

SC 20477

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

v.

DENISE MERRILL, SECRETARY OF
THE STATE

:
:
:
:
:
:
:
:
:
:
:
:

SUPREME COURT

STATE OF CONNECTICUT

JULY 1, 2020

**PETITION AND COMPLAINT PURSUANT TO
GENERAL STATUTES SECTIONS 9-323, 52-29, AND 52-471**

NOW COME the Plaintiffs, Mary Fay, Thomas Gilmer, Justin Anderson, and James Griffin, by and through counsel, and for their Petition and Complaint state as follows:

INTRODUCTION

The Plaintiffs are four candidates for the office of Representative in the United States Congress and are on the ballot for the August 11, 2020 primary election. The instant action is being brought to protect the integrity of the election.

The Secretary of the State's Application for Absentee Ballot for the August 11, 2020 primary election, which is expected to be mailed to all Connecticut voters, uses the COVID-19 pandemic to unconstitutionally impose effectively no-excuse absentee voting. However, the Connecticut Constitution does not permit no-excuse absentee voting and entrusts the electorate to define the scope of absentee voting through constitutional amendment. The Constitution further assigns to the Legislature the obligation of implementing the will of the electorate. Neither the Secretary of the State

nor the Governor has the constitutional authority to prescribe, expand, or alter the rules governing absentee ballot voting. There is no pandemic exception to the Connecticut Constitution. The Application for Absentee Ballot that the Secretary has prepared for the August 11, 2020 primary election should be rescinded.

JURISDICTION

1. This petition and complaint is presented and brought pursuant to General Statutes §§ 9-323, 52-29, and 52-471.

PARTIES

2. Plaintiff Mary Fay is an elector and a candidate for United States Representative for the 1st Congressional District in Connecticut.

3. Plaintiff Thomas Gilmer is an elector and a candidate for United States Representative for the 2nd Congressional District in Connecticut.

4. Plaintiff Justin Anderson is an elector and a candidate for United States Representative in the 2nd Congressional District in Connecticut.

5. Plaintiff James Griffin is an elector and a candidate for United States Representative in the 1st Congressional District in Connecticut.

6. Defendant Denise Merrill is the Secretary of the State of Connecticut and by virtue of her office, the commissioner of elections with general supervisory authority over elections in the State of Connecticut. Defendant Merrill is an “election official” under General Statutes § 9-323. Defendant Merrill is named solely in her official capacity.

FACTS

7. On August 11, 2020, Connecticut will hold its congressional primary

elections as well as its presidential preference primaries.

8. The Plaintiffs are candidates in the August 11, 2020 primaries being held in the First and Second Congressional Districts.

9. In late June 2020, citing Governor Lamont's Executive Order No. 7QQ and General Statutes § 9-3, Secretary Merrill issued an Application for Absentee Ballot for the August 11, 2020 primaries that unconstitutionally and erroneously expands absentee voting in Connecticut and allows **all** voters to vote by absentee ballot. A copy of the Application for Absentee Ballot is attached hereto as Exhibit A.

10. Merrill's preparation and issuance of the Application for Absentee Ballot for the August 11, 2020 primary constitutes a "ruling of an election official." See Arciniega v. Feliciano, 329 Conn. 293, 303 (2018).

11. In the Application for Absentee Ballot, Secretary Merrill unconstitutionally and erroneously determined that all eligible voters may use "COVID-19 ... as a valid reason for requesting [an absentee] ballot."

12. Article Sixth, Section 5 of the Connecticut Constitution protects the right to vote in secret.

13. Article Sixth, Section 7 of the Connecticut Constitution provides that voting must be done in person and limits the use of absentee voting to circumstances where a person is unable to appear due to one of the limited reasons set forth therein.

14. Specifically, Article Sixth, Section 7 of the state Constitution provides:

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

their religion forbid secular activity.

15. The Connecticut Supreme Court has long recognized that any attempt to expand absentee voting must comply with the state Constitution. See Opinion of Judges of the Supreme Court, 30 Conn. 591 (1862) (declaring that statute providing for Civil War soldiers to vote by absentee ballot was unconstitutional necessitating constitutional amendment).

16. In order to implement absentee voting as set forth in Article Sixth, Section 7, the legislature enacted General Statutes § 9-135 (a), in which it specifically enumerated six categories of electors who are eligible to vote by absentee ballot:

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.

17. Only the General Assembly is permitted to alter state law implementing absentee voting as limited by the state Constitution.

18. Only the electorate can expand the use of absentee ballots in Connecticut through amendment of the state Constitution.

19. Neither the Governor nor the Secretary of the State has the constitutional authority to expand the use of absentee ballots.

20. In the November 2014 election, the electorate was presented with a

proposed amendment to the state Constitution that would have removed restrictions on absentee ballot use and authorized the General Assembly to expand the use of absentee ballots, which the electorate rejected.

21. On March 10, 2020, Governor Lamont issued a declaration of public health and civil preparedness emergencies, proclaiming a state of emergency throughout the State of Connecticut in response to the COVID-19 pandemic.

22. On May 20, 2020, Governor Lamont issued Executive Order No. 7QQ which, *inter alia*, purported to modify General Statutes § 9-135 to state that an eligible elector may “vote by absentee ballot for the August 11, 2020 primary election if he or she is unable to appear at his or her polling place during the hours of voting because of the sickness of COVID-19.” A copy of Governor Lamont’s Executive Order No. 7QQ is attached hereto as Exhibit B.

23. Executive Order No. 7QQ further stated: “For purposes of this modification, a person shall be permitted to lawfully state he or she is unable to appear at a polling place because of COVID-19 if, at the time he or she applies for or casts an absentee ballot for the August 11, 2020 primary election, there is no federally approved and widely available vaccine for prevention of COVID-19.”

24. Executive Order No. 7QQ is unconstitutional because Article Sixth, Section 7 expressly commits the prescription of absentee voting procedure to the General Assembly – not to the Governor.

25. Executive Order No. 7QQ is unconstitutional because it broadens the use of absentee ballots, in contravention of the strict reasons for which absentee ballots may be used in Connecticut elections as set forth in Article Sixth, Section 7.

26. There is no COVID-19 exception in the Connecticut Constitution.

27. In late June 2020, Secretary Merrill released the Application for Absentee Ballot for Connecticut’s August 11, 2020 congressional primaries and the presidential preference primary.

28. Secretary Merrill intends to mail the Application for Absentee Ballot to all voters in Connecticut.

29. Secretary Merrill added to the Application for Absentee Ballot a new seventh category for absentee voting – “COVID-19.”

30. Secretary Merrill listed this new category first on the list of reasons for obtaining an absentee ballot and further encouraged all voters to select this reason by highlighting and bolding it to make it distinct from the other six reasons listed from General Statutes § 9-135:

Section II. – Statement of Applicant

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

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

31. Secretary Merrill’s decision not to limit the reasons for obtaining an absentee ballot to those set forth by the Legislature in General Statutes § 9-135 was a ruling of an election official.

32. Secretary Merrill’s decision to expand absentee voting based on Executive Order No. 7QQ, rather than limit absentee voting in accordance with the

restrictions set forth by the Legislature in General Statutes § 9-135, was a ruling of an election official.

33. Secretary Merrill's broadening of the use of absentee voting in Connecticut through the Application for Absentee Ballot violates the Connecticut Constitution because:

a. The Secretary of the State lacks the constitutional authority to alter the parameters of who is entitled to vote by absentee ballot; and

b. The reasons that electors may vote by absentee ballot are strictly limited by the Connecticut Constitution and can only be expanded by the electorate.

34. Executive Order No. 7QQ included two conditions under which a person could obtain an absentee ballot due to COVID-19:

a. The elector must certify that he or she "is unable to appear at a polling place because of COVID-19"; and

b. "[T]here is no federally approved and widely available vaccine for prevention of COVID-19."

35. Secretary Merrill's decision to add a new category called "COVID-19" and her failure to include the restrictions contained in Executive Order No. 7QQ concerning that reason – i.e. the voter being unable to appear and the unavailability of a vaccine – constitutes a ruling of an election official.

36. In allowing all voters to vote by absentee ballot, Secretary Merrill ignored the important qualification in Executive Order No. 7QQ that "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.”

37. Article Sixth, Section 7 of the state Constitution limits the use of absentee ballots to “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.”

38. The Application for Absentee Ballot expands the use of absentee ballots for reasons beyond those specifically prescribed in Article Sixth, Section 7 of the state Constitution.

39. Through the Application for Absentee Ballot, Secretary Merrill has violated Article Sixth, Section 7 of the state Constitution.

**THE PLAINTIFFS ARE AGGRIEVED BY
THE APPLICATION FOR ABSENTEE BALLOT**

40. Each of the Plaintiffs is aggrieved by the Application for Absentee Ballot.

41. Voters and candidates have a constitutional right to a fair election.

42. Every voter has a right under the United States Constitution to have his or her vote fairly counted without it being debased or diluted by improperly or illegally cast votes. An individual’s right to vote is infringed if his or her vote is cancelled by an unlawfully cast vote. See Anderson v. United States, 417 U.S. 211, 227 (1974); Gray v. Sanders, 372 U.S. 368, 380 (1963); Baker v. Carr, 369 U.S. 186, 208 (1962).

43. A candidate has standing to assert his or her own constitutional rights as well as the constitutional rights of the voters. See Bush v. Gore, 531 U.S. 98, 104 (2000); Anderson v. Celebrezze, 460 U.S. 780, 788 (1983); Walgren v. Board of

Selectmen of Town of Amherst, 519 F.2d 1364 n.1 (1st Cir. 1975)

44. Plaintiff Mary Fay is aggrieved as an elector and as a candidate, specifically based on the right to have votes counted equally and not be diluted by votes that are unlawfully cast in contravention of Article Sixth, Section 7 of the state Constitution, as well as her constitutional right to a fair and honest election.

45. Plaintiff Thomas Gilmer is aggrieved as an elector and as a candidate, specifically based on the right to have votes counted equally and not be diluted by votes that are unlawfully cast in contravention of Article Sixth, Section 7 of the state Constitution, as well as his constitutional right to a fair and honest election.

46. Plaintiff Justin Anderson is aggrieved as an elector and as a candidate, specifically based on the right to have votes counted equally and not be diluted by votes that are unlawfully cast in contravention of Article Sixth, Section 7 of the state Constitution, as well as his constitutional right to a fair and honest election.

47. Plaintiff James Griffin is aggrieved as an elector and as a candidate, specifically based on the right to have votes counted equally and not be diluted by votes that are unlawfully cast in contravention of Article Sixth, Section 7 of the state Constitution, as well as his constitutional right to a fair and honest election.

COUNT ONE: CHALLENGE TO RULING OF ELECTION OFFICIAL PURSUANT TO GENERAL STATUTES § 9-323

48. The Plaintiffs restate all allegations contained in Paragraphs 1 through 47 hereof as if fully rewritten herein.

49. The Plaintiffs are electors and candidates for the office of United States Representative in the United States Congress.

50. The Plaintiffs are aggrieved by a ruling of the Secretary of the State in

connection with the August 11, 2020 primary election for Representative in the United States Congress.

51. The Absentee Ballot Application prepared by the Secretary of the State is inconsistent with:

- a. General Statutes § 9-135;
- b. Executive Order No. 7QQ; and
- c. Article Sixth, Section 7 of the Connecticut Constitution.

COUNT TWO: DECLARATORY JUDGMENT

52. The Plaintiffs restate all allegations contained in Paragraphs 1 through 51 hereof as if fully rewritten herein.

53. The Plaintiffs seek a judicial determination that the Application for Absentee Ballot is unconstitutional because it conflicts with Article Sixth, Section 7 of the state Constitution and is erroneous because it is based on an improper interpretation of Executive Order No. 7QQ and General Statutes § 9-135.

54. There is an actual bona fide and substantial question in dispute and substantial uncertainty of legal relations that requires resolution.

55. There is no other forum of proceeding that can provide the Plaintiffs with timely redress.

COUNT THREE: INJUNCTIVE RELIEF

56. The Plaintiffs restate all allegations contained in Paragraphs 1 through 55 hereof as if fully rewritten herein.

57. The Plaintiffs seek a prohibitory injunction precluding Defendant Merrill from mailing or distributing copies of the Application for Absentee Ballot to any

Connecticut voters.

58. The Plaintiffs seek a mandatory injunction requiring Defendant Merrill to recall any copies of the Application for Absentee Ballot already mailed or distributed to any Connecticut voters.

59. If no such injunctions issue, the Plaintiffs will suffer irreparable harm.

60. The Plaintiffs have no other adequate remedy at law.

WHEREFORE, the Plaintiffs pray for judgment as follows:

- (i) That Secretary Merrill's Application for Absentee Ballot be rescinded;
- (iii) A declaration that the Application for Absentee Ballot is unconstitutional because it conflicts with Article Sixth, Section 7 of the state Constitution and is erroneous because it is based on an improper interpretation of Executive Order No. 7QQ and General Statutes § 9-135;
- (iii) A prohibitory injunction precluding Defendant Merrill from mailing or distributing copies of the Application for Absentee Ballot to any Connecticut voters;
- (iv) A mandatory injunction requiring Defendant Merrill to recall any copies of the Application for Absentee Ballot already mailed or distributed to any Connecticut voters; and
- (v) Such other relief as this Court determines to be just and equitable.

PLAINTIFFS,

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

By 

Proloy K. Das, Esq.
pdas@murthalaw.com
Matthew A. Ciarleglio, Esq.
mciarleglio@murthalaw.com

Murtha Cullina LLP
280 Trumbull Street, 12th Floor
Hartford, Connecticut 06103
Telephone: 860.240.6000
Facsimile: 860.240.6150
Juris No. 040248

Their Attorneys