DOCKET NO.: HHD CV 20-6130532 S	:	SUPERIOR COURT
	:	
	:	
MARY FAY	:	
	:	JUDICIAL DISTRICT OF
v.	:	HARTFORD
	:	
DENISE MERILL	:	JULY 22, 2020

Memorandum of Decision

May the executive branch of government allow absentee ballots permitted under our state constitution "because of sickness" to be used "because of COVID-19 sickness"? 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?

The words matter first. Neither this court nor the Executive Branch may change the text of the Connecticut Constitution nor may they ignore it. Focusing on the text means looking at the words—without evidence of how they have been applied –and giving them their ordinary meaning whenever that meaning is clear.

When we do this the court can't avoid that the words say nothing more than "because of sickness" in the relevant part. Significantly, where the absentee ballots are allowed by the same article and section for "absence" or "religion" the language is more specific to the applicant. Absence must be—with emphasis added— from "the town of which *they* are inhabitants". The religious tenets must be the tenets of "*their*" religion. It wouldn't have been hard for this section to say "their sickness". That would have

settled the matter. Indeed, the plaintiffs say similar language did so in a Texas case. But that's not what it says here. So while the other grounds for absentee ballots all tie the right to the person, the sickness ground does not explicitly do so.

Was it an oversight? Was it loose drafting? Did the author assume we would think it meant "their sickness"? We don't know. And we shouldn't care. Unless the words can't be made sense of, all that matters is what the words say, not what anyone would have us believe they say.

Given that the constitution says "because of sickness" not "because of their sickness" this case isn't really about vindicating the words of the constitution. Instead, this case is about is vindicating what many people have long thought those words meant and about vindicating how the words have been applied over time by the General Assembly. Everybody knows—the plaintiffs say—that historically you can't get an absentee ballot just because *other* people are sick. You have to be sick yourself.

But that's not enough. Courts should not interpret the boundaries of a constitutional provision based on the extent of its use. They must interpret those boundaries based on the words that authorize the action. A party granted authority by a law may use the power granted fully or partly. The use doesn't demark the limit. What matters is that they may not exceed the power granted. Here that power has not been exceeded merely because it is not the applicant's sickness that is specifically referred to.

But does this mean the absentee ballot rules are pointless because there is always "sickness" out there? Is saying "sickness" is enough tantamount to saying that anyone can have an absentee ballot anytime?

It isn't. The established tools for reading laws—the canons of construction—make that clear. Under them, interpretations leading to absurd results are impermissible. An interpretation that makes a law pointless to pass is absurd.

So while adding the word "their" to "sickness" isn't permissible, interpreting the word "sickness" to mean any sickness anywhere any time is equally impermissible because it would have made this law pointless to pass.

Has the executive branch crossed the line into absurdity by allowing absentee ballots "because of sickness" to include "because of the sickness, COVID-19"? It hardly seems so. What has been done is far from saying the law means any sickness, anywhere, anytime. After all, COVID-19 is today in a class by itself.

The court can take judicial notice about that. COVID-19 is the scourge of the earth. It is a sickness of a lethality and ubiquity unknown for a hundred years. According to the state's official website it has killed to date over 4,406 Connecticut residents.[1] The National Archives show that this number is almost exactly the same number of Connecticut residents— 4,496— killed in World War I, World War II, Korea, and Vietnam combined.[2] It took collectively around 15 years of war to kill those residents. It has taken COVID-19 around six months to kill almost the same number of us.

[1] https://portal.ct.gov/Coronavirus.
[2] World War II: (3,558), https://www.archives.gov/research/military/ww2/navy-casualties/connecticut; https://www.archives.gov/research/military/ww2/army-casualties/connecticut.
Korea (326), https://www.archives.gov/files/research/military/korean-war/casualty-lists/ct-alpha.pdf.
Vietnam (612), https://www.archives.gov/files/research/military/vietnam-war/casualty-lists/ct-alpha.pdf.

So it can be said with some confidence that the executive branch has not so broadly interpreted the constitutional language as to make it meaningless. Instead, the governor and the secretary of state have confined the interpretation to include a sickness of a nearly unique character. One so rare. One so grievous as to mean—we can hope—that we will not see its like again for another hundred years.

It matters that this is what the executive branch has done. We are not dealing with an absurd exercise of power, and we do not have to contemplate every potential interpretation that might offend the constitution. Suffice it to say that cold and flu season wouldn't be enough. Those circumstances would leave the exception of absentee balloting swallowing the rule of in-person voting. This is a far case from that.

It matters also that this action was taken during a state of emergency. That emergency gave Governor Lamont extraordinary power by virtue of General Statutes §28-9(b)(1), which authorized him to "modify…any statute…in conflict with…the public health." He has modified the statute that would otherwise apply here —General Statutes §9-135— to include, "because of the sickness of COVID-19".

The plaintiffs say Governor Lamont had no authority to modify this statute because the constitution gives the authority to legislate about absentee ballots to the General Assembly. This is not, say the plaintiffs, a general assault on the emergency power statute, but a special case because of the specific reference here to the General Assembly.

But there are specific references to the General Assembly's power to legislate throughout the Connecticut Constitution, including with regard to the authority over

local governments, education, elections in general, corporations and a host of other things. This claim therefore can only be something that the plaintiffs have neither pleaded nor argued: a claim that the governor has not the power to modify the statute under his emergency powers. With the plaintiffs eschewing making this claim and no reason for the court to independently hold the General Assembly powerless to delegate power in an emergency, the court need not consider this claim further—especially since the General Assembly also retained in the emergency law the power to block the governor's acts under it whenever it chooses.

Secretary of State Merrill has used this modification to govern her actions. Since the constitution permits that modification, it and the modified statute permit Secretary of State Merrill's action.

The relief sought is denied because the secretary of state acted within her authority. Yet Merrill cites other grounds too.

Merrill says the court has no subject matter jurisdiction under the election contest statutes. But, at a minimum, the court has jurisdiction under General Statutes §52-29, the declaratory judgment statute. Therefore, even if the state is right about those statutes, the court can hear it under this statute.

Merrill also said the congressional candidates who brought this suit have no standing because they aren't aggrieved by the actions they challenge. But Merrill tries to treat them as only making a claim indistinguishable from that of an ordinary voter when these are not ordinary voters. They are candidates for office with direct interests at stake and with immediate conduct—encouraging or discouraging absentee ballots—hanging in

the balance. They are aggrieved enough to have standing to sue. They are rightly trying to sort this out now to remove a cloud over what happens next.

For these reasons, the court rejected a challenge to its subject matter jurisdiction at the outset of the hearing.

Merrill says the plaintiffs waited too long and that this long wait would prejudice her if the court ordered her to stand down. Given the result on the merits, this claim being dependent on prejudice is moot because the plaintiff will get no relief.

Finally, Merrill argues this action is barred because of the prior pending action doctrine. There was an action almost identical to this one brought directly in the Connecticut Supreme Court. It has been dismissed, and, while there is a reconsideration motion pending, no binding authority or persuasive rationale calls for its application here. This action is not barred by the prior pending action doctrine.

This action fails on its merits as a matter of law because Merrill's challenged action was constitutional. Both parties agreed the case would live or die by this ruling. Consequently, the court and the parties deemed it was hearing the parties on the merits.

Judgment will enter for the defendant.

BY THE COURT

434447

_____

Moukawsher, J.