

RETURN DATE: JULY 7, 2020

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|------------------------------|---|----------------------|
| DOMINIC RAPINI, LINDA        | : | SUPERIOR COURT       |
| SZYNKOWICZ, STATE SENATOR    | : |                      |
| ERIC BERTHEL, AND STATE      | : | JUDICIAL DISTRICT OF |
| REPRESENTATIVE JASON PERILLO | : | NEW BRITAIN          |
|                              | : |                      |
| v.                           | : | AT NEW BRITAIN       |
|                              | : |                      |
|                              | : |                      |
| DENISE MERRILL, SECRETARY OF | : | JUNE 17, 2020        |
| THE STATE                    | : |                      |

**PETITION FOR ADMINISTRATIVE APPEAL**

TO THE SUPERIOR COURT FOR THE JUDICIAL DISTRICT OF NEW BRITAIN ON THE SEVENTEENTH DAY OF JUNE, 2020, COME JOINTLY DOMINIC RAPINI, LINDA SZYNKOWICZ, STATE SENATOR ERIC BERTHEL, AND STATE REPRESENTATIVE JASON PERILLO, APPEALING PURSUANT TO SECTIONS 9-3 AND 4-183 OF THE CONNECTICUT GENERAL STATUTES FROM A MEMORANDUM OF OPINION ISSUED BY THE OFFICE OF THE SECRETARY OF THE STATE, DATED MAY 6, 2020, AND COMPLAIN AND SAY:

**INTRODUCTION**

Fair elections are central to our republican form of government. Democracy demands that there be public confidence in the integrity of the election process. The Connecticut Constitution safeguards our elections through two significant provisions. Article Sixth, Section 5 protects the right to vote in secret. Article Sixth, Section 7 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.

As a bi-partisan election reform commission, chaired by former President Jimmy Carter and James Baker, explained, “[a]bsentee ballots remain the largest source of potential voter fraud.” Commission on Federal Elections Reform, Building Confidence in U.S. Elections 46 (2005). Absentee ballots can be mailed to the wrong address, can get lost in the mail, or can get intercepted by, for example, other residents in large residential buildings or even roommates. Absentee ballots can be the subject of ballot harvesting, where third parties, unknown to the voter and to election officials, gather ballots and may pressure electors to vote a certain way or dispose of ballots that do not support a particular candidate. Absentee ballots run the danger of not being secret ballots. Individuals might sign their absentee ballots. A spouse may influence the other to vote a certain way. Third parties, including family and friends, can oversee how a person is voting on an absentee ballot. The privacy and security of the voting booth disappears with absentee ballots. In addition, eligible electors voting by absentee ballot can be disenfranchised when their ballots are not counted for being statutorily defective or untimely. For all of these reasons, Connecticut requires in person voting and its absentee ballot system is strictly limited. And since those limitations are rooted in our state constitution, only the electorate, by amending the constitution, can expand the circumstances under which absentee ballots can be used.

This case is a challenge to the Secretary of the State’s declaration expanding who is entitled to vote by absentee ballot based, in part, on the COVID-19 public health and civil preparedness emergency in Connecticut. The Secretary’s actions will decrease public confidence in the election process and increase the election’s

susceptibility to irregularities, from errors to fraud. Moreover and fundamentally, it is for Connecticut's electorate – not the Secretary of the State – to decide whether and when absentee ballot use should be expanded. The Plaintiffs herein challenge the Secretary's May 6, 2020 Memorandum of Opinion as an unlawful and unconstitutional expansion of absentee balloting.

NOW COME the Plaintiffs, Dominic Rapini, Linda Szykowitz, Senator Berthel, and Representative Perillo, by and through counsel, and for their Complaint state as follows:

### **PARTIES AND JURISDICTION**

1. Plaintiff Dominic Rapini is a Connecticut elector, former candidate for the United States Senate, and potential future candidate for elected office.

2. Plaintiff Linda Szykowitz is a Connecticut elector, former candidate for state representative, and a candidate for state representative in the November 2020 general election.

3. Plaintiff Hon. Eric Berthel is a member of the state senate representing the 32<sup>nd</sup> Senatorial District and a candidate for re-election in the November 2020 general election.

4. Plaintiff Hon. Jason Perillo is a member of the state house of representatives representing the 113<sup>th</sup> Assembly District and a candidate for re-election in the November 2020 general election.

5. 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. She is named solely in her official capacity.

6. This petition and complaint is brought pursuant to General Statutes §§ 9-3 and 4-183 and the Connecticut Supreme Court's decision in Republican Party v. Merrill, 307 Conn. 470 (2012).

### SECRETARY MERRILL'S MEMORANDUM OF OPINION

7. General Statutes § 9-3 provides, in relevant part, that:

[T]he Secretary's regulations, declaratory rulings, instructions and opinions, if in written form... shall be presumed as correctly interpreting and effectuating the administration of elections and primaries under this title... and shall be executed, carried out or implemented, as the case may be, provided nothing in this section shall be construed to alter the right of appeal provided under the provisions of chapter 54. Any such written instruction or opinion shall be labeled as an instruction or opinion issued pursuant to this section, as applicable, and any such instruction or opinion shall cite any authority that is discussed in such instruction or opinion.

8. On May 6, 2020, citing her authority under General Statutes § 9-3, Secretary Merrill issued a "Memorandum of Opinion" that unconstitutionally and erroneously expands the definition of "illness" in General Statutes § 9-135 for purposes of broadening who is entitled to vote by absentee ballot. A copy of the Memorandum of Opinion is attached hereto as Exhibit A.

9. In the Memorandum of Opinion, Secretary Merrill unconstitutionally and erroneously determined "that any registered voter who has a **pre-existing illness** can vote by absentee ballot because that voter's illness would prevent them from appearing at their designed polling place safely because of the COVID 19 virus." (emphasis in original).

10. Furthermore, Secretary Merrill unconstitutionally and erroneously determined that "individuals who may have been in contact with a COVID-19 infected individual such as healthcare workers, first responders, individuals who are caring for

someone at increased risk, as well as those that feel ill or think they are ill because of the possibility of contact with the COVID-19 virus should also be included in the category of voters that would qualify as ‘ill’ for the purposes of absentee voting.”

11. If not overturned on appeal, said Memorandum of Opinion will have an overall adverse effect on the fairness of Connecticut’s electoral process. The Plaintiffs respectfully request that this appeal be sustained because the Secretary of the State lacks the constitutional authority to broaden the use of absentee ballots, the Memorandum of Opinion is based on an erroneous and improper construction of General Statutes § 9-135, and the Memorandum of Opinion unconstitutionally broadens the use of absentee ballots in violation of Article Sixth, Section 7 of the state constitution.

**THE SECRETARY OF THE STATE LACKS THE CONSTITUTIONAL AUTHORITY TO BROADEN THE USE OF ABSENTEE BALLOTS**

12. Article Sixth, Section 7 of the state constitution provides as follows:

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.

13. In enacting General Statutes § 9-135 (a), the General Assembly identified several 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.

(emphasis added).

14. Although General Statutes § 9-3 authorizes the Secretary of the State, as the commissioner of elections in the state, to promulgate regulations, declaratory rulings, instructions, and opinions concerning the conduct and administration of elections and primaries, only the General Assembly or the electorate can expand the use of absentee voting.

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

16. Only the electorate can expand the use of absentee ballots in Connecticut through amendment of the state constitution.

17. In the November 2014 election, the electorate rejected 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.

18. The Secretary of the State has no authority to unilaterally expand the use of absentee ballots.

19. Through the Memorandum of Opinion, the Secretary of the State made a clear error of law in concluding that she has the legal authority to expand the definition of “illness” in General Statutes § 9-135.

20. Given that the Secretary of the State lacks the authority to alter the parameters of who is entitled to vote by absentee ballot, the Memorandum of Opinion violates Article Sixth, Section 7 of the state constitution and is unconstitutional.

**THE SECRETARY OF THE STATE’S MEMORANDUM OF OPINION IS  
BASED ON AN ERRONEOUS AND IMPROPER CONSTRUCTION OF GENERAL  
STATUTES SECTION 9-135 AND UNCONSTITUTIONALLY BROADENS THE USE  
OF ABSENTEE BALLOTS IN VIOLATION OF ARTICLE SIXTH, SECTION 7 OF THE  
STATE CONSTITUTION**

21. The Memorandum of Opinion is based on an erroneous and improper construction of General Statutes § 9-135 and is otherwise inconsistent with principles of statutory construction.

22. In expanding the definition of “illness” in General Statutes § 9-135 to include those with “pre-existing illness,” anyone “who may have been in contact with a COVID-19 infected individual such as healthcare workers, first responders, [and] individuals who are caring for someone at increased risk,” anyone that “feel[s] ill,” or anyone that “think[s] they are ill because of the possibility of contact with the COVID-19 virus,” the Secretary of the State erroneously and improperly interpreted the language of General Statutes § 9-135.

23. 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.”

24. The Memorandum of Opinion expands the use of absentee ballots for reasons beyond those specifically prescribed in Article Sixth, Section 7 of the state constitution.

25. Through the Memorandum of Decision, the Secretary of the State has violated Article Sixth, Section 7 of the state constitution.

**THE PLAINTIFFS ARE AGGRIEVED BY THE MEMORANDUM OF OPINION**

26. Each of the Plaintiffs is aggrieved by the Memorandum of Opinion.

27. Plaintiff Dominic Rapini is aggrieved as a voter and a potential candidate, specifically based on his right to have his vote 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. See Anderson v. United States, 417 U.S. 211, 227 (1974); Baker v. Carr, 369 U.S. 186, 208 (1962).

28. Plaintiff Linda Szykowitz is aggrieved as a voter and a candidate, specifically based on her right to have her vote 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. See Anderson v. United States, 417 U.S. 211, 227 (1974); Baker v. Carr, 369 U.S. 186, 208 (1962).

29. Plaintiff State Senator Eric Berthel is aggrieved as a member of the General Assembly, which is the constitutional body authorized to implement absentee ballot procedures, because encroachment by the Secretary of the State on the powers of the legislature is both a constitutional violation and a tangible harm. See Office of



Governor v. Select Committee of Inquiry, 271 Conn. 540 (2004). Senator Berthel is also aggrieved as an elector and a candidate for reelection in the November 2020 general election.

30. Plaintiff State Representative Jason Perillo is aggrieved as a member of the General Assembly, which is the constitutional body authorized to implement absentee ballot procedures, because encroachment by the Secretary of the State on the powers of the legislature is both a constitutional violation and a tangible harm. See Office of Governor v. Select Committee of Inquiry, 271 Conn. 540 (2004). Representative Perillo is also aggrieved as an elector and a candidate for reelection in the November 2020 general election.

WHEREFORE, the Plaintiffs respectfully request that this Court:

- (i) Sustain this appeal;
- (ii) Vacate Secretary Merrill's Memorandum of Opinion; and
- (iii) Grant such other relief in law or in equity as is required or appropriate.

PLAINTIFFS,

DOMINIC RAPINI, LINDA SZYNKOWICZ,  
STATE SENATOR ERIC BERTHEL, AND  
STATE REPRESENTATIVE JASON  
PERILLO

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# **EXHIBIT A**



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

### MEMORANDUM OF OPINION

To: All Town Clerks and Registrars of Voters

From: Office of the Secretary of the State

Date: May 6, 2020

Re: Absentee Balloting Voting During a State of Health Emergency

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

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

Connecticut General Statutes §9-135 permits a voter to receive an absentee ballot if they cannot appear at their assigned polling place because of "(1) His or her active service with the armed forces of the United States; (2) his or her absence from the town of his or her voting residence during all of the hours of voting; (3) his or her illness; (4) his or her physical disability; (5) the tenets of his or her religion forbid secular activity on the day of the primary, election or referendum; or (6) the required performance of his or her duties as a primary, election or referendum

official, including as a town clerk or registrar of voters or as staff of the clerk or registrar, at a polling place other than his or her own during all of the hours of voting at such primary, election or referendum.”

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

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

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

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

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

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

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