes] to challenge a law or regulation under which the election or primary election is held by claiming aggrievement in the election official's obedience to the law." 205 Conn. 495, 503 (1987), quoting *Wrinn,* 186 Conn. at 134 n.10. The reason is that the contest statutes are designed "for speedy adjudication of disputes about technical violations of election laws on the theory that identification and rectification of such mistakes is ordinarily not a matter of great complexity." *Id.* at 505. By contrast, "[c]onstitutional adjudication . . . requires study and reflection," and is therefore inappropriate for resolution under the expedited procedures the contest statutes provide. *Id.* at 505-06.

This Court applied *Scheyd's* reasoning to claims under § 9-323 in particular in *Wrotnowski*. In doing so this Court reaffirmed *Scheyd's* holding that "constitutional claims are not within the ambit of General Statutes §§ 9–324, 9–328 and 9–329a," and it held that the same reasoning applies to § 9-323 as well. *Wrotnowski,* 289 Conn. at 527–28, citing *Scheyd*, 205 Conn. at 506. As a matter of law, therefore, this Court lacks jurisdiction to consider ***any*** constitutional challenge in this case, whether to the EO or the Application.

**2. Plaintiffs Are Not Aggrieved By The EO Or The Secretary's Application**

Even if the Court somehow concludes that § 9-323 is an appropriate vehicle and that the EO is a ruling of an election official that can be challenged under that statute, Plaintiffs still cannot invoke § 9-323 (or any other statute) because they simply are not aggrieved by either the EO or the Application.

Unlike some other statutes that have "dispensed with the requirement that a plaintiff establish the elements of classical aggrievement in order to have standing," the state's contest statutes continue to require plaintiffs to establish that they are "aggrieved" in the classical sense of the term. *Lazar*, 334 Conn. at 86. To satisfy that requirement the plaintiff must provide "proof of a specific, personal and legal interest that has been injured by the defendant's conduct . . . ." *Id.* at 87.

The only potential injuries that Plaintiffs identify here are their general and abstract interests in having a "fair and honest election" and not having their votes "diluted" by what they believe are illegal absentee voting procedures. Compl., ¶¶ 41-47. Numerous courts, including our Supreme Court, have rejected these exact same standing theories in analogous absentee ballot challenges, and this Court should do the same.

For example, in *Lazar* individual primary voters sought to challenge other voters' allegedly illegal use of absentee ballots. The plaintiffs sought to establish standing through a "zone of interests" test, which the Supreme Court rejected. *Id.* at 87. Having done so, the Court specifically noted that the plaintiffs did not even attempt to establish standing through the normal standards governing classical aggrievement, and it made clear that classical aggrievement would not have existed if they had. To the contrary, the only harm the plaintiffs identified in *Lazar* was that "the election was unfair as a result of the [absentee ballot] improprieties . . . ." *Id.* at 91. The Court held that such harms are not enough because they "affect[] every voter," and "it is well established that a claim of injury to 'a general interest that all members of the community share' is not sufficient to establish standing." *Id.* at 91-92, quoting *Fort Trumbull Conservancy, LLC v. City of New London,* 282 Conn. 791, 803 (2007).

In reaching that conclusion, *Lazar* cited and relied on the Pennsylvania Supreme Court's decision in *Kauffman v. Osser*, 441 Pa. 150 (1970). Just like Plaintiffs here, the *Kauffman* plaintiffs intended to vote in an upcoming election and sought to enjoin certain absentee ballot laws that they believed were unconstitutional. *Id.* at 151-53. Just like Plaintiffs here, the *Kauffman* plaintiffs sought to establish standing by arguing that other voters' allegedly illegal use of absentee ballots would cause them to "have their votes diluted by the absentee votes . . . ." *Id.* at 155. Applying the same "hornbook law" that applies in Connecticut, the Court rejected the plaintiffs' argument because their asserted interest "is not peculiar to them, is not direct, and is too remote and too speculative . . . ." *Id.* at 156-57. In reaching that conclusion, the Court specifically distinguished *Baker v. Carr*—which Plaintiffs similarly rely on here, *see* Compl., ¶ 42—because the voters in *Baker* "were able to demonstrate injury distinct from other voters in the state." *Kauffman*, 441 Pa. at 157. By contrast, "the interest which appellants claim is nowise peculiar to them but rather it is an interest common to that of all other qualified electors." *Id.*

Although *Kauffman* is not of recent vintage, the standing analysis it adopted is. Indeed, numerous courts have applied those exact same principles to dismiss analogous challenges to absentee voting procedures, including during the current pandemic. In *Paher v. Cegavske*, for example, the Court rejected an identical vote dilution and fair election theory of standing in a challenge to Nevada's all-mail voting plan during the pandemic because the plaintiffs' claimed injury "may be conceivably raised by any Nevada voter," a holding that the Court emphasized was "not a pioneering finding." No. 320CV00243MMDWGC, 2020 WL 2089813, at *5 (D. Nev. Apr. 30, 2020) (collecting cases); *see, e.g., In re Gen. Election 2014*, 111 A.3d 785, 792-93 (Pa. Commw. Ct. 2015); *Landes v. Tartaglione*, No. CIV.A.04-CV-3164, 2004 WL 2397292, at *2 (E.D. Pa. Oct. 26, 2004), citing *Whitmore v. Arkansas*, 495 U.S. 148, 160 (1990).

The standing theories that the courts rejected in *Lazar*, *Kauffman* and *Paher* are the exact same standing theories that Plaintiffs advance here, and this Court should reject them for the same reasons. The only purported injuries that Plaintiffs identify are their general and abstract interests in having a "fair and honest election" and not having their votes "diluted" by what they believe are illegal absentee voting procedures. Compl., ¶¶ 41-47. As the cases discussed above make clear, those are precisely the kind of "general interest[s]" shared by "all members of the community" that are "not sufficient to establish standing." *Lazar*, 334 Conn. at 91-92.

### C. TO THE EXTENT PLAINTIFFS SEEK TO CREATE JURISDICTION BY FRAMING THE CASE AS A STANDALONE CHALLENGE TO THE APPLICATION, THIS COURT STILL LACKS JURISDICTION

Regardless of what gloss Plaintiffs put on it, this case is an impermissible attack on the EO that this Court lacks jurisdiction to decide. To the extent Plaintiffs seek to avoid that conclusion by framing their claims as a standalone challenge to the Application instead of the EO, the Court must reject that transparent effort to create jurisdiction where it does not exist.

First, Plaintiffs are not "aggrieved" by the Application for the same reasons they are not aggrieved by the EO, upon which the Application is based. *See supra* at 16-19. Further, because the Application merely implements the EO, and does so correctly, Plaintiffs lack standing to challenge the Application in particular for the additional reason that they cannot be aggrieved by a ruling of an election for purposes of § 9-323 "when the ruling is made 'in conformity with the law.'" *Price*, 323 Conn. at 536, quoting *Wrotnowski*, 289 Conn. at 527. That is because "[w]hen an election official has complied with existing law, but the plaintiff claims that the law is unconstitutional, 'the plaintiff may well be aggrieved by the law or regulation, but he or she is not aggrieved by the election official's rulings which are in conformity with the law.'" *Wrotnowski*, 289 Conn. at 527, quoting *Scheyd*, 205 Conn. at 503.

To the extent Plaintiffs seek to avoid this conclusion with their half-baked argument that the Application does not comply with the EO, that argument is frivolous and the Court should reject it out of hand. Specifically, Plaintiffs assert that the Application is inconsistent with the EO because it fails to reference the two requirements in the EO 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; *see also id.* at ¶¶ 35-36, 51(b) and 53. Perhaps Plaintiffs did not read the Application. In Section II, titled "Statement of Applicant," it 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. Compl., Exh. A. 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.* The first EO requirement that Plaintiffs claim the Secretary improperly omitted is therefore right there in the Application, plain as day.

So too is the second requirement regarding the availability of a vaccine. 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." Contrary to Plaintiffs' misrepresentation to this Court, therefore, the Application specifically notifies and informs voters about the EO requirement that there be no vaccine.

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. 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.

Second, even if Plaintiffs had standing to challenge the Application because it misapplies the EO and they are classically or statutorily aggrieved by that error—none of which is true—any standalone challenge to the Application is nonjusticiable because it cannot afford Plaintiffs any practical relief. Plaintiffs' sole goal in this litigation is to prevent the expanded use of absentee ballots during the pandemic. The only legal authority for that expanded absentee voting is the EO, which modified § 9-135 to include the sickness of COVID-19 as a permissible ground for obtaining an absentee ballot. By contrast, the Application itself does not authorize absentee voting of any kind, and invalidating it will not prevent the absentee voting that Plaintiffs wish to suppress. To the contrary, regardless of what happens to the Application, so long as the EO remains in place every voter will remain eligible to request an absentee ballot using whatever application replaces the one Plaintiffs seek to invalidate, and every voter will remain eligible to cast their vote with that absentee ballot whenever they receive it. Invalidating and recalling the Applications therefore will not provide Plaintiffs practical relief, rendering any standalone challenge to the Application nonjusticiable. *See, e.g.*, *Mendillo v. Tinley, Renehan & Dost, LLP*, 329 Conn. 515, 527 (2018).

Third, even if Plaintiffs' claims are justiciable, the fact remains that § 9-323 simply is not a permissible vehicle through which Plaintiffs can pursue their constitutional claims. That is true regardless of whether Plaintiffs seek to challenge the constitutionality of the EO or the Application. Indeed, the "study and reflection" that are required for constitutional claims do not magically disappear just because the challenge focuses on the actions of a state official instead of a state law. *Scheyd*, 205 Conn. at 505-06. That is especially true for claims under § 9-323, as that statute arguably does not permit appellate review. *See supra* at 14 n.5. Constitutional questions as important as this should be resolved by the full membership of our Supreme Court, especially when a judgment invalidating the EO and the Application would have a profound and irreparable impact on voters, election officials and poll workers, and the electoral process more broadly.

### D. LACHES BARS THIS CASE BECAUSE PLAINTIFFS UNREASONABLY DELAYED BRINGING THEIR CLAIMS, AND THAT DELAY HAS SUBSTANTIALLY PREJUDICIED THE ELECTION PROCESS

The Court must dismiss this case for lack of jurisdiction for all of the reasons discussed above. To the extent the Court concludes otherwise, however, it nevertheless should dismiss the case under the doctrine of laches.[7] 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.

[7] Defendant acknowledges that laches ordinarily cannot be raised on a motion to dismiss. Given the time constraints in this case, however, the Court should exercise its discretion to consider the defense in this posture. That is especially appropriate given that Plaintiffs' delay, which is the basis for the defense, also is what prevents Defendant from raising it in the normal course.

*Price* involved an inter-Party dispute about who was entitled to the Party's line on the ballot for the office of United States Senator in the 2016 general election. The parties became aware of that dispute by late August, 2016, and the Secretary notified them that no candidate would be placed on the ballot on September 2, 2016. Despite that knowledge, the plaintiffs did not take any action to 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 plaintiffs' action even more untimely, it strongly suggested that the aforementioned "delay of nearly two weeks" was "inexcusable" given its "proximity to the election," which at the time the plaintiffs first took action 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 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 challenges to expanded of absentee voting 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 would be able to 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 Dec., ¶¶ 6, 8, 15. 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 on August 11. 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. If Plaintiffs believed the EO's authorization for expanded absentee voting is illegal, they should have challenged the EO immediately rather than waiting for the Secretary to issue the Application, which Application merely implements a statutory modification that had existed for over a month. Plaintiffs offer no explanation for this inexcusable and unreasonable delay, which is three times longer than the delays that the courts found objectionable in *Price* and *Paher*.

Further, Plaintiffs' complacency undeniably 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. Many of those voters already have returned their completed applications, and local election officials already 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. 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.

Indeed, reversing this process and recalling the Applications at this late 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. 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 currently 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 at this late juncture would be extremely difficult, if not impossible. *Id.*, ¶¶ 9-12, 27.

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. 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. *Id.*, ¶¶ 9, 18-20.

In addition, election officials based their choice of polling locations in large 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 much 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 at this late stage, and in 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.

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. 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

The Court should dismiss this case in its entirety for lack of jurisdiction and because it is barred by laches.

Respectfully submitted,

DEFENDANT DENISE MERRILL

WILLIAM TONG
ATTORNEY GENERAL

CLARE KINDALL
SOLICITOR GENERAL

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## CERTIFICATION

I hereby certify that this motion complies with the applicable rules, that it does not contain any names or other personal identifying information that is prohibited from disclosure, and that a copy of this motion was e-mailed on this 7th day of July, 2020 to:

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| DENISE MERRILL | : | JULY 7, 2020 |

**APPENDIX TO DEFENDANT'S MOTION TO DISMISS**

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**AFFIDAVIT OF THEODORE E. BROMLEY**

**THEODORE E. BROMLEY** declares as follows:

1. I submit this Declaration in support of Defendant Secretary of the State Denise Merrill ("the Secretary") in *Fay v. Merrill*, Docket No. SC 20477 (Conn. 2020). I have compiled the information in the statements below through personal knowledge, the Connecticut Secretary of the State ("SOTS") personnel who assisted me in gathering the information from our agency, or on the basis of documents I have reviewed. I also have familiarized myself with the allegations in Plaintiffs' Complaint in this case in order to understand them and how the relief sought by Plaintiffs—the recall of over 1.25 million absentee ballot applications—will impact SOTS, voters, candidates and local election officials in the administration of the 2020 primary elections.
2. I am the Director of Elections at SOTS. The Secretary is the chief election official for the State of Connecticut. SOTS is the lead agency for administering and overseeing elections in Connecticut. I have worked at SOTS since 2001 in the Legislative, Elections Administration Division, which administers statewide elections in Connecticut and advises local election officials on election matters. I was promoted to Director of Elections in August 2019, in which capacity I manage a staff of thirteen.

3. As part of my job responsibilities in 2020, I assisted in the formulation and preparation of the absentee ballot applications that are the subject of this lawsuit and which will be used in voting in the August 11, 2020 primary elections. As I discuss below, the applications have already been distributed. Between now and August 11, 2020, I will continue to work with local election officials and, to some extent, oversee the administration of the absentee ballot distribution and voting process.

4. As the Director of Elections, I am also involved in creating the state election calendar, administering ballot access for both major and minor party candidates, administering ballot preparation, and administering the programming and testing of the voting machines used in the State of Connecticut. Planning for any election begins months in advance of the actual "election day" and voting begins well before election day every year. In fact, the 2020 Primary Election is already well underway. SOTS is well into the process of both assisting and approving local officials' selection of polling locations; staffing levels; procurement of personal protective equipment; cleaning services for polling places and procuring and installing at least one absentee ballot drop boxes for each of the 169 towns.

5. This year has been an unusual election season because of the COVID-19 pandemic. The pandemic has required several aspects of Connecticut's voting and ballot access procedures to be modified. First, we moved our Presidential Preference Primary from April 28, 2020 to June 2, 2020 and then ultimately August 11, 2020. *See* Executive Order 7G and Executive Order 7BB. Then we modified our ballot access procedures on May 11, 2020 to make petitioning process easier for minor party candidates, unaffiliated candidates, and major party challengers. *See* Executive Order 7LL. Given the public health risk posed by in-person voting during the pandemic, the Governor issued

Executive Order 7QQ ("the EO") on May 20, 2020. (attached hereto as Exhibit 1). SOTS and local election officials have had to adapt to these changing circumstances while dealing with closed offices and other challenges.

6. On March 13, 2020, the Secretary issued a press release indicating that she believed that absentee ballots for the then scheduled April 28, 2020 Presidential Primary should be made available to all voters. (attached hereto as Exhibit 4). That ultimately was not necessary because the primary was moved to June. Then on March 28, 2020, in an open letter to the Governor and legislative leaders, she called on officials to make absentee balloting available for all voters in 2020. (attached hereto as Exhibit 5). On March 26, 2020, she wrote an opinion that was published in the Hartford Courant advocating the same change. (attached hereto as Exhibit 6).
7. On May 6, 2020, the Secretary exercised her authority under General Statutes § 9-3 to issue a Memorandum of Opinion ("the Opinion") interpreting how § 9-135 applies in the unique circumstance of the current pandemic and resulting states of emergency. She determined that, in this extraordinary context, the term "illness" in § 9-135 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 in this context if they put the individual at a heightened risk of serious illness or death if they were to contract COVID-19. Opinion at 2. (attached hereto as Exhibit 2). The Secretary therefore determined that registered voters who have such a pre-existing illness can vote absentee during the August primaries.
8. It has been clear since mid-March 2020 that expanded absentee balloting was being seriously considered at the highest levels of Connecticut's government. In May, 2020,

that possibility became a certainty with the Secretary's Opinion and then Executive Order 7QQ. As a result of this expansion, SOTS altered its election plan for the August 2020 primary to account for the anticipated increase in absentee balloting. That Plan has been posted on the SOTS website since at least May 6, 2020. The Plan, at page 9, makes clear that absentee balloting applications will be mailed to all registered voters. *See* "2020 Connecticut Safe Polls Plan" available at https://portal.ct.gov/-/media/SOTS/ElectionServices/2020-Voting-Plan-FINAL-DRAFT-May-2-715-PM.pdf?la=en (last viewed July 5, 2020).

9. SOTS has planned for the anticipated large increase in absentee balloting by changing the usual election plan in several significant ways for 2020. None of these modification can be easily reversed, if at all, at this late stage in the election. First, SOTS overhauled the absentee balloting process by centralizing it with a vendor retained by SOTS in 2020. This change was necessary because thousands more absentee ballot applications and absentee ballot sets must be printed in 2020. This change to was made possible by section of the EO that authorized a third party mail vendor. Second, SOTS and local election officials changed their planning for staffing the polls on election day. Third, SOTS and local election officials selected different polling locations for election day because large percentages of voters are expected to vote by absentee ballot.

10. As for the first significant change to the election plan, the use of a contractor to oversee absentee balloting. In normal years, we usually have around 3-5% of voters vote by absentee and the town clerks and registrars are able to handle the work load. This year, based on the experience of other similar jurisdictions, we are expecting between 50-80% of Connecticut voters to opt to vote by absentee ballot in the August 11, 2020 primary.

11. The absentee balloting process has two steps. First, a voter completes an application to vote by absentee ballot. (attached hereto as Exhibit 3). The local election official reviews that application and if approved by the official, he or she enters the name of the voter into the Centralized Voter Registration System (CVRS) as an absentee ballot voter. In normal years, the election official mails out the ballot to an approved applicant directly from the town hall once the ballots are printed and available 31 days before the election and 21 days before a primary. This year, the names of absentee ballot voters are going to be downloaded into a Comma Separated Value (CSV) file by SOTS directly and provided to the vendor, Cathedral Corporation, a national company with an office in Rhode Island. Those CSV files will be provided to Cathedral Corporation on a rolling basis for so they can begin printing the ballots and mailing them out immediately on July 21, 2020.
12. The first of the absentee ballot CSV files will go to Cathedral Corporation beginning on July 7 or 8, 2020 and will continue approximately every other day until close to election day, likely August 7, 2020.
13. Pursuant to the SOTS plan and Conn. Gen. Stat. § 9-140, the Secretary began mailing the Application to active registered voters on June 26, 2020 and that process was completed on July 1, 2020. Cathedral Corporation mailed 1,274,414 absentee ballot applications to active registered voters. Thousands of voters have already completed and returned their applications, and many applications have been processed by local election officials. Once voters begin receiving the absentee ballots from Cathedral Corporation, after July 21, 2020, they will begin casting their votes with those ballots and returning them to election officials.

14. Just the application printing and mailing alone cost the State $850,000. We anticipate the entire expansion of absentee ballots will cost the State $1.6 million.

15. I understand that Plaintiffs are asking that all of those applications be recalled. Practically speaking, this is impossible. All the absentee ballot applications have been mailed and in some instances filled out and returned. I do not understand why Plaintiffs delayed so long to raise these claims since they have known for months about the plans for expanded absentee balloting and definitely since May that they would be candidates. Mary Fay received the Republican Party endorsement for the 1st Congressional District on May 7, 2020. Her challenger, Plaintiff James Griffin, received the support of at least 15% of the delegates on that date to become a candidate in the August primary. Thomas Gilmer, received the Republican Party endorsement for the 2nd Congressional District on May 11, 2020. His challenger, Plaintiff Justin Anderson, received the support of at least 15% of the delegates on that date to become a candidate in the August primary. So they knew no later than May that they would be candidates and probably even before then that they objected to an expansion of absentee balloting.

16. Even if it were possible, I am not sure how SOTS and local election officials would actually go about recalling the over 1.25 million applications as Plaintiffs have requested. As I mentioned, even in normal times thousands of Connecticut voters vote by absentee ballot for a host of reasons. I presume Plaintiffs are not seeking to have those voters' rights to vote by absentee ballot infringed upon too. So, presumably, the local election officials would have to scrutinize the applications to claw back only those applications that offend Plaintiffs.

17. SOTS and local election officials would then have to figure out a way to inform the voters who have already applied for an absentee ballot that they can no longer have one because they checked the "COVID-19 box" on the application. Some of those voters probably could have checked the illness box even under Plaintiffs' interpretation of the law, or any one of the other boxes for that matter, but opted to simply check the COVID-19 box. So those voters would be eligible to apply again, this time under a different reason. There is no way for SOTS to identify who those voters are or to inform them of their rights in a timely and effective manner at this late date.

18. If Plaintiffs are granted the relief they seek, SOTS and election officials also would have to go through the tedious and expensive process of nullifying the application and creating and printing a new one. Depending on when this Court ruled for Plaintiffs, if it does, some voters may have already cast an absentee ballot. An order to nullify that ballot would require election officials to first identify the ballot, correct the official voter list to remove them as absentee voters, then notify the voter that they must now appear in person to vote. Trying to accomplish all this within thirty days of the election will result in substantial voter confusion and disenfranchisement, especially for voters who already have received an absentee ballot and cast their vote with it. Voters will be confused about whether the ballot they already applied for and cast is to be counted. In addition, election officials' ability to field inquiries from the public regarding the election has been impacted by the pandemic. So I am concerned about our ability to address widespread confusion with many offices closed or working with reduced staff.

19. Changes to absentee balloting ordered by a Court at this late stage will also impact the orderly administration of in-person voting. Election officials throughout Connecticut in

2020 have planned around a reduced in-person voter turnout. As a result, they have made different staffing choices and selected different polling places that are more appropriate during a pandemic.

20. If more people will be forced to vote in person in 2020 because of a Court order, there could be misallocation of resources to handle this unanticipated increase. Polling places that do not permit large numbers of voters to vote in a socially distant manner and reduced staffing could result in long lines, confusion for voters and poll workers. This voter confusion, frustration and fear of health risks could also diminish voter participation. To try and reduce that impact, the election officials would be forced to try and find, hire and train many more poll workers to assist on election day, many of whom will be older and thus at the highest risk from COVID-19. It is doubtful that election officials could make these additional staffing changes in the limited time that is now left before the election.

21. In some larger cities, election officials have intentionally moved polling out of traditional locations that pose a grave health risk, such as senior centers or other locations frequented by citizens vulnerable to the COVID-19 virus.

22. In selecting alternative locations, election officials have planned for more space between the voting privacy booths, to the recommended minimum of 6 feet. Whereas before, voters were within a foot or two of each other. Since fewer voters have been planned for, it was possible to select a smaller location and still space the voting stations.

23. If absentee balloting is not permitted as planned for, then election officials will have to select new polling locations. They will also have to communicate with voters about

where they now have to go to vote. By statute, election officials must give notice of the polling locations by around July 11, 2020. Conn. Gen. Stat. § 9-168.

24. Inevitably, some voters will not get the message about where to vote in time. If polling places are not changed, social distancing requirements could mean that fewer voters will be permitted into the polling location at any one time. This will lead to longer lines to vote. Often times, if voters are forced to wait extended periods to vote, they simply abandon their efforts either out of necessity, frustration, or this year, possibly genuine and rational fear for their health. This is exactly what happened recently in Atlanta, Georgia and Milwaukee, Wisconsin. We are trying to avoid a similar experience here in Connecticut.

25. As I stated above, voting in Connecticut is already underway. On or before June 26, 2020, "military ballots" were issued to all military personnel and dependents living with such personnel.

26. Also on that date or before, "absentee ballots" were sent to all registered voters temporarily residing out of the United States and dependents living with such individuals. In addition, "overseas ballots" were sent to all former United States residents who last lived in Connecticut before permanently moving outside of the United States on or before June 26, 2020.

27. Under federal and state law, absentee ballots must be available in each of our 169 municipalities by July 21, 2020. As a result of this deadline, Connecticut election officials and the vendor retained by the Secretary, Cathedral Corporation, are beginning their final preparations for the different paper ballots that are used in our elections. Cathedral Corporation has all the materials for mailing the absentee ballot sets and it is

already preparing to begin mailing them out to absentee ballot applicants from one centralized location beginning July 21, 2020. This is a change from the usual process which was made possible by Executive Order 7QQ, ¶ 4. That paragraph of the EO authorized the Secretary to contract with a third party mailing vendor. In normal times, the town clerks would mail out the absentee ballots. Because of authorization in EO 7QQ to use a centralized third party mailing vendor, town clerks are now unprepared to send out absentee ballots at all. If the Executive Order is nullified, then the contract with Cathedral Corporation will be contrary to the requirements of Conn. Gen. Stat. § 9-140, and we will have to revert back to the normal process of local officials mailing out the ballots. It would be extremely difficult if not impossible to make this change at this late juncture.

28. All of this confusion surrounding absentee balloting will also divert the attention and time of local election officials who need to prepare for the August 2020 primary. Election officials in Connecticut have a host of duties they must fulfill leading up to election day. In the weeks leading up to the election, they must prepare the final lists of voters, "test vote" voting machines and special equipment that is accessible to voters with disabilities that enables them to vote privately and independently at each polling location; they also must hire and train poll workers; register voters; enroll party members; review and process petitioning candidates filings; and plan to protect the safety and welfare of their poll workers and voters with increased sanitizing of the polling place. This year especially elections are a massive undertaking that take a tremendous amount of planning, teamwork, communication and thought.

29. Another problematic aspect of Plaintiffs' claims is that they are seeking to recall all absentee ballot applications even though they are candidates only in the Republican primary. If they are claiming that they have a right to not have their election impacted, I am not sure why they need to impact the larger election, which is the Democratic primary. While we administer both elections at the same time to save money and resources, they are two distinct primary elections. Conn. Gen. Stat. §§9-476, 9-372, 9-415, 9-416, and 9-431 all define and require that a primary for a political party is a separate event for such party.

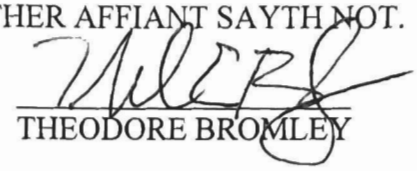
30. Although the general statutes do allow for party primaries to be held on the same date, they are clearly conducted and administered separately by the registrar of voters of the political party holding such primary in each municipality. Indeed, there have been years when only a single party has held a Presidential Preference Primary or when only a single party has held a statewide or congressional district primary such as is the case here with the Plaintiffs. There is no Democratic Congressional District Primary in the districts in which the Plaintiffs will hold a Republican Congressional District Primary. Thus it remains unclear how the Plaintiffs as Republicans can effect the administration of any Democratic Primary in districts that are unrelated to the office for which they are running.

31. As a consequence, the relief Plaintiffs seek at this late date, against the Secretary, even if ordered today, will be extremely disruptive to the orderly administration of Connecticut's August 11, 2020 primary elections. As I mentioned, the election is already underway and there would simply be no way to implement such a dramatic, state-wide change to our election procedures at this late date without risking significant voter confusion, increasing

the chance of election official errors and confusion and, generally, undermining voters' confidence in our elections and their ability to easily and efficiently exercise their franchise. Not to mention the actual health risk posed to voters, officials and poll workers by increased in-person voting during this pandemic.

The foregoing is true and accurate to the best of my knowledge and belief.

FURTHER AFFIANT SAYTH NOT.



THEODORE BROMLEY

STATE OF CONNECTICUT )
)ss: Hebron, Connecticut
COUNTY OF TOLLAND )

Subscribed to and sworn before me via telephonic communication and electronic mail, this 6th day of July, 2020, in a manner similar to the requirements of Governor Lamont's Executive Order No. 7Q, but not recorded and retained for ten years.

*/s/ Maura Murphy Osborne*
Maura Murphy Osborne
Commissioner of the Superior Court

**CERTIFICATION**

I hereby certify that on this 6th day of July, 2020, a copy of the foregoing Affidavit of Theodore Bromley was filed electronically and served by email to all counsel of record. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

*/s/ Maura Murphy Osborne*
Assistant Attorney General
Maura Murphy Osborne

**STATE OF CONNECTICUT**

**BY HIS EXCELLENCY**

**NED LAMONT**

**EXECUTIVE ORDER NO. 7QQ**

**PROTECTION OF PUBLIC HEALTH AND SAFETY DURING COVID-19 PANDEMIC AND RESPONSE – SAFE VOTING DURING STATEWIDE PRIMARY**

**WHEREAS**, on March 10, 2020, I issued a declaration of public health and civil preparedness emergencies, proclaiming a state of emergency throughout the State of Connecticut as a result of the coronavirus disease 2019 (COVID-19) outbreak in the United States and Connecticut; and

**WHEREAS,** pursuant to such declaration, I have issued forty-three (43) executive orders to suspend or modify statutes and to take other actions necessary to protect public health and safety and to mitigate the effects of the COVID-19 pandemic; and

**WHEREAS**, COVID-19 is a respiratory disease that spreads easily from person to person and may result in serious illness or death; and

**WHEREAS,** the World Health Organization has declared the COVID-19 outbreak a pandemic; and

**WHEREAS**, to reduce the spread of COVID-19, the United States Centers for Disease Control and Prevention (CDC) and the Connecticut Department of Public Health (DPH) recommend implementation of community mitigation strategies to slow transmission of COVID-19, including cancellation of gatherings of ten people or more and social distancing in smaller gatherings; and

**WHEREAS,** the risk of severe illness and death from COVID-19 is higher for individuals who are 60 or older and for those who have chronic health conditions; and

**WHEREAS,** public health experts have determined that it is possible to transmit COVID-19 even before a person shows symptoms and through aerosol transmission; and

**WHEREAS,** a statewide primary election is scheduled for August 11, 2020, to select candidates for various state offices and for the 2020 federal presidential election; and

**WHEREAS,** a significant portion of poll workers and volunteers are 60 or older; and

**WHEREAS,** because elderly registered voters consistently demonstrate the highest rate of voter turnout, providing an alternative to in-person voting could be particularly helpful in reducing the risk of transmission during voting among this population; and

**WHEREAS,** public health experts have indicated that persons infected with COVID-19 may not show symptoms, and transmission or "shedding" of the coronavirus that causes COVID-19 may be most virulent before a person shows any symptoms; and

**WHEREAS,** the CDC has recommended that people with mild symptoms consistent with COVID-19 be assumed to be infected with the disease; and

**WHEREAS,** public health experts have recommended that, to prevent transmission of COVID-19, and in light of the risk of asymptomatic transmission and a significant rate of false negative tests, everyone should assume they can be carrying COVID-19 even when have received a negative test result or do not have symptoms; and

**WHEREAS,** secure and tamper-proof drop boxes manufactured specifically for the purpose of voting offer a safe and secure way for voters to deliver absentee ballots to election officials without in-person interactions that could increase the risk of transmission of COVID-19; and

**WHEREAS,** absentee voting offers a proven method of secure voting that reduces the risk of transmission of COVID-19 by allowing individuals to vote by mail and by reducing the density of in-person voting at polling places; and

**WHEREAS,** upon a proclamation that a civil preparedness emergency exists, section 28-9(b) of the Connecticut General Statutes authorizes the modification or suspension in whole or in part by executive order of any statute or regulation or requirement or part thereof that conflicts with the efficient and expeditious execution of civil preparedness functions or the protection of public health; and

**WHEREAS,** the General Assembly is not in session, there is no announced schedule to reconvene in special session, and no committee hearings have been scheduled to take up any business; and

**WHEREAS,** the drafting, circulation and review of new or amended regulations is hindered by the limited access to information technology resources and source documents for state employees involved in such processes, the majority of whom continue to work from home to mitigate the transmission of COVID-19, and therefore it is not possible to both follow the requirements of the Uniform Administrative Procedures Act respond efficiently and expeditiously to the COVID-19 pandemic and mitigate its effects;

**NOW, THEREFORE, I, NED LAMONT,** Governor of the State of Connecticut, by virtue of the authority vested in me by the Constitution and the laws of the State of Connecticut, do hereby **ORDER AND DIRECT**:

1. **Absentee Voting Eligibility During COVID-19 Pandemic.** Section 9-135 of the Connecticut General Statutes 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. 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. It shall not constitute a misrepresentation under subsection (b) of Section 9-135 of the General Statutes for any person to communicate the provisions of this modification to any elector or prospective absentee ballot applicant.

2. **Notice of Modification Required on Inner Envelope.** Section 9-137 of the Connecticut General Statutes is modified to provide that it shall not constitute a false statement for an elector to represent his or her eligibility to vote by absentee ballot pursuant to the modifications of Section 9-135 in Section 1 of this order, and the inner envelope described in Section 9-137 shall contain a notice describing the modification in Section 1 of this order.

3. **Authority for Secretary of the State to Modify Absentee Ballot Applications, Envelopes, and Printed Materials Regarding Eligibility.** Notwithstanding any provision of Title 9 of the Connecticut General Statutes or any other law or regulation to the contrary, the Secretary of the State shall be authorized to modify any required notice, statement, or description of the eligibility requirements for voting by absentee ballot on any printed, recorded, or electronic material in order to provide accurate information to voters about the modifications to absentee voter eligibility and related requirements of this order.

4. **Authority to Issue Absentee Ballots.** Section 9-140(g) of the Connecticut General Statutes is modified and suspended to permit the municipal clerk to use a third party mailing vendor that has been approved and selected by Secretary of the State to fulfill the municipal clerk's duties to mail absentee voting sets for the August 11, 2020 primary election. All other requirements of Section 9-140(g) continue to apply.

5. **Modification of Requirement that Absentee Ballots be Returned by Mail or In Person.** Section 9-140b(c) of the Connecticut General Statutes is modified to provide that the term "mailed" shall include the act of depositing an absentee ballot for the August 11, 2020 primary in a secure drop box designated by the town clerk for that purpose in accordance with instructions to be provided by the Secretary of the State. All other requirements of Section 9-140b(c) continue to apply.

6. **Clarification that Commissioner Orders Issued Pursuant to the Governor's Executive Orders Are Not Regulations Subject to the UAPA.** Section 4-166(16) of the Connecticut General Statutes is modified to clarify that the definition of a regulation does not include any amendment or repeal of an existing regulation and any directive, rule, guidance, or order issued by a Commissioner or Department Head pursuant to a Governor's Executive Order during the existing civil preparedness and public health

emergency and any renewal or extension thereof. Notwithstanding Sections 4-166 to 189, inclusive, of the Connecticut General Statutes, any Commissioner or Department Head, as permitted or directed by any such Governor's executive order, may modify or suspend any regulatory requirements adopted by the Commissioner or Department Head that they deem necessary to reduce the spread of COVID-19 and to protect the public health. This section applies to all orders that have been issued since the declaration of public health and civil preparedness emergencies on March 10, 2020 and for the duration of the public health and civil preparedness emergency, including any period of renewal of such emergency declaration.

Unless otherwise specified herein, this order shall take effect immediately and remain in effect for the duration of the public health and civil preparedness emergency, unless earlier modified, extended or terminated.

Dated at Hartford, Connecticut, this 20th day of May, 2020.

Ned Lamont
Governor

By His Excellency's Command

Denise W. Merrill
Secretary of the State

Office of the Secretary of the State
165 Capitol Avenue
Hartford, CT 06106

**MEMORANDUM OF OPINION**

To: All Town Clerks and Registrars of Voters

From: Office of the Secretary of the State

Date: May 6, 2020

Re: Absentee Balloting Voting During a State of Health Emergency

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We are writing this opinion to ensure that voters are able to participate in the upcoming August 11, 2020 Republican and Democratic Primaries in the safest manner possible. More specifically, we are clarifying the definition of "Illness" for Absentee Balloting at a time when the Governor has declared a public health and civil preparedness emergency throughout the State of Connecticut.

This opinion is issued pursuant to Connecticut General Statutes §9-3 which states, "(a) The Secretary of the State, by virtue of the office, shall be the Commissioner of Elections of the state, with such powers and duties relating to the conduct of elections as are prescribed by law and, unless otherwise provided by state statute, the secretary's regulations, declaratory rulings, instructions and opinions, if in written form, and any order issued under subsection (b) of this section, shall be presumed as correctly interpreting and effectuating the administration of elections and primaries under this title, except for chapters 155 to 158, inclusive, and shall be executed, carried out or implemented, as the case may be, provided nothing in this section shall be construed to alter the right of appeal provided under the provisions of chapter 54. Any such written instruction or opinion shall be labeled as an instruction or opinion issued pursuant to this section, as applicable, and any such instruction or opinion shall cite any authority that is discussed in such instruction or opinion…."

Connecticut General Statutes §9-135 permits a voter to receive an absentee ballot if they cannot appear at their assigned polling place because of "(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."

Webster's dictionary defines "illness" as "an unhealthy condition of body or mind or sickness." "*Illness.*" *Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/illness. Accessed 2 May. 2020*. It is clear that this definition as well as the statutory section referenced above, does not limit the term illness to an individual who has limited mobile function or is hospitalized or confined to a bed.

In fact, the Centers for Disease Control have identified numerous **pre-existing illnesses** that put certain individuals at increased risk when exposed to the COVID-19 virus. These include, but are not limited to: (1) People of all ages with underlying medical conditions, particularly if not well controlled, including: People with chronic lung disease or moderate to severe asthma, People who have serious heart conditions, People who are immunocompromised (Many conditions can cause a person to be immunocompromised, including cancer treatment, smoking, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, and prolonged use of corticosteroids or other immune weakening medications); (2) People with severe obesity (body mass index [BMI] of 40 or higher); (3) People with diabetes; (4) People with chronic kidney disease undergoing dialysis; (5) People with liver disease; and (6) Pregnant women.

Pursuant to Connecticut General Statutes §1-2z, "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered."

Looking first at the statutory language and the relationship to other statutes, "illness" cannot be limited to some affliction that leaves an individual debilitated or bed ridden. First, the statutory section itself does not define "illness" in such a way. Second, the statutory section at issue also uses the term "physical disability" which in and of itself identifies an individual with mobility issues that can be described as both an "illness" as well as a limitation on mobility. As such, it would be contrary to statutory construction to place the same or similar meaning to both phrases.

In addition, Connecticut General Statutes also provides additional methods of absentee balloting such as Supervised Absentee Balloting *see section 9-159q*, Emergency Absentee Balloting *see section 9-150c,* Permanent Absentee Balloting *see section 9-140e*, and Voting In Person After Voting By Absentee Ballot *see section 9-158n*. Given the additional meanings of "illness" or "physical disability" when used in the other sections of the General Statutes, it stands to reason that "illness" as used in Connecticut General Statutes §9-135 must have a broad definition, one that gives meaning to the special circumstances by which voters can vote using an absentee ballot.

Given the reasoning set forth above and the guidance provided by the Centers of Disease Control, the Office of the Secretary of the State has determined that any registered voter who has a **pre-existing illness** can vote by absentee ballot because that voter's illness would prevent them from appearing at their designed polling place safely because of the COVID 19 virus.

In addition, individuals who may have been in contact with a COVID-19 infected individual such as healthcare workers, first responders, individuals who are caring for someone at increased risk, as well as those that feel ill or think they are ill because of the possibility of contact with the COVID-19 virus should also be included in the category of voters that would qualify as "ill" for the purposes of absentee voting.

EXHIBIT 3

**APPLICATION FOR ABSENTEE BALLOT**
**You are receiving this application for an absentee ballot because, due to COVID-19, the Secretary of the State has sent an application to every eligible voter in the state. Pursuant to Executive Order7QQ, COVID-19 may be used as a valid reason for requesting a ballot.**

**For Municipal Clerk's Use**

| **Outer Envelope Serial No.** | | |
|---|---|---|
| **Date Forms Issued** | | |
| **Check** ▶ | **Mailed to Applicant** ☐ | **Given to Applicant Personally** ☐ |
| **Pol. Subdivision** | **Voting District No.** | |

**Section I. – Applicant's Information**

Name:_____ Date of Birth_____

Home Address:_____Zip Code_____
*(Number, Street, Town)*

Telephone No._____ E-mail Address_____

Mailing Address: _____
_____
_____
*(Use only if the mailing address is different from the address above.)*

Date of Primary AUGUST 11, 2020 Republican ____ Democratic____

**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

**Section III. – Applicant's Declaration**
I declare, under the penalties of false statement in absentee balloting, that the above statements are true and correct, and that I am the applicant named above. *(Sign your legal name in full. If you are unable to write, you may authorize some one to write your name and the date in the spaces provided, followed by the word "by" and the signature of the authorized person. Such person must also complete section IV below.)*

Signature of Applicant:_____ Date Signed:_____

**Section IV. – Declaration of person providing assistance** *(Completed by any person who assists with completion of application)*
I sign this application under penalties of false statement in absentee balloting.

Signature:_____ Printed Name:_____ Tel. No:_____

Residence Address:_____

***SPECIAL INSTRUCTIONS***
Connecticut law allows you to receive an absentee ballot if you cannot appear at your assigned polling place on primary day because of active service in the Military, absence from the town during all of the hours of voting, illness, religious tenets forbid secular activity on the day of the primary, duties as a primary official at a polling place other than your own during all of the hours of voting, or physical disability. The State of Connecticut, via Executive Order 7QQ, as interpreted by the Secretary of the State pursuant to CGS §9-3, has determined (1) that having a pre-existing illness allows you to vote by absentee ballot because your pre-existing illness would prevent you from appearing at your designed polling place or (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. To receive your absentee ballot please complete and sign this application (be sure to check "Illness" for reason (1) or "COVID-19" for reason (2) above) and return it to your Town Clerk using the enclosed postage prepaid envelope. Your absentee ballot will be mailed to you. If you do not receive your absentee ballot within one week contact your local Town Clerk's office.

STEP 1

**MARK YOUR ABSENTEE BALLOT**
Completely fill in the oval next to your choice(s) using a black pen.

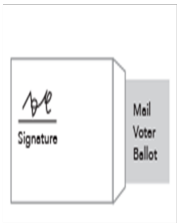
To vote for a candidate whose name is not on the ballot: Fill in the oval to the left of "Write-in" and print the name clearly in the box.

If you make a mistake while marking your ballot do not cross out. Instead call your local Town Clerk's office to make arrangements to receive a replacement ballot


STEP 2

**COMPLETE THE INNER ENVELOPE**
Insert the voted ballot into the inner envelope (marked B) and seal the envelope.

Sign your name and date the envelope.

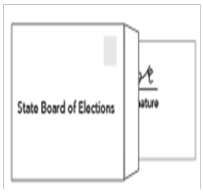



STEP 3

**MAIL OR HAND-DELIVER YOUR BALLOT**
Place completed inner envelope into the larger mailing envelope (marked C).

Mail the envelope or hand-deliver the envelope to the Town Clerk of your city or town.

Your Town Clerk must receive your absentee ballot by 8:00 p.m. on Election Day.




**NOTE: WHEN SEALING ENVELOPES PLEASE DO NOT LICK ENVELOP TO SEAL. USE AN ALTERNATIVE METHOD SUCH AS A SPONGE OR WET CLOTH TO MOISTEN THE CLOSE TAB.**

- Any elector who has returned an absentee ballot and who finds he is able to vote in person shall proceed before ten o'clock a.m. on election, primary or referendum day to the municipal clerk's office and request that his ballot be withdrawn. The municipal clerk shall mark the ballot "rejected". The municipal clerk shall give the elector a signed statement directed to the moderator of the voting district in which the elector resides stating that the elector has withdrawn his absentee ballot and may vote in person.

- No absentee ballot shall be rejected as a marked ballot unless, in the opinion of the moderator, it was marked for the purpose of providing a means of identifying the voter who cast it.

- Any (1) person who executes an absentee ballot for the purpose of informing any other person how he votes, or procures any absentee ballot to be prepared for such purpose, (2) municipal clerk or moderator, elector appointed to count any absentee ballot or other person who wilfully attempts to ascertain how any elector marked his absentee ballot or how it was cast, (3) person who unlawfully opens or fills out, except as provided in section 9-140a with respect to a person unable to write, any elector's absentee ballot signed in blank, (4) person designated under section 9-140a who executes an absentee ballot contrary to the elector's wishes, or (5) person who wilfully violates any provision of chapter 145, shall be guilty of a class D felony.

- A person is guilty of false statement in absentee balloting when he intentionally makes a false written statement in or on or signs the name of another person to the application for an absentee ballot or the inner envelope accompanying any such ballot, which he does not believe to be true and which statement or signature is intended to mislead a public servant in the performance of his official function.

DENISE W. MERRILL
SECRETARY OF THE STATE
CONNECTICUT

**03/13/2020**

Guidance Issued by Secretary of the State Denise Merrill: Absentee Ballots Should be Made Available Due to Public Health Emergency

## COVID-19, as a serious illness that is transmitted via direct contact, presents an inherent risk of transmission at the polling place
## The CDC polling place guidelines encourage the use of absentee balloting to avoid disease transmission

HARTFORD – Secretary of the State Denise Merrill today announced that, due to the public health emergency of COVID-19 and the anticipated spread within Connecticut, absentee ballots for the April 28th Presidential Preference Primary should be available for any Connecticut voter who wants to avoid polling places due to COVID-19. Considering the threat of the spread of COVID-19 and the nature of its spread through contact, Secretary Merrill has determined that for reasons of public health, absentee ballots that are requested to avoid public gatherings at polling places are requested because of illness, and should be validly issued.

“Through surprise October snowstorms, November hurricanes, to the threat of a global pandemic – voting in Connecticut must go on,” said Secretary Merrill. “The nature of COVID-19, or the coronavirus, is such that public health experts advise minimizing crowds and direct contact with other people. In order to ensure that Connecticut voters are able to cast a ballot on April 28th, absentee ballots must be available for voters who want to follow public health advice and avoid polling places.”

Connecticut General Statutes 9-135 (a) (3) currently allows voters to get absentee ballots because of “his or her illness.” Secretary Merrill has asked Governor Lamont to issue an Executive Order that would eliminate restrictive language in the statute during this emergency. Following an executive order, 9-135 (a) (3) would allow voters to get absentee ballots because of “illness.” It is the opinion of Secretary Merrill that, under a revised statute, the current public health emergency of COVID-19 would qualify under 9-135 (a) (3) as an “illness” justification to request an absentee ballot. This opinion is narrow, and would only apply to the April 28th Presidential Preference Primary.

“Our polling places will remain open, and our hard-working local election officials and poll workers are preparing to deliver as smooth and as healthy an Election Day as is possible under the circumstances,” said Secretary Merrill. “Every town has the benefit of guidelines provided by the Centers for Disease Control and Prevention, including cleaning and disinfecting polling stations, practicing frequent hand hygiene, and encouraging curbside voting for voters who need it. Those guidelines also include encouraging absentee balloting and my office has provided local election officials with the opinion necessary to carry out those guidelines.”

The Office of the Secretary of the State is working closely with the Registrars and Town Clerks of Connecticut’s towns and cities, and has advised them to expect higher than normal demand for absentee ballots. The primary is six weeks from this coming Tuesday and absentee ballots will be available on April 7th. Towns are unable to order any ballots until after the ballot order is determined which, by statute, must take place on March 24th.

The Office has asked every town to update their Emergency Contingency Plans with our office and to make sure that they have the legally required deputies in place in their towns, and have shared the CDC guidance on polling places and COVID-19 with the local election officials (**https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html**).

Secretary Merrill and her staff are meeting on COVID-19 response planning daily, are participating in all of the Office of the Governor’s planning calls, and are in regular contact with federal authorities. The Office has also set up a working group with the leadership and membership of the Registrars’ and Town Clerks’ Associations to ensure that both state and local election officials are prepared for the upcoming primary.

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DENISE W. MERRILL
SECRETARY OF THE STATE
CONNECTICUT

March 28, 2020

TO: Governor Lamont, Senate President Pro Tempore Looney, Speaker Aresimowicz, Majority Leader Duff, Majority Leader Ritter, Minority Leader Fasano, and Minority Leader Klarides,
CC: Representative Fox, Senator Flexer, Representative Walker, Senator Osten, Secretary McCaw, Town Clerks Association, Registrar of Voters Association

I am writing to you to make you aware of the resources my office and our local election officials in each of our 169 towns need in order to ensure that our presidential preference primary is conducted to the high standards that Connecticut voters expect and deserve. My number one priority is ensuring that our presidential preference primary is free, fair, and safe.

**Viable options for vote by mail**

Most pressing is my call for an executive order removing restrictive language from CGS 9-135 to allow any voters who are fearful of entering a polling place because of the coronavirus to ask for and receive a ballot they can mail in to vote in the June 2nd presidential preference primary. No voter should have to choose between jeopardizing their health and exercising their right to vote.

As you are aware, we are in a declared public health emergency due to the coronavirus, a contagious virus that passes through direct person-to-person contact. This crisis presents unique challenges to Connecticut election administration, as an overwhelming percentage of voters, as compared to other states, vote in-person at polling places instead of via mail (in a normal election roughly 6-8% of voters statewide can be expected to cast their ballots via mail). I asked for, and Governor Lamont issued, an executive order moving our April 28th presidential preference primary to June 2nd. This gave us some time to plan for how the coronavirus will affect that June 2nd primary and act accordingly.

In talking to my colleagues across the country, many of the states that have pushed back their primaries, including our neighbors in Rhode Island, have also expanded access to voting by mail, or even outright promoting it, as the best possible scenario to allow voters to cast ballot while also protecting the health and safety of voters and poll works alike.

We are in a unique situation. I am neither asking for a policy change to mail-in voting for all elections, nor am I requesting that the June 2nd presidential preference primary be conducted entirely by mail. The executive order I am requesting is narrowly tailored: to allow voters to vote by mail if they are concerned about entering polling places on June 2nd for the presidential preference primary due to the coronavirus.

Polls must remain open, but considering the challenges that all towns are currently facing to find poll workers, and Governor Lamont's recent executive order limiting public gatherings to five people, we must as a state do something to make voting on June 2nd feasible. Loosening the restrictions on mail-in voting will alleviate the problem at the polling places by shifting votes from in-person at the polling place to mailed ballots.

The workload will be manageable as roughly forty two percent of the state's voter are registered as unaffiliated voters or in third parties and are therefore ineligible to participate in the June 2nd presidential primary. Another roughly twenty percent are only eligible to vote in a Republican primary that has seen fairly low interest, and where low turnout is expected, regardless of voting method.

Time is of the essence to issue the executive order and start planning the logistics of the June 2nd presidential preference primary. Town Clerks will make their ballot order on or around April 28th, and mail-in ballots are statutorily required to be available to voters on May 12th. It is possible that the longer we wait, the harder it will be to reserve printing services.

**State match required to access federal funds**

There are federal funds available to help us with this unprecedented election event. The United States Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act, a two trillion-dollar stimulus bill. Included in that bill is $400 million to aid election administration in the face of the coronavirus. Connecticut's share is roughly $6.46 million, which includes a mandatory twenty percent state match of roughly $1.08 million. In order to unlock $5.38 million in federal funding to combat the issues in election administration caused by the coronavirus, Connecticut must appropriate $1,076,346 in funding specifically for the coronavirus response for elections.

**Ballot access for primaries and minor parties and petitioning candidates in the general election**

Finally, we have an urgent need to adjust our method of allowing candidates to petition on to both the August primary election ballot and the November general election ballot. As you know, there are processes in Title 9 for candidates to gather petition signatures in order to appear on the ballot for the primary and for the general election. Both of those processes require, by law, direct person to person contact in order to collect the signatures, the signatures to be delivered to registrars or town clerks in town halls that are now largely closed, verification by local election workers who are currently largely working from home, delivery to my office, and tabulation by workers in my office who are also largely working from home. Given the nature of the coronavirus, both petitioning processes present an opportunity for the virus to spread and are not feasible on the timeline required by statute. This is also a time-sensitive issue as petitioning candidates for the November election have had access to petition papers, and have been circulating those petitions, since January, and petitions for potential candidates in the August primary will be available in May.

My recommendation is to eliminate any path to ballot access via a petition process by executive order. Instead, for challengers in primaries, lower the delegate percentage to gain primary ballot access at the conventions to 5%, apply that to both multi-town and single-town districts, and have that be the only way to get on the primary ballot aside from being the endorsed candidate at a convention.

For the general election, my recommendation is to again eliminate any path to ballot access via petitions as a minor party or petitioning candidate for the November general election ballot. Instead, grant

automatic ballot access for all races in November to any third parties that already have statewide ballot access, currently the Green Party, the Independent Party, the Libertarian Party, and the Working Families Party.

These two changes would address the public health emergency and prevent petition gatherers from going door to door and potentially spreading coronavirus, while at the same time preserving Connecticut's democratic tradition of allowing challengers access to the primary and general election ballots.

Thank you for your attention to these critically important matters. Although we are in an emergency situation, I am heartened by our ability to work together across party and state and local lines. By partnering between state and local officials, and the leadership of the legislature, we can provide Connecticut with the best possible elections under the circumstances. Thank you for all of your hard work during this stressful time.

https://www.courant.com/opinion/op-ed/hc-op-merrill-vote-by-mail-0329-20200329-2t5ah2quvba3joszxph2lrndei-story.html

Denise Merrill: It's time to allow voting by mail

By DENISE MERRILL | SPECIAL TO HARTFORD COURANT | MAR 26, 2020

In Connecticut, we pride ourselves on ensuring that every citizen has the opportunity to make their voice heard, whether it be in town meetings, at the ballot box, or in referenda that many towns hold every year. Despite that legacy, we have fallen behind most states in one crucial area: making it easy for registered voters to actually cast their ballots.

Forty-one states allow their voters to mail in a ballot without a reason, vote early in a polling place or both. Five states conduct all of their elections by mail, and California, Pennsylvania and others are moving in that direction by allowing permanent mail-in voting status.

Connecticut stands with Missouri, Kentucky, Mississippi, Alabama, South Carolina, New Hampshire and Rhode Island as the only states in the country that won't let voters vote before Election Day and won't let them vote by mail without an excuse. And of those states, we have the ignominious distinction of having the most restrictive absentee ballot laws in the country.

The argument for flexibility in voting methods isn't that Connecticut is behind most other states, although we are, or that it would make it more convenient for voters to vote, although it would — the argument right now is that we are in a public health emergency, and our inflexibility is threatening our democracy.

The coronavirus has laid bare the weakness at the heart of our Election Day polling place-based system. Unlike almost everywhere else in America, our elections, instead of being run by counties, are run by the hard-working local election workers in each of our 169 towns. Thousands of poll workers staff almost 800 polling places in towns across the state. For years, Connecticut towns have struggled to find enough poll workers. Now, with an aging poll worker population and fear of a contagious and deadly virus, our towns are stretched to the breaking point.

I recommended to Gov. Ned Lamont and he issued executive orders that will delay Connecticut's April 28 presidential primary until June 2. I have also asked him to use his emergency powers to remove the restrictive absentee ballot language in our statutes temporarily, so that more people are able to vote by mail when the primary is held.

These two measures would give us more time to prepare for what could be a large number of people who are either too ill to vote in person or who fear that they might be ill and don't want to go to a polling place to vote.

States that have all mail voting, like Colorado, Washington, Oregon and Michigan, are prepared for this, and states that allow mail-in voting with automatically sent ballots, like California, have the capacity to get quickly up to speed. We do not.

But there are steps we can take to both shore up our capacity to hold the Presidential Preference Primary, now set for June 2, and to anticipate a significant increase in absentee ballots for future elections.

The legislature should immediately remove the restrictive language in the absentee ballot statute so that voters can request an absentee ballot simply due to “illness” for the June 2 primary. If the legislature doesn’t act, the governor should use his emergency powers to make this change. After all, anyone who is scared to visit a polling place for fear of spreading or contracting a deadly disease should not have to choose between their health and their right to vote.

But what if we are facing similar challenges in August? What if we see a fall resurgence of COVID-19 before the general election?

First, the legislature should immediately vote for a Constitutional Amendment, like the one I proposed in 2019, that removes the restrictive absentee voting language and provides for early voting, and do it with a super-majority so voters can decide on it this November. This would not solve the short-term problem but would give us the flexibility we now need to respond to new realities.

Second, anticipating a larger number of absentee ballots means we need a significant change to our voting infrastructure, including the use of new technologies and systems to accommodate new realities. There are proposals in Congress that have broad support to require the option of voting by mail for all Americans. This change would mean hiring additional people to open, sort and feed mailed in ballots into our tabulators, and to reconsider the number of polling places we currently require. We also would have additional physical needs. Some of our bigger towns will need space to collect and store, under lock and key, an unprecedented number of mailed ballots. My office will also need the resources to quickly develop an online mechanism to request an application for mail-in ballot. To pull this off by November, the legislature would have to allocate emergency funding.

Finally, we need to recognize that we are not just in a public health emergency but a democratic emergency. The coronavirus is affecting our ability to hire poll workers, locate polling places and gather together to elect our representatives the way we have in Connecticut for 200 years. It’s affecting our very ability hold an election.

Delaying the primary does not entirely solve the underlying problem. The November general election cannot be delayed, and it surely can’t be denied. We are on the precipice of disaster but, acting together, putting aside partisanship, we can ensure that every Connecticut voter is able to safely, conveniently and fairly cast their ballot and have it counted.

Denise Merrill is Connecticut’s secretary of the state.