BECAUSE OF SICKNESS: EXECUTIVE ORDERS, ELECTIONS, AND ABSENTEE ELIGIBILITY IN THE ERA OF COVID-19

FAY V. MERRILL, 256 A.3D 622 (CONN. 2021).

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I. INTRODUCTION

In *Fay v. Merrill*,[1] the Connecticut Supreme Court held that a state constitutional provision allowing for absentee voting if the voter is "unable to appear . . . because of sickness"[2] was "sufficiently capacious" to encompass the COVID-19 pandemic.[3] Voting is a critical aspect of

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1. 256 A.3d 622 (Conn. 2021).
2. CONN. CONST. art. VI, § 7.
3. 256 A.3d at 655.

democracy and a protected right enshrined in state constitutions.[4] Voters typically cast their ballots at assigned polling locations on Election Day.[5] However, voters who cannot vote in person on the date of the election for certain reasons—like military service, illness, and religious restrictions—are able to request an absentee ballot and still cast their ballot.[6] The Connecticut Constitution authorizes the legislature to proscribe law supporting the enfranchisement of such voters at article VI, section 7:

> 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.[7]

Because state legislatures establish the "[t]imes, [p]laces and [m]anner" of federal elections, there is a wide and varied landscape of absentee voting and voting by mail across the country.[8] Voting by absentee ballot gained new traction and attention in the national conversation in 2020 as COVID-19 spread rapidly and key election dates loomed.[9] Many states altered their primary election procedures in

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4. Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 91, 95, 101 (2014). As Professor Douglass discusses, states have different approaches to the statutory construction of the right to vote. *See id.* at 101. Connecticut's right to vote falls into the "qualified elector" category of construction. *See* CONN. CONST. art. VI, § 1.

5. *See generally* CONN. GEN. STAT. § 9-168 (2023) (place of holding elections); *id.* § 9-169 (voting districts).

6. *See* CONN. CONST. art. VI, § 7.

7. *Id.* (emphasis added).

8. U.S. CONST. art. I, § 4, cl. 1. "Absentee voting" and "voting by mail" are two distinct terms. *Knowing the Difference: Voting Absentee vs. By Mail*, LEAGUE OF WOMEN VOTERS [hereinafter *Knowing the Difference*], https://www.lwv.org/blog/knowing-difference-voting-absentee-vs-mail (Sept. 10, 2020). Generally, absentee voters must have a qualified reason for their absence and must request or apply for a ballot. *Id.* In contrast, states with vote-by-mail provisions automatically send out ballots to registered voters to mail back or drop off at a specified location. *Id.*

9. *See* Zachary Scherer, *Majority of Voters Used Nontraditional Methods to Cast Ballots in 2020*, U.S. CENSUS BUREAU (Apr. 29, 2021), https://www.census.gov/library/stories/2021/04/what-methods-did-people-use-to-vote-in-2020-election.html; Nathaniel Rakich & Jasmine Mithani, *What Absentee Voting Looked Like in All 50 States*, FIVE THIRTY EIGHT (Feb. 9, 2021), https://fivethirtyeight.com/features/what-absentee-voting-looked-like-in-all-50-states/.

response to the pandemic to allow for more access to absentee or mail-in voting.[10]

The distinct factual and procedural postures of *Fay v. Merrill* should—hopefully—render it largely inconsequential in the future.[11] At a minimum, the case marks a significant moment in state and national history as people attempted to navigate the COVID-19 pandemic. It is also possible that *Fay v. Merrill* will be mooted by an amendment to article VI, section 7 of the Connecticut Constitution.[12] A no-excuse absentee voting amendment has been introduced that would eliminate the constitutional text at issue in *Fay*.[13] If this resolution passes in the 2023 legislative session it will appear on the ballot as a constitutional amendment in November 2024.

II. Statement of the Case

This case arose in the context of the global COVID-19 pandemic and the primary election held in Connecticut on August 11, 2020.[14] The plaintiffs, four nominees running in the Republican party primary for the federal congressional seats in Connecticut's First and Second Districts, sought declaratory and injunctive relief against changes made by the Secretary of State and defendant, Denise W. Merrill, to the state's absentee ballot application listing COVID-19 as a reason why a voter may be recognized as unable to appear at the polls on election day.[15]

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10. *See, e.g.*, Wendy R. Weiser et al., *Mail Voting: What Has Changed in 2020*, BRENNAN CTR. FOR JUST. (Sept. 17, 2020), https://www.brennancenter.org/our-work/research-reports/mail-voting-what-has-changed-2020.

11. *But see* Eleni Smitham & Amanda Glassman, *The Next Pandemic Could Come Soon and Be Deadlier*, CTR. FOR GLOB. DEV. (Aug. 25, 2021), https://www.cgdev.org/blog/the-next-pandemic-could-come-soon-and-be-deadlier.

12. Connecticut's constitution provides for changing by legislatively referred constitutional amendments. *See* CONN. CONST. art. XII. Three-fourths of both legislative chambers can refer a constitutional amendment in one session, or a majority in both legislative chambers over two sessions can refer a constitutional amendment. *Id.*

13. H.R.J. Res. 58, 2021 Gen. Assemb. (Conn. 2021), https://www.cga.ct.gov/2021/ACT/RA/PDF/2021RA-00002-R00HJ-00058-RA.PDF. Further information detailing the bill's progress and amendments can be found on the state's bill tracker. *See Bill Status: Substitute for H.J. No. 58*, CONN. GEN. ASSEMB., https://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=HJ00058&which_year=2021 (last visited May 15, 2023).

14. Fay v. Merrill, 256 A.3d 627–29 (Conn. 2021). The primary was originally scheduled for April 28th, 2020, before being rescheduled for June 2nd, then yet again pushed back to August 11th. Peter Andringa et al., *2020 Connecticut Primary Results*, WASH. POST, https://www.washingtonpost.com/elections/election-results/connecticut-primaries-2020/ (Aug. 11, 2020, 8:01 PM).

15. 256 A.3d at 627–28.

Merrill authorized these changes pursuant to Executive Order No. 7QQ[16] and under her "general supervisory authority over elections in Connecticut."[17] The executive order, issued by Governor Lamont on May 20, 2020, addressed the need to create safe voting procedures in light of the upcoming statewide primary election and the realities of the novel coronavirus.[18]

Executive Order No. 7QQ modified section 9-135 of the Connecticut General Statues that, for the August primary election, a voter may vote by absent ballot if they are "unable to appear at [their] polling place during the hours of voting because of the sickness of COVID-19."[19] The order further clarified that a voter may lawfully claim this excuse if, at the time they either apply for or cast an August primary mail-in ballot, "there is no federally approved and widely available vaccine for the prevention of COVID-19."[20] Absentee ballot applications contained a notification that any voter was eligible to "check [the] box" and claim that they were unable to vote in person due to COVID-19 under Executive Order No. 7QQ.[21]

A day before the absentee ballots were scheduled to be finalized, and subsequently mailed to voters, the election candidates brought an action in trial court stating two claims.[22] First, plaintiffs argued that Executive

16. Conn. Exec. Order No. 7QQ, CONN. GEN. STAT. § 9-135 (May 20, 2020).

17. 265 A.3d at 629.

18. *Id.* Governor Lamont issued the order pursuant to his authority under section 28-9 of the Connecticut General Statutes, which outlines the governor's powers in the event of an emergency and provides for the modification or suspension of "any statute, regulation or requirement or part thereof whenever the Governor finds such [authority] is in conflict with the efficient and expeditious execution of civil preparedness functions or the protection of the public health." CONN. GEN. STAT. § 28-9(b)(1) (2023); *see id.* § 9-135.

19. *Id.* § 9-135.

20. *Id.* In developing his justification for Executive Order No. 7QQ, the governor explained the relevant and alarming qualities of COVID-19, citing its extreme contagiousness and potential to cause death or serious illness. *Id.* Further, the order recognizes the vulnerability of people sixty years or older when it comes to COVID-19; it specifically notes the high rates of voter turnout among this demographic and percentage of elderly poll workers. *Id.*

21. 256 A.3d at 629.

22. *Id.* at 630–31. This was the plaintiffs' second attempt at this claim; on July 1, 2020, they filed a petition with a single Connecticut Supreme Court Judge in accordance with section 9-323 of the Connecticut General Statutes, which states that electors in federal races can file directly with the Supreme Court if they are aggrieved by the ruling of "an election official." *Id.* at 630; *see* CONN. GEN. STAT. § 9-323; *see also* Fay v. Merrill, 246 A.3d 970, 981 (Conn. 2020). Chief Justice Robinson determined section 9-323 did not apply to primary elections and dismissed the case for lack of subject matter jurisdiction on July 20, 2020. 246 A.3d at 982. The present case was brought the same day but filed in the Superior Court pursuant to section 9-329(a) of the Connecticut General Statutes. 256 A.3d at 630; *see* CONN. GEN. STAT. § 9-329(a).

Order No. 7QQ unconstitutionally violated article VI, section 7 of the Connecticut Constitution.[23] They claimed that the constitution expressly and exclusively delegated the authority to determine absentee balloting procedures to the state legislature.[24] This would include broadening the use of absentee ballots as plaintiffs claimed Executive Order No. 7QQ did.[25] Thus, the actions by Governor Lamont and Secretary Merrill impermissibly exceeded the scope of their power.[26] Second, plaintiffs argued that Executive Order No. 7QQ expanded the ability to vote by mail ballot beyond what the enumerated, qualifying reasons in article VI, section 7 of the Connecticut Constitution allow.[27] Specifically, they asserted that the "because of sickness" clause of enumerated qualifying reasons to request an absentee ballot refers to the individual voter's health, not the state of a global pandemic.[28] In response to the plaintiffs' arguments, Secretary Merrill mounted equity and justiciability defenses, as well as substantive arguments concerning the statutory definition of "sickness."[29]

The trial court issued a decision in favor of the defendant on July 22, 2020, finding that Executive Order No. 7QQ did not violate article VI, section 7 of Connecticut Constitution.[30] The court reached its decision on

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23. 256 A.3d at 630. The pertinent provision of the Connecticut Constitution reads:

> The general assembly may provide [mail-in alternatives for voters] 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.

CONN. CONST. art. VI, § 7.

24. 256 A.3d at 630.
25. *Id.*
26. *Id.* at 638–39.
27. *Id.* at 630–31.
28. *Id.* at 639.
29. *Id.* at 633, 637, 642. The defendant attacked the plaintiffs' standing to bring their claims, arguing that they were "not aggrieved" because they did not establish how Executive Order No. 7QQ harmed them beyond an "abstract assertion." *Id.* at 633. The defendant argued in the alternative that, if they were aggrieved, relief should be limited to their specific races. *Id.* (citing Lazar v. Ganim, 220 A.3d 18 (Conn. 2019)). In response, plaintiffs contended that expansion of absentee balloting would change the "essential character" of voting, and spurn changes in their strategy. *Id.* The defendant also mounted an argument using the defense of laches. *Id.* at 637. Laches concerns undue delay and falls under equity doctrine on the notion that a party should not benefit by purposely being untimely with their claims. *Id.* Ultimately, the court rejected both of the defendant's procedural arguments. *Id.* at 633–38.
30. *Id.* at 631. The court was persuaded that COVID-19 is a "sickness of a nearly unique character" and is fully encompassed by the phrase "because of sickness." *Id.* The trial court also rejected plaintiffs' separation of powers argument, finding the claim to be inconsistent with the emergency powers delegated to the governor under section 28-9(b)(1) of the Connecticut General Statutes, which the plaintiffs did not contest. *Id.*; CONN. GEN. STAT. § 28-9(b)(1) (2023).

the merits, and rejected many of the non-substantive arguments presented by the defendant.[31] The plaintiffs appealed, filing an expediated public interest appeal pursuant to section 52-265(a) of the Connecticut General Statutes.[32]

On July 31, 2020—after the public interest expediated appeal was granted, but before oral arguments occurred—the Connecticut General Assembly passed Special Session Public Act 20-3, ratifying Executive Order No. 7QQ in full and extending its COVID-19 related voting provisions to the November 2020 general election.[33] This development significantly impacted the parties' available arguments on the separation of powers claim.[34] Ultimately, the Supreme Court held an expediated oral argument on August 6, 2020, and immediately issued a ruling affirming the trial court judgement.[35] Their written opinion was subsequently released in February 2021.[36]

III. BACKGROUND

This case is perhaps best understood against the backdrop of the global and national responses to the spread of COVID-19. Before engaging with the court's analysis, it is prudent to discuss the timeline of events, including how quickly factual circumstances changed regarding COVID-19. This is critical in the context of the election, as government officials mobilized to ensure voters had safe conditions to exercise their right to vote.

COVID-19 is an infectious disease caused by an airborne virus.[37] It can result in mild to very serious illness in those it infects, especially the

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31. 256 A.3d at 631.

32. *Id.* at 628 n.5; CONN. GEN. STAT. § 52-265(a). Section 52–265a allows for:

> [A]ny party to an action who is aggrieved by an order or decision of the Superior Court in an action which involves a matter of substantial public interest and in which delay may work a substantial injustice, may appeal under this section from the order or decision to the Supreme Court within two weeks from the date of the issuance of the order or decision.

CONN. GEN. STAT. § 52-265(a). Chief Justice Robinson granted the plaintiffs' public interest appeal application on July 23rd, 2020, a day after the trial court decision was rendered. 256 A.3d at 628 n.5.

33. 256 A.3d at 631–32; H.B. 6002, 2020 Gen. Assemb., July Spec. Sess. § 1(a) (Conn. 2020).

34. See *infra* notes 60–62 and accompanying text for further discussion of the plaintiffs' separation of powers claim.

35. 256 A.3d at 633.

36. *Id.* at 622.

37. *See Coronavirus Disease (COVID-19)*, WHO, https://www.who.int/health-topics/coronavirus#tab=tab_1 (last visited May 15, 2023).

elderly and those with underlying conditions.[38] COVID-19 is transmitted through aerosol droplets, which means the virus spreads when people are in close contact, or in crowded, indoor spaces.[39] The virus can easily spread among those who do not present with symptoms, which makes containing transmission difficult.[40]

COVID-19 was first identified in the United States in Washington on January 20, 2020.[41] On March 8, 2020, Connecticut governor Ned Lamont announced the state's first positive case involving a resident.[42] Shortly thereafter, the World Health Organization declared COVID-19 a pandemic, and the Trump administration shifted the country to a state of national emergency.[43] Governor Lamont issued a declaration of emergency for public health and civil preparedness on March 10, 2020.[44]

By spring, COVID-19 posed a significant threat to people in Connecticut and the rest of the country.[45] Government officials tasked with overseeing the election were concerned about voters' safety on election day and about the health of volunteer poll workers, especially given that election workers tend to be older adults.[46] Several other states

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38. *Id.*

39. *See, e.g.*, *Coronavirus Disease (COVID-19): How is it Transmitted?*, WHO [hereinafter *How is it Transmitted?*], https://www.who.int/news-room/questions-and-answers/item/coronavirus-disease-covid-19-how-is-it-transmitted (Dec. 23, 2021); *How COVID-19 Spreads*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html (Aug. 11, 2022).

40. *See How is it Transmitted?*, *supra* note 39.

41. *CDC Museum COVID-19 Timeline*, CTRS. FOR DISEASE CONTROL & PREVENTION, [hereinafter *COVID-19 Timeline*] https://www.cdc.gov/museum/timeline/covid19.html (last visited May 16, 2023).

42. Press Release, Ned Lamont, Governor of Connecticut, Office of the Governor, Governor Lamont Announces First Positive Case of Novel Coronavirus Involving a Connecticut Resident (Mar. 8, 2020).

43. *COVID-19 Timeline*, *supra* note 41.

44. Fay v. Merrill, 256 A.3d 622, 628 (Conn. 2021); *see also* Memorandum from Ned Lamont, Governor of Connecticut, to the Hon. Denise Merrill, Sec'y of State, State Capitol Hartford, et al., Declaration of Pub. Health and Civ. Preparedness Emergencies (Mar. 10, 2020), https://portal.ct.gov/-/media/Office-of-the-Governor/News/20200310-declaration-of-civil-preparedness-and-public-health-emergency.pdf.

45. COVID-19 data shows 1,064 new cases and 82 deaths were reported in Connecticut on May 1, 2020, alone. *Tracking Coronavirus in Connecticut: Latest Map and Case Count*, N.Y. TIMES, https://www.nytimes.com/interactive/2021/us/connecticut-covid-cases.html (Mar. 23, 2023). The national data for new cases on May 1st clocked in at 33,970, with 1,762 deaths. *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, https://www.nytimes.com/interactive/2021/us/covid-cases.html (Mar. 23, 2023).

46. Conn. Exec. Order No. 7QQ, CONN. GEN. STAT. § 9-135 (May 20, 2020); *Recruitment Effort Announced for CT Poll Workers as Changes in Elections Made Amid COVID-19 Crisis*, WTNH NEWS 8, https://www.wtnh.com/news/connecticut/recruitment-effort-announced-for-ct-poll-workers-as-changes-in-elections-made-amid-covid-19-crisis/ (Jul. 7, 2020, 5:32 AM). Research shows that the majority of poll workers in America are over sixty-

made changes to their election procedures to allow for more protections for voters and poll workers to prevent exposure to the virus and minimize transmission.[47]

IV. REASONING

In a unanimous decision affirming the trial court's ruling, the court held that changes made to absentee balloting and Executive Order No. 7QQ did not violate article VI, section 7 of the Connecticut Constitution because the phrase "because of sickness" "is not limited to an illness suffered by the individual voter that renders that person physically unable to travel to the polling place," and therefore includes the COVID-19 pandemic.[48] In reaching its decision on the merits, the court rejected the defendant's procedural and equitable defenses.[49]

A. *Justiciability and Equity Defenses*

The court ultimately rejected several of the defendant's arguments based on justiciability and equitable defenses that concerned the plaintiffs' ability to fairly bring their claims.[50] The court noted that standing requires the court to consider whether the defendant is a proper entity to be named in this suit.[51] The test is a two-fold determination where the "party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the subject matter of the challenged action], as distinguished from a general interest . . ." and "establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]."[52] This court was

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one years old. Michael Barthel & Galen Stocking, *Older People Account for Large Shares of Poll Workers and Voters in U.S. General Elections*, PEW RESCH. CTR. (Apr. 6, 2020), https://www.pewresearch.org/fact-tank/2020/04/06/older-people-account-for-large-shares-of-poll-workers-and-voters-in-u-s-general-elections/. However, Connecticut was not included in the analyzed data set that supports this conclusion. *Id.*

47. *See, e.g.*, DEL. CODE ANN. tit. 15, § 7571 (2007) (modified by Declaration of a State of Emergency, 2019 DE EO C20-06 (May 7, 2020)) (expanding access to absentee/vote by mail for voters in the primary election); Press Release, Off. of Governor Brad Little, Idaho's Primary Election to Remain on May 19, Will Be Conducted by Mail (Mar. 30, 2020), https://gov.idaho.gov/pressrelease/idahos-primary-election-to-remain-on-may-19-will-be-conducted-by-mail/; Ky. Exec. Ord. No. 2020-296 (Apr. 24, 2020) (allowing all Kentuckians to vote absentee by mail in the June 2020 primary if they chose).

48. 256 A.3d at 628.

49. *Id.* at 633–38.

50. *Id.* at 636–37.

51. *Id.* at 634.

52. *Id.* at 634 (alteration in original) (quoting Travelers Cas. & Sur. Co. of Am. v. Netherlands Ins. Co., 95 A.3d 1031, 1043 (Conn. 2014)). The Federal Constitution does not

persuaded that, as candidates in the primary election, plaintiffs gained standing from their interest in the race, and thus proceeded on substantive issues.[53]

Similarly, the court declined to "apply the doctrine of laches in the first instance on appeal as an alternative ground" to affirm the trial court decision.[54] Therefore, the court established jurisdiction and proceeded to the merits of the case for analysis.

B. Constitutional Claims

The court subsequently addressed the plaintiff's constitutional claims that Executive Order No. 7QQ violates article VI, section 7 because Secretary Merrill and Governor Lamont exceeded their authority by exercising a power reserved to the legislature and because the phrase "because of sickness" refers only to the specific health of the individual voter, not a globally present infectious disease.[55] Chief Justice Robinson noted that the same presumption of constitutionality and high burden of proving unconstitutionality beyond a reasonable doubt that would apply to a "validly enacted statute" applied to Executive Order No. 7QQ, especially given the passage of Special Session Public Act 20-3.[56] The court evaluated the plaintiffs' claims by employing its *Geisler* framework, which provides six enumerated considerations the court must weigh when determining issues of state constitutional interpretation.[57] The listed factors include:

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contain a standing clause. *See* U.S. CONST. art. III, § 2. The standing requirement in the federal courts is derived from the "cases and controversies" requirement in Article III. *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

53. 256 A.3d at 636.

54. *Id.* at 637 (declining to apply the doctrine of laches because the trial court did not reach the issue, and thus the plaintiffs never had an opportunity to establish the reasonableness of their filing). "Given the procedural circumstances of this case, we decline to consider the intensely factual defense of laches in the first instance as an alternative ground on which to affirm the judgment of the trial court." *Id.* at 637–38.

55. *Id.* at 638–39.

56. *Id.* at 626, 639 (quoting Doe v. Hartford Roman Cath. Diocesan Corp., 119 A.3d 462, 496 (Conn. 2015)).

57. *Id.* at 639 (citing State v. Geisler, 610 A.2d 1225, 1232 (Conn. 1992)). The court recognized that these factors often overlap, and each consideration may not be relevant to every issue. *Id.* at 639–40. Additionally, the court clarified that *Geisler* does not require literal tallying of the factors. *Id.* at 640. Dicta in the opinion also promoted the concept that the *Geisler* framework provides the dual benefit of providing a standardized format for constitutional claims to be addressed by opposing parties, and "encourage[s] a principled development of our state constitutional jurisprudence." *Id.* at 639 (quoting Feehan v. Marcone, 204 A.3d 666, 676 (Conn. 2019)).

> (1) persuasive relevant federal precedents; (2) the text of the operative constitutional provisions; (3) historical insights into the intent of our constitutional forebears; (4) related Connecticut precedents; (5) persuasive precedents of other state courts; and (6) contemporary understandings of applicable economic and sociological norms, or as otherwise described, relevant public policies.[58]

The opinion also noted that the *Geisler* framework applies to cases with no federal analogue, as is the case here.[59]

C. Separation of Powers

The court succinctly determined that the plaintiffs' first constitutional claim challenging the executive's authority to issue and enact Executive Order No. 7QQ was rendered moot by the state assembly's passage of Special Session Public Act 20-3.[60] The court cited persuasive authorities to establish that "[a] separation of powers challenge to executive action is rendered moot by legislative ratification of the challenged executive action."[61] Because Special Session Public Act 20-3 adopted the full text of Executive Order No. 7QQ, the court dismissed this claim without reaching its merits, and therefore did not apply the *Geisler* factors.[62]

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58. *Id.* at 639. The *Geisler* framework is a method of state constitutional interpretation that is known as a "criteria" or "factor approach." *See* ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 146 (2009). Several states employ a methodology similar to *Geisler*, where factors are enumerated "under which [the state court] says it will feel justified in interpreting its state constitution more broadly than the federal Constitution." *Id. See generally* State v. Hunt, 450 A.2d 952 (N.J. 1982) (creating New Jersey's factor approach); State v. Gunwall, 720 P.2d 808 (Wash. 1986) (en banc) (enumerating Washington's constitutional criteria); Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991) (establishing Pennsylvania's factor test).

59. 256 A.3d at 640, 647; *see also* McDonald v. Bd. of Election Comm'rs of Chi., 394 U.S. 802 (1969) (holding that an Illinois absentee ballot provision that limited eligibility to persons with medical reasons did not violate equal protection for failure to approve mail ballots for those held in pre-trial detention due to lack of proof that those detained in the home counties had been prevented from voting).

60. 256 A.3d at 640.

61. *Id.* at 640–41; *see also* We the People of Conn., Inc. v. Malloy, 92 A.3d 961, 965–66 (Conn. App. Ct. 2014) (holding that a case involving an executive order that allowed personal care attendants to bargain collectively was moot after it was replaced in full by legislation); Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297, 302 (1937) (finding that Congress's legislative authority legitimizes otherwise unauthorized official action when it ratifies such action).

62. 256 A.3d at 641; *see also* Curley v. Kaiser, 962 A.2d 167, 176 (Conn. App. Ct. 2009) ("Mootness . . . implicates subject matter jurisdiction, which imposes a duty on the court to dismiss a case if the court can no longer grant practical relief to the parties."); Conn. Nat.

1. Statutory Definitions

The court in *Fay v. Merrill* ultimately held that "sickness" under article VI, section 7, "encompasses the existence of a specific disease such as the COVID-19 pandemic addressed by Executive Order NO. 7QQ, and is not limited to an illness suffered by an individual voter."[63] Because the plaintiffs' constitutional claims turned on the interpretation of the term, the opinion focuses on the definition of "sickness" and the construction of the text.[64] The court weighed the question of interpretation within the context of the *Geisler* factors and found that the plaintiffs did not overcome the burden to prove unconstitutionality beyond a reasonable doubt.[65] Chief Justice Robinson concluded that the "political branches" permissibly took action to safeguard the right to vote while balancing critical public health measures during an unprecedented pandemic.[66]

i. Constitutional Language

After analyzing article VI, section 7 under the *Geisler* factor focusing on the textual language of the disputed provision,[67] the court asserted the language could plausibly be read as supporting both parties' contentions, and thus, the "provision [was] sufficiently ambiguous so as not to render the textual factor dispositive of this issue."[68] Article VI, section 7 stakes absentee eligibility on being "unable to appear at the polling place" for the election "because of absence from the [location where] they are inhabitants or because of sickness, or physical disability or because the tenets of their religion forbid secular activity."[69] Plaintiffs raised two relevant issues: (1) that "unable" means a literal and complete

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Gas Corp. v. Dep't of Consumer Prot., 682 A.2d 547, 550 (Conn. App. Ct. 1996) ("Mootness presents a circumstance wherein the issue before the court has been resolved or has lost its significance because of a change in the condition of affairs between the parties.").

63. 256 A.3d at 643.

64. *Id.* at 641–43.

65. *Id.* at 654–55. The court did not analyze the *Geisler* factors in the same order as they are listed in the quoted language cited by the court. *See id.* at 639, 643–55 (quoting Feehan v. Marcone, 204 A.3d 666, 676 (Conn. 2019)). The court also deviated from the original *Geisler* order, which was enumerated as: 1) textual provisions; 2) Connecticut precedent; 3) federal precedent; 4) sister state cases; 5) historical context; and 6) public policies. *See* State v. Geisler, 610 A.2d 1225, 1232 (Conn. 1992).

66. 256 A.3d at 655 ("Executive Order No. 7QQ nevertheless represents a considered judgment by our political branches that the limited expansion of absentee voting is an appropriate measure to protect public health and suffrage rights during the exceptional circumstance of a pandemic . . . .").

67. *Id.* at 643.

68. *Id.* at 645.

69. CONN. CONST. art. VI, § 7.

inability, and (2) that "sickness" refers only to the status of a specific voter.[70] The court detailed practices for approaching issues of semantics and textual interpretation before turning to its analysis.[71]

The court first considered common definitions of "unable," noting it is broadly defined to mean lacking requisite power or ability.[72] The opinion approached this definition in context of article VI, section 7, and found that the provision "suggests that *physical* inability to get to the polling place on election day is not the sine qua non for rendering a voter 'unable to appear' there."[73] Rather, a voter's "control or judgment" is determinative of their ability to vote in person.[74] The court considered several plausible examples, illustrating that the voter is central in defining their eligibility in reference to their availability. For instance, religious voters may physically be able to go to the polls in person, but nevertheless are lawfully allowed and protected to "[make] the personal decision to adhere to religious tenets that would forbid the act of in person voting."[75] Further, the court cited the existence of voters "who may be physically able to get to the polling place, but only after a great deal of exertion or obtaining assistance from others."[76] Ultimately, the court concluded that the plaintiffs' "purely physical focus" in defining the term "unable" was not consistent with the notion that absentee application is "entirely subject to the individual actions and motivations of the voter."[77]

The court then turned its analysis to the definition of "sickness" as it appears in article VI, section 7, finding that there is a strong, but non-dispositive, suggestion that the term is broad enough to include a public health emergency such as COVID-19.[78] The court noted that the common definition of "sickness" can mean a state of being sick, or a particular

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70. 256 A.3d at 643.

71. *Id.* (noting the assumption that "infinite care was employed" to draft precise language and intentionality to not "supply constitutional language that the drafters intentionally may have chosen to omit") (citing Conn. Coal. for Just. in Educ. Funding, Inc. v. Rell, 990 A.2d 206, 228–29 (Conn. 2010)).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 644.

76. *Id.* (citing Parker v. Brooks, No. CV-92-0338661S, 1992 WL 310622, at *2–3 (Conn. Super. Ct. Oct. 20, 1992) (holding that voters living in an apartment with occupancy limited to elderly and disabled tenants were eligible for absentee voting, rejecting the argument that because they were sometimes able to leave their apartments with assistance, they were not "unable to appear" at the polls)). In *Parker*, the court evaluated section 9-135 of the Connecticut General Statutes, which defines absentee voting eligibility and is worded similarly to article VI, section 7. *Parker*, 1992 WL 310622, at *2. *Compare* CONN. GEN. STAT. § 9-135(a) (2023), *with* CONN. CONST. art. VI, § 7.

77. 256 A.3d at 644.

78. *Id.* at 645.

disease.[79] It concluded these definitions could plausibly support either the plaintiffs' or the defendant's suggested construction, but that the meaning "tend[ed] to support the defendant's interpretation,"[80] particularly when considered in context with the text's religious protections.[81] Regardless, the court concluded that this factor was not dispositive, and further analysis was needed.[82]

ii. Constitutional History

The next *Geisler* factor the court considered was the constitutional history of the provision, including its motivation and development. The court similarly found little in terms of helpful guidance on the definition of sickness, and conceded that article VI, section 7's history is significantly limited.[83] Chief Justice Robinson described how several decades before the adoption of the current constitution and article VI, the 1818 Connecticut Constitution was briefly amended to allow for soldiers serving in the Civil War to vote by absentee ballot.[84] Jumping ahead in history to 1932, the court explained how "the electorate adopted article sixth, [section] 7 as article XXXIX of the amendments to the 1818 constitution."[85] The opinion attempted to consider the legislative committee hearing's discussion and proposal of the absentee ballot provision, but noted that the record was brief—it essentially only contained support for alternatives to in-person voting based on personal anecdotes of sick constituents and relatives.[86] The court responded to the plaintiffs' argument that the absence of any reference to the 1918 influenza pandemic was meaningful with tentative agreement, but strongly cautioned against drawing inferences on missing commentary given the sparseness of the record.[87] Thus, the court moved on to the next factor for consideration.

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79. *Id.* at 644.

80. *Id.* at 644–45.

81. *Id.* The court noted the religious reason clause relates the voters' eligibility to "the tenets of *their* religion." *Id.* at 645. When compared to the phrase "because of sickness," "absence of similar words so limiting 'sickness,' strongly suggests that the term . . . is capacious enough to include an identified illness such as COVID-19 that has created a public health emergency." *Id.*

82. *Id.*

83. *Id.* at 646.

84. *Id.* at 645. This amendment was adopted directly in response to a state supreme court case that, relying on the previous, unamended language, held that Civil War soldiers must vote in their towns. *Id.* (citing Opinion of the Judges of the Supreme Court, 30 Conn. 591 (1862)).

85. *Id.*

86. *Id.* at 645–46.

87. *Id.* at 646.

iii. Connecticut Case Law

The court began its analysis of relevant case law with decisions from Connecticut courts under the third *Geisler* factor. Again, the court found limited applicable guiding authority here on the meaning of "unable to appear" and no helpful instruction on the definition of "sickness."[88] In *Parker v. Brooks*, the Connecticut Superior Court found that elderly disabled voters were "unable to appear," and thus, eligible for absentee voting despite being physically able to leave their apartments with assistance.[89] Finding that this holding was consistent with the Connecticut Supreme Court's ruling in *Wrinn v. Dunleavy*,[90] Chief Justice Robinson determined this case law favors the defendant's construction of the text.[91] The court determined that *Parker* provides "support that a voter's ability to appear is uniquely subjective and should be liberally construed in favor of the right to vote," but that it does not clarify the definition of "sickness."[92]

iv. Federal Case Law

The court subsequently moved on to the next *Geisler* factor—federal case law—ultimately finding that Executive Order No. 7QQ "is consistent with the state's exercise of its police power to protect the fundamental right to vote, along with its responsibility under the United States [C]onstitution to superintend elections within Connecticut."[93] However, like the posture of the previously discussed factors, the available federal case law was not dispositive on "whether Executive Order No. 7QQ is consistent with Connecticut's own state constitutional restrictions on the use of absentee balloting."[94] The court focused its initial analysis on *Jacobson v. Massachusetts*, which affirmed a state's police power to enact vaccination requirements.[95] Additionally, several recent cases from the COVID-19 pandemic informed the court's analysis on this issue, leading

88. *Id.*

89. Parker v. Brooks, No. CV-92-0338661S, 1992 WL 310622, at *2–3, (Conn. Super. Ct. Oct. 20, 1992).

90. Wrinn v. Dunleavy, 440 A.2d 261, 269 (Conn. 1982) (requiring liberal interpretation of absentee ballot statutes to err on the side of protecting suffrage); *see also* 256 A.3d at 646.

91. 256 A.3d at 646.

92. *Id.*

93. *Id.* at 647, 650. The court explicitly notes that, unlike most cases that employ the *Geisler* analysis, there are no directly comparable federal court cases on this issue due to the lack of a federal constitutional analogue to article VI, section 7. *Id.* at 647.

94. *Id.* at 650.

95. *Id.* at 647 (citing Jacobson v. Massachusetts, 197 U.S. 11, 25–27 (1905)).

to the implication that states have power to limit constitutionally protected activities to some extent if there is appropriate relation between the restriction and the intended goal.[96]

Next, the court considered the broad powers states are endowed with in regards to administering elections, and found that Executive Order No. 7QQ was consistent with this power.[97] This again implicates the current constitutional reality that there is no federal constitutional right to vote by mail-in ballot, "so long as all eligible voters are provided with the right to vote."[98] Notably, states may "make rational classifications as to who may receive an absentee ballot, but they may not impose discriminatory, undue or irrational burdens on their use, particularly in a way that constitutes an outright denial of the franchise."[99]

The court, again, considered the specific intricacies of COVID-19 through analysis of recent cases involving pandemic regulations. Citing examples from the federal courts, the court determined that "concerns attendant to COVID-19 have not diminished federal deference to state officials' control over the election process, including expanded access to absentee voting, as long as those innovations do not impose irrational, undue, or discriminatory burdens on the right to vote."[100] For instance, the Fifth Circuit determined that Texas was not required under the Fourteenth or Twenty-Sixth Amendments to provide mail-in voting for all voters in light of the COVID pandemic.[101] Specifically, a Texas statute

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96. *Id.* at 647–48. *See generally* South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613–14 (Roberts, C. J., concurring) (denying religious organization's free exercise claim against California executive order limiting worship service occupancy due to COVID-19 precautions); Elim Romanian Pentecostal Church v. Pritzker, 962 F.3d 341, 347 (7th Cir. 2020) (rejecting First Amendment claim against an Illinois executive order limiting religious services to ten in-person attendees); Bayley's Campground Inc. v. Mills, 463 F. Supp. 3d 22, 29 (D. Me. 2020), *aff'd*, 985 F.3d 153 (1st Cir. 2021) (considering *Jacobson* in the context of COVID-19 quarantines). *But see* Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66–67 (2020) (enjoining enforcement of an executive order capping religious service attendance in certain high COVID-19 zones because it was not narrowly tailored enough and non-religious institutions—both essential and non-essential—in those zones did not have such caps).

97. 256 A.3d at 648; *see also* Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45, 50 (1959) ("The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised . . . .").

98. 256 A.3d at 648; *see* McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 807–08 (1969).

99. 256 A.3d at 648 (citing O'Brien v. Skinner, 414 U.S. 524, 530 (1974)).

100. *Id.* at 649; *see* Tully v. Okeson, 977 F.3d 608, 613–14 (7th Cir. 2020) (denying a preliminary injunction because plaintiffs could not establish likelihood of success on their claim that due to COVID-19, the Twenty-Sixth Amendment required Indiana to make absentee voting available to all voters).

101. Tex. Democratic Party v. Abbott, 961 F.3d 389, 394 (5th Cir. 2020); *see also* 256 A.3d at 649.

allowing for vote by mail for voters sixty-five and older did not violate equal protection under a rational basis review because Texas took other measures to ensure younger voters were not completely prohibited from exercising their right to vote.[102]

Ultimately, relevant federal case law supports the notion that Executive Order No. 7QQ was a lawful exercise of the state's "police power to protect the fundamental right to vote" and "its responsibility under the United States [C]onstitution to superintend elections within Connecticut."[103] However, this factor was not helpful to the court in determining whether the order was "consistent with Connecticut's own state constitutional restrictions on the use of absentee balloting."[104]

v. Sister State Cases

The court continued its review of persuasive sister state case law under the fourth *Geisler* factor, but was similarly unlucky in finding clear guidance providing clarification for Connecticut's absentee voting provision.[105] The most informative case the court considered under this factor was *Forrest v. Baker*, which concerned "whether 'sickness in the family' was a legally sufficient reason for absentee voting under a statute" that allowed mail voting by anyone who, "*because of illness* or physical disability [would] be unable to attend the polls on election day."[106] There, the court essentially found that voters can have an illness present in their familial context that makes it impossible to vote in person.[107] However, Chief Justice Robinson signaled the court's hesitancy in finding *Forrest* to be definitively instructive due to its conclusory assertions and lack of an adequate textual or historical analysis.[108]

Conversely, the least persuasive case according to the court was *In re Texas*, another recent decision from Texas that determined that an individual voter's lack of immunity to COVID-19 was not a disability within the meaning of the election code.[109] There, the statute provided for absentee eligibility for voters who "[have] a sickness or physical condition that prevents [them] from appearing at the polling place on election day."[110] The *Fay* court found that the Texas court did not

102. 961 F.3d at 402–04; *see also* 256 A.3d at 649–50.
103. 256 A.3d at 650.
104. *Id.*
105. *Id.* at 650–51.
106. *Id.* (citations omitted) (quoting Forrest v. Baker, 698 S.W.2d 497, 498 (Ark. 1985)); *see also* ARK. CODE ANN. § 7-5-402 (2023) (formerly ARK. CODE ANN. § 3-903 (1947)).
107. 698 S.W.2d at 499.
108. 256 A.3d at 651.
109. *In re* Texas, 602 S.W.3d 549, 560 (Tex. 2020); 256 A.3d at 651–52.
110. TEX. ELEC. CODE ANN. § 82.002 (West 2021).

adequately explore the breadth of the word "sickness" to be instructive on its meaning in the present application, and noted that the statutory language rendered it distinguishable from the case before them.[111]

Lastly, the court considered a recent COVID-19 related case from the Tennessee Supreme Court mounting a state constitutional challenge to the Tennessee's COVID-19 election contingency plan.[112] In *Fisher v. Hargett*, the Tennessee court determined that those with heightened vulnerabilities to COVID-19 and their caretakers met the eligibility requirements for absentee voting.[113] In regard to those without illness, physical disabilities, or status as a caretaker, the court there found that prevention of absentee voting was a "moderate" burden that was overcome by the state's interest in preventing election fraud.[114] Additionally, the Tennessee court emphasized the distancing procedures and early voting schedule that were also components of the contingency plan as policy choices that demonstrated an acceptable preference for in-person voting.[115]

vi. Economic and Sociological Considerations

Finally, the court evaluated the last *Geisler* factor—"economic and sociological considerations" that essentially amount to issues of public policy.[116] Plaintiffs claimed that increased absentee voting creates more potential for election fraud.[117] Furthermore, they argued that the irregularity of the expansion could lead to disenfranchisement of more people as a result of inconsistent signatures and mailing delays.[118] In response, the defendant argued that reading article VI, section 7 to expand the classification of eligible absentee voters is "consistent with

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111. 256 A.3d at 651–52. The court emphasized the plain meaning of the Texas statute in differentiating the language of Executive Order No. 7QQ. *See id.* Specifically, the language is more directly linked to the voter applying for the absentee ballot than article VI, section 7. *Id.*; *see also* CONN. CONST. art. VI, § 7.

112. 256 A.3d at 652 (citing Fisher v. Hargett, 604 S.W.3d 381 (Tenn. 2020)) (explaining that while the state anticipated an increase in the use of mail-in ballots, the plan did not include expansion of the eligibility class); *see also* TENN. CODE ANN. § 2-6-201(5) (2019) (limiting absentee eligibility to persons unable to appear for voting because they are in the hospital, ill, physically disabled, or the caretaker of such person).

113. 604 S.W.3d at 393–94; 256 A.3d at 652.

114. 604 S.W.3d at 405; 256 A.3d at 652–53.

115. 604 S.W.3d at 402–03; 256 A.3d at 652–53.

116. 256 A.3d at 653.

117. *Id.*

118. *Id.*; *see also* Erin Cox et al., *Postal Service Warns 46 States Their Voters Could Be Disenfranchised by Delayed Mail-in Ballots*, WASH. POST (Aug. 14, 2020, 4:44 PM), https://www.washingtonpost.com/local/md-politics/usps-states-delayed-mail-in-ballots/2020/08/14/64bf3c3c-dcc7-11ea-8051-d5f887d73381_story.html.

the public policy that states across the nation have adopted, both before and during the pandemic" in regard to mail-in voting restrictions.[119]

Ultimately, the court determined that the issues raised position this case on the "opposite side of the coin" of *Texas Democratic Party v. Abbott* and *Fisher v. Hargett* because the state general assembly ratified Executive Order No. 7QQ entirely.[120] Thus, the public policy pronounced by Special Session Public Act 20-3 should be given deference in the context of interpreting article VI, section 7.

V. ANALYSIS

Despite the opinion's difficulty to put forth significant and persuasive authorities, *Fay v. Merrill* remains largely straightforward and resulted in the correct decision as a pragmatic matter. The particularly unique factual and procedural nature of this case made analysis through the traditional *Geisler* framework less workable than other cases employing this framework. Chief Justice Robinson articulated that the court was most persuaded by the analysis of the textual meaning of article VI, section 7.[121] This makes sense because the question at hand involved textual interpretation of a key phrase, and the remaining factors did not offer a lot of substantive guidance rooted in case law. Regardless, the court acted consistently with Connecticut case law urging liberal construction of voting statutes that favor the right to vote.[122]

The court was also clearly influenced by the ratification of Special Session Public Act 20-3, although it rooted this authority in its public policy analysis. Because of the quick turn-around on the factual and procedural circumstances of this case, the parties did not make any arguments about the policy goals of a duly elected legislative body. Rather, the opinion pivoted slightly from the parties' contentions and primarily focused on the deference the legislature ought to be given in reference to Special Session Public Act 20-3.

One potential implication of this opinion is the absence of a decision on the merits regarding the separation of powers claim. Because the court determined the issue to be moot, it omitted any analysis on whether

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119. 256 A.3d at 654. Defendant cites the fact that thirty-four states allowed no excuse absentee voting before the pandemic, and fourteen more have altered their election laws in the COVID-19 landscape to allow for some expansion of mail-in balloting. *Id.*

120. *Id.* ("Given the reasonable policy concerns that support the parties' respective state constitutional arguments, in interpreting our state's constitution, we must defer to the legislature's primary responsibility in pronouncing the public policy of our state." (quoting Doe v. Hartford Roman Cath. Diocesan Corp., 119 A.3d 462, 515 (Conn. 2015))).

121. *Id.* at 655.

122. *See id.* at 646.

Governor Lamont or Secretary of State Merrill actually possessed the authority to alter the absentee ballots at the time they took their official action. Had the state general assembly not passed Special Session Public Act 20-3, this case would likely have been significantly tighter on the margins and more difficult to vigorously defend. The court, relying heavily on the separation of powers argument in their public policy analysis, was quick to conflate the executive and legislative actors involved in promulgating COVID-19 safe election procedure.[123]

The court also failed to address a significant weakness in the plaintiffs' argument—the sheer impracticality of the notion that a voter's own COVID-19 infection would be an allowable reason to request an absentee ballot. No one *plans* to test positive for COVID-19, and one must *plan ahead* to vote by mail.[124] A voter who planned to vote on election day, but tested positive for the virus shortly before, would not have sufficient time to request and return an absentee ballot. This could disenfranchise a significant number of voters given the rates of community transmission at the time of the primary election.[125]

VI. CONCLUSION

In *Fay v. Merrill*, the Connecticut Supreme Court determined that Executive Order No. 7QQ did not violate article VI, section 7, and found in favor of the defendant. The opinion is a significant, although slightly mechanical decision that correctly finds that the limited expansion of absentee voting is a reasonable measure to protect voters from COVID-19 that "represents a considered judgement by our political branches."[126] The combination of the issues made moot by passage of Special Session Public Act 20-3, construction of the constitutional text, and public policy arguments led the court to reach the appropriate conclusion.

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123. For example, the court discusses "our political branches" which lends itself to a construction that fails to separate executive from legislative authority. *See id.* at 654–55.

124. *See Knowing the Difference*, *supra* note 8.

125. *See* CONN. DEP'T OF PUB. HEALTH, COVID-19 UPDATE AUGUST 06, 2020, at 2 (2020), https://portal.ct.gov/-/media/Coronavirus/CTDPHCOVID19summary8062020.pdf.

126. TERRY ADAMS, ABSENTEE VOTING: SUMMARY OF FAY V. MERRILL 1–2 (2021), https://www.cga.ct.gov/2021/rpt/pdf/2021-r-0191.pdf.

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