SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 20486

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

v.

SECRETARY OF THE STATE DENISE MERRILL
DEFENDANT-APPELLEE

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

FOR THE DEFENDANT-APPELLEE DENISE MERRILL:

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2. Whether Plaintiffs' claim that the Governor lacked authority to issue Executive Order 7QQ is moot, and if that claim is not moot, whether General Statutes § 28-9(b)(1) authorized the Governor to issue Executive Order 7QQ.

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

4. Whether Plaintiffs have standing, and if so, whether the nature of Plaintiffs' aggrievement requires that any relief in this case should be limited to the primaries in which these four Plaintiffs are candidates.

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INTRODUCTION

The Governor has ordered that all voters may vote by absentee ballot in the upcoming August primary if they choose to. That is the law of the State of Connecticut. By his order, Executive Order 7QQ (the "EO"), the Governor has modified General Statutes § 9-135 in order to (a) protect public health and save lives in the middle of a global pandemic that has infected more than 45,000 and killed more than 4,000 Connecticut residents alone, and (b) protect the fundamental right of all voters to vote. The Governor's EO carries the same "force and effect of law" as any statute enacted by the legislature. Conn. Gen. Stat. 28-9(b)(1). Indeed, the General Assembly has now ratified the EO, and in doing so has expressly authorized expanded absentee voting for both the August primaries and the November general election. The Secretary of the State has executed and implemented those directives by creating and mailing an absentee ballot application (the "Application") that unambiguously complies with them. That is, the Secretary did what she is compelled by oath to do: follow the law and discharge her ministerial duties as the state's chief elections officer.

In their Complaint and now this expedited appeal under § 52-265a, Plaintiffs seek to use the courts to disrupt a state and national election already in process, to cause mass voter confusion and to disenfranchise Connecticut voters. The Court cannot allow Plaintiffs to endanger hundreds of thousands of Connecticut residents in order to gain attention for their political campaigns, suppress voter turnout and participation, and grandstand in defiance of the law. To the contrary, the state constitution and General Statutes unambiguously require the Court to reject these last-minute efforts to interfere with the election and dismiss this case once and for all. That is true for four reasons.

First, the only constitutional question that is properly before the Court is whether the EO's (and now the legislature's) authorization for individuals to vote absentee "because of the sickness of COVID-19" falls within the constitutional authorization for individuals to vote absentee if they are unable to appear "because of sickness." Conn. Const. art VI, § 7. It clearly does. There is nothing in the text or history of Article VI, § 7 to suggest that the framers intended for that provision to preclude health and safety measures like the EO and thereby force hundreds of thousands of people to vote in-person during a global pandemic. To the contrary, such an interpretation would conflict with basic canons of construction, impede the government's ability to combat the crisis under its police powers, make Connecticut a clear outlier among other states, and create potential problems under the First Amendment. And worst of all, it would jeopardize public health and cause more illness and death. No reasonable constitutional interpretation permits such a result.

Second, to the extent Plaintiffs seek to avoid this conclusion by arguing that the Governor lacked authority to issue the EO under § 28-9(b)(1), that claim is moot because the General Assembly has not only ratified the EO, thus protecting the primary election, but also has extended the rationale of the EO to the November general election. Even if the legislature had not done so, however, this claim has no basis. During a state of emergency § 28-9(b)(1) unambiguously authorizes the Governor to modify "any statute" he determines is in conflict with public health and safety. Plaintiffs make no plausible argument that the phrase "any statute" does not include § 9-135. Instead, Plaintiffs baldly conclude—without briefing or analysis—that § 28-9(b)(1) would be unconstitutional if it can be read to authorize the EO, and therefore ask the Court to ignore the statutory text and exclude § 9-135 from the phrase "any statute" using the maxim of constitutional avoidance. But that interpretation tool

only applies when a statute is ambiguous, which § 28-9(b)(1) is not. Contrary to Plaintiffs' assertion, moreover, § 28-9(b)(1) would not be unconstitutional if read to authorize the EO, and Plaintiffs have not even pled or adequately briefed a claim to the contrary. In fact, they expressly waived any constitutional challenge to § 28-9(b)(1) during argument before the trial court. To the extent the Governor's authority to issue the EO remains in question despite the legislature's ratification of it, therefore, this Court's analysis must be limited to the statutory text. That text is clear and unambiguous, and it authorized the Governor's actions here.

Third, the Court should affirm on the alternative ground that the equitable defense of laches bars Plaintiffs' claims. Plaintiffs waited six weeks after the Governor issued the EO before finally choosing to challenge it, and then wasted another three weeks pursuing a baseless action under General Statutes § 9-323 that the Court lacked jurisdiction to decide. Plaintiffs' nine-week delay is inexcusable and will substantially prejudice voters and the integrity of the primary, and will cause voter confusion and mass disenfranchisement. The Court should not reward Plaintiffs' dilatory litigation tactics by considering their claims, and it certainly should not grant the extraordinary relief that Plaintiffs seek. Indeed, the primary is just days away, and there is no practical relief any court can award at this late juncture.

Fourth, Plaintiffs lack standing because they have not suffered a cognizable personal injury that is attributable to the EO or the Application implementing it, including in their capacity as candidates in the August primaries. To the extent the Court concludes otherwise, any judicially cognizable injury that Plaintiffs may have suffered can only be in their capacity as candidates and not as voters or members of the public. If the Court is inclined to award relief in this case at all, therefore, it must be limited to the specific primaries in which these four Plaintiffs are candidates.

STATEMENT OF THE FACTS

A. Connecticut's Legal Framework For Absentee Voting

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

Article VI, § 7 provides that the General Assembly may enact laws authorizing absentee voting by "qualified voters of the state who are unable to appear at the polling place on the day of election because of absence from the city or town of which they are inhabitants or because of sickness, or physical disability or because the tenets of their religion forbid secular activity." Conn. Const. art. VI, § 7. 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). 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.*

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

COVID-19 has "prompted a rapid reorientation of workplace practices and social life in support of public health." *Fed. Defs. of New York, Inc. v. Fed. Bureau of Prisons*, 954 F.3d 118, 126 (2d Cir. 2020). The Governor responded to the crisis by declaring Civil Preparedness and Public Health Emergencies under General Statutes §§ 28-9 and 19a-131a on March 10, 2020. The Governor, the Secretary and other officials have since taken

numerous steps to combat the crisis, including measures to ensure that the 2020 primaries are conducted safely and in a manner that protects the health and safety of voters, election officials and volunteers. Two such measures are relevant here.

1. Executive Order 7QQ

First, concerned that the language of § 9-135 does not adequately protect public health and safety, the Governor exercised the emergency powers delegated to him under § 28-9(b)(1) 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, Pl. Appx. A24-A25.

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

Exercising his powers under § 28-9(b)(1), the Governor issued the EO on May 20. The EO provides that § 9-135 "is modified to provide that, in addition to the enumerated eligibility criteria set forth in subsection (a) of that statute, an eligible elector may vote by absentee ballot for the August 11, 2020 primary election if he or she is unable to appear at his or her polling place during the hours of voting because of the sickness of COVID-19." EO

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.* No vaccine currently exists. Under the statutory framework as modified by the EO, therefore, state law unambiguously permits ***every*** eligible elector to vote absentee during the August primaries if they choose to.

2. The Secretary's Absentee Ballot Application

Second, to ensure that every eligible voter is able to vote during the primaries, the Secretary mailed an absentee ballot Application to every eligible voter beginning on June 26, 2020. Consistent with state law as modified by the EO, the Application requires each voter to state that he or she "expect[s] to be unable to appear at the polling place during the hours of voting" because of any one of seven authorized reasons listed in Section II of the Application, and to declare "under penalties of false statement in absentee balloting" that said statement is true and correct. Application at 1, Sections II and III, Pl. Appx. A20. Also consistent with state law as modified by the EO, the listed reasons for voting absentee include "My illness" and "COVID-19." *Id.* The Instructions explain that voters should check the "My illness" box if they have a pre-existing illness that prevents them from appearing (referring to the pre-EO version of General Statutes § 9-135) and that a voter should check the "COVID-19" box if the voter believes he or she is unable to appear because of COVID-19, as authorized by the EO. *Id.*

The Secretary began mailing the Application to more than 1.25 million voters on June 26, and that process is complete. Hundreds of thousands of applications already have been completed, returned and processed, and thousands of ballots already have been mailed to voters. Def. Appx. A8, A32-A33. Those voters may cast their votes at any time if they have not already. For all of the reasons discussed below, it is now too late to reverse this process without causing substantial voter confusion and disenfranchisement. *See infra* at 31-33.

3. The Legislature's Passage Of Amended HB 6002

Although the Governor was legally authorized to issue the EO for all of the reasons discussed below, the General Assembly has since expressly ratified it so as to eliminate any uncertainty caused by claims like those presented by Plaintiffs here. Specifically, Amended HB 6002 provides in relevant part that "[n]otwithstanding any provision of the general statutes, any provisions of sections 1 to 5, inclusive, of Executive Order No. 7QQ of Governor Ned Lamont, dated May 20, 2020, that relate to the August 11, 2020, primary, are ratified." Def. Appx. A335. The bill also extends the expanded absentee voting authorized by the EO to the November general election. The bill passed by a vote of 144-2 in the House and 35-1 in the Senate, reflecting the General Assembly's near-unanimous judgment that expanded absentee voting is appropriate and necessary during the pandemic. *Id.* at A336-A337. Although the Governor had not signed HB 6002 at the time of this filing, it is the Secretary's understanding that the Governor does intend to sign the legislation into law before this Court holds argument on August 6, 2020.

C. Proceedings Below

Instead of bringing a declaratory judgment action immediately, Plaintiffs waited ***six weeks*** before bringing an improper challenge to the EO under General Statutes § 9-323.

Fay v. Merrill, S.C. 20477 ("*Fay I*"). The Secretary promptly notified Plaintiffs of jurisdictional defects in that action, but instead of simply admitting their error Plaintiffs wasted three more weeks pursuing *Fay I* until the Court dismissed it for lack of jurisdiction on July 20.

After the Court dismissed *Fay I*, Plaintiffs belatedly filed this declaratory judgment action under General Statutes §§ 52-29 and 52-471. The trial court (*Moukawsher, J.*) held an immediate hearing and promptly issued a written decision dismissing Plaintiffs' case. In its decision the trial court correctly held that the plain language of Article VI, § 7 permits the expanded absentee voting authorized by the EO, and therefore did not address the other *Geisler* factors that also support that conclusion. Pl. Appx. A27-A30. The trial court further held that the text of § 28-9(b)(1) authorized the Governor to issue the EO, and that Plaintiffs' argument to the contrary is nothing more than an unpled and un-briefed claim that § 28-9(b)(1) is unconstitutional. *Id.*, A30-A31. Because Plaintiffs expressly "eschew[ed]" that unpled constitutional claim during oral argument, the trial court properly declined to address it. Pl. Appx. A31; *see* Def. Appx. A2 (conceding that "we're not saying [28-9(b)(1)] is unconstitutional"). This appeal followed.

ARGUMENT

The Court should affirm the judgment for four reasons. First, the only constitutional question before the Court is whether the EO falls within the scope of Article VI, § 7. The text alone compels the conclusion that it does, and each of the other *Geisler* factors supports that conclusion. Second, to the extent Plaintiffs challenge the Governor's authority to issue the EO, that claim is moot because the legislature has ratified the EO. And even if it had not, the Governor had authority to issue the EO under § 28-9(b)(1), the constitutionality of which Plaintiffs do not and cannot challenge. Third, laches bars this case because Plaintiffs

unreasonably waited six weeks after the Governor issued the EO before challenging it, and that delay will substantially prejudice voters, election officials and the integrity of the primary. Fourth, Plaintiffs lack standing because they are not aggrieved by the EO or the Application. To the extent the Court concludes otherwise, any cognizable injury can only be in Plaintiffs' capacity as candidates, and any relief this Court may award should therefore be limited to the specific primaries in which these four Plaintiffs are candidates.

I. STANDARD OF REVIEW

This Court's review is *de novo*. *Graham v. Friedlander*, 334 Conn. 564, 589 (2020).

II. BOTH EXECUTIVE ORDER 7QQ AND THE APPLICATION IMPLEMENTING IT COMPLY WITH ARTICLE VI, § 7 OF THE CONNECTICUT CONSTITUTION

The only constitutional claim that properly is before the Court is whether the EO falls within the constitutional authorization for absentee voting for persons who are "unable to appear at the polling place on the day of election . . . because of sickness . . . ." Conn. Const. art. VI, § 7. The Court must consider six factors in resolving that question: "(1) persuasive relevant federal precedents; (2) the text of the operative constitutional provisions; (3) historical insights into the intent of our constitutional forebears; (4) related Connecticut precedents; (5) persuasive precedents of other state courts; and (6) contemporary understandings of applicable economic and sociological norms, or as otherwise described, relevant public policies." *Feehan v. Marcone*, 331 Conn. 436, 449 (2019). For the reasons discussed below, each of the *Geisler* factors weighs in favor of interpreting Article VI, § 7 to permit the expanded absentee voting authorized by the EO.

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

Article VI, § 7 provides in relevant part that the "[t]he general assembly may provide by law for voting . . . by qualified voters of the state who are unable to appear at the polling

place on the day of election . . . ***because of sickness*** . . . ." Conn. Const. art. VI, § 7 (emphasis added). Two important points are evident from that constitutional text.

First, by authorizing the use of absentee ballots instead of the normal requirement that voters must appear in-person, the clear purpose of Article VI, § 7 is to expand and protect the ability of electors to exercise their fundamental right to vote. *Parker v. Brooks*, No. CV 92 0338661S, 1992 WL 310622, at *3 (Conn. Super. Ct. Oct. 20, 1992). The reasons listed in that provision must be interpreted broadly in a manner that advances and achieves that constitutional purpose, and not in a manner that frustrates or impedes it. *See Wrinn v. Dunleavy,* 186 Conn. 125, 142 (1982); *see also infra* at 13-14.

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

Specifically, prior to the EO the legislature voluntarily chose to implement Article VI, § 7 by providing that electors could vote absentee only if they are unable to appear because of "***his or her*** illness," suggesting that the individual must actually have an illness. Conn. Gen. Stat. § 9-135 (emphasis added). But the legislature was not required to exercise its authority so narrowly. The constitutional text contains no such limiting language and instead authorizes absentee voting if individuals are unable to appear "because of sickness" more broadly. As far as the constitution is concerned, therefore, only two requirements must be met: (1) there must be a sickness; and (2) the individual must be unable to appear because of it. There is nothing in the text that requires the voter to actually have the sickness.

Importantly, and as the trial court correctly held, this conclusion is confirmed by the fact that unlike the broad "because of sickness" language, the framers expressly tied other reasons referenced in Article VI, § 7 more directly to the individual voter. In particular, the framers authorized absentee voting for individuals who are unable to appear because of "***their*** religion" or because of absence from the town in which "***they*** are inhabitants . . . ." Conn. Const. art. VI, § 7 (emphasis added). The framers thus knew how to tie each reason directly to the individual voter when they wanted to. The framers' deliberate choice not to do that with regard to the sickness language further supports the conclusion that the framers intended for that language to apply more broadly to any sickness that prevents the individual from appearing at the polls, whether the individual personally has the sickness or not. *See, e.g., Williams v. Housing Auth.*, 327 Conn. 338, 358 (2017) (when legislature includes a word in one place but omits it in another, the failure to use the word is deemed deliberate and intended to signify a difference); *Comm'r of Envtl. Prot. v. Underpass Auto Parts Co.*, 319 Conn. 80, 108-09 (2015), citing *M. DeMatteo Construction Co. v. New London,* 236 Conn. 710, 717 (1996) (same).

Contrary to Plaintiffs' assertions, the fact that the framers joined the term "sickness" with "physical disability" does not compel a different conclusion. Pl. Br. at 27. To the contrary, it supports the Secretary's position. As with "sickness," the framers provided that individuals may vote absentee if they cannot appear because of "physical disability" more broadly, and not just because of "***their*** physical disability." Thus, just as the legislature could permit absentee voting for healthy individuals caring for sick family members, it also could permit able bodied persons to vote absentee if they are caring for a disabled family member.

See infra at 19-20. If anything, therefore, the grouping of the terms "sickness" and "physical disability"—neither of which is tied to the specific voter—supports the Secretary's position.

When the constitutional text properly is characterized in this way, the EO plainly complies with it. First, the term "sickness" is commonly understood to mean, among other things, "a specific disease."[1] COVID-19 is a specific disease.[2] Second, it is eminently reasonable for the Governor to provide by law that ***all*** voters may state they are unable to appear because of COVID-19 as long as there is no vaccine. There is no known treatment for the disease which already has killed more than 4,300 people in Connecticut alone.[3] As those numbers illustrate, the disease is highly contagious and spreads easily during close contact via small droplets produced by coughing, sneezing, or even just talking.[4] These are precisely the conditions voters will find themselves in at the polls. There simply is nothing in the constitutional text that compels voters to make a Hobson's choice between exercising their right to vote or protecting their health—and their lives—by staying home and not voting.

2. Historical Insights Into The Framers' Intent

Plaintiffs recite various aspects of the history of Article VI, § 7, but most of it has no bearing on what the "because of sickness" language means. Pl. Br. at 32-35. The only relevant history Plaintiffs cite—without including a copy for the Court—are statements made

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

2 Plaintiffs cite various definitions from other dictionaries. Pl. Br. at 26. While the Secretary will not quibble with the validity of those definitions, there can be no serious dispute that the word "sickness" also is commonly understood to mean a specific disease. Indeed, the definition from *Bouvier's Law Dictionary* upon which Plaintiffs primarily rely simply describes what a sickness is without any reference to who must have it. COVID-19 clearly satisfies that definition as well.

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

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

during the Joint Standing Committee Hearings on House Resolution 26. Pl. Br. at 32. Those statements, which are attached in the Secretary's appendix, shed no light on the issue at hand. Rather, two speakers simply gave anecdotal personal experiences that prompted them to support absentee voting. *See* Def. Appx. A327-A334. Nowhere did they discuss or express an opinion about the full scope of that constitutional language, or whether it could include the circumstances at issue here. Further, the Secretary is not aware of any historical information that addresses that question, much less that suggests the framers intended for that provision to force voters to risk illness and death by voting in-person during a global pandemic that has killed thousands of people and shut down much of the state.

3. Connecticut Precedents Support The Constitutionality Of The EO

The Secretary has not identified any Connecticut precedents directly interpreting Article VI, § 7. However, there are several cases that inform how the Court should interpret that provision in this context, all of which support the Secretary's position.[5]

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

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

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[5] Plaintiffs do not cite any Connecticut precedents that inform the analysis. They instead rely on cases noting that absentee voting traditionally has been limited "for a variety of policy reasons," most notably the potential for fraud. Pl. Br. at 28-29. But this case is not about whether absentee voting generally is good policy. It is about what the constitutional text means.

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

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

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

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

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

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

Second, beyond this deference to which the EO is entitled, the Supreme Court has made clear that our state constitution is "an instrument of progress" that "is intended to stand for a great length of time," and that it "should not be interpreted too narrowly or too literally so that it fails to have contemporary effectiveness for all of our citizens." *Kerrigan v. Comm'r of Pub. Health*, 289 Conn. 135, 156-57 (2008). This principle alone arguably is dispositive in this context. Regardless of what the framers intended when they wrote Article VI, § 7, it is doubtful that they had in mind—or that they even could have foreseen—the global pandemic that we currently face. The Court should not interpret that provision narrowly to preclude the expanded absentee voting that the needs of contemporary society—as reflected by the near unanimous votes of the General Assembly on HB 6002, *see infra* at 23—clearly demand.

Third, and relatedly, the breadth and importance of the government's ability to combat the virus under its police powers should weigh heavily on any interpretation of Article VI, § 7 the Court may adopt in this case, and they counsel strongly in favor of the Secretary's position. Indeed, those powers are "broad and inclusive," and they run especially "broad and deep" when addressed to threats to the "health and welfare of the public." *O'Dell v. Kozee*, 307 Conn. 231, 291-92 (2012); *Cohen v. City of Hartford*, 244 Conn. 206, 218 (1998). Courts ordinarily cannot invalidate such laws unless they "either fail to serve the public good or serve it in a despotic way." *Caldor's, Inc. v. Bedding Barn, Inc.*, 177 Conn. 304, 317 (1979). This is true with regard to all laws enacted under the police power, but it is especially apt during a public health emergency like that here. *See infra* at 17-18 (discussing *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905)). This judicial deference that courts owe to the government's exercise of its police powers to protect public health and safety necessarily should inform and guide the Court's interpretation of Article VI, § 7 in this case, and the Court ***must*** take it into account when ruling on Plaintiffs' claims.

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

Specifically, several courts already have called into question or invalidated various limitations on absentee voting during the current pandemic because they burden the right to vote. *See, e.g., League of Women Voters of Virginia v. Virginia State Bd. of Elections*, No. 6:20-CV-00024, 2020 WL 2158249 (W.D. Va. May 5, 2020); *Thomas v. Andino*, No. 3:20-CV-01552-JMC, 2020 WL 2617329, at *21 (D.S.C. May 25, 2020); *People First of Alabama v. Merrill*, No. 2:20-CV-00619-AKK, 2020 WL 3207824, at *19 (N.D. Ala. June 15, 2020), stay granted *Merrill v. People First of Alabama*, No. 19A1063, 2020 WL 3604049, at *1 (U.S. July 2, 2020). That includes one court that squarely has held that a vote-by-mail option is constitutionally required in this climate. *See Demster v. Hargett*, No. 20-0435-I(III) (Tenn. Chancery Ct. June 4, 2020) (A249-A280). As a result, there is at least a question about whether and to what extent absentee voting is constitutionally required during the COVID-19 crisis. The EO eliminates that question for the August primaries. As a matter of constitutional avoidance, the Court should interpret Article VI, § 7 in a manner that keeps any potential constitutional infirmity due to lack of absentee voting off the table for both the August primaries and the November general election.

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

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

There is no federal analogue to Article VI, § 7, and the Secretary has not located any federal precedents directly interpreting that provision or others like it. However, the Supreme Court has long interpreted the federal constitution to permit states to substantially ***curtail*** the most fundamental of constitutional rights in order to protect health and safety during a crisis. It would be anomalous for this Court to interpret our own Constitution to prevent the state from ***protecting*** those same rights for that same important purpose. That principle should again inform the Court's analysis of Article VI, § 7 in this case.

Specifically, in *Jacobson* the Supreme Court held that "a community has the right to protect itself against an epidemic of disease" and that states may limit the "possession and enjoyment of all rights" when confronted with the "pressure" and "great dangers" posed by infectious disease. 197 U.S. at 27, 29. Those limits can be substantial, and can include measures that clearly would be unconstitutional in normal circumstances, such as forcibly quarantining people or compelling them, by force and against their religious and political convictions if necessary, "to take [their] place in the ranks of the army of [their] country, and risk the chance of being shot down in its defense." *Id.* at 29. Indeed, the Court held that even personal "liberty itself, the greatest of all rights," can be substantially restrained and restricted when public health and safety demand it during an emergency. *Id.* at 26-27.

Courts regularly have applied these principles from *Jacobson* in the current pandemic. *See generally, e.g., In re Abbott*, 956 F.3d 696, 703 (5th Cir. 2020). Indeed, Chief Justice Roberts recently confirmed that "[o]ur Constitution principally entrusts [t]he safety and the health of the people to the politically accountable officials of the States to guard and protect.

When those officials undertake[ ] to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad." *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring) (quotation marks omitted), citing *Jacobson*, 197 U. S. at 38 and *Marshall* v. *United States*, 414 U. S. 417, 427 (1974).

Although *Jacobson* is not directly on point, it strongly counsels in favor of interpreting Article VI, §7 broadly to permit the EO. Simply put, if the most fundamental rights protected by the federal constitution must give way during a crisis in order to protect health and safety, there is no plausible reason why our state Constitution should be interpreted to preclude the Governor from protecting those same rights also in the name of public health. That is especially true when the whole point of Article VI, § 7 is to facilitate the right to vote, not to impede it. *See supra* at 9, 13-14.[6]

5. Persuasive Precedents From Other States

Thirty-four states offered all-mail or no-excuse absentee voting before the pandemic, and have thus had no occasion to address this issue during the pandemic.[7] Of the other states, all but two (Texas and Mississippi) have expanded absentee voting during those states' primaries, general elections, or both.[8] *See generally* Def. Appx. A40-A150. The

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[6] As with Connecticut precedents, Plaintiffs do not identify any relevant federal precedents to support their claim. They instead rely exclusively on *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969), for the proposition that there is no right to vote absentee under the federal constitution. Pl. Br. at 30. That has nothing to do with the issues in this case and does not inform how our own constitutional authorization for absentee voting should be interpreted.

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

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

Secretary is not aware of any state court that has assessed the constitutionality of such measures, much less interpreted their own constitutions to prohibit them. If this Court were to invalidate the EO, therefore, to the Secretary's knowledge it would be the first court in the entire nation to invalidate this near-universal response to the pandemic.

There simply is no cause for the Court to take such a dramatic leap. To the contrary, similar to the Superior Court's decision in *Parker*, the Arkansas Supreme Court has interpreted analogous language in a manner that is fully consistent with the Secretary's construction of Article VI, § 7 here. In *Forrest v. Baker*, the legislature authorized absentee voting for "[a]ny person who, because of illness or physical disability will be unable to attend the polls on election day." 287 Ark. 239, 240 (1985). Like Article VI, § 7, that language does not require the individual to actually have the illness, and instead applies if the individual is unable to appear "because of illness" more broadly. The Court held that two voters who voted absentee because of "sickness in the family" properly cast their vote, as "[a] voter can have sickness in his family which renders him unable to attend the polls." *Id.* at 243-44. That is fully consistent with the Secretary's argument that the phrase "because of sickness" in Article VI, § 7 should be interpreted to include the existence of any sickness that makes a person unable to appear, whether the person actually has it or not. *See supra* at 9-12.

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

In *Bailey v. S.C. State Election Comm'n*, the plaintiffs sought a declaration that language in South Carolina's pre-pandemic statutory definition of "physically disabled person," which was defined as "a person who, because of injury or illness, cannot be present

in person at his voting place on election day," should be construed to include those individuals "practicing social distancing to avoid contracting or spreading the illness COVID-19." No. 2020-000642, 2020 WL 2745565, *2 (S.C. May 27, 2020). The Court rejected the argument, but ***not*** on the basis of any judicial interpretation of the statutory language. Rather, the Court rejected it because after the plaintiffs brought their case the legislature adopted a new law that permitted absentee voting for all voters. The Court held that the subsequent enactment was a "***legislative*** determination" that the original law did not include the plaintiffs' interpretation, and that any judicial effort to override that determination "based on [the statute's] plain language or the canons of construction" would violate the political question doctrine. *Id.* at *2-3 (emphasis added). The Court therefore refused to conduct such an analysis, and expressed no opinion about how the analysis would have come out if it had. *Id.* at *3; *see id.* at *4 (Hearn, J. dissenting in part).

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

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

In re State has no relevance here. As an initial matter, it interpreted the term "physical condition," not the term "sickness" used in Article VI, § 7. Further, it interpreted that term in the context of a statute that explicitly required the person to actually have the condition. While that question may be relevant to an interpretation of the pre-EO version of § 9-135, which similarly requires that an individual may vote absentee only on the basis of "his or her illness," it has no bearing on the EO or the "because of sickness" language in Article VI, § 7, neither of which impose such a requirement.[9]

6. Relevant Contemporary Public Policies

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

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

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[9] Plaintiffs also rely on *Rocci v. Massachusetts Acc. Co.*, a 1917 case that discussed different levels of sickness that existed under a private insurance indemnity policy. Pl. Br. at 30-31, citing 226 Mass. 545, 553, 116 N.E. 477, 479 (1917). Plaintiffs' reliance on *Rocci* is confusing at best. As an initial matter, what "sickness" means for purposes of a private insurance policy has nothing to do with the meaning of "because of sickness" for purposes of absentee voting under Article VI, § 7. More importantly, the plaintiff in *Rocci* ***had*** a sickness, and the Court therefore had no occasion to address whether the term could include somebody who is impacted by a sickness but does not actually have it.

Second, the Secretary's position is consistent with the public policy that states across the nation have adopted, both before and during the pandemic. As discussed above, thirty-four states permit all-mail or no-excuse absentee voting during normal times. Of the sixteen states that do not, all but two of them—Texas and Mississippi—have changed their absentee ballot laws during the pandemic to permit some form of expanded absentee voting. If this Court interprets Article VI, § 7 to invalidate the EO, therefore, it will be joining Connecticut with Texas and Mississippi in a class of just three states that have not adapted their voting methods to meet the threats posed by COVID-19. That is contrary to the public policy of Connecticut and virtually every other state in the nation.

III. GENERAL STATUTES § 28-9(b)(1) PLAINLY AND UNAMBIGUOUSLY AUTHORIZED THE GOVERNOR TO ISSUE EXECUTIVE ORDER 7QQ, AND ANY CLAIM THAT IT DID NOT OR COULD NOT IS MOOT, WAIVED AND INADEQUATELY BRIEFED

Plaintiffs also claim that the Governor lacked authority to modify § 9-135 because the power to provide for absentee voting resides with the General Assembly. Pl. Br. at 12-23. The Court should reject that claim because it is moot and contradicted by the unambiguous text of § 28-9(b)(1), the constitutionality of which Plaintiffs do not and cannot challenge.

A. Any Claim That The Governor Lacked Authority To Issue The EO Is Moot

To the extent there is a question about whether the Governor had authority to issue the EO—which there should not be for the reasons discussed below—that question is moot. It is well settled that the legislature may ratify an executive order through subsequent legislation. *See, e.g., Isbrandtsen-Moller Co. v. U.S.*, 300 U.S. 139, 147 (1937). That is true even if the original act was unauthorized, as the legislature may "give the force of law to official action unauthorized when taken." *Swayne & Hoyt v. U.S.*, 300 U.S. 297, 302 (1937); *see Fusco-Amatruda Co. v. Tax Commissioner*, 168 Conn. 597, 605 (1975). Here, the

legislature ratified the EO when it passed Amended HB 6002 by a vote of 144-2 in the House and 35-1 in the Senate. Def. Appx. A335-A337. That reflects the ***General Assembly's*** near-unanimous judgment that all voters should be allowed to vote absentee during the pandemic. Because Article VI, § 7 authorizes the General Assembly to provide for absentee voting and it has now done so, whether the Governor had authority to issue the EO is moot. *See, e.g., We The People of Connecticut, Inc. v. Malloy*, 150 Conn. App. 576, 581-82 (2014).

B. The Governor Had Authority To Issue The EO Under § 28-9(b)(1)

Even if the legislature had not ratified the EO, the Governor had authority to issue it under § 28-9(b)(1). The Secretary does not dispute Plaintiffs' lengthy discussion of the language in Article VI, § 7 providing that "[t]he General Assembly may provide by law" for absentee voting. Pl. Br. at 12-21. To be sure, that is the General Assembly's prerogative. But that does not answer the question here because the legislature unambiguously has delegated the power to modify any statute—including § 9-135—during the public health emergency, and Plaintiffs do not and cannot challenge the constitutionality of that delegation.

As discussed above, § 28-9(b)(1) expressly authorizes the Governor to "modify or suspend in whole or in part . . . ***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) (emphasis added). When determining the meaning of statutory language and whether it is clear and unambiguous, this Court must consider the text of the statute, its relationship to other statutes and whether it yields absurd results. *AvalonBay Communities, Inc. v. Zoning Comm'n of Town of Stratford*, 280 Conn. 405, 413-19 (2006). When the Court does so, the only plausible interpretation of the phrase "any statute" is that it plainly and unambiguously includes § 9-135.

First, in setting forth the Governor's power the legislature used broad and sweeping language at every turn. That includes its description of: (1) what the Governor may modify ("statutes," "regulations" and "requirements" without limitation); (2) which of those things the Governor may modify ("any" of them, again without limitation); and (3) the reason for the modification ("whenever" the "Governor finds" such statute to conflict with "the protection of the public health"). Although the word "any" may have different meanings, the sweeping language that the legislature used here demonstrates that it could only have meant for the word to have a broad meaning of "every" or "all." *See AvalonBay*, 280 Conn. at 413-414. That is especially apparent given that the clear purpose of § 28-9(b)(1) is to bestow the broadest powers possible upon the Governor to protect public health. Indeed, the legislature cannot predict what statutes might need to be modified in any particular emergency, and the word "any" must be construed broadly to ensure that the Governor can assess what actions must be taken based on the unique facts that each emergency presents. *See id.*

Second, that conclusion is confirmed by the fact that the legislature used similarly broad and sweeping language elsewhere in the statute. *See, e.g.* Conn. Gen. Stat. § 28-9(b)(3) (authorizing Governor to take "***any*** other precautionary measures reasonably necessary in the light of the emergency") (emphasis added); *id.*, § 28-9(b)(5) (requiring Governor to take "appropriate measures" for protecting the health and safety of inmates and children in schools); *id.*, § 28-9(b)(7) (authorizing the Governor to take "such other steps as are reasonably necessary in the light of the emergency to protect the health, safety and welfare of the people of the state"). The legislature's use of the same kind of broad language throughout the statute further demonstrates that it intended for the phrase "any statute" to have a broad meaning of "every" or "all." *See AvalonBay*, 280 Conn. at 413-414.

Third, in assessing whether the statute is unambiguous the Court must determine whether the Secretary's construction leads to absurd results, which it does not. *Id.* at 418. In fact, the only absurd result would be if the Court adopted Plaintiffs' construction. Again, excluding § 9-135 from the scope of § 28-9(b)(1) would either require hundreds of thousands of people to vote in-person during a pandemic, thereby causing the very illness and death that § 28-9(b)(1) exists to prevent, or opt to not participate in our democracy. Further, there is no policy rationale for the legislature to allow modification of some statutes that conflict with public health but not others, especially when § 28-9(b)(1) gives no guidance about which statutes fall on which side of that line. Such a construction would put the Governor in the untenable position of having to arbitrarily guess at which statutes are included and then wait to see if the courts tell him otherwise. That plainly is not what the legislature intended.

Importantly, Plaintiffs do not provide ***any*** textual analysis that could compel a different conclusion. They instead assert—without meaningful briefing or analysis—that § 28-9(b)(1) would be unconstitutional if it is read to permit the modification of § 9-135, and they therefore claim that the Court should apply the maxim of constitutional avoidance to exclude § 9-135 alone among all other provisions of the General Statutes. Pl. Br. at 21-22. That argument lacks merit. Even assuming that reading § 28-9(b)(1) to include § 9-135 would create potential constitutional infirmities—which it does not—the maxim of constitutional avoidance is a tool of interpretation that courts can use only when the statute is ambiguous. In other words, courts cannot put a judicial "gloss on a statute that contradicts its plain meaning." *State v. DeCiccio*, 315 Conn. 79, 149-50 (2014). Nor can they "rewrite the statute" when the requested "gloss is not consistent with the intent of the legislature as expressed in the clear statutory language . . . ." *Kuchta v. Arisian*, 329 Conn. 530, 547-48 (2018).

Here, the language of § 28-9(b)(1) is clear and unambiguous, and it authorized the EO for all of the reasons discussed above. The Court cannot disregard the plain statutory text and "'interpret' [§ 28-9(b)(1)] by gerrymandering [it] with a list of exceptions that happen to describe [Plaintiffs'] case. 'The canon [of constitutional avoidance] is not a method of adjudicating constitutional questions by other means.'" *U.S. v. Apel*, 134 U.S. 1134, 1153 (2014), quoting *Clark v. Martinez*, 543 U. S. 371, 381 (2005). That is especially true when Plaintiffs have not even pled or adequately briefed the purported constitutional infirmity upon which they rely, and have in fact expressly waived any such claim in this case.

C. The Constitutionality Of § 28-9(b)(1) Is Not Properly Before The Court And The Court Therefore Should Not Address It, But If The Court Does Address That Issue § 28-9(b)(1) Is Constitutional

As discussed above, Plaintiffs suggest in passing that § 28-9(b)(1) would be unconstitutional if it is read to authorize the Governor to modify § 9-135. Pl. Br. at 21-22. To be clear, Plaintiffs make that suggestion only as part of their argument about how § 28-9(b)(1) should be ***interpreted***, and not as part of any claim that § 28-9(b)(1) actually is unconstitutional either facially or as-applied. *See* Pl. Br. at 13 (framing the question as "whether it would be constitutional to ***read*** General Statutes §28-9(b)(1) to permit the Governor to change Connecticut's absentee ballot laws")(emphasis added); *id.* at 22 (relying on maxim of constitutional avoidance to argue that "§ 28-9(b)(1) cannot be ***read*** to empower the Governor to alter absentee voting")(emphasis added); *see also See* Def. Appx. A2-A3 (conceding that a constitutional challenge to § 28-9(b)(1) "is beyond the scope of what we're challenging," and arguing instead that § 28-9(b)(1) should be interpreted to avoid any potential constitutional infirmity). Indeed, Plaintiffs did not plead a constitutional challenge to § 28-9(b)(1), did not even mention that statute in their Complaint, and have not adequately

briefed such a claim to this Court. More importantly, Plaintiffs expressly waived any constitutional challenge to § 28-9(b)(1) during oral argument before the trial court, and the trial court therefore rightly declined to address the constitutionality of that statute—either facially or as-applied—in its decision. Def. Appx. A2 (conceding that "we're not saying [28-9(b)(1)] is unconstitutional"); Pl. Appx. A31 (noting that Plaintiffs "neither pleaded nor argued" a claim that the Governor lacks power to modify § 9-135 under the emergency powers delegated to him under § 28-9(b)(1), and that Plaintiffs "eschew[ed]" such a claim during argument before the trial court). The constitutionality of § 28-9(b)(1) therefore is not properly before the Court in this appeal, and the Court should not address it. *E.g., State v. Ortiz*, 154 Conn. App. 378, 387-88 (2014); *Rock v. Univ. of Connecticut*, 323 Conn. 26, 33 (2016).

Nevertheless, to the extent the Court somehow is inclined to reach out and decide this issue, it should reject Plaintiffs' claim. This Court has held that a statute will violate the separation of powers doctrine only if it "(1) confers on one branch of government the duties which belong exclusively to another branch; . . . or (2) if it confers the duties of one branch of government on another branch which duties significantly interfere with the orderly performance of the latter's essential functions." *Univ. of Connecticut Chapter AAUP v. Governor*, 200 Conn. 386, 394-95 (1986) (citation omitted). Plaintiffs rely exclusively on the first of those two grounds, but it does not apply here for two reasons.

First, the Governor did not exercise the legislature's "lawmaking function" when he modified § 9-135. *State v. Stoddard*, 126 Conn. 623, 627 (1940). Although no Connecticut court has defined the term "lawmaking," other courts have described it as "the power to decide what the policy of the law shall be, and if [the legislature] has intimated its will, however indirectly, that will should be recognized and obeyed.'" *Buxton v. Ullman*, 147 Conn.

48, 59 (1959), quoting *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 351 (1937). In other words, the non-delegable portion of the legislative power is the "responsibility for formulating public policy." *Morel v. Comm'r of Pub. Health*, 262 Conn. 222, 239 (2002).

Although the legislature ordinarily cannot delegate this policy-making function, it "may carry out its legislative policies within the police power of the state by delegating" to the Executive Branch the power to "fill in the details." *Town of New Milford v. SCA Servs. of Connecticut, Inc.*, 174 Conn. 146, 149 (1977). In delegating this enforcement authority the legislature does not delegate its law-making authority. To the contrary, as noted in the administrative context, the power "to prescribe rules and regulations under a statute is not the power to make law, but only the power to adopt regulations to carry into effect the will of the legislature as expressed by the statute." *Salmon Brook Convalescent Home, Inc. v. Comm'n on Hosps. & Health Care*, 177 Conn. 356, 363 (1979). Put differently, the separation of powers doctrine requires "that the Legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies." *Saratoga Cty. Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 821–22 (2003) (internal quotation marks omitted); *see, e.g.*, *Arizona Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 75 P.3d 1088, 1096 (Ariz. Ct. App. 2003); *Riley v. West Kentucky Production Credit Ass'n., Inc.*, 603 S.W.2d 916, 917 (KY 1980); *Green v. Kearny*, 225 N.C. App. 281, 291 (2013); *Chambers v. St. Mary's School*, 82 Ohio St. 3d 198, 202 (1998); *Hampton v. Haley*, 403 S.C. 395, 403-404 (2013).

That is exactly what happened here. Through § 28-9(b)(1) the legislature made the fundamental policy choice that the protection of public health and safety is paramount during a public health emergency, and that it takes precedence over all other policy choices reflected in the General Statutes, including § 9-135. That is the ***legislature's*** policy choice, not the

Governor's. Because the legislature cannot predict what statutes will have to be modified in any given emergency, the legislature gave the Governor the power to fill in the details of its policy choice in § 28-9(b)(1) by modifying other statutes that conflict with or impede it. The Governor's execution of that legislative directive is not an exercise of a "lawmaking function." Rather, the Governor is simply carrying out and effectuating the will of the legislature as reflected in the primary and unambiguous policy choice contained in § 28-9(b)(1).[10]

Second, even if the power to modify statutes under § 28-9(b)(1) constitutes "lawmaking," in this extraordinary context it is not an exclusive legislative function that cannot be delegated. Indeed, it is well established that Connecticut's separation of powers doctrine is flexible and should be applied in such a way as to prevent "the paralysis of government." *In re Clark*, 31 A. 522, 527 (Conn. 1894). This flexibility is especially vital when the statute at issue concerns the exercise of the police powers. *See Snyder v. Town of Newtown*, 147 Conn. 374, 389–90, (Conn. 1960). It is therefore unsurprising that since *Stoddard* there has been no case in which any Connecticut court has invalidated a statute—especially one that delegates police powers to protect public health—on separation of powers grounds.

This Court likewise should not do so here. Section 28-9(b)(1) is a *sui generis* delegation of legislative power made necessary by the extraordinary circumstances of a global pandemic. The delegated powers are limited both in time (6 months) and in scope (actions necessary to protect health and safety). Further, at all times the legislature retains the power to revoke or override the Governor's actions under § 28-9(b)(1). Although those

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[10] The language in Article VI, § 7 providing that "[t]he general assembly may provide by law" for absentee voting is just a specific example of the basic principle that the General Assembly is responsible for passing all laws in this state, and it is no different in that regard than the broader grant of legislative power in Article II and Article III, § 1. It therefore has no independent bearing on whether the Governor's actions in this case constitute "lawmaking."

actions do not even constitute lawmaking since they implement policy rather than make it, to the extent they are lawmaking they are not the kind of exclusive lawmaking that cannot be delegated in this unique and extraordinary context.

IV. THE COURT SHOULD AFFIRM ON THE ALTERNATIVE GROUND THAT THE EQUITABLE DEFENSE OF LACHES BARS PLAINTIFFS' CLAIMS

Laches is an equitable defense that precludes the Court from considering untimely claims. For the defense 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). Both requirements are satisfied here.

First, the Governor authorized expanded absentee voting on May 20. Plaintiffs have known since then that every voter may vote absentee during the primaries, but they waited exactly ***six weeks*** before pressing their claims, and then wasted another three weeks pursuing a baseless action under § 9-323. The fact that the Secretary did not issue the Application until June 26 is irrelevant, as the EO is fundamentally what Plaintiffs challenge in this case. Their delay in challenging it is inexcusable. *See Price v. Indep. Party of CT-State Cent.*, 323 Conn. 529, 546-47 (2016); *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).

Second, there can be no dispute that Plaintiffs' improper actions will prejudice voters, election officials and poll workers, and the broader electoral process if Plaintiffs' claims are permitted to proceed. The Secretary already has mailed more than 1.25 million Applications to voters on June 26, hundreds of thousands of applications have been returned and processed, and thousands of ballots have been sent to voters. Def. Appx. A8, A32-A33. Laches is particularly appropriate in such circumstances where the electoral machinery

already is "underway" and in "full swing." *Price*, 323 Conn. at 546; *Paher*, 2020 WL 2748301, at *5. Reversing this process at this juncture is impossible, and even if it were possible it will be extremely burdensome and is certain to lead to voter confusion and disenfranchisement.

In addition, the prejudice caused by Plaintiffs' purposeful delay is not limited to just voters. For example, due to the increased number of absentee ballots that are expected, the Secretary has revamped the internal management of absentee ballots and contracted with an outside vendor to print and mail the ballots to voters. That change was necessitated by, and was only possible because of, the EO. *See* EO at 3, § 4. The logistics of reverting back to the normal process at this late stage would be extremely difficult, if not impossible. Def. Appx. A6-A10. Similarly, given the lower anticipated in-person turnout in light of the EO, election officials have reduced the level of staffing on election day. If the EO and Application are invalidated, election officials will be forced at the last minute to enlist 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 hire and train enough poll workers to meet the increased demand for in-person voting that would arise if the EO is invalidated. In addition, officials based their choice of polling locations in part on the assumption that there will be lower in-person turnout. Many of the current polling locations are thus too small to accommodate the increased in-person voting that is sure to arise if the EO is invalidated, especially in a way that permits appropriate social distancing. This will either result in longer lines at the polls or will require election officials to move some polling places to other locations. At best this will be logistically difficult, and it will violate state law regarding the notice voters must receive about the location of their polling places, resulting in even more voter confusion and disenfranchisement. Def. Appx. A10-A13.

Further, at this stage the only practical relief would be to hold a new primary. Even if limited to Plaintiffs' own races, however, that would jeopardize the timely creation of the general election ballot by the September 15 statutory deadline for the Secretary to publish the make-up of the ballot for every election. *See* General Statutes § 9-140(f) (absentee ballots shall be issued 31 days before the November 3, 2020 election); 52 U.S. C. § 20303 (requiring ballots in federal elections to be available 45 days before November 3, 2020).

Finally, any changes will cost a significant amount of money beyond what the State already has spent. The Application alone cost $850,000 to print and mail, and the entire expansion of absentee voting contemplated by the EO will cost the State approximately $1.6 million. Def. Appx. A9. Reversing course now will waste 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.

Ultimately, it is difficult not to conclude that Plaintiffs timed the filing of this lawsuit and *Fay I* to maximize public attention for themselves, disrupt the primary election and sow voter confusion. Plaintiffs' actions are exceedingly improper and, and the Court should not reward them by permitting these claims to proceed or by granting any form of relief.

V. PLAINTIFFS LACK STANDING BECAUSE THEY ARE NOT AGGRIEVED, AND TO THE EXTENT THEY ARE THE NATURE OF THEIR AGGRIEVEMENT REQUIRES THAT ANY RELIEF BE LIMITED TO THE SPECIFIC PRIMARIES IN WHICH PLAINTIFFS ARE CANDIDATES

In its order granting Plaintiffs' § 52-265a application, the Chief Justice directed the parties to address aggrievement and how it impacts any potential relief in this case. For the reasons discussed below, the Court should affirm the judgment on the alternative ground that Plaintiffs lack standing because they are not aggrieved, and if they are aggrieved any relief in this case should be limited to the specific primary races in which they are candidates.

To have standing Plaintiffs must establish that they are aggrieved in the classical sense of the term, which means that they must provide "proof of a specific, personal and legal interest that has been injured by the defendant's conduct . . . ." *Lazar v. Ganim*, 334 Conn. 73, 86-87 (2019). The only potential injuries Plaintiffs identify here are their general interests in having a "fair and honest election" and not having their votes "diluted" by what they believe are illegal absentee voting procedures. Compl., ¶¶ 40-47. Numerous courts, including this Court, have rejected these exact same standing theories because such injuries "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." *Lazar*, 334 Conn. at 91-92, quoting *Fort Trumbull Conservancy, LLC v. City of New London*, 282 Conn. 791, 803 (2007); *see, e.g., Kauffman v. Osser*, 441 Pa. 150, 155-57 (1970); *Paher v. Cegavske*, No. 320CV00243MMDWGC, 2020 WL 2089813, at *5 (D. Nev. Apr. 30, 2020).

To the extent this case is different because Plaintiffs are candidates, that is a distinction without a difference as Plaintiffs must identify a personal harm even in their capacity as candidates. They have not done so. Their aggrievement argument boils down to the abstract assertion that the EO has "changed the essential character of the elections in which the plaintiffs are candidates." Pl. Br. at 8-9. Whether that is true or not, Plaintiffs do not explain how that change has ***harmed*** them or their candidacies. Indeed, we do not know how many people will vote absentee using the COVD-19 box, which candidates those people will vote for, or whether the races will be close enough such that the allegedly improper use of absentee ballots could have any tangible impact on their candidacies at all. Thus, although it is possible that a different candidate could identify a cognizable injury from the improper use of absentee ballots in a proper case, these Plaintiffs simply have not done so here.

Finally, to the extent Plaintiffs have been aggrieved, for the reasons discussed above any injury is cognizable only in Plaintiffs' capacity as candidates, and not as voters. Plaintiffs therefore do not have standing to challenge the expanded use of absentee ballots in any primary election other than their own. Thus, to the extent relief is appropriate at all—which it is not—it must be limited to the Republican primaries for the First and Second Congressional Districts in which Plaintiffs are candidates. *See Kelly v. Harris*, 331 F.3d 817, 820 (11th Cir. 2003); *In re Baker*, 404 S.W.3d 575, 580-82 (Tex. Civ. App. 2010).

CONCLUSION

The Court should affirm the judgment because Plaintiffs' claims fail on the merits, are barred by laches, and because Plaintiffs are not aggrieved.

Respectfully submitted,

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CERTIFICATION

The undersigned attorney hereby certifies that: (1) the electronically submitted brief and appendix have been delivered electronically to each counsel of record for whom an e-mail address has been provided; (2) the electronically submitted brief and appendix, and the paper filed brief and appendix, do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; (3) the brief and appendix being filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically; (4) the brief and appendix comply with all provisions of Connecticut Practice Book § 67-2 and all other applicable rules of appellate procedure; and (5) a copy of the brief and appendix have been mailed, first class postage prepaid, this 31st day of July, 2020, by Brescia's Printing Service to each counsel of record in compliance with Practice Book § 62-7, at the following addresses:

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