SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 20486

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

v.

DENISE MERRILL
SECRETARY OF THE STATE
Defendant - Appellee

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

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ARGUMENT

The trial court's declaration that COVID-19 is a constitutional justification for allowing every Connecticut elector to vote by absentee ballot is wrong. To vote by absentee ballot, Article Sixth, Section 7 of the Connecticut Constitution requires that an individual be "unable to appear at the polling place" on election day "because of sickness." The voter's "sickness" must be personal to the voter and must be the *cause in fact* for why the voter is unable to appear in-person at the polls. If an individual is not actually sick and is capable of voting in-person, with certain health and safety measures in place for example, that individual is not entitled to vote by absentee ballot. Indeed, the Secretary has conceded this point. The trial court's declaration that COVID-19 provides a constitutional basis for allowing every Connecticut elector to vote by absentee ballot should be reversed.

I. THE PLAINTIFFS ARE AGGRIEVED AS CANDIDATES WITH RESPECT TO BOTH THE PRIMARY AND THE GENERAL ELECTIONS

The defendant erroneously argues that the plaintiffs "must identify a personal harm even in their capacity as candidates" and that "[t]hey have not done so." See Def. Br. at 34. The trial court correctly found that the plaintiffs established their aggrievement as candidates with respect to both the primary and the general elections. All four plaintiffs' status as candidates in the primary election, two of the plaintiffs' status as candidates in the general election, and the allegation that the essential character of the elections in which the plaintiffs are candidates would change through no-excuse mail-in voting for all voters are sufficient to establish aggrievement here. See Pl. Br. at 7-9. Simply put, the plaintiffs, as candidates, have a personal interest in knowing who is eligible to vote for or against them by absentee ballot and the manner in which those absentee votes may be cast.

II. THE TRIAL COURT'S DECLARATION THAT THE "SICKNESS" REFERRED TO IN ARTICLE SIXTH, SECTION 7 OF THE CONNECTICUT CONSTITUTION DOES NOT REFER TO THE SICKNESS OF THE INDIVIDUAL SEEKING TO VOTE BY ABSENTEE BALLOT IS INCORRECT AND SHOULD BE REVERSED

A. The Secretary Has Conceded That The "Sickness" Referred To In The State Constitution Must Be The Sickness Of The Individual

As the trial court observed, the question presented by this case is: "Must the sickness referred to in Article Sixth, Section 7 of the Connecticut Constitution be the sickness of the individual seeking to vote by absentee ballot or is the existence of a raging global pandemic enough?" Mem. Dec. at 1. The defendant now argues that the Constitution "permit[s] absentee voting for healthy individuals caring for sick family members…" Def. Br. at 12. But the defendant has already conceded that not to be true. On March 2, 2012, the Secretary testified before the legislature asking for an amendment to the state constitution to address this very issue. In testifying in favor of HJ 2, the Secretary clearly explained that Article Sixth, Section 7's reference to "sickness" applies to the voter's personal health and that any expansion would *require* a constitutional amendment:

> This amendment has been proposed before by my office and this year Governor Malloy is proposing it with my enthusiastic support. The substitute language for House Joint Resolution 2 would amend the State Constitution to remove the current barriers in the Connecticut Constitution that allow voting by absentee ballot for only specified reasons. Removal of these barriers would enable the General Assembly to consider other ways to cast a ballot without appearing at your poll on Election Day.
>
> ***
>
> In fact, a spouse who is a caregiver to their husband or wife who does not want to leave their ailing spouse's bedside is not even allowed to vote by absentee ballot. This is wrong and needs to change. The **only** way to do it is to open up our state constitution through this amendment and enact some sort of non-precinct place voting. That would really help bring Connecticut elections into the 21st century and would serve our voters much better by giving them multiple options to cast ballots.

(Emphasis added.) Government Administration and Elections Committee, Testimony of D. Merrill, Secretary of the State (March 2, 2012).[1]

In response, the legislature passed a resolution which proposed an amendment to Article Sixth, Section 7 that would remove the "sickness" (and other) constitutional restrictions and allow people who were not personally sick to vote by absentee ballot:

> The general assembly may provide by law for voting in the choice of any officer to be elected or upon any question to be voted on at an election by qualified voters of the state who [are unable to appear at the polling place on the day of the 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] do not appear in person at a polling place on the day of an election.

Resolution Act No. 12-1. Because the resolution did not receive the three-fourths vote required to place the question on the next ballot, it needed to also be approved in a subsequent legislative session.

In 2013, the legislature again considered the proposed constitutional amendment. The meaning of "sickness" in Article Sixth, Section 7 as applying to the individual voter was again given as a reason for seeking the proposed amendment. A proponent of the constitutional amendment explained:

> …The Connecticut Constitution and current law limit the use of an absentee ballot[ ] to a handful of specific electors including those who will be out of town during the election, the sick and disabled, those whose religious tenets prohibit them from going to the polling place and election workers who may be working at a polling place other than their own. It penalizes other electors who may in fact benefit most from using these ballots such as first responders, commuters, family caregivers or the parents of young children. A first responder who works in the same community where he lives, may be on duty and unable to make it to the polls. A commuter by the letter of the law must be outside the town limits before 6 a.m. and not return until after 8 p.m. in order to qualify for an absentee ballot. A late train or an accident on the highway could make that commuter late in returning to his community. **A caregiver for a sick or disabled family member who qualifies for an**

[1]The Secretary's comments are available at page A43-A45 of the appendix to this brief.

> **absentee ballot, cannot seek his or her own absentee ballot and must find a substitute caregiver or give up his or her right to vote in an election**…

(Emphasis added.) Government Administration and Elections Committee, Testimony of S. Voris, Election Laws Specialist, League of Women Voters of Connecticut (Feb. 25, 2013). The legislature passed HJ 36 which became Resolution Act No. 13-1, putting the question to the electorate of whether the limitations contained in the state constitution on absentee voting, including the limiting phrase "because of sickness," should be removed.

As noted in the plaintiffs' principal brief, the electorate rejected the amendment.[2] Pl. Br. at 34. Given that the legislature passed resolutions to amend the Constitution specifically in order to give caregivers and family members of sick or disabled individuals the opportunity to vote by absentee ballot, it is clear that the "sickness" limitation contained in Article Sixth, Section 7 of the state constitution relates to the individual voter's personal health. See Republican Party of Connecticut v. Merrill, 307 Conn. 470, 498 (2012) ("It is well established that testimony before legislative committees may be considered in determining the particular problem or issue that the legislature sought to address by legislation."). The trial court's declaration to the contrary must be reversed.

B. A Review of the History of the Absentee Voting Statute Confirms That That "Sickness" Refers to The Individual Voter's Health

The genealogy of the absentee voting statute confirms that the meaning of "because of sickness" has not changed. After the constitution was amended in 1932 to allow people to vote by absentee ballot who, "because of sickness" were "unable to appear at the polling

[2] This was a significant and telling vote by the electorate. Since 1955, electors have been presented with forty-five proposed constitutional amendments. They have rejected only two of them, including the 2014 proposal to expand absentee voting. See K. Sullivan, "Amendments to the Connecticut Constitution Since the 1955 Revision," Office of Legislative Research (June 17, 2016).

places on the day of the election," the legislature in 1933 enacted General Statutes § 168c providing:

> Sec. 168c. Absentee voting. (a) Any qualified elector of this state who shall be absent from the state during the entire day of any national or state election, or who, **because of illness or physical disability**, shall be unable to appear at the polling place on such date, may cause his vote to be cast at such election in the manner and subject to the conditions hereinafter stated….

(Emphasis added.). The 1949 version of the absentee ballot statute provided:

> Sec. 1134 Absentee voting by electors not members of armed forces. Any qualified elector of this state, not a member of the armed forces, who is unable to appear at his polling place during the hours of voting of any national, state or municipal election, or of a special election, **because of** absence from the state, **illness or physical disability**, may cause his vote to be cast at any such election, in the manner and subject to the conditions hereinafter stated.

(Emphasis added.) 1949 Rev., § 1134.

In 1953, the legislature directed the Secretary of the State, Alice Leopold, to "prepare a revision of the sections of the [G]eneral [S]tatutes relating to elections, primaries, caucuses and conventions for the purpose of consolidating and clarifying the same." Republican Party of Connecticut v. Merrill, 307 Conn. at 497. As a result of that revision, the absentee ballot provision stated:

> Absentee voting by Civilians. Any elector not a member of the armed forces, who is unable to appear at his polling place during the hours of voting of any state, municipal or state election, **because of** absence from the state during the hours of voting of such election, **illness or physical disability**, may cause his vote to be cast at any such election, in the manner and subject to the conditions hereinafter stated.

(Emphasis added.) A. Leopold, Proposed Revision of the Sections of the General Statutes Pertaining to Elections (1953), at p. 53. Secretary Leopold's proposed revisions were adopted by Public Acts 1953, No. 368.

In 1957, the legislative commissioner prepared a revised edition of the General Statutes in accordance with Secretary Leopold's revisions, setting forth absentee voting in

General Statutes § 9-135, where it remains today. In 1965, after the 1964 constitutional amendment expanding absentee voting for religious reasons; see Pl. Br. at 21; General Statutes § 9-135 was amended to state:

> Any elector, not a member of the armed forces, who is unable to appear at his polling place during the hours of voting of any state, municipal or special election, **because of** absence from the state during all of the hours between the opening of the polls in the town of his voting residence in the morning and the closing thereof in the evening of the day of such election, **illness or physical disability** *or because the tenets of his religion forbid secular activity*, may cause his vote to be cast at such election, in the manner and subject to the conditions hereinafter stated.

(Emphasis added.) Public Acts 1965, No. 74. By 1972, the categories allowing for absentee ballots were enumerated and the language concerning the voter's inability to appear because of illness remained substantially the same. See General Statutes § 9-135 (Rev. 1972) ("Any elector who is unable to appear at his polling place… (5) because of illness, or (6) because of physical disability…").

In 1986, the language "his illness" first appeared in the statute. Public Act 86-179, entitled "An Act Making Technical Revisions to the Absentee Voting Laws," modified General Statutes § 9-135 as follows:

> Any elector… MAY VOTE BY ABSENTEE BALLOT IF HE is unable to appear at his polling place during the hours for voting [of any state, municipal or special election, (1) because of absence] FOR ANY OF THE FOLLOWING REASONS:… (3) HIS illness; (4) HIS physical disability…"

In 2012, General Statutes § 9-135 was the subject to another technical revision:

> (a) Any elector eligible to vote at a primary or an election and any person eligible to vote at a referendum may vote by absentee ballot if he OR SHE is unable to appear at his or her polling place during the hours of voting for any of the following reasons: (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.

Public Act 12-193, § 7.

The additions of "his" in 1986 and "her" in 2012 to § 9-135 were technical revisions. It is well-settled that technical revisions have "no effect on the state of substantive law." State v. Perry, 195 Conn. 505, 514 (1985); see also Republican Party of Connecticut v. Merrill, 307 Conn. at 495. Thus, the meaning of § 9-135 in its use of "his or her" to affirm that the individual voter must have the illness in order to be eligible to vote by absentee ballot has the exact same meaning as it did in 1933. This demonstrates the original and current meaning of Article Sixth, Section 7.

C. The Phrase "Unable To Appear At The Polling Place" Has Independent Meaning And Prevents The Existence Of COVID-19 From Justifying The Use Of Absentee Ballots By Any And All Voters

The defendant's analysis also overlooks the "unable to appear" language in Article Sixth, Section 7. Not only is the existence of COVID-19 not one of the reasons set forth in the Constitution for voting by absentee ballot, but Article Sixth, Section 7 also requires that the enumerated reasons for voting by absentee ballot, including "sickness," be the *cause in fact* for the voter being "unable to appear at the polling place" on election day. The Constitution requires a causal link between "sickness" and an individual's inability to appear and vote in-person. Our state constitution simply does not permit COVID-19 to allow everyone to vote by absentee ballot, including those who are able to appear in-person to vote while taking precautions such as mask wearing and social distancing as would be done with any other activity.

Article Sixth, Section 7 of the state constitution states:

> The general assembly may provide by law for voting in the choice of any officer to be elected or upon any question to be voted on at an election by

> qualified **voters** of the state who are **unable to appear at the polling place** on the day of election because of absence from the city or town of which they are inhabitants or **because of sickness** or physical disability or because the tenets of their religion forbid secular activity.

(Emphasis added). For an individual to vote by absentee ballot, there must be a causal link between the voter's "sickness" and the voter being "unable to appear at the polling place."

The plain meaning of "unable to appear at the polling place" in Article Sixth, Section 7 can be identified from the applicable dictionary definitions. See Rutter v. Janis, 334 Conn. 722, 730–31 (2020). Modern dictionaries define "unable" as "not able," "incapable," "incompetent," or "helpless." See Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/unable. "Unable" is also defined as "lacking the necessary power, competence, etc., to accomplish some specified act." See Dictionary.com, https://www.dictionary.com/browse/unable. The word "appear" is defined as "to show up." See Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/appear. Finally, "polling place" is defined as "a building where people go to vote in an election" or "a place at or in which votes in an election are cast." See Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/polling%20place; Dictionary.com, https://www.dictionary.com/browse/polling-place. Thus, the plain meaning of "unable to appear at the polling place" refers to a voter's inability to show up at a physical location on election day to cast a ballot. The plain text of the Constitution requires that this inability to show up at a physical location on election day to cast a ballot be caused by "sickness" or one of the other reasons identified in Article Sixth, Section 7. The trial court's declaration, which improperly expands absentee voting to all voters in Connecticut regardless of whether they are actually able to appear at the polling place and vote in-person, is incompatible with Article Sixth, Section 7's plain text.

D. Requiring In-Person Voting As Set Forth in the Constitution Enfranchises Voters

1. Absentee voting laws are to be narrowly construed

The Secretary cites a superior court decision to argue that the "unable to appear" language should be read liberally. See Def. Br. at 14 (discussing Parker v. Brooks, 1992 WL 310622 (Conn. Super. Ct. 1992)). However, the court in Parker was not considering the "unable to appear" language in the context of Article Sixth, Section 7, which is the provision at issue in this case. Moreover, the Parker decision is an outlier in our absentee voting jurisprudence. As the State Elections Enforcement Commission has explained, laws permitting the use of absentee voting are to be strictly construed because they are an exception to the general rule of in-person voting:

> The default rule of voting in Connecticut is that an elector must vote in person at such elector's designated polling location or such elector's Election Day registration location. Absentee voting is a limited exception to that general rule, which is not only established in General Statutes § 9-135, but also in Section 7 of Article Sixth of the Constitution of the State of Connecticut….
>
> In general, exceptions to the law are narrowly construed. See Commission on Human Rights and Opportunities v. Sullivan, 285 Conn. 208, 222, 939 A.2nd 541 (2008).

State Elections Enforcement Commission, In the Matter of a Complaint by Louis DeCilio, File No. 2017-057 (March 23, 2018).

This Court has explained that "[t]he right to vote by absentee ballot is a special privilege granted by the legislature, exercisable only under special and specified conditions to [e]nsure the secrecy of the ballot and the fairness of voting by persons in this class." Keeley v. Ayala, 328 Conn. 393, 406 (2018) (internal citation omitted). Indeed, the strict construction rule for absentee voting makes sense in light of this Court's concern about the potential for election irregularities, including mistakes and fraud, associated with absentee voting. See Lazar v. Ganim, 334 Conn. 73, 79-80 (2019); Keeley v. Ayala, 328 Conn. 393,

406–07 (2018); Wrinn v. Dunleavy, 186 Conn. 125, 142–44 (1982); Dombkowski v. Messier, 164 Conn. 204 (1972). The potential for mistakes and fraud, along with the loss of privacy and security that accompany the use of absentee ballots, require that absentee voting be strictly construed and limited.

2. Mail-in voting results in disenfranchisement

The defendant accuses the plaintiffs of trying to "suppress voter turnout and participation" and that public policy supports her position. Def. Br. at 1, 23. This is an erroneous accusation. Requiring in-person voting as set forth in the Connecticut Constitution enfranchises voters because it ensures that electors' votes are counted. In 2013, the Connecticut Town Clerks Association submitted testimony "caution[ing] against legislation that would expand vote by mail opportunities to include an all mail or no excuse absentee ballot option." Government Administration and Elections Committee, Testimony of A. C. Spinelli, Chair, CTCA Legislative Committee (Feb. 25, 2013). The Association explained:

> Our Association has done extensive research on the ballot process and found that in last November's election a large number of towns reported that absentee ballots were not counted or arrived after Election Day. On **average 5-percent** of the absentee ballots were not counted with some towns reporting the rejection of 7 or 8-percent. Absentee ballots are rejected for various reasons. For example, the absentee ballot was received late (after 8:00 pm on Election Day), the ballot was not signed, the ballot was missing the inner envelope or missing a ballot, the ballot was not properly delivered. It would stand to reason that if you expand the absentee ballot process to every voter in Connecticut, the number of disenfranchised voters would rise significantly.
>
> Also, under a "no excuse" option, the possibility of fraud is a serious concern. Our Association has had numerous discussions with the State Elections Enforcement Commission and we have come to the conclusion that most of the fraud complaints filed are not because of something that happened at a polling place, but rather with something that may have happened with an absentee ballot.

(Emphasis in original.) Id. The Connecticut Town Clerks Association repeated these concerns in testimony before the legislature in 2019. See Government Administration and Elections Committee, Testimony of M. Bernacki, Connecticut Town Clerks Association (March 13, 2019). The defendant's attack on the plaintiffs for attempting to preserve election integrity, ensure that every legitimate vote that is cast is counted, and enforce our Constitution, is improper.

E. The Secretary's Application for Absentee Ballot Is Unlawful Because The Governor Lacked The Constitutional Authority To Issue Executive Order No. 7QQ Pursuant to General Statutes § 28-9 (b)(1)

The defendant relies on Executive Order No. 7QQ to defend the Application, and on General Statutes § 28-9 (b)(1) to defend the Executive Order. Def. Br. at 24-31. Although § 28-9 (b)(1) enables the Governor to modify or suspend certain statutes during a civil preparedness emergency, this power does not extend to the absentee voting statutes, specifically General Statutes § 9-135 which provides the six statutory reasons that a person may use to obtain an absentee ballot. The text of Article Sixth, Section 7 of the Connecticut Constitution is clear that only the electorate has the power to expand absentee voting through constitutional amendment and only the General Assembly has the power to prescribe the rules concerning absentee voting as limited by the state constitution. General Statutes §28-9 (b)(1) cannot supersede the Connecticut Constitution. Because the Governor lacked the constitutional authority to modify § 9-135, Executive Order No. 7QQ was unlawfully enacted and the Secretary's Application is unconstitutional.

1. The plaintiffs' claims are not moot

The issue before this Court is whether the trial court correctly declared that COVID-19 is a constitutional justification for allowing all voters in Connecticut to vote by absentee ballot. The defendant claims that because the legislature has "ratified the EO, thus

protecting the primary election" and "also has extended the rationale of the EO to the November general election," the plaintiffs' claims are moot. Def. Br. at 4. The defendant is wrong for three reasons.

First, as the defendant concedes, the issue of whether the trial court correctly determined that COVID-19 can be used as a justification to allow all electors in Connecticut to vote by absentee ballot is a "live controversy," especially because of the application of this declaration to the general election. See State v. T.D., 286 Conn. 353, 366 (2008).

Second, the Secretary's creation of a new category for absentee voting called "COVID-19" was not constitutionally authorized when the Application for Absentee Ballot was issued, nor is it constitutionally authorized after the new legislation. Thus, the nature of the Application remains a live controversy.

Third, the defendant's reliance on the legislature's ratification of the Governor's Executive Order is misplaced, especially given that the legislature also lacked the authority to expand absentee voting in a primary. See Article Sixth, Section 7. The constitutional provision for absentee voting only applies to an "election," not a primary. The defendant recently convinced this Court that elections and primaries are distinct under Connecticut state law, leading this Court to conclude that the distinction was significant enough to strip it of jurisdiction. See Fay v. Merrill, S.C. 20477 (July 20, 2020 Order). The argument presented by the defendant in that case is equally applicable to why the legislature lacked constitutional authority to expand absentee voting in primaries in this case:

> 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).

(Emphasis in original). Def. Motion to Dismiss (7/7/20), Fay v. Merrill, S.C. 20477. The language used in Article Sixth, Section 7—"voting in the choice of any officer to be elected"—makes the same distinction between an election and a primary that the defendant already successfully argued to this Court. Cf. Attorney General Opinion (Aug. 6, 1945) (absentee voting not applicable to voting on constitutional amendments).

Finally, if this Court were to conclude that any aspect of the plaintiffs' appeal were moot, it should then apply the doctrine of *vacatur* to the trial court's decision, which necessarily involves a consideration of the merits. See State v. Singleton, 274 Conn. 426, 439-442 (2005).

2. General Statutes § 28-9 (b)(1) cannot give the Governor the ability to change absentee voting laws

Under well-established Connecticut law, a statute should be read in a way that avoids potential constitutional infirmities. See Honulik v. Greenwich, 293 Conn. 641, 647 (2009) ("This court has a duty to construe statutes, whenever possible, to avoid constitutional infirmities."). Under separation of powers principles:

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

(Emphasis added.) Univ. of Connecticut Chapter AAUP v. Governor, 200 Conn. 386, 394–95 (1986).

> As this court explained in Norwalk Street Railway Co.'s Appeal, [69 Conn. 576, 586–89 (Conn. 1897], the adoption of the 1818 constitution represented a radical departure from the government that previously had been in existence. In contrast to the earlier establishment, in which the elected General Assembly had been free to exercise the entirety of state power without constraints, the new government was founded upon the principle of separation of powers, which specifies that the sovereign authority of the people is granted to three separate branches of government—legislative, executive and judicial—each of which maintains separate and independent power over its individual sphere of authority. Id., at 587, 592–94, 37 A. 1080. The powers granted to each branch encompass the full range of its authority over that sphere, except as limited by the constitution, and no branch may invade the powers of another branch. Conn. Const. (1818), art. II; Norwalk Street Railway Co.'s Appeal, supra, at 587, 592–94, 37 A. 1080. In accordance with this tenet, for more than 100 years, this court consistently has reaffirmed the principle of separation of powers and has held that no branch may usurp powers belonging to another branch for the purposes of exercising the authority of that branch.

Honulik v. Town of Greenwich, 293 Conn. 641, 669–70 (2009) (*Katz, J.*, dissenting).

State v. Stoddard, 126 Conn. 623, 627 (1940) is on point and instructive here. At issue in Stoddard was whether the delegation of the General Assembly's legislative power to regulate the sale of milk products to an executive branch official was unconstitutional on separation of powers grounds. The court in Stoddard ultimately concluded that the statute implementing the delegation was unconstitutional and noted that "since the lawmaking function is vested exclusively in the legislative department, … the Legislature cannot delegate the lawmaking power to any other department or agency." Id. at 627. "If the Legislature fails to prescribe with reasonable clarity the limits of the power delegated or if those limits are too broad, its attempt to delegate is a nullity." Id. at 628.

Here, the Connecticut Constitution commits the prescription of absentee voting exclusively to the General Assembly and, thus, any attempt to confer that authority onto the executive branch, even during a time of emergency, would be unconstitutional.

F. The Doctrine Of Laches Does Not Apply

The defendant's contention that the doctrine of laches is applicable and serves to bar the plaintiffs' claims is incorrect. This appeal is about the trial court's ruling in a declaratory judgment action interpreting Article Sixth, Section 7, which is a legal action – not an equitable one. It has long been the rule in this state that laches invokes the equitable power of the court and "is not imputed to a suitor in a court of law." Waterman v. Sprague Mfg. Co., 55 Conn. 554 (Conn. 1888). Laches is not an available defense to a declaratory judgment action. See Doe v. Hartford Roman Catholic Diocesan Corp., 317 Conn. 357, 397–402 (2015); Silberman v. McLaughlin, 129 Conn. 273, 276 (Conn. 1942).

Nevertheless, there is no merit to the defendant's laches claim. The plaintiffs acted swiftly and "with all due haste" in bringing their action before both the primary and the general election. See Price v. Independent Party, 323 Conn. at 547. Despite being made aware about the constitutional objections to the executive branch attempting to alter our state's absentee ballot laws, the defendant forged forward in the face of pending litigation, designed a new absentee ballot application creating a seventh category for absentee voting, and mailed it out to Connecticut voters. As result of these actions, the defendant now claims prejudice. "One is reminded of the old saw about the child who murders his parents and then asks for mercy because he is an orphan." Fog Cutter Capital Group Inc. v. S.E.C., 474 F.3d 822, 826 (C.A.D.C. 2007). The defendant's laches claim is baseless.

CONCLUSION

For the above stated reasons, the plaintiffs urge this Court to reverse the trial court's declaratory judgment and declare that COVID-19 is not a constitutional justification under Article Sixth, Section 7 of the Connecticut Constitution for allowing every Connecticut elector to vote by absentee ballot.

Respectfully submitted,

THE PLAINTIFFS-APPELLANTS,

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CERTIFICATION

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2, that on August 4, 2020:

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

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

(3) a copy of the brief has been sent electronically to each counsel of record in compliance with Section 62-7; and

(4) the brief being filed with the appellate clerk are true copies of the brief that was submitted electronically; and

(5) the brief complies with all provisions of this rule.

/s/ Proloy K. Das, Esq.
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CERTIFICATION OF FORMAT AND SERVICE

I hereby certify that a copy of the Plaintiffs-Appellants Reply Brief was sent via electronic mail and mailed, first-class postage-prepaid, this 4th day of August, 2020 to:

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