SC 200027

SUPERIOR COURT DOCKET NO. HHD-CV20-6130532-S

MARY FAY ET AL.	:	SUPREME COURT
v.	:	STATE OF CONNECTICUT
DENISE MERRILL	:	JULY 23, 2020

DEFENDANT'S OPPOSITION TO PLAINTIFFS' APPLICATION FOR CERTIFICATION OF IMMEDIATE EXPEDITED APPEAL BY THE CHIEF JUSTICE

This § 52-265a application is the latest step in Plaintiffs' baseless and untimely effort to interfere with a primary election that already is underway. The Court should reject Plaintiffs' request to appeal because hasty review of the issues in this case is decidedly not in the public interest at this late stage of the election cycle, and because permitting such review will create substantial injustice rather than avoid it. Indeed, at this point the relief Plaintiffs seek will serve no purpose other than to sow more voter confusion and disenfranchise hundreds of thousands of Connecticut voters. More than 1.25 million absentee ballot applications already have been sent to voters; at least 257,000 applications already have been returned and processed; and thousands of absentee ballots already have been mailed to voters with more being mailed out every day. Many of those voters may have cast their vote already, and those who have not may do so at any time. It is now simply too late for this Court—or ***any*** court—to interfere with the August primaries that quite literally are happening as we speak. The greatest service this Court could do for the public interest is therefore to deny this application and put an end to the campaign of voter confusion and turmoil that Plaintiffs have stoked through their dilatory litigation tactics over the last three and a half weeks.

While that alone should be enough to deny the application, the Court should deny it for an additional reason. On July 17, 2020, the Governor called for a special session of the General Assembly to address absentee voting for both the primaries and the November general election.[1] That special session may well result in legislation that not only moots Plaintiffs' primary argument in this case (that the Governor lacked authority to adopt Executive Order 7QQ under General Statutes § 28-9(b)(1)), but that also creates the same underlying question about expanded absentee voting for the general election. The Court should not rush to judgment on that substantive question as it applies to the primaries when there is no way for the Court to provide practical relief without disenfranchising thousands of voters. The prudent course—which ***is*** in the public interest—is for the Court to instead see what transpires in the special session and, if necessary, address these important issues in an orderly fashion in a proper and timely filed case that these or other plaintiffs are sure to file related to the general election.

Finally, to the extent the Court is inclined to grant the application, it should reject Plaintiffs' request to "rely on the merits briefs that have already been filed by the parties in *Mary Fay et al. v. Secretary of the State Denise Merrill*, S.C. 20477" ("*Fay I*"). Application at 5 and n.1. In *Fay I* Plaintiffs improperly raised and briefed an unpled challenge to the Governor's statutory and constitutional authority to issue Executive Order 7QQ under § 28-9(b)(1). The Secretary has not yet had an opportunity to respond to or brief that unpled claim, which Plaintiffs have waived and abandoned in this case in any event. The Court simply cannot decide that important question without briefing from the State.

---

[1] https://portal.ct.gov/-/media/Office-of-the-Governor/News/20200717-Call-of-July-2020-Special-Session.pdf (last viewed July 22, 2020).

I. BRIEF HISTORY OF THE CASE

The Governor issued Executive Order 7QQ ("the EO") on May 20, 2020. Instead of bringing a declaratory judgment action challenging the EO at that time—which they easily could and should have done if they believe it is illegal—Plaintiffs waited ***six weeks*** before pressing their claims in *Fay I* through an improper action filed directly with a single Supreme Court justice under General Statutes § 9-323. The Secretary promptly notified Plaintiffs of obvious jurisdictional defects in that action through a motion to dismiss filed on July 6. But instead of simply admitting their error and refiling in the correct forum using the correct procedures, Plaintiffs chose to waste three more weeks pursuing *Fay I* to conclusion. On July 20, the Court (*Robinson, C.J.*) dismissed *Fay I* for lack of jurisdiction, and Plaintiffs then moved for reconsideration *en banc*.

Just moments after the Court dismissed *Fay I*, Plaintiffs finally did what they should have done nine weeks earlier and belatedly filed this declaratory judgment action in Superior Court under General Statutes §§ 52-29 and 52-471. The trial court (*Moukawsher, J.*) held a hearing and issued a written decision on July 22, dismissing Plaintiffs' case in its entirety. In its decision the trial court correctly held that the plain language of Article VI, § 7 unambiguously permits the expanded absentee voting authorized by the EO, and therefore did not even address the other *Geisler* factors that also support that same conclusion. MOD at 1-4. The trial court also squarely held that the text of § 28-9(b)(1) authorized the Governor to issue the EO, and that Plaintiffs' argument to the contrary is nothing more than an unpled claim that § 28-9(b)(1) is unconstitutional. *Id.* at 4-5. Because Plaintiffs expressly "eschew[ed]" that unpled constitutional claim during oral argument, the trial court properly declined to address it. *Id.* at 5.

II. SPECIFIC FACTS RELIED UPON

Plaintiffs have now filed an application for certification of immediate expedited appeal by the Chief Justice pursuant to General Statutes § 52-265a. The specific facts that the Secretary relies on in submitting this opposition are as follows: (1) Plaintiffs improperly delayed pressing their claims for six weeks after the Governor issued the EO; (2) Plaintiffs improperly caused an additional delay of three weeks by filing their claims in the wrong forum under the wrong statute, and deliberately chose to pursue those claims to completion despite being notified of jurisdictional defects soon after they filed; (3) Plaintiffs' inexcusable and unjustified delay in pursuing their claims will substantially prejudice hundreds of thousands of voters, election officials and the election process more generally; (4) more than 1.25 million absentee ballot applications already have been sent to voters; (5) at least 257,000 absentee ballot applications already have been returned and processed; (6) thousands of voters already have received their absentee ballots for the August primary; (7) voters who sought and have received absentee ballots may cast their vote with them at any time, and many of those voters may have already done so; (8) there is no way to stop the electoral process at this late juncture without causing substantial voter confusion and mass disenfranchisement; and (9) the General Assembly is in special session at this very moment debating legislation that would moot Plaintiffs' primary argument in this case; namely, that the Governor did not have statutory or constitutional authority to issue the EO under § 28-9(b)(1).

III. LEGAL GROUNDS RELIED UPON

This opposition is submitted pursuant to General Statutes § 52-265a and Practice Book §§ 66-2, 66-3 and 83-1.

IV. LEGAL ARGUMENT

Expedited direct appeals under § 52-265a are an extraordinary remedy that short circuit the normal judicial process, and the Court should permit them only in exceptional circumstances. By the statute's plain language, those circumstances are limited to cases involving "a matter of substantial public interest and in which delay may work a substantial injustice." Conn. Gen. Stat. § 52-265a(a). Those requirements are not met here.

First, although the issues in this case are of substantial public interest, it is not in the public interest for this Court to decide them through the rushed procedures that Plaintiffs seek to invoke. To the contrary, insofar as the August primaries are concerned it is not in the public interest for any court to decide these issues at all, as doing so will cause the very substantial injustice that § 52-265a seeks to avoid. That is true for two reasons.

As an initial matter, the primary election process already is well underway, with hundreds of thousands of voters already having received, completed and returned the very same absentee ballot Applications that Plaintiffs ask the Court to invalidate and recall. Absentee ballots already have been mailed to thousands of voters, all of whom can cast their vote at any time if they have not done so already. At this late juncture there simply is no way for any court to fashion the relief that Plaintiffs seek without disenfranchising those voters who already have received their ballot and cast their vote with it, not to mention the hundreds of thousands of other voters who may submit applications, receive absentee ballots and cast their votes between now and when the Court ultimately rules. Thus, the most the Court realistically could do at this late juncture is issue an advisory opinion about the legality of the EO, which is something this Court simply does not do. *Echavarria v. Nat'l Grange Mut. Ins. Co.*, 275 Conn. 408, 419 (2005).

Further, any such advisory opinion is particularly inappropriate here because it is certain to cause even more voter confusion than Plaintiffs' dilatory litigation tactics already have caused. Again, Plaintiffs waited until July 1 to file their Complaint in *Fay I*, which was six weeks after the Governor issued the EO and even longer after the Secretary made clear her intention to mail absentee ballot applications to all eligible voters. The litigation that has been ongoing since that date has received widespread publicity. Plaintiffs' aggressive and abusive litigation tactics are thus causing immediate harm to our state, right now — no doubt their high-profile attack on voting rights already has succeeded in creating confusion and uncertainty that actively and irrevocably suppresses voter turnout and participation for the August primary. To allow this litigation to continue at this late date, as voters are receiving their ballots and casting their votes with them, will surely lead to even more confusion and uncertainty. The Court should put an end to it now by denying the application instead of permitting Plaintiffs' baseless claims to drag on even one moment longer.

Indeed, declining to take this case now or to decide it on the expedited basis that Plaintiffs request is particularly appropriate given that the General Assembly currently is addressing this issue insofar as it applies to the August primary. Specifically, although it was not legally necessary because the Governor acted well within his authority under § 28-9(b)(1), in his call for the special session the Governor sought to eliminate any doubt over the legality of the EO by requesting the General Assembly to address expanded absentee voting for the August primary. The state House of Representatives is scheduled for session ***today*****,** July 23, and the Senate will follow shortly thereafter. Given that the Governor and significant majorities in both houses of the General Assembly are of the

same party, it is likely they will pass legislation on the issues in this case within days, and in the case of the House, within hours. If the General Assembly does so it likely will render moot Plaintiffs' primary argument that the Governor lacked authority to issue the EO under § 28-9(b)(1), making it unnecessary for this Court to even consider that particular issue.

Second, and relatedly, to the extent the Court is inclined to address the legality of expanded absentee voting under Article VI, § 7, it will have other and more appropriate opportunities to do so should the need arise. That is because during the current special session the General Assembly also is considering legislation related to expanded absentee voting for the November general election. If the legislature fails to enact such legislation, then for all of the reasons discussed above there simply is no reason for the Court to reach out and decide this issue for the August primaries, which are already underway and cannot be stopped at this late juncture. And if the legislature does enact such legislation then the Court can and should address this same issue in an orderly fashion in a proper and timely filed action that avoids the chaos and confusion that Plaintiffs' seek to sow through their dilatory litigation tactics in this case.

Third, and finally, if the Court is inclined to grant the application it should reject Plaintiffs' request to simply incorporate and rest on the expedited briefing that the Parties submitted to Chief Justice Robinson in *Fay I*. In the merits brief that Plaintiffs submitted in that case they improperly argued that § 28-9(b)(1) cannot be interpreted to permit the Governor's EO, and that if it can be so interpreted it is unconstitutional. Not only did Plaintiffs not plead any such claim in *Fay I*, they did not even mention § 28-9 anywhere in their Complaint (or in their Complaint in this case for that matter). Further, because the Parties were required to submit their merits briefs in *Fay I* simultaneously and with no

chance for a reply brief, neither the Secretary nor the Governor (who is not even a party in this case and who has thus had no opportunity to defend the legality of his own EO) has yet had an opportunity to brief or respond to that unpled claim. As the trial court noted in its decision in this case, moreover, Plaintiffs expressly "eschew[ed]" any constitutional challenge to § 28-9(b)(1) at oral argument below. Because this argument raised in Plaintiffs' merits brief in *Fay I* goes to the very authority of the Governor to act under § 28-9(b)(1)—including potentially in circumstances other than just absentee voting—the Secretary must have an opportunity to address both the substance of this issue and whether it is properly before the Court in any appeal under § 52-265a (which it is not).

Given these considerations, if it grants the application the Court should order further briefing on the merits. The Secretary requests that said briefing proceed in the normal order of submission, and not simultaneously. Such a course will promote fairness and ensure that the Court has before it proper briefing from both parties on all of the issues in this case.

CONCLUSION

The Court should deny Plaintiffs' application to appeal under § 52-265a.

Respectfully submitted,

DEFENDANT DENISE MERRILL

WILLIAM TONG
ATTORNEY GENERAL

CLARE KINDALL
SOLICITOR GENERAL

By: */s/ Michael K. Skold*
Michael K. Skold (Juris No. 431228)
Maura Murphy Osborne (Juris No. 423915)
Alma R. Nunley (Juris No. 439858)
Assistant Attorneys General
Office of the Attorney General
165 Capitol Ave.
Hartford, CT 06106
Tel.: (860) 808-5020
Fax: (860) 808-5347
Michael.skold@ct.gov
Maura.murphyosborne@ct.gov
Alma.nunley@ct.gov

CERTIFICATION OF FORMAT AND SERVICE

Pursuant to Practice Book § 62-7, I hereby certify that this motion complies with all applicable Rules of Appellate Procedure, that it does not contain any names or other personal identifying information that is prohibited from disclosure, and that a copy of this motion was e-mailed on this 23rd day of July, 2020 to:

Proloy K. Das, Esq.
Matthew Ciarleglio, Esq.
Murtha Cullina LLP
185 Asylum Street
Hartford, Connecticut 06103
Email: pdas@murthalaw.com
Email: mciarleglio@murthalaw.com
Telephone: (860) 240-6000

/s/ Michael K. Skold
Michael K. Skold
Assistant Attorney General
Juris No. 431228
Office of the Attorney General
165 Capitol Avenue
Hartford, CT 06106
Tel.: (860) 808-5020
Fax: (860) 808-5347
Email: Michael.Skold@ct.gov