S.C. 20477

MARY FAY, THOMAS GILMER, JUSTIN ANDERSON AND JAMES GRIFFIN	:	**SUPREME COURT**
v.	:	**STATE OF CONNECTICUT**
SECRETARY OF THE STATE DENISE MERRILL	:	**JULY 20, 2020**

MOTION FOR RECONSIDERATION *EN BANC*

Pursuant to Practice Book § §§ 60-2 and 71-5, and General Statutes § 51-199(d), the plaintiffs, Mary Fay, Thomas Gilmer, Justin Anderson, and James Griffin (the "Plaintiffs"), respectfully move this Court for reargument and/or reconsideration *en banc* of the Court's July 20, 2020 order dismissing this action. Reconsideration by this Court by an *en banc* panel is proper because the issues of whether a Congressional primary may be the subject of General Statutes § 9-323 and whether the Secretary of the State's Application for Absentee Ballot and the Governor's Executive Order No. 7QQ are constitutional are issues of first impression.

I. BRIEF HISTORY OF THE CASE

The Plaintiffs are four candidates for the office of Representative in the United States Congress in the First and Second Congressional Districts. On or about June 29, 2020, the Secretary's Application for Absentee Ballot became publicly available. The Application, unconstitutionally and erroneously expands absentee voting in Connecticut to all voters. On July 1, 2020, the Plaintiffs filed the instant action, which is a challenge to a ruling of the Secretary as reflected in her Application for Absentee Ballot. On July 7, 2020, the Secretary filed the Motion to Dismiss arguing, *inter alia*, laches.

On July 7, 2020 this Court issued an order scheduling a hearing in this matter for July

22, 2020. The Court set a briefing deadline of noon on July 17, 2020.

The Court (*Robinson, C.J.*) was scheduled to hear from the parties on Wednesday, July 22, 2020. As set forth in the Plaintiffs' opposition to the Defendant's laches argument presented in the Motion to Dismiss, the Plaintiffs brought this action "a full 20 days before the July 21st date on which the absentee ballots themselves would become available." Pl. Opp. (7/13/20) at p. 17.

Subsequently, the Secretary represented that absentee ballots would still be mailed out on July 21, 2020. See Stipulation of Facts (7/15/20), ¶ 13. As a result, the Plaintiffs filed a motion for order on July 16, 2020 seeking an order: (1) enjoining the Defendant from issuing absentee ballots for COVID-19 reasons on July 21, 2020 until this Court has had the opportunity to issue a decision in this matter; or (2) alternatively, rescheduling the hearing currently scheduled for July 22, 2020 for July 20, 2020. The motion was filed in order to protect this Court's ability to afford the fullest extent of relief available in this case. See Independent Party v. Merrill, 330 Conn. 729, 743 (2019).

On July 16, 2020, the Court issued a *sua sponte* notice bifurcating the Defendant's jurisdictional claims and the merits of the case. The jurisdictional claims were heard on July 20, 2020. After that hearing, the Court (*Robinson, C.J.*) dismissed the Plaintiffs' suit.

II. SPECIFIC FACTS RELIED UPON

After the July 20, 2020 argument, the Court announced a decision from the bench. The Court held that: (1) General Statutes § 9-323 is not the proper vehicle for challenging the expansion of absentee voting in the context of a federal Congressional primary; (2) United States v. Classic, 313 U.S. 299 (1941) is not controlling here because its holding that Congressional primaries are intertwined with Congressional elections only applies to the right

to vote; (3) Plaintiffs should have brought their action under General Statutes § 9-329a because a federal Congressional primary is a primary for a "district office"; and (4) Executive Order No. 7QQ is not a "ruling of an election official" pursuant to this Court's decisions in Wrotnowski v. Bysiewicz, 289 Conn. 522 (2008) and Scheyd v. Bezrucik, 205 Conn. 495 (1987).

The Court also issued a one sentence order dismissing the action, noting that a more detailed opinion would follow.

III. LEGAL GROUNDS RELIED UPON

This motion is brought pursuant to Practice Book § §§ 60-2 and 71-5, and General Statutes § 51-199(d).

IV. ARGUMENT

Reconsideration *en banc* is appropriate because the case presents issues of first impression; cf. Practice Book § 81-2(A); and presents question of great public importance. Cf. Practice Book § 81-2(D).

A. The Court Erred In Concluding That General Statutes § 9-323 Does Not Apply To Congressional Primaries

The issue of whether § 9-323 applies to Congressional primaries has never been addressed by this Court. In the history of § 9-323 (which dates back to 1902), only five actions have been brought. Two have involved Presidential elections. See Wrotnowski v. Bysiewicz, 289 Conn. 522 (2008); Reform Party v. Bysiewicz, 254 Conn. 789 (2000). The other three have involved Congressional races. See In re Election 2nd District, 231 Conn. 602 (1994); Reale v. Bysiewicz, 298 Conn. 808 (2010) (Libertarian candidate for Congress); and Price v. Independent Party, 323 Conn. 529 (2016). Given that no electoral challenge to a

Congressional primary has ever been brought in Connecticut (prior to this case), the application of § 9-323 to a Congressional primary is one of first impression.

Indeed, the closest case to address the issue was Price, which involved a U. S. Senate race. In his analysis, Justice Palmer equated a Senate primary with a Senate election based on § 9–381a:

> ... [E]lection officials and caucus officials not only have different qualifications but also serve different functions. In this state, major parties may be required to hold primaries to select nominees for state office when such nominations are contested. See General Statutes § 9–415 (a). [ ] Much like elections, such primaries are carefully regulated by the state. See, e.g., General Statutes § 9–381a ("[e]xcept as otherwise provided by statute, the provisions of the general statutes concerning procedures relating to regular elections shall apply as nearly as may be ... to primaries held under the provisions of this chapter"); see also General Statutes § 9–381 (applying provisions of General Statutes §§ 9–382 through 9–450, which govern major parties, to "the nomination by a major party of any candidate for an elective office"). Indeed, the registrar of voters is charged with appointing and training "primary officials," such as moderators, checkers, challengers, ballot clerks, voting tabulator tenders, and assistant registrars, to oversee the operation of the primary elections. General Statutes § 9–436 (c) and (d).
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> ...
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> Nevertheless, the court recognizes that the judiciary has a role to play in promoting fair play even within the nomination process. See Butts v. Bysiewicz, supra, 298 Conn. at 674, 5 A.3d 932 ("[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes" [internal quotation marks omitted]). Thus, rather than foreclosing, or even discouraging, adjudication of disputes arising during that broader electoral process, this decision should be read narrowly, as barring only one avenue of relief for the allegedly unlawful or improper actions of caucus officials, that is, by motion to a justice of the Supreme Court under § 9–323.

(Footnote omitted.) Id. at 541-43. The Court should grant reconsideration *en banc* to discuss the interplay between this decision and Price.

B. The Court Erred In Failing To Follow United States v. Classic, 313 U.S. 299

(1940)

The Court's decision not to treat the Congressional primary as intertwined with the Congressional election is inconsistent with the U. S. Supreme Court's decision in United States v. Classic, 313 U.S. 299 (1940). There, the Court explained that a Congressional election includes the Congressional primary:

> Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary, is likewise included in the right protected by Article I, s 2. And this right of participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery, whether the voter exercises his right in a party primary which invariably, sometimes or never determines the ultimate choice of the representative. Here, even apart from the circumstance that the Louisiana primary is made by law an *319 integral part of the procedure of choice, the right to choose a representative is in fact controlled by the primary because, as is alleged in the indictment, the choice of candidates at the Democratic primary determines the choice of the elected representative. Moreover, we cannot close our eyes to the fact already mentioned that the practical influence of the choice of candidates at the primary may be so great as to affect profoundly the choice at the general election even though there is no effective legal prohibition upon the rejection at the election of the choice made at the primary and may thus operate to deprive the voter of his constitutional right of choice.

It is illogical to distinguish between a Congressional election and a Congressional primary for purposes of a *candidate*'s substantive and procedural rights when the U. S. Supreme Court has forbidden such a distinction for eligible voters.

C. The Court Erred In Dismissing Rather Than Transferring The Matter

The Defendant should not have been able to avoid an adjudication of the merits in this case. The Court concluded that this action could be brought under § 9-329(a). If this is correct, then the matter should not have been dismissed, but rather it should be transferred from the Supreme Court to the Superior Court. See Practice Book § 65-4.

General Statutes § 51-199 (b)(1) provides that an action brought under General Statutes § 9-323 is filed directly with the Connecticut Supreme Court. Practice Book § 65-4 provides:

> Any appeal or **cause brought to the Supreme Court** or the Appellate Court **which is not properly within the jurisdiction of the court to which it is brought shall not be dismissed for the reason that it was brought to the wrong court but shall be transferred** by the appellate clerk to the court with jurisdiction and entered on its docket. Any timely filed appeal or cause transferred shall be considered timely filed in the appropriate court. The appellate clerk shall notify all parties and the clerk of the trial court that the appeal or cause has been transferred. In the event that an appeal or cause is so transferred, no additional fees will be due.

(Emphasis added.). If the Court were correct that the instant action should have been filed in the Superior Court and not the Supreme Court, then the matter should have been transferred to the Superior Court – not dismissed. It is of no significance that the complaint cites § 9-323, as the Defendant clearly understands the nature of the claim. See Caruso v. City of Bridgeport, 285 Conn. 618 (2008) (citation to election challenge statute does not implicate subject matter jurisdiction). A transfer rather than dismissal should have entered.[1]

D. The Court Erred In Holding That Executive Order No. 7QQ Was Not Reviewable

The Court erred in holding that the Governor's Executive Order No. 7QQ was not reviewable. The Governor's Executive Order factors into this case because the Defendant cites it as her reason for failing to follow the legislative restrictions set forth in General Statutes § 9-135. For this reason, reviewing the legality of the Executive Order is proper as it is no

[1] As a matter of law, justices of the Connecticut Supreme Court are also judges of the Connecticut Superior Court. See General Statutes § 51-198 (a). In this case, as a matter of judicial economy, the Chief Justice could have decided the merits of the case as a judge of the Superior Court in light of his disagreement with the Plaintiffs about the applicability of § 9-323. Either way, the Court should have reached the merits of the Plaintiffs' claims.

different than reviewing the legality of absentee ballot votes that have been cast and that serve as a basis for an election official's ruling. In Wrinn v. Dunleavy, 186 Conn. 125 (1982) the Supreme Court explained that, when reviewing a ruling of an election official, the Court could review alleged misconduct by voters because those actions were ultimately relied upon by the election official. Similarly, in Keeley v. Ayala, 328 Conn. 393 (2018), the Court considered how certain absentee ballots were submitted in the context of reviewing a ruling of an election official that relied on those absentee ballots.

Moreover, it was error for the defendant to follow Executive Order No. 7QQ rather than General Statutes § 9-135. When a governor acts beyond his constitutional authority, that act becomes a nullity. The Connecticut Supreme Court has twice addressed this issue. In Caldwell v. Meskill, 164 Conn. 299, 315 (1973), the Supreme Court held that where the Governor had attempted to veto a portion of a bill in a manner that was beyond his constitutional authority, his actions were void (not just voidable) and the Secretary of the State had the duty to disregard them and certify the entire bill as law. Similarly, in Patterson v. Dempsey, 152 Conn. 431, 447 (1965), the Supreme Court explained that the reason that the constitution limited the Governor's veto power was to protect, as a matter of separation of power, the legislature's role:

> [T]he fundamental reason why a partial disapproval or veto is not generally authorized, at least in the case of general legislation, is because of the separation of powers among the executive, legislative and judicial branches of the government. All affirmative legislative powers are given exclusively to the General Assembly. See cases such as Booth v. Town of Woodbury, 32 Conn. 118, 126; Beach v. Bradstreet, 85 Conn. 344, 348, 82 A. 1030. If the governor were allowed to disapprove or veto parts of a bill involving general legislation, he could, in the case of many if not most such bills, by the exercise of that power, eliminate selected portions of a bill in such a manner as to change its meaning and thereby, in effect, enact an entirely different bill. This would usurp the legislative function, which is committed to the General Assembly alone. But such

> legislative action through the use of the veto power would be impossible if the veto power were restricted to distinct items of appropriation in a bill, whether that bill did, or did not, include other items of general legislation.

(Emphasis added). Id. at 442. The Court in Patterson further explained that "the [governor] had no constitutional power to veto or disapprove any of the three sections in question and that his action in purporting so to do was unconstitutional and void." Id. at 443.

Moreover, it is the proper role of the judicial branch to declare executive branch conduct that exceeds constitutional bounds to be unconstitutional. See Office of Governor v. Select Comm. of Inquiry, 271 Conn. 540, 574–75 (2004) ("It is emphatically the province and duty of the judicial department to say what the law is.") (quoting Marbury v. Madison, 5 U.S. [1 Cranch] 137, 177, 2 L.Ed. 60 1803). When the executive branch has acted beyond its constitutional authority or failed to respect the authority of another branch of government to control matters within a particular area, it is the obligation of the judiciary to order remedial action. Thus, in Office of Governor v. Select Comm. of Inquiry, 271 Conn. 540 (2004), the Supreme Court recognized that, once the Constitution entrusts one branch of the government with the authority to act in a particular subject matter, in that case the legislature's authority over impeachment, the judiciary appropriately acts in requiring that the other coordinate branch of government acknowledge that authority, in that case recognizing the validity of a legislative subpoena served on the Governor. Similarly, in Republican Party v. Merrill, 307 Conn. 470 (2012), when the Secretary of the State improperly awarded the top line of the 2012 election ballots to the Democratic Party, the Supreme Court ordered her to place the Republican Party's candidates on the top line of the ballots. It is inherently the obligation of the judicial branch to ensure that the executive and legislative branches of governments are acting within their constitutional parameters.

In this case, both the Governor, in expanding absentee voting in Connecticut to all voters through Executive Order No. 7QQ, and the Secretary, in expanding such absentee voting through the Application for Absentee Ballot, have exceeded their executive authority and encroached upon a constitutional function committed to the General Assembly. It is this Court's role to declare those actions to be unlawful. There is no constitutional authority for the Governor to alter or expand absentee voting in Connecticut. As set forth by the Supreme Court in Caldwell and Patterson, Executive Order No. 7QQ is void and it was improper for the Secretary to implement it through the Application. It should have been subject to review in this case because it served as the basis for the Defendant's failure to limit the reasons for obtaining an absentee ballot to those set forth by the Legislature in General Statutes § 9-135.

Reconsideration *en banc* by this Court is proper because the issues of whether a Congressional primary may be the subject of General Statutes § 9-323 and whether the Secretary of the State's Application for Absentee Ballot and the Governor's Executive Order No. 7QQ are constitutional are issues of first impression.

V. CONCLUSION

This Court should grant the instant motion.

Respectfully Submitted,

THE PLAINTIFFS,

MARY FAY, THOMAS GILMER,
JUSTIN ANDERSON AND JAMES GRIFFIN

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CERTIFICATION

I hereby certify that this motion complies with the provisions of Practice Book § 66-3 and that a copy of this motion pursuant to Practice Book §62-7 was mailed, via first-class mail, postage pre-paid on this 20th day of July, 2020 to:

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